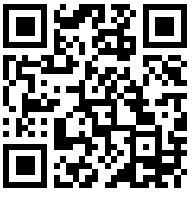
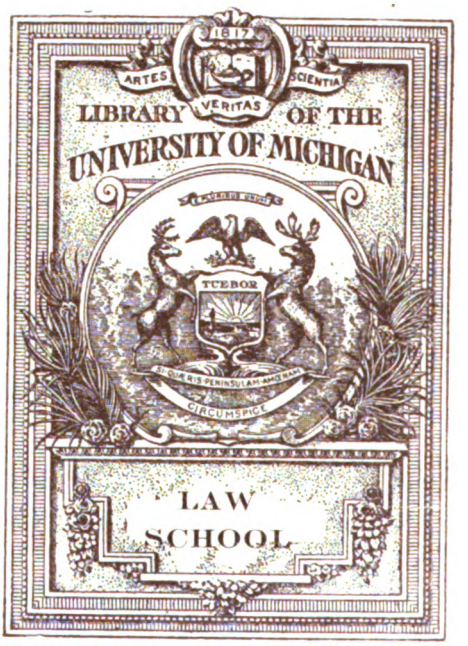


DICTIONARY OF LAW

ANDERSON



Albert G. Barclay

A

DICTIONARY OF LAW,

CONSISTING OF

JUDICIAL DEFINITIONS AND EXPLANATIONS

OF

WORDS, PHRASES, AND MAXIMS,

AND AN

EXPOSITION OF THE PRINCIPLES OF LAW:

COMPRISING A

DICTIONARY AND COMPENDIUM OF AMERICAN AND ENGLISH JURISPRUDENCE.

BY

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TO
MY BROTHER,
GEORGE BONBRIGHT ANDERSON, M. D.,
THIS BOOK IS DEDICATED.

INTRODUCTION.

The title Dictionary of Law has been chosen for this book because it seeks to define and otherwise explain law terms and expressions, to show the application of legal principles, and to present judicial interpretations of common words and phrases.

Similar productions, heretofore issued, are marked, in the opinion of the writer, by the following imperfections:

1. Absence of judicial matter, especially of judicial definitions or interpretations and reasoning; also, dearth of non-technical terms as cross-references.

2. Neglect or omission of important subjects, and needless repetition of matter under different heads.

3. Inattention to pronunciation, and lack of discrimination in selecting words for etymological explanation.

4. Omission of the names of the parties to important cases, and of the dates when decisions were rendered.

5. The presence of thousands of obsolete Anglo-Saxon, Old English, Scotch, Spanish, French, and civil law words and phrases, antiquated Norman and Latin expressions, and matters of a purely non-legal character,—a mass of material of no use to student or practitioner, of interest to the legal antiquarian alone.

In the preparation of this work care has been taken not to follow in the "beaten path" of law dictionaries. Under the following heads its plan is set forth:

1. The different spellings of terms are noted, the preferred spelling being placed first, with comment where pertinent.

2. The correct pronunciation of words often mispronounced is indicated, according to Webster's Dictionary.

3. As to etymology, while the aim has been to discriminate between terms whose origin is of no importance or interest and such as contain in their ancient form somewhat of their present signification, the supposed origin of all technical terms is stated.

4. The definitions are printed in the larger type, except where incorporated in a paragraph along with explanatory matter.

The endeavor has been to find definitions framed by the courts, the highest tribunals of this country receiving the preference. Some by text-writers also are given. Where a court explains rather than defines a term (as, in a charge to a jury), such explanation has generally been condensed. Definitions thought to be too narrow or too broad in statement have been modified with a view to greater fullness and clearness.

Any change made in the phraseology of a definition is indicated. A single

bracket [denotes that a slight or immaterial change has been made; a double bracket [ ] that the substance only is given — that the definition is recast, or that a definition is constructed out of the language employed by the authority cited, or is formed upon partial or incomplete definitions found in the accompanying citations.

The absence of a bracket denotes that no change has been made in the language of the court. This last class of definitions makes up the body of the DICTIONARY portion of the book, and constitutes one of the special features mentioned — its large number of *judicially* framed definitions.

The word "whence," which will be noticed in the text immediately after some definitions, does not necessarily mean that the word or words which follow it are derived from the title word, but that they are derivatives from the same root word,— the latter being sometimes included in the appended list. This is done to avoid repetitions under different forms of the same word.

Expressions having the same initial word are placed under that word, arranged alphabetically with reference to the second word. Thus, *A mensa* will be found under A, and not between Amends and Amerce.

For typographical reasons, general cross-references have been advanced to the beginning of a few articles, and some common words, not originally intended for definition, have been defined.

5. Synonyms are treated under the leading word of the group. For positives and negatives — words beginning with *dis-*, *il-*, *in-*, *non-*, *re-*, *un-*, reference should be had to the simple word, except where the negative itself is the word most used. Examples: Dishonor, Insolvency, and Insanity.

6. The Latin and Norman-French law terms now in use have been collected, and such maxims and phrases as student and practitioner alike meet in the books they consult. The selection also includes important terms found in treatises on Roman law, mention of the primitive meaning of terms current under new applications, and explanation of a few terms in ancient law long obsolete but occasionally referred to as of historical interest.

Each Latin maxim or phrase is entered, in whole or in part, as a title or subtitle under its initial word; but if that word is unimportant, like the particles *a*, *ab*, *con*, *de*, *in*, *nam*, *pro*, *qui*, *quod*, *ut*, or is an adjective, a cross-reference is made from such word to the principal word, under which the expression is explained at length.

7. Having given the origin of a term, and the senses in which it is used, where the importance of the subject warrants it, the value of the idea or the extent of its application in the affairs of society is stated — by comment, more or less extended, or by reference to a related topic under which such information may be found. These remarks, which are printed in the smaller type and compose the COMMENTARY portion of the work, consist, in brief, of matters pertaining, it is believed, to every recognized branch of the law, and set forth the "reasoning of the law" itself.

For English common law antedating the adoption of the Constitution, I have relied chiefly upon the commentaries of Blackstone, making my own abridgment

of that invaluable treatise, and citing it in all cases. Many statements of principles have been taken from the commentaries and decisions of Chancellor Kent, more from the works and decisions of Judge Story, and not a few paragraphs from other and later standard writers.

Under appropriate heads have been embodied the various provisions of the Constitution of the United States, and many from the constitutions of the States. When the former is given *verbatim* its original orthography and punctuation have been restored.

Quotations are made from English statutes followed in this country.

Still more frequently acts of Congress, from the earliest to the latest date, have been drawn upon — very important recent ones being reprinted entire; also, enactments in the several States, including sections from codes.

There are also presented decisions of the courts on the foregoing subjects, explanatory of questions of general and sometimes of local importance, and, for the most part, of permanent interest. To this end, all the decisions of the United States Supreme Court have been read, and thousands of the decisions rendered in the States — indeed, entire series of State reports.

8. In the cross-references a subject may be found to be not the title word, but its shortest form.

English words are referred to foreign words, and *vice versa*, wherever there is likeness or sameness of sense between them, and a perusal of both will contribute to an understanding of the general subject.

Sub-titles referred to under the title word are italicised.

Having treated each word where it will be soonest comprehended in its own meaning or meanings and as related to other subjects, references to it, under heads where it might be incidentally treated, are entered.

Specific terms are *fully* defined only under the generic head with which they are associated. Thus under "Express" the reader will not find "express contract:" he will there find "express" explained, generically and specifically, but it is only under "Contract" that he will learn anything substantial about "express contract." Not so, with local or isolated expressions, such as "Baby Act." and "Lynch Law."

9. In the selection of cases, preference has been given to decisions reviewing or collecting earlier cases.

In a very few instances the dates of decisions are not given because not known. In collections of leading cases, where the annotations are the important matter, the year of the title case may not be stated.

From 108 to 128 United States Supreme Court Reports (October, 1882, to January, 1889), the year when an opinion was rendered is given; prior to 108 U. S., the reporters noted only the year of the term to which the writ of error or the appeal was taken.

Cases without the names of the parties are such as follow a text-book quoted; or they occur where it was not thought necessary to make copious reference to definitions on common technical terms; or where a later quotes an earlier authority already given in full; or they are so added in order not to take up space on a

point already supported by cases cited at length; or they establish a principle universally accepted; or they concern incidental or illustrative matters; or they show where a term or maxim was applied. Cited to a common word, they will sometimes be found to contain that word without suggestion as to its general meaning or use.

The word "cases," printed at the end of a citation, imports that the court examined previous decisions which will be found discussed or referred to in the decision itself. This device, while saving space, directs the reader to *other cases* on the same subject.

The abbreviation *id.* refers to another volume in the same set or series; *ib.*, to the volume last mentioned. Unless otherwise indicated, *new series* is meant, where there is also an "old series." "R." stands for Railroad or Railway. "Constitution" means Constitution of the United States; while "constitution" refers to the similar instrument belonging to a particular State. "Supreme Court" means the Supreme Court of the United States; in a few instances, for purposes of distinction, the names of the other Federal courts begin with capital letters. "State" refers to one of the United States; "state" to a nation; "R. S." to the Revised Statutes of the United States; "Government" to the National government.

The first descriptive word in the names of corporations has been sought for. Some reports furnish nothing more than "Insurance Co." or "Railroad Co."

Unless otherwise noted, the original or star pages are intended.

10. I have received valuable information from other dictionaries. For original extracts taken from them due credit has been given. Definitions from these books, adopted by the courts, are noted. Where a court has approved a definition of a common word as found in a vernacular dictionary, or in a cyclopædia, the title of such work is placed after the particular case, separated from it by a colon; so, also, with matter from other sources.

11. References are made to useful articles in the law periodicals, especially to such as discuss cases, and to a few articles in lay publications.

12. A knowledge of the chief events in the lives of Sir William Blackstone, James Kent, and Joseph Story, the most widely read of law-writers,— in particular, the circumstances under which their works were composed, with information as to different editions,— being useful to all students of the law, and those works having been largely quoted throughout this book — brief biographies are inserted under the names of those distinguished jurists.

Hoping that the volume will in some degree lighten the labors of student and practitioner, it is submitted to the kindly consideration of the profession.

PITTSBURGH, PA., March 1, 1889. W. C. ANDERSON.

DICTIONARY OF LAW.

A.

A, or **a**, the first letter of the alphabet, is used in legal, legislative, and judicial writings as a numerical character, as an abbreviation, and as a word:

1. The capital serves for marking — (1) the first division, chapter, or other large portion of a legal treatise or digest; (2) the first appendix in a report: of cases, or of a commission or committee; (3) the first schedule to a constitution or a statute; (4) the first series of an issue of corporate or governmental bonds; (5) the first distinct portion of any other tabulated statement.

The small letter designates — (1) in old law-books, the first page of a leaf or folio (*b* designating the second page); (2) in modern works, the first paragraph of new matter inserted in the body of a volume: as, of a new section printed between older sections; (3) the first foot-note to a page in the first edition of a book: in enlarged editions, especially those prepared by annotators, a note subjoined to such foot-note is designated as a^1, or $(a)^1$, a^2, etc.

The other letters, capital and small (in the language of printers, upper case and lower case), are used in the same manner.

2. Indicates the first of a number of documents or other proofs: as, Exhibit "A," or "A 1," "A 2," etc.

The other letters, in their order, are similarly employed. See further EXHIBIT, 2.

In the old States, volumes containing recorded instruments were formerly, and perhaps are still, designated by letters, or by letters and numbers: as, A, or A 1; B, or B 1; A 2, B 2; AA, BB. To avoid errors and confusion in copying references, some of the letters, as J, K, N, U, V, Y, were not used.[1]

3. As an abbreviation, usually denotes American, *anno*, appeal, article, assistant, associate, attorney.

Has been used for *al* in the expression *et al.*[1] See ALIUS.

Formerly stood for *adversus* (*versus*); as, Cockle *a* Underwood.[2]

Among the Puritans, a convicted adultress wore an A upon the front of her dress, in Plymouth colony by law of 1658, or earlier, and in Vermont as late as 1788.

A. D. *Anno Domini*, in the year of our Lord. See YEAR.

A. G. Attorney-general.

A. J. Assistant, or associate, judge or justice. *A. JJ.* Associate judges or justices. *A. L. J.* Associate law judge or justice. See JUDGE.

A. R. *Anno regni*, in the year of the reign.

A 1. Of the highest class.

Originated with underwriters in rating vessels: the A denoted that the hull of a particular ship was well built and seaworthy for a voyage of any length; the 1 the efficient state of her tackle, sails, apparel, and other appurtenances. B, C, and other letters, indicated lower conditions of seaworthiness; 2, 3, and perhaps other numerals, inferior or insufficient appurtenances.[3]

4. The indefinite article *a* or *an*.

Often used in the sense of *any*, and then applies to more than one individual object.[4]

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[1] In the superior court of Baltimore city, Md., this practice, which was begun in 1651, continued to 1797; in the office of the recorder of deeds for Philadelphia county, Pa., it continued from 1683 to 1799; in the county court of Augusta, Va., from 1745 to 1879; in the office of recorder of deeds for Allegheny county, Pa., from 1788 to 1849. In the last county there is a deed book N 5, or volume 86. In the department of internal affairs at Harrisburg, Pa., the patent books (early numbers of which contain the grants from William Penn) are designated as A 1 to 20, AA 1 to 16, P 1 to 65, H 1 to 74; and there is also in use a second series of account books designated as AA, BB, etc., to HH 4, which last is in use in 1868.

[1] 58 N. H. 3, 4, 6, 7, *et seq.*

[2] 1 Abb. Pr. R. o. s. 1; *id.*, vols. I-XIX.

[3] See Webster's Dict., p. 1782; Chambers' Ency., tit. A.

[4] Nat. Union Bank *v.* Copeland, 141 Mass. 206 (1886).

Where directors are empowered to issue a note or accept a bill of exchange, they may give several notes or bills, equal to the sum specified.[1] See ANY; THE.

5. The Latin preposition: from, away from, by, in, on. Compare AB.

A fortiori. With stronger (reason); with more right; much more.

A private person, and *a fortiori* a peace-officer, present when a felony is committed, is bound to arrest the felon.[2]

A multo fortiori. By far the stronger — reason, right, equity.[3, 4]

A gratia. Out of favor; from mere indulgence, and not of right. See GRACE.

A latere. By the side: collaterally.

Said of succession to property; but now of rare occurrence.

A mensa et thoro (*toro*). From table and bed: from bed and board. **A vinculo matrimonii.** From the bond of matrimony.

The former describes a "partial" divorce: separation of the parties by law, with all rights preserved; the latter, a "total" divorce: complete dissolution of the marriage relation with all incidental rights. See further DIVORCE.

A nativitate. From birth, from infancy.

The legal settlement of an idiot *a nativitate* is that of his father.[5]

A posteriori. From what comes after — the effect. **A priori.** From what goes before — the cause.

Reasoning from an effect back to its supposed cause is described as *a posteriori;* reasoning or argument from an assumed cause to the result it may or must produce is termed *a priori.*[6]

A prendre. F. See PROFIT, A prendre.

A quo. From which.

As, the court *a quo* a cause has been removed, by an appeal or a writ of error. Correlative *ad quem*, to which. See further QUI, QUO.

A retro. In arrear, *q. v.*

A sociis. From its associates; from its surroundings; from the context. See further NOSCITUR.

A teneris annis. From tender years; by reason of youth. See NEGLIGENCE.

A verbis legis. See LEX, A verbis, etc.

A vinculo. See *A mensa, etc.*

AB. L. From.

Takes the place of *a* before a vowel sound. See A, 5; ABS.

Ab assuetis. See INJURIA, Ab assuetis.

Ab inconvenienti. From hardship, *q. v.*

Ab initio. From the beginning; from inception.

A contract is said to be illegal, a writ, an action, or a service, irregular or void, *ab initio.* See TRESPASS, Ab initio.

Ab intestato. From an intestate (owner).

Ab invito. By one unwilling: unwillingly. See INVITUS.

Ab irato. By one in anger — displeased.

A gift, bequest or devise, adverse to the interest of any heir is sometimes said to be made *ab irato.*

ABANDON.[1] To relinquish, surrender, disclaim, desert, forsake, give up wholly. Whence abandonment, non-abandonment, and (though rare) abandoner, abandonee.

As, to abandon property, a relation, a proceeding — any species of right.

"Abandon" includes the intention and the external act by which it is carried into effect.[2]

To constitute an abandonment of a right, there must be an unequivocal and decisive act of the party showing a determination not to have the benefit designed.[3] See ESTOPPEL.

For example, a homestead is abandoned by an act which shows an intention wholly to relinquish it; not by temporary absence.[4]

A statute may require that this intention be proved by a declaration duly executed and recorded.[5]

There is a difference between "abandoning" and "surrendering" a right or thing; between giving it up because regarded as useless, and assigning or transferring it to another as valuable. When one surrenders a thing by solemn agreement in writing, he certainly does not "abandon" it in the sense in which that word is generally understood.[6]

1. Property. An object of property remains the owner's till such time as he does some act which shows an intention to abandon it; then it becomes *publici juris* once

[1] Thompson *v.* Wesleyan Association, 65 E. C. L. 849 (1849). See also Sharff *v.* Commonwealth, 2 Binn. *516, 519 (1810).

[2] 4 Bl. Com. 293.

[3] 100 U. S. 633.

[4] Although strictly terms in logic, these expressions are so common in law language that they may be considered *quasi* legal.

[5] Shippen *v.* Gaines, 17 Pa. 42 (1851).

[1] F. *a*, to; *ban-*, to proscribe, give up. See BAN.

[2] Livermore *v.* White, 74 Me. 455 (1883), Appleton, C. J.

[3] [Dawson *v.* Daniel, 2 Flip. 309 (1878), Hammond, J.

[4] Hurt *v.* Hollingsworth, 100 U. S. 104 (1879); 29 Minn. 20.

[5] Tipton *v.* Martin, 71 Cal. 338 (1886); Cal. Civ. Code, §§ 1243-44.

[6] [Hagan *v.* Gaskill, 42 N. J. E. 217 (1886), Bird, V. C.

more, liable to appropriation by the next occupant.[1]

"If a man be dissatisfied with his immovable estate and abandon it, immediately he departs from it corporally, with the intention that it shall no longer be his; and it will become the property of him who first enters thereon."[2] See DERELICTION, 2.

Property is abandoned when it is thrown away, or its possession is voluntarily forsaken by the owner,— in which case it will become the property of the first occupant; or, when it is voluntarily lost or left without the hope or expectation of again acquiring it,— then it becomes the property of the finder, subject to the superior claim of the owner; except that in salvage cases, by the admiralty law, the finder may hold possession until he is paid his compensation or till the property is submitted to legal jurisdiction for ascertainment of the compensation.[3] See FIND, 1.

To an abandonment of "land" there must be a concurrence of the act of leaving the premises vacant, so that they may be appropriated by the next comer, with an intention of not returning.[4] See VACANT.

No rule of law, applicable to all cases, can be laid down, as to what change of a "station" will constitute an abandonment or relocation. Every relocation involves, in one sense, an abandonment of the old station.[5]

The abandonment of an "easement" imports a non-user of it. All acts of enjoyment must have totally ceased for the same length of time that was necessary to create the original presumption.[6] See EASEMENT.

A person may abandon an "invention" in two senses: (1) When he gives up his idea, abandons it in the popular sense, relinquishes the intention of perfecting it, so that another person may take up the same thing and become the original and first inventor; (2) when, having made an invention, he allows the public to use it without objection.[7] See PATENT, 2.

In the law of marine insurance, abandonment is the act of cession, by which in cases where the loss or destruction of the property, though not absolute, is highly imminent, or its recovery is too expensive to be worth the attempt, the assured, on condition of receiving at once the whole amount of the insurance, relinquishes to the underwriters all his property and interest in the thing insured, as far as it is covered by the policy, with all the claims that may ensue from its ownership, and all profits that may arise from its recovery.[1]

The yielding up or surrendering to the insurer by the insured of his interest in the property.[2]

Usually made by the owner of the property when informed of the peril or loss. He gives the insurer notice of the abandonment, the effect of which is to place the insurer in his position to the extent of the interest insured.[3]

To be made within reasonable time; which is a question of fact and of law. No particular form is necessary, nor need it be in writing; but it should be explicit, and not left to be inferred from equivocal acts. The insured must yield up all his interest in the subject. Regularly made, operates as a transfer of the property to the underwriter.[3]

"The right of abandonment does not depend upon the certainty, but on the high probability, of a total loss, either of the property or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities, and if the facts present a case of extreme hazard, and of probable expense exceeding half the value of the ship, the insured may abandon; though it should happen that she was afterward recovered at less expense." If the abandonment, when made, is good, the rights of the parties are definitely fixed, and do not become changed by subsequent events; if not good, subsequent circumstances will not impart validity to it.[4]

Where the interest insured is that of a part owner, or when the entire owner insures some definite part, the abandonment is limited to a cession of the insured interest; but, when the insurance reaches every part of the ownership indiscriminately, the abandonment extends to the entire property, though its value exceeds the amount of the insurance. For the protection of the underwriter, the abandonment relates back to the date of the loss.[5] See DERELICTION, 3; LOSS, 2.

The doctrine is not applicable to fire insurance.[6]

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[1] [1 Bl. Com. 9-10.

[2] Partidas, 3, Tit. 4, law 50; Sideck v. Duran, 67 Tex. 269 (1887), cases.

[3] Eads v. Brazelton, 22 Ark. 509 (1861), cases, Fairchild, J.

[4] Judson v. Malloy, 40 Cal. 310 (1870), Rhodes, C. J.

[5] Attorney-General v. Eastern R. Co., 137 Mass. 48 (1884).

See also 64 Ill. 238; 49 N. Y. 346; 2 Johns. 98; 9 Pa. 273; 21 W. Va. 286; 40 Am. Dec. 464, n.; 2 Washb. Real Prop. 370.

[6] Corning v. Gould, 16 Wend. 535-36 (1837), cases; 3 Mas. 275.

[7] [American, &c. Dressing Machine Co. v. American Tool Co., 4 Fish. P. C. 299 (1870). And see Planing-Machine Co. v. Keith, 101 U. S. 485 (1879); Bump, Patents, 946.

[1] 2 Arnould, Mar. Ins. 912.

[2] [Merchants', &c. Mar. Ins. Co. v. Duffield, 2 Handy, 127 (Ohio, 1855).

[3] Chesapeake Ins. Co. v. Stark, 6 Cranch, C. C. 272 (1810), Marshall, C. J.; Patapsco Ins. Co. v. Southgate, 5 Pet. 621 (1831); The City of Norwich, 118 U. S. 492. 506 (1886); 4 Pet. 144; 4 B. Mon. 544; 6 Ohio St. 203; 12 Mo. Ap. 250-51; 32 E. C. L. 110-20; 2 Arn. Mar. Ins. 912-942; 2 Pars. Mar. Ins. 111-200.

[4] Bradlie v. Maryland Ins. Co., 12 Pet. 397 (1838), Story, J., quoting 3 Kent, 321; Marshall v. Delaware Ins. Co., 4 Cranch, 206 (1808). Same cases approved. Orient Mut. Ins. Co. v. Adams, 123 U. S. 67 (1887), Harlan, J.

[5] The Manitoba, 30 F. R. 129 (1887).

[6] May, Ins. § 421a.

2. Relation or Duty. The relation of husband and wife, of parent and child, or of master and servant.

(1) The act of a husband in voluntarily leaving his wife with an intention to forsake her entirely, — never to return to her, and never to resume his marital duties toward her or to claim his marital rights.[1]

Such neglect as either leaves the wife destitute of the common necessaries of life, or would leave her destitute but for the charity of others.[2]

Exists when a man fails to supply his wife with such necessaries and comforts of life as are within his reach, and by cruelty compels her to quit him and seek shelter and protection elsewhere.[3] See further CAUSE, 1 (2), Reasonable; DESERTION, 1; DIVORCE.

(2) The act of a parent in exposing an infant of tender years (usually under seven) in any place, with intent wholly to desert it.[4] See DISPOSE, 2.

(3) For an apprentice, a sailor, or a soldier, to quit his service, intending not to return to it. See DESERTION, 2, 3.

3. Of Legal Proceedings. *Voluntary*, when of the plaintiff's own accord; *involuntary*, when the defendant compels him either to abandon or to continue the action. See NONSUIT; RETRAXIT.

ABATE.[5] To quash, beat down, destroy.[6]

"Abating" is used in three senses. The first and primitive sense is that of beating down a nuisance; the second, that of abating a writ or action — its overthrow or defeat by some fatal exception to it; in the third denotes that the rightful possession or freehold of an heir or devisee is overthrown by the rude intervention of a stranger.[7]

In such expressions as to abate a demand, duties, rents, taxes, the word has no distinctly technical meaning. Compare REBATE.

Abater; abator. He who actually removes a nuisance; also, he who abates a freehold. See 1, *infra*.

Abatement. Demolition, destruction, diminution, removal, suspension.

In equity practice, a suspension of proceedings in a suit from want of parties capable of proceeding therein.[1]

1. **Abatement of a freehold; of an estate.** Where a person dies seized of an inheritance, and, before the heir or devisee enters, a stranger, who has no right, makes entry and gets possession of the freehold.[2] Compare AMOTION, 1.

2. **Abatement of a legacy.** The reduction of a legacy, in case of insufficiency of assets to pay all debts and other legacies.

First, general legacies, and then specific legacies, abate proportionately.

The rule is that where bequests are made in the form of a general legacy, and are pure bounty, and there is no expression in or inference to be drawn from the will manifesting an intention to give them priority, in case of a deficiency of funds to pay them in full, they abate ratably: on the principle that equality is equity.[3] See LEGACY.

3. **Abatement of a nuisance.** The removal of a nuisance.

Whatever unlawfully annoys or doeth damage to another may be abated, *i. e.*, taken away or removed by the party aggrieved thereby, he committing no riot.[4]

An injunction may prevent, and a verdict for damages may punish, but neither will "abate" a nuisance.[5] See further NUISANCE.

4. **Abatement of a writ.** Quashing or setting it aside on account of some fatal defect in it.[6]

A plea in abatement is one mode. Sometimes it is the duty of the court to abate a writ *ex officio*. Where the writ is a nullity, so that judgment thereon would be incurably erroneous, it is *de facto* abated.[7]

Plea in abatement. Matter of defense which defeats an action for the present, because of a defect in the writ or declaration.[8]

Such plea is: (1) *of the writ* — for an irregularity, defect, or informality, in its terms, form, issue, service or return, or for want of jurisdiction in the court; (2) *to the action* — as misconceived, or because the right has not yet accrued, or because another action is pending;[1] (3) *to the declaration*, on account of — (a)

[1] [Moore *v.* Stevenson, 27 Conn. 25 (1858), Ellsworth, J. A *feme-sole* trader law.

[2] [Washburn *v.* Washburn, 9 Cal. 476 (1858), Field, J. A divorce case.

[3] Levering *v.* Levering, 16 Md. 219 (1860), Bartol, J. A divorce case.

[4] See State *v.* Davis, 70 Mo. 468 (1869); 4 Bl. Com. 198.

[5] F. *abattre;* L. *ab-batuere*, to beat down, prostrate.

[6] Case *v.* Humphrey, 6 Conn. 140 (1826).

[7] [3 Bl. Com. 168.

[1] See Story, Eq. Pl. §§ 20, n, 354.

[2] 3 Bl. Com. 168.

[3] Titus *v.* Titus, 26 N. J. E. 114, 117-19 (1873), cases, Runyon, Ch.; Brown *v.* Brown, 79 Va. 650 (1884), cases.

[4] [3 Bl. Com. 5, 168.

[5] Ruff *v.* Phillips, 50 Ga. 132 (1873).

[6] [3 Bl. Com. 168, 302.]

[7] Case *v.* Humphrey, 6 Conn. 140 (1826).

[8] [3 Bl. Com. 302. See also Steph. Plead. 47; Gould Plead. 235.

the misnomer of a party; (b) the disability of a party:[2] alienage, infancy, coverture, lunacy, imprisonment, non-existence of a corporation; (c) a privilege (*q. v.*) in the defendant; (d) non-joinder or mis-joinder of parties; (e) a departure as between the writ and the declaration; (f) a variance between the writ and the instrument sued upon.

If the action be such as survives (*q. v.*), the representative of a deceased party may be substituted.[3]

Pleadable to an indictment, but chiefly for misnomer.[4] [1]

Because they are dilatory, pleas in abatement are not favored. Each plea must give a better writ, *i. e.*, show how the writ may be amended. Each must also precede a plea to the merits,[2] [1] and a plea in bar;[4] and be verified by affidavit.

Judgment upon a plea is, for the plaintiff — *respondeat ouster*, that the defendant answer anew; for the defendant — *quod billa cassetur*, that the writ be made void or abated.[5]

See AMENDMENT, 1; QUASH; PLEA; PLEADING; REVIVE, 1. Compare BAR, 3, Plea in.

ABBREVIATIONS. A judge may, without proof, determine the meaning of the customary abbreviations of Christian names,[6] names of offices,[7] names of places,[8] and common words.[9] See AMBIGUITY; NAME, 1.

See, in this book, particular words, and the collections of abbreviations at the beginning of each letter.

In declaring upon an instrument containing abbreviated terms, extrinsic averments may be used to make them intelligible; and evidence of the sense in which the parties were in the habit of using the abbreviations, and of their conventional meaning, is admissible, but not to show the intention of one party in using them.[10]

Generally, in indictments, common words are to be used as descriptive of the matter. Abbreviations of terms employed by men of science or in the arts will not answer, without full explanation of their meaning in common language. The use of A. D., year of our Lord, because of its universality, constitutes an exception. Arabic figures and Roman letters have also become indicative of numbers as fully as words written out could be. Their general use makes them known to all men. But unexplained initials, as, for example, initials referring to public land surveys, may not be employed in an indictment.[1]

ABDUCTION.[2] Taking away a wife, child, or ward, by fraud and persuasion, or open violence.[3]

In private or civil law, the act of taking away a man's wife by violence or persuasion.[4]

In criminal law, the act of taking away or detaining a woman either against her own will, or, in the case of a minor, against the will of her parents or other person having the lawful charge of her.[5]

Any unlawful seizure or detention of a female.[6]

The taking may be accomplished by solicitations or inducements, as well as by force. This, at least, is the intention of the California statute which punishes abductions for purposes of prostitution.[7] In New York, also, it must be proved that there was persuasive inducement on the part of the accused, for the purposes of prostitution; mere permission or allowance to follow such a life is not enough. And proof must be given, aside from the testimony of the alleged abducted female, of the taking and the specific intent.[8]

Harboring against the will is abduction. Not, protection against abuse, nor shelter given after the parent or guardian has relinquished the right of control. Every abduction includes a false imprisonment. The remedies are trespass *vi et armis* for damages, and indictment for the assault and battery.[9] See KIDNAPING; SERVITUDE, 1.

ABET.[10] To aid, encourage, promote the commission of an offense; to incite a person to commit a crime. Whence abettor, abetment. See ACCESSARY; AID, 1.

If men who are present at a quarrel encourage a battery, they thereby assume the consequences of the act, equally with the party who does the beating; often, indeed, they are more culpable. It is not necessary that encouragement should consist of appeals. It is enough that they sanction what is being done, and

[1] Cook *v.* Burnley, 11 Wall. 668 (1867).

[2] Society for Propagation of the Gospel *v.* Town of Pawlet, 4 Pet. 501 (1830).

[3] 4 Bl. Com. 334.

[4] Baltimore, &c. R. Co. *v.* Harris, 12 Wall. 84 (1870); Pointer *v.* State, 89 Ind. 257 (1883).

[5] 3 Bl. Com. 302-3. See generally Gould, Plead. 235-78; Stephen, Plead. 47-51.

[6] Gordon's Lessee *v.* Holiday, 1 Wash. 289 (1805); Weaver *v.* McElhenon, 13 Mo. 90 (1850); Stephen *v.* State, 11 Ga. 241 (1852).

[7] Moseley's "Adm'r" *v.* Mastin, 37 Ala. 221 (1861).

[8] Ellis *v.* Park, 8 Tex. 205 (1852); Russell *v.* Martin, 15 *id.* 238 (1855).

[9] Jaqua *v.* Witham, &c. Co., 106 Ind. 547-48 (1886); Dana *v.* Fiedler, 12 N. Y. 40, 46 (1854); 1 Greenl. Ev. § 282; 2 Whart. Ev. § 1003; Best, Ev. 232, 262.

[10] Jaqua *v.* Witham, &c. Co., 106 Ind. 547-48 (1886), cases; Robinson *v.* Kanawha Bank, 44 Ohio St. 441 (1886).

[1] United States *v.* Reichert, 32 F. R. 147 (1887), Field, J. See Bish. Contr. § 377

[2] L. *ab-ducere*, to lead away.

[3] See 3 Bl. Com. 139; Carpenter *v.* People, 8 Barb. 606 (1850); State *v.* George, 98 N. C. 570 (1885).

[4] 3 Stephen, Com. 437.

[5] [Sweet's Law Dict.

[6] See 1 Russell, Crimes, 9 Am. ed., 940; 5 Strob. (S. Car.) 1.

[7] People *v.* Marshall, 59 Cal. 388 (1881).

[8] People *v.* Plath, 100 N. Y. 590 (1885), cases, Ruger, C. J.; Penal Code, § 282; Laws 1884, c. 46, § 2; amended, Laws 1886, c. 31.

[9] 3 Bl. Com. 139-41. As to place, see 6 Cr. L. M. 357-60 (1884), cases.

[10] F. *a-beter*, to bait, lure on.

manifest this by demonstrations of resistance to any who might desire to interfere to prevent it; or by words, gestures or acts, indicating approval.[1]

ABEYANCE.[2] In expectation, remembrance, and contemplation of law; in suspense.[3]

Subsisting in contemplation of law.[4]

In abeyance: undetermined.

Said of a fee or a freehold when there is no person *in esse* in whom it can vest and abide: though the law considers it as always potentially existing, and ready to vest when a proper owner appears.[5]

Thus, in a grant to A for life and then to the heirs of B, the fee is not in A or B, nor can it vest in the "heirs" of B till after his death: it therefore remains in waiting or abeyance, during the life of B.[6]

It is a maxim of the common law that a fee cannot be in abeyance. The maxim rests upon reasons that have now no existence, and it is not now of universal application. Even where it still applies, being a common-law maxim, it must yield to a statutory provision inconsistent with it — as, the Confiscation Act of 1862.[6]

The franchise of a corporation may be in abeyance;[7] so may a grant of land to a charity.[8] In this category, also, are all property rights of a bankrupt until final adjudication;[9] and, a capture until a prize court has passed upon it.[10]

ABIDE. To await; as, in saying that costs abide the event of the suit.

Abide by. To conform to, obey.

"To abide by an award" is to stand by the determination of the arbitrators, and take the consequences of the award; to await the award without revoking the submission; not, necessarily, to acquiesce in, or not to dispute the award.[11]

The language employed in arbitration bonds, "to abide by the award," is to prevent the revocation or breaking of the contract of submission, rather than to apply to the actual finding of the arbitrators.[12]

In a bond "to appear and abide the order of the court," means to perform, to execute, to conform to, such order. An obligation to appear and abide the final order and judgment (in force through the entire proceedings), although it does not oblige the defendant to attend court personally and consecutively, yet it does require him to take notice, by himself or his representative, of each step in the proceeding, and to attend personally when by law necessary.[1]

"To abide and satisfy" a judgment or order is to perform, execute, conform to, and to satisfy it; that is, to carry it into complete effect.[2]

Abiding conviction. Of guilt — a settled and fixed conviction, a conviction which may follow a careful examination of the whole evidence in the case.[3]

ABILITY. See CAPACITY; DISABILITY; PECUNIARY; REHABILITATE; RESPONSIBLE.

ABLEGATUS. See MINISTER, 8.

ABODE. The place where a person dwells.

Prescribed as the criterion of the residence required to constitute a legal voter, nothing more than a domicil, a house, which the party is at liberty to leave, as interest or whim may dictate, but without any present intention to change it.[4]

The place where a college is situated may or may not be a student's permanent abode. To such as are free from parental control, and regard the place as their home, having no other place to which to return in case of sickness or affliction, it is, *pro hac vice*, their home, their permanent abode.[4]

A college student may be both a voter and a student; and if he in good faith elects to make the place his home, to the exclusion of all other places, he may acquire a legal residence, although he may intend to remove from such place at some fixed time, or at some indefinite period in the future.[5] See DOMICIL.

ABORTION.[6] The act of miscarrying, or producing young before the natural time, or before the foetus is perfectly formed; also, the foetus itself so brought forth.[7]

"Miscarriage" means bringing forth the foetus before it is perfectly formed and capable of living. The word "abortion" is equivalent to miscarriage in its primary meaning; but it has a secondary meaning, in which it is used to denote the off-spring.[8]

At common law an indictment will not lie for an attempt to procure an abortion with the consent of the

[1] Frantz *v.* Lenhart, 56 Pa. 367 (1867). See 50 Conn. 101, 92.

[2] F. *abeiance*, suspension, waiting: *abayer*, to expect.

[3] 2 Bl. Com. 107, 216, 318.

[4] 4 Kent, 260.

[5] 2 Bl. Com. 107.

[6] Wallach *v.* Van Riswick, 92 U. S. 212 (1875).

[7] Dartmouth College *v.* Woodward, 4 Wheat. 691 (1819).

[8] Town of Pawlet *v.* Clark, 9 Cranch, 332 (1815).

[9] Bank *v.* Sherman, 101 U. S. 406 (1879).

[10] 1 Kent, 102. See also 5 Mass. 555; 15 *id.* 464.

[11] Shaw *v.* Hatch, 6 N. H. 162 (1833).

[12] Marshall *v.* Reed, 43 N. H. 40 (1862); 17 *id.* 461; 35 *id.* 198.

[1] Hodge *v.* Hodgdon, 8 Cush. 297 (1851), Shaw, C. J.; 108 Mass. 585; 30 Kan. 88; 13 R. I. 125; 7 Tex. Ap. 33.

[2] Erickson *v.* Elder, 34 Minn. 371 (1885), Berry, J.

[3] [Hopt *v.* Utah, 120 U. S. 439 (1887), Field, J.

[4] Dale *v.* Irwin, 78 Ill. 181 (1875): Ill. R. S. 1874. See Fry's Election Case, 71 Pa. 302 (1872); McCrary, Elections, § 34.

[5] Pedigo *v.* Grimes, Ind. Sup. Ct. (Nov. 1887), cases; Sanders *v.* Getchell, 76 Me. 165 (1884); Vanderpoel *v.* O'Hanlon, 53 Iowa, 249 (1880), cases.

[6] L. *abortio*. untimely birth.

[7] [Butler *v.* Wood, 10 How. Pr. 224 (1854).

[8] Mills *v.* Commonwealth, 13 Pa. 633 (1850), Coulter, J

mother, until she is "quick with child." It was considered that the child had an independent existence only when the embryo had advanced to the degree of maturity designated by that phrase, although, in reference to civil rights, an infant *in ventre sa mere* was regarded as a person in being.[1] See QUICKENING.

It is a flagrant crime at common law to attempt to procure a miscarriage or an abortion. By that law it is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature.[2]

Notwithstanding an infant *in ventre* is treated by the law, for some purposes, as born, or as a human being, yet it is otherwise with reference to making the act of causing its miscarriage murder, unless so declared by statute. When the infant is born it becomes a human being, within the meaning of the law; and if it should die by reason of potions or bruises received in the womb, it would be murder in the person who administered or gave them, with a view of causing a miscarriage.[3] See MALICE, Constructive.

Abortion, as a crime, is found only in modern statutes and treatises. No mention is made of it in the ancient common-law writers.[4]

The intent not being specifically to take life, some States have made the offense a statutory felony, and punish any unlawful attempt to procure a miscarriage.[5]

The woman cannot be indicted as an accomplice.[6]

Abortionists' articles are non-mailable,[7] and non-importable.[8] See ATTEMPT; DECOY.

ABOUT. 1. Carrying weapons concealed "about" the person means: near, in close proximity, within convenient control and easy reach.[9]

2. In close proximity to; closely approximating.

An agreement to furnish "about 1000 tons" of metal per month will not allow the shipment of a quantity materially less than that number of tons.[1]

"About forty acres" implies that the actual quantity is a near approximation to forty acres.[2] See ESTIMATE; MORE OR LESS.

3. Imports not only nearness of time, quality, or degree, but, also, making preparation to do a thing, or being actually engaged in doing it.[3]

A man is about to convert his property into money when he is near doing it, is making preparations to do it, is actually about to dispose of the property.[4] See ABSCOND.

ABOVE. Upper, higher; superior.

"Above all incumbrances" means in excess of such incumbrances.[4]

Court above. The court to which a cause is removed.

Defendant above. The party who is defendant before an appellate court. **Plaintiff above.** The plaintiff in an appellate court.

Opposed — court, plaintiff, and defendant *below*. See BAIL Above. Compare SUPRA.

ABRIDGE.[5] 1. To shorten, condense; to epitomize, reduce, contract.

A reasonable abridgment of a copyrighted publication is permitted as a new production, involving in its preparation intellectual labor. Not so as to a mere colorable reduction, which is not real nor fair and does not require invention and judgment. What constitutes a fair and reasonable abridgment is a question difficult to answer. But a mere selection, or different arrangement of parts, so as to bring the work into a smaller compass, is not such abridgment. There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of scissors, or extracts of the essential parts.[6]

A "compilation" consists of selected extracts from different authors; an "abridgment" is a condensation of the views of one author.[7]

The former cannot be extended so as to convey the same knowledge as the original work; the latter con-

[1] Commonwealth *v.* Parker, 9 Metc. 266 (1845), Shaw, C. J.

[2] Mills *v.* Commonwealth, *ante*. Commented on in cases below, especially in Mitchell *v.* Commonwealth, 78 Ky. 206-7 (1879).

[3] Abrams *v.* Foshee, 3 Iowa, 278-79 (1856). To same effect, State *v.* Cooper, 22 N. J. L. 53-58 (1849), cases; Smith *v.* State, 33 Me. 54-55 (1851), cases; State *v.* Moore, 25 Iowa, 131-37 (1868), cases; Evans *v.* People, 49 N. Y. 88 (1872); State *v.* Dickinson, 41 Wis. 309 (1877), cases; Mitchell *v.* Commonwealth, 78 Ky. 204 (1879); State *v.* Slagle, 82 N. C. 653 (1880). And see 10 Cent. L. J. 338; 4 Bl. Com. 201; 2 Whart. Cr. L. § 1220.

[4] State *v.* Cooper, 22 N. J. L. 55, 53-58 (1849), cases; 3 Coke, Inst. 50; 1 Bl. Com. 129.

[5] See Commonwealth *v.* Wood, 11 Gray, 85 (1858); Commonwealth *v.* Boynton, 116 Mass. 343 (1874); Commonwealth *v.* Felch, 132 *id.* 22 (1882); Commonwealth *v.* Taylor, *ib.* 261 (1882); State *v.* Watson, 30 Kan. 281 (1883); Commonwealth *v.* Railing, 113 Pa. 37 (1886); 2 Whart. Cr. L. §§ 1220-28.

[6] People *v.* Vedder, 98 N. Y. 630, 632 (1885), cases.

[7] Act 3 March, 1879; 1 Sup. R. S. p. 229.

[8] R. S. §§ 2491-92; Act 3 March, 1883, 22 St. L. 499, 500.

[9] State *v.* McManus, 89 N. C. 558 (1883).

[1] Norrington *v.* Wright, 115 U. S. 204 (1885). And see Brawley *v.* United States, 96 *id.* 171-72 (1877).

[2] Stevens *v.* McKnight, 40 Ohio St. 341 (1883). See also Baltimore Land Society *v.* Smith, 54 Md. 208 (1880); 16 C. B. 36; 44 L. T. R. 152.

[3] [Hockspringer *v.* Ballenburg, 16 Ohio, 308, 312 (1847): 59 Tex. 285. See also Von Lingen *v.* Davidson, 4 F. R. 350 (1880); s. c. 11 Rep. 5.

[4] Williams *v.* McDonald, 42 N. J. E. 395 (1886).

[5] F. *abregier*, to shorten.

[6] Folsom *v.* Marsh, 2 Story, 107, 115 (1841), Story, J. Concerned letters reprinted from "Sparks' Life of Washington."

[7] Story's Executors *v.* Holcombe, 4 McLean, 308-14 (1847), McLean, J. Concerned an abridgment of "Story's Commentaries on Equity Jurisprudence."

tains an epitome of the work abridged, and, consequently, conveys substantially the same knowledge. The former cannot adopt the arrangement of the works cited, the latter must adopt the arrangement of the work abridged. The former infringes the copyright if the matter transcribed, when published, impairs the value of the original work; but a fair abridgment, though it injures the original, is lawful. To "abridge" is to epitomize, to reduce, to contract. To copy certain passages from a book, omitting others, is in no sense an abridgment: the judgment is not exercised in condensing the author's views; his language is copied, not condensed. To "abridge" is to preserve the substance, the essence of the work, in language suited to such purpose.[1]

An abridgment of an original work, where intellectual labor and judgment are involved, made and condensed by another person, without the consent of the author, is not an infringement of a copyright on the original, especially as to histories, translations, and abridgments not of a character to supersede the original.[2] See further COMPILE; PIRACY, 2.

2. "Abridgment" has also been used to describe a book in which the substance of reports, or of the rules of law to be deduced from them, are concisely and more or less systematically stated.[3] Compare DIGEST.

3. To subtract, diminish, limit, curtail, restrict, discriminate against.

"No State shall make . . . laws which shall abridge the privileges or immunities of citizens of the United States."[4]

The exercise of any right may be regulated by law. The right to pursue a lawful employment is not "abridged," within the Fourteenth Amendment, by an ordinance which merely prescribes the reasonable conditions under which such business may be carried on.[5] See CITIZEN.

ABROAD. In English chancery law, beyond the seas. See DEPOSITION; SEA.

ABROGATE. See REPEAL; RESCIND.

ABS. The form of *a* or *ab* (from) in composition. See A, 5.

ABSCOND.[6] To hide, conceal or absent one's self clandestinely, with intent to avoid legal process.[7]

In an attachment-of-debtor law, may not apply to an act about to be done.[7] See ABOUT, 3.

An absent and absconding debtor is one who lives without the State, or intentionally conceals himself from his creditors, or withdraws himself from the reach of their suits, with intent to frustrate their demands.[1]

If a debtor departs from his usual residence, or remains absent therefrom, or conceals himself in his house, so that he cannot be served with process, with intent unlawfully to delay or defraud his creditors, he is an absconding debtor.[1] See ABSENT.

ABSENT. Being away: away, not present; not at one's domicil or usual place of business; out of the jurisdiction. Compare PRESENCE.

Absentee. A person who has resided in the State and has departed without leaving any one to represent him; also, a person who was never domiciliated in the State and resides abroad.[2]

Absence does not necessarily mean out of the State; it may refer to cases of default without service of process. Where the presence of a defendant is not secured by appearance or service of summons to appear, a judgment rendered upon his involuntary default is rendered "in his absence."[3] See ABSCOND.

Notice by publication (*q. v.*) is often given to absent defendants.

Brief or temporary absence from a dwelling-house, in the law of arson, burglary, and insurance (*qq. v.*), does not, as a rule, affect the owner's rights.

ABSOLUTE.[4] Exclusive; without condition or incumbrance; complete; perfect; final; opposed to conditional, qualified, relative: as,

Absolute or an absolute — acceptance, alienation, allegiance, bail, bond, confirmation, conveyance, decree, delivery, divorce, estate, fee, guaranty, nullity, ownership, possession, privilege, property, right, rule, sale, waiver, warranty, *qq. v.*

Absolute means complete, unconditional, not relative, not limited, independent of anything extraneous. In the sense of "complete, not limited," distinguishes an estate in fee from an estate in remainder. In the sense of "unconditional," describes a bond, a conveyance, or an estate without condition. In the sense of "not relative," describes the rights of a man in a state of nature, as contradistinguished from those which pertain to him in his social relations. Characterises a pure estate, unmixed and unconnected with any peculiarities or qualifications; a naked estate, freed from every qualification and restriction, in the donee. Thus, it may describe an estate given to a married

[1] Story's Executors *v.* Holcombe, 4 McLean, 306-14 (1847), *ante*.

[2] Lawrence *v.* Dana, 4 Cliff. 79-86 (1869), cases, Clifford, J. Concerned an infringement of the copyright of "Wheaton's Elements of International Law."

[3] See 1 Bl. Com. 72; 1 Kent, 507; Story's Misc. Writ. 99; North Am. Rev., July, 1826, pp. 8-13.

[4] Constitution, Amd. XIV.

[5] *Re* Bickerstaff, 70 Cal. 38-40 (1886), cases.

[6] L. *abs*, away; *condere*, to hide.

[7] Bennett *v.* Avant, 2 Sneed, 153 (1854).

[1] Fitch *v.* Waite, 5 Conn. 121 (1823).

[2] Morris *v.* Bienvenu, 30 La. An. 880 (1878): Civ Code, art. 3556.

[3] James *v.* Townsend, 104 Mass. 371-73, 369 (1870).

[4] L. *ab-solvere*, to free from, set free.

woman, without the exclusion of the husband, in distinction from an estate qualified with that exclusion. The most usual acceptation, when used of estates, is, not independent, but the opposite of partial or conditional.[1]

Absolute is often used as the opposite of "conditional" and in the same sense as "perfect." It signifies without any condition or incumbrance.[2]

That is an absolute interest in property which is so completely vested in the individual that he can by no contingency be deprived of it without his own consent. "Absolute" may be used synonymously with "vested," and as contradistinguished from contingent or conditional; as in speaking of the absolute property of an assured.[3]

ABSQUE. L. Without; except.

Absque hoc. Without this. **Absque tali causa.** Without such cause.

Technical words of denial at common law. The former introduces the negative part of a special traverse and follows the affirmative part or inducement. The latter denies the matter of a plea by which defendant seeks to excuse a tortious act. See further, TRAVERSE.

ABSTRACT.[4] 1, *v.* To take or withdraw from; to remove or take away.

Under § 5209, Rev. St., an officer of a national bank may be guilty of "abstracting" funds, money, and credits, without any *animus furandi*. The statute may be satisfied with an intent to injure or defraud some company, body politic or corporate, or individual person, other than the banking association whose property is abstracted, or merely to deceive some other officer of the association, or an agent appointed to examine its affairs.[5]

To abstract a public record for the purpose of destroying or mutilating it has been generally made a criminal offense.

2, *n.* That which is drawn off: an epitome, a summary.

Referring to records, ordinarily a brief, not a copy, of that from which it is taken.[6]

But may be used in the sense of "copy."[7]

Abstract of title. A concise statement of the record evidence of one's title or interest in realty. Frequently spoken of as an "abstract."

In conveyancing, an abstract or summary of the most important parts of the deeds and other instruments composing the evidences of a title to real estate, arranged usually in chronological order, and intended to show the origin, course and incidents of the title, without the necessity of referring to the deeds themselves. It also contains a statement of all charges, incumbrances, and liabilities to which the property may be subjected, and of which it is in any way material for purchasers to be apprised.[1]

The person preparing a perfect abstract must fully understand all the laws on the subject of conveyancing, descents, uses, trusts, devises,—every branch of the law that can affect real estate in its mutations from owner to owner.[2]

ABUNDANS. See CAUTELA.

ABUSE.[3] 1. An improper use; a custom or practice contrary to the intendment of law or to good morals.

Common expressions are: the abuse of authority, of discretion, of a thing bailed, of process, of a distress, of a prisoner; of the liberty of free speech; of a witness, *qq. v.*

2. The synonym of injure; in its largest sense, ill-use or improper treatment of another person or of a dumb animal. Compare CRUELTY.

In a statute punishing the deflowering of a female child, is limited by the words with which it is connected referring to the same subject-matter. The term itself includes physical injury, which is also included in the words "carnally knew." Our statutes, following the English, describe the offense by the words "unlawfully and carnally know and abuse any woman child under the age of ten years."[4] See SEDUCTION.

ABUT. To touch or meet. Compare ADJOINING.

Abutment. The part of a bridge which touches the land. See BRIDGE.

Abuttal. The point at which tracts of land meet; the butting or bounding of lands.

Abutting. Usually, although not necessarily, imports "in contact" with.[5]

Properties *abut* upon a street; and their owners are *abutting* owners. See further STREET.

AC. See AD.

ACADEMY. See ABODE; CADET; COLLEGE, 2; SCHOOL, Public.

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[1] Johnson's Adm. *v.* Johnson, 32 Ala. 640-42 (1858), cr sea, Walker, J.

[2] Converse *v.* Kellogg, 7 Barb. 597 (1850); 2 N. Y. 357.

[3] Hough *v.* City Fire Ins. Co., 29 Conn. 20 (1860), Sanford, J.; Williams *v.* Buffalo German Ins. Co., 17 F. R. 95 (1883), cases.

[4] L. *abs-trahere*, to draw away or off.

[5] United States *v.* Northway (President Second Nat. Bank of Jefferson, Ohio), 120 U. S. 327, 334-36 (1887), Matthews, J.

[6] [Dickinson *v.* Railroad Co., 7 W. Va. 413 (1874).

[7] Willhite *v.* Barr, 67 Mo. 286 (1878).

[1] Burrill's Law Dict.; Warvelle, Abstr. Title, § 2.

[2] Banker *v.* Caldwell, 3 Minn. 101 (1859); 7 W. Va. 413.

[3] L. *ab*, amiss; *uti*, to use.

[4] Dawkins *v.* State, 58 Ala. 379, 378 (1877), Brickell, C. J. See generally Commonwealth *v.* Roosnell, 143 Mass. 32 (1887).

[5] Cohen *v.* Cleveland, 42 Ohio St. 197 (1883).

ACCELERATE. To shorten the period after which an interest or estate is to vest in possession or enjoyment.

ACCEPTANCE.[1] A receiving — with approval, or conformably to the purpose of a tender or offer; receiving with intention to retain.

Whence acceptor, non-acceptance.

A person is said to accept the service of a notice, an offer, a bid, the terms of a contract, a guaranty, a charter, rent, goods delivered, a bill of exchange.

1. At common law, a sale of goods, wares, or merchandise was complete upon acceptance of the offer to sell. The Statute of Frauds requires that before an action can be maintained there must have been both a delivery and an acceptance of the article by the purchaser or by his duly authorized agent. In determining, in a particular case, whether there was a binding acceptance, the courts consider the intention of the parties and the nature of the property.[2]

It is a question for the jury whether, under all the circumstances, the acts which the buyer does or forbears to do amount to a receipt and acceptance. But where the facts are not in dispute it is for the court to determine their legal effect; also when the facts are not such as can in law warrant finding an acceptance. To take the contract out of the operation of the statute, there must be "acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer as absolute owner, discharged of all liens for the price."[3] See FRAUDS, Statute of; OFFER, 1.

2. Acceptance of a bill of exchange is an assent or agreement to comply with the request or order contained in the bill, or, in other words, an assent or agreement to pay the bill according to the tenor of the acceptance, when due.[4]

An engagement to pay the bill according to the tenor of the acceptance; a general acceptance being an engagement to pay according to the tenor of the bill.[5]

"Accepted," on a bill of exchange, is an engagement to pay the bill in money when due. Indorsed upon non-negotiable paper, would not import a consideration.[1]

The bill itself, after acceptance, is also called "an acceptance."

Acceptor. He who accepts a bill of exchange,— usually the drawee.

An acceptance is commonly made by writing "accepted" upon the face of the bill and signing thereunder the acceptor's name; but there is no particular place, and no uniform formula, observed.

Acceptances are: express, and implied; verbal, and written; prior to drawing the bill; before or after maturity; for accommodation; after protest; absolute, qualified, conditional; by all the drawees, by one or more of them, by a person not a drawee for the honor of the drawer or of an indorser. They are "complete," when in exact conformity with the tenor of the bill; "qualified," when the engagement is to pay at a different time, place, or manner, from the tenor; and "conditional," when the obligation to pay is to commence on the happening of some event or circumstance.[2]

Every act giving credit to a bill amounts to an acceptance; and this, once fairly and fully made and consummated, cannot be revoked. But the drawee has a reasonable time in which to obtain desired and pertinent information.[3]

Unless forbidden by statute, a promise to accept an existing bill is an acceptance whether the promise is in writing or by parol.

The acceptor is to the drawer as the maker of a promissory note is to the payee, *i. e.*, he is the principal debtor, and the drawer is his surety. His liability is governed by the terms of the acceptance.[4]

Acceptors of a bill of exchange by the act of acceptance admit the genuineness of the signatures of the drawees, and the competency of the drawers to assume that responsibility. Such an act imports an engagement, on the part of the acceptor, with the payee or other lawful holder of the bill, to pay the same if duly presented, when it becomes due according to the tenor of the acceptance. He engages to pay the holder, whether payee or indorsee, the full amount of the bill at maturity, and if he does not, the holder has a right of action against him, and he may also have one against the drawee. Drawers of bills of exchange, however, are not liable to the holder, under such circumstances, until it appears that the bill was duly presented, and that the acceptor refused or neglected to pay according to the tenor of the instrument; their liability is contingent and subject to those conditions

[1] L. *accipere*, to receive.

[2] See Bullock *v.* Tschergi, 13 F. R. 345 (1882); Mahan *v.* United States, 16 Wall. 146 (1872); 1 Reed, St. Fr. §§ 258-303, cases; 28 Minn. 354; 2 Kent, 494; 3 Pars. Contr. 39; 2 Bl. Com. 447.

[3] Hinchman *v.* Lincoln, 124 U. S. 38 (1888), cases, Matthews, J., quoting Marsh *v.* Rouse, 44 N. Y. 647 (1871), cases. See also Shindler *v.* Houston, 1 *id.* 265 (1848); 49 Am. Dec. 325-40 (1883), cases; Remick *v.* Sandford, 120 Mass. 316 (1876), cases; Baldey *v.* Parker, 2 Barn. & C. 40 (1823); Benj. Sales, § 187; Browne, Stat. Fr. § 317 *a*.

[4] Gallagher *v.* Nichols, 60 N. Y. 445 (1875), Miller, J.; 12 Barb. 669; 1 Pars. N. & B. 281.

[5] Cox *v.* Nat. Bank of New York, 100 U. S. 712 (1879), Clifford, J.

[1] Cowan *v.* Halleck, 9 Col. 578 (1886), cases.

[2] See 1 Pars. Contr. 267; 2 Pars. N. & B. 281; 1 Daniel, Neg. Inst. § 496; 64 Ala. 28-33; 109 Mass. 414.

[3] 3 Kent, 82-88.

[4] Scudder *v.* Union Nat. Bank, 91 U. S. 413-14 (1875), cases; Cox *v.* Nat. Bank of New York, 100 *id.* 713, 712-18 (1879), cases.

precedent.[1] See CHECK; EXCHANGE, 2, Bill of; PLACE, 1, Of payment; PROTEST, 2.

ACCESS.[2] Going to or with: approach, intercourse, or opportunity therefor. Opposed, **non-access.**

In a special sense, refers to sexual intercourse between a husband and wife, and imports its occurrence or opportunity of communicating for that purpose.

The presumption that children born in lawful wedlock are legitimate, may be rebutted by evidence showing that there could have been no intercourse. Where there were opportunities for intercourse, evidence to establish impotency is generally not admitted. Non-access is not presumed from the mere fact that the parties lived apart in the same country.[3]

A parent will not be permitted to prove non-access for the purpose of bastardizing issue born in wedlock. The admission of such testimony would be unseemly and scandalous; it would reveal immoral conduct in the parents, and the child, who is in no fault, would be the chief sufferer. Modern statutes allowing parties to testify in their own behalf have not changed this rule of law.[4]

ACCESSARY.[5] He who is not the chief actor in an offense, nor present at its performance, but is in some way concerned therein, either before or after the fact committed.[6]

If a person does no more than procure, advise or assist, he is only an accessary; but if he is present, consenting, aiding, procuring, advising, or assisting, he is a "principal."[7]

Accessary before the fact. One who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit the crime.[8]

Accessary at the fact. An aider and abetter was formerly defined to be an "accessary *at* the fact." He is now spoken of as a principal in the first or second degree.[9]

Accessary after the fact. One who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon.[1]

In treason and misdemeanors, all participants are principals. The nearest relatives dare not aid or receive one another. Mere presence makes an accessary before the fact a principal in the second degree. An accessary before the fact is liable for all that ensues from the unlawful act. The manner of executing his command is simply a collateral circumstance. Any assistance given a felon to hinder his being apprehended, tried, or punished, makes the assister an accessary after the fact. A person acquitted as a principal may be indicted as an accessary after the fact; and one may be indicted as an accessary both before and after the fact.[2]

Whatever will make a party an accessary before the fact in felony will make him a principal in misdemeanor, if properly charged as such. . . . The acts, conduct, and declarations of each confederate, made during the pendency of the enterprise, are evidence, as part of the *res gestæ*, against all concerned; but a confession made subsequently to the crime affects only him who makes it. . . . Where the accessary is tried with the principal, the confession of the latter is admissible to prove his own guilt, and where he confesses by pleading guilty and retiring, the record of such conviction is *prima facie* evidence of his guilt at the trial of other defendants. Evidence of the confession of an accessary, to prove the guilt of the principal, cannot be admitted under an indictment against the accessary, unless the guilt or conviction of the principal is alleged in the indictment. The rule at common law was that the accessary could not be convicted until the guilt of the principal was established; so that the principal was first to be convicted or both indicted and tried together. . . . When the accessary is indicted before the principal has been convicted, the indictment, whether separate or joint, must allege the guilt of the principal, as the offense of the accessary depends upon the principal's guilt and is never to be regarded as complete unless the chief offense was actually committed. When principal and accessary are indicted together, the regular course is to introduce all substantive evidence against all the parties before they are required to state their defense. Then the jury are instructed to consider the case of the principal defendant in the first place, and, if they find him not guilty, that it is their duty also to acquit the accessary; but if they find him guilty, they are to proceed to examine the charge against the accessary, and declare whether it is sustained.[3]

Every accessary after the fact to murder, robbery, or piracy, shall be imprisoned not more than three years, and fined not more than five hundred dollars. Every accessary after the fact to any robbery of the carrier, agent, or other person intrusted with the mail, of such mail or of any part thereof, shall be fined not

[1] Hoffman *v.* Bank of Milwaukee, 12 Wall. 186, 193 (1870), Clifford, J.

[2] Ac-cess', or ac'-cess,— Webster.

[3] 2 Greenl. Ev. §§ 150-51; 1 *id.* § 28; 1 Whart. Ev. § 608; 2 *id.* § 1298; 1 Bl. Com. 457.

[4] Tioga County *v.* South Creek Township, 75 Pa. 436-37 (1874); Boykin *v.* Boykin, 70 N. C. 263-64 (1874), cases; Melvin *v.* Melvin, 58 N. H. 570 (1879), cases; King *v.* Inhab. Sourton, 31 E. C. L. 315-16 (1836), cases.

[5] Ac-ces'-sary,— Webster. L. *accessorius*, q. v. Also spelled -ory, but -ary is preferred. See ACCESSORY.

[6] 4 Bl. Com. 35; 3 Cliff. 227.

[7] United States *v.* Wilson, Baldw. 103 (1830). See also Speer *v.* Hiles, 67 Wis. 363 (1886), cases.

[8] 4 Bl. Com. 37: 1 Hale, P. C. 615.

[9] United States *v.* Hartwell, 3 Cliff. 226 (1869).

[1] 4 Bl. Com. 37; 14 R. I. 283.

[2] 4 Bl. Com. 36-40. See also State *v.* Davis, 14 R. I. 283 (1883).

[3] United States *v.* Hartwell, 3 Cliff. 226-31 (1869), cases, Clifford, J. See also 2 Steph. Hist. Cr. L. Eng. 229.

more than two thousand dollars, and be imprisoned at hard labor not more than two years;[1] and for stealing any letter, or other mail matter, or inclosure therein, not more than five years imprisonment and one thousand dollars fine.[2] Accessaries to murder, robbery or other piracy upon the seas, shall suffer death.[3]

"An accessary is he who stands by, and aids, abets, or assists, or who, not being present, aiding, abetting, or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime. He who thus aids, abets, assists, advises or encourages shall be considered as principal and punished accordingly. Every such accessary, when a crime is committed within or without this State by his aid or procurement in this State, may be indicted and convicted at the same time as the principal, or before, or after his conviction, and whether the principal is convicted or amenable to justice, or not, and punished as principal."[4]

See ABET; ACCOMPLICE; AID, 1; ANARCHISTS' CASE; DECOY; HUSBAND; PRESENCE; PRINCIPAL, 5.

ACCESSIO. L. Increase; accession, *q. v.*

Accessio cedit principali. Increase goes with the principal.

Any addition belongs to the owner of the principal object. See ACCESSORIUM.

ACCESSION. Addition, increase; augmentation. See ACCESSIO.

Specifically, the right to all that which one's own property produces, whether that property be movable or immovable, and the right to that which is united to it, either naturally or artificially.[5]

The fruits of the earth, produced naturally or by human industry, the increase of animals, new species of articles made by one person out of the materials of another, and increments to land, are embraced within the definition.[6]

The doctrine of property arising from accession is grounded on the right of occupancy. By the Roman law, if any corporeal substance received an accession by natural or artificial means, the original owner of the thing, by virtue of his right of possession, was entitled to the thing in its improved state; but if the thing itself became changed into a different species, as by making wine out of another's grapes, it belonged to the new operator, who was only to make satisfaction to the former proprietor for the materials so converted. These doctrines have since been confirmed by the courts.[8]

The rule is that the accession goes with the principal thing.[7]

See ACCESSORIUM; ACCESSORY; ACCRETION; INCIDENT; PARTUS. Compare CONFUSION, Of goods.

[1] R. S. §§ 5533, 5473.
[2] R. S. §§ 5535, 5467, 5469, 5471.
[3] R. S. §§ 5323-24.
[4] Ill. Rev. St., Cothran's ed., p. 506, cases. On casual connection, see 20 Cent. Law J. 3-6 (1885), cases.
[5] [3 Kent, 360.
[6] 2 Bl. Com. 405.
[7] 2 Kent, 360.

ACCESSORIUM. L. An accessory — thing; the incident.

Accessorium sequitur principale, or principalem, or naturam sui principalis. The accessory follows the principal thing, or the principal, or the nature of the principal.

The incident follows the principal. The more worthy draws to itself the less worthy.[1] See ACCESSION.

ACCESSORIUS. L. An accessary; an assistant.

Accessorius sequitur naturam sui principalis. An assistant follows the character of his chief.

An accessary follows the nature of his principal — in treason and misdemeanors: he cannot be guilty of a higher degree of crime.[2] See further ACCESSARY.

ACCESSORY.[3] 1. Accompanying; incidental; subservient; appurtenant: as, an accessory contract or obligation, *qq. v.*

2. Whatever is connected as an incident or subordinate thing to another as the principal. See ACCESSION.

3. An accessary, *q. v.*

Accessorial. Going with some other as the chief or more important thing: as, an offense of an accessorial nature,[4] an accessorial service.[5]

ACCIDENT. See ACCIDERE.

An event or occurrence which happens unexpectedly, from the uncontrollable operations of nature alone, and without human agency; or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both.[6]

An event from an unknown cause, or an unusual and unexpected event from a known cause; chance, casualty.[7]

In equity, includes not only inevitable casualties and such as are caused by the act of God, but also those that arise from unforeseen occurrences, misfortunes, losses, and acts or omissions of other persons, without the fault, negligence, or misconduct of the party.[8] See MISTAKE; RELIEF, 2.

[1] See 2 Bl. Com. 11, 36, 176; Broom, Max. 497.
[2] See 3 Inst. 139; 4 Bl. Com. 36; Broom, Max. 497.
[3] Ac-ces'-sory,— Webster.
[4] 12 Wheat. 476; 1 Greenl. Ev. § 294.
[5] 2 F. R. 478.
[6] Morris *v.* Platt, 32 Conn. 85 (1864), Butler, J.
[7] Crutchfield *v.* Richmond, &c. R. Co., 76 N. C. 320 (1877), Reade, J.
[8] Bostwick *v.* Stiles, 35 Conn. 198 (1868), Park, J.

Avoidable, unavoidable, and inevitable accident. Accidents are: (1) Such as are "inevitable" or absolutely unavoidable, because effected or influenced by the uncontrollable operations of nature. (2) Such as result from human agency alone, but are "unavoidable" under the circumstances. (3) Such as are "avoidable," because, in a given case, the act was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care which the law reasonably requires of one doing such a lawful act, or because the accident was the result of actual negligence or folly, and might, with reasonable care adapted to the emergency, have been avoided.

"Unavoidable accident" does not mean an accident which it is physically impossible in the nature of the things to prevent; but an accident not occasioned in any degree, remotely or directly, by the want of such care or skill as the law holds every man bound to exercise.[1]

No one is responsible for that which is merely the act of God or "inevitable accident." But when human agency is combined with it and neglect occurs in the employment of such agency, a liability for damages results from the neglect.[2]

In maritime law, "inevitable accident" is a relative term, to be construed not absolutely, but reasonably with regard to the circumstances of each case. In that light it signifies an occurrence which the party charged with the collision could not possibly prevent by the exercise of ordinary care, caution, and maritime skill; as, a collision resulting from the darkness of the night.[3]

"Unavoidable accidents or dangers," in a bill of lading, mean such accidents as are unavoidable by the carrier. To avail himself of such as an exception to his liability he must prove their existence, and clearly show that there was no default on his part.[4]

Where a collision occurs exclusively from natural causes, the loss must rest where it falls, on the principle that no one is responsible for such an accident. . . . It is only where a disaster happens from natural causes, and without negligence or fault on either side, that "inevitable accident" as a defense can be admitted — a collision which occurs where both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident.[5]

"Inevitable accident," within the meaning of the maritime law, is where a vessel is pursuing a lawful avocation in a lawful manner, using proper precaution against danger, and an accident occurs.[6]

When a casualty occurs, which might have been prevented by the use of known and proper means, it is not "inevitable."[7] See further ACT, Of God; COLLISION, 2.

Accidents in insurance law. In a policy insuring a person "against death or injury by accident" it is difficult to define "accident" so as to draw with perfect accuracy a line between injury or death from accident, and from natural causes. But in the term, thus used, some violence, casualty, or *vis major*, is necessarily involved.[8]

Disease produced by the action of a known cause cannot be considered as "accidental" — unless, for example, exposure is brought about by circumstances which may give it the character of accident. In one sense, disease or death through the direct effect of a known natural cause may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Yet diseases arising from malaria or infection have always been considered, not as accidental, but as proceeding from natural causes. Sunstroke arises from a natural cause, although it implies exposure to the sun.[9]

A large proportion of the events called accidents happen through some carelessness of the party injured. Thus, men are injured by the careless use of fire-arms, of explosives, of machinery, etc., where a little greater care on their part would have prevented it. Yet such injuries, having been unexpected, and not caused intentionally, are always called accidents, and properly so. . . . An accident may happen from an unknown, or be an unusual result of a known cause, and therefore unexpected; as where a person is injured in passing from the platform of a railway depot to a car in motion.[10]

Death by accident means death from any unexpected event which happens as by

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1 Story, Eq. § 78; Bisp. Eq. § 174; Pom. Eq. § 823; 17 F. R. 616.

[1] [Dygert v. Bradley, 8 Wend. 473 (1832).

[2] Chidester v. Consolidated Ditch Co., 59 Cal. 202 (1881), cases.

[3] The Morning Light, 2 Wall. 560-61 (1864), cases, Clifford, J.

[4] Hays v. Kennedy, 41 Pa. 378-86 (1861), cases, Lowrie, C. J.

[5] Union Steamship Co. v. N. Y. & Va. Steamship Co., 24 How. 313 (1860), cases, Clifford, J.

[6] The Grace Girdler, 7 Wall. 203 (1868), cases, Swayne, J. See also Stewart v. Ship Austria, 7 Saw. 437 (1882); s. c. 14 F. R. 800.

[7] Ladd v. Foster, 31 F. R. 827 (1887).

[8] Sinclair v. Maritime Passengers Assur. Co., 107 E. C. L. 484 (1861), Cockburn, C. J.

[9] Schneider v. Provident Life Ins. Co., 24 Wis. 29-31 (1869), Paine, J.

chance, or which does not take place according to the usual course of things.[1]

When the object of a company is to insure against bodily injuries produced by external, violent, and accidental means, all combined, there can be no recovery where an assured innocently drank poison.[2]

Within a policy against injury or death from "external, violent, and accidental means," excepting injury or death from "poison," a recovery was had for death from poison *absorbed* into the system by handling hides.[3] See POISON.

A policy against "bodily injuries, effected through external, accidental, and violent means," occasioning death or complete disability to do business, providing that "this insurance shall not extend to death or disability caused by bodily infirmities or disease, by suicide, or self-inflicted injuries," — covers a death by hanging one's self while insane.[4] See SUICIDE.

The burden of proof rests upon the insurer to show that the assured did not use the required degree of 'diligence for his personal safety.' . . . The use of the word "accidental" will not prevent recovery for injuries to which the negligence of the assured contributed.[5]

Within the meaning of the rules of a beneficial society, an "accident" has its usual signification of an event that takes place without one's foresight or expectation.[6]

In this sense it includes an injury received by one in a common affray, when no fault on his part is shown.[6]

A "railway accident" is any accident having its essence in the peculiarities or properties of railway traveling;[7] an accident attributable to the fact that the injured party is a passenger on the railway, and arising out of an act immediately connected with his being such a passenger.[8]

See CASUALTY; CAUSE, 1, Proximate; CONVEYANCE, 1; INJURY; NEGLIGENCE; RES, Perit, etc.

[1] North American Life, &c. Ins. Co. *v.* Burroughs, 69 Pa. 51 (1871), Williams, J. Approved, Bacon *v.* Accident Association, 44 Hun, 607, *infra*.

[2] Pollock *v.* United States Mut. Accident Association, 102 Pa. 234 (1883).

[3] Bacon *v.* United States Mut. Accident Association, 44 Hun, 599 (1887), cases.

[4] Accident Ins. Co. *v.* Crandal, 120 U. S. 527, 531–32 (1887), cases, Gray, J.

[5] Freeman *v.* Travelers' Ins. Co., 144 Mass. 575 (1887), cases; s. c., 36 Alb. Law J. 127. As to "total disability," see Saveland *v.* Fidelity & Casualty Ins. Co., 67 Wis. 176 (1886).

[6] Supreme Council of Chosen Friends *v.* Garrigus, 104 Ind. 140 (1884), Zollars, J.

[7] Theobald *v.* Railway Passenger Assur. Co., 26 E. L. & Eq. 437 (1854), Alderson, B.

[8] *Ibid.* 440, Pollock, C. B.

That accidents are not crimes, see 21 Cent. Law J. 264–70 (1885), cases.

ACCIDERE. L. To fall upon: to come to, arrive at; to come to hand; to fall out, come to pass, happen.

Quando acciderint. When they (assets) come to hand.

Where an executor or an administrator pleads *plene administravit*, the plaintiff may pray judgment of assets *quando acciderint*, or traverse the plea.[1]

ACCOMMODATION. Convenience, favor, benefit. An engagement made as a favor to another, and without consideration; something done to oblige another; as, a loan of money or credit.

Accommodation paper. A loan of the maker's credit, without restriction as to the manner of its use, by means of a bill of exchange or a promissory note, and by making, accepting, or indorsing the same, as the case may be.

A payee may use such instrument, as the name imports, for his own benefit, in any manner he may judge best calculated to advance his interests. Thus, he may pay an existing debt with it, sell or discount it, or pledge it as collateral security.

A holder for value may recover, though he knew that no consideration passed between the parties to the paper; if otherwise, the purpose of the paper would be defeated. But the want of a consideration is a good defense as against the party accommodated.[2]

Being out of the regular course of business, a partner, unauthorized, may not thus loan the name of his firm.[3] See ACCOMMODATUM.

ACCOMMODATUM. L. A loan for use without pay, the thing to be restored *in specie*.

A species of bailment, *q. v.* The same as *commodatum*.[4]

ACCOMPLICE.[5] One who is in some way concerned in the commission of a crime, whether as principal or as an accessary. . . . One of many equally concerned in a felony, the term being applied to those who are admitted to give evidence against their fellow criminals for the furtherance of justice.[6]

[1] See 1 Pet. C. C. 442, n; 67 Ga. 49; 19 S. C. 251.

[2] Appleton *v.* Donaldson, 3 Pa. 386 (1846); Lord *v.* Ocean Bank, 20 *id.* 396 (1853), Black, C. J.; Moore *v.* Baird, 30 *id.* 139 (1858); Dunn *v.* Weston, 71 Me. 283 (1880), Appleton, C. J.; 109 U. S. 667; 55 Pa. 75; 3 Kent, 42, 86; Byles, Bills, 131–32, note by Sharswood.

[3] 1 Daniel, Neg. Inst. 272; 1 Pars. N. & B. 259; 1 Bates, Partn. § 349, cases.

[4] 2 Kent, 573.

[5] F. *accomplic*, *complice*, a confederate: L. *complicem*, folded with, interwoven; involved.

[6] Cross *v.* People, 47 Ill. 158 (1868), Breese, C. J. And see People *v.* Smith, 28 Hun, 627 (1883), Daniels, J.; Cook *v.* State, 14 Tex. Ap. 101 (1883), White, P. J.; *ib.* 591.

One who in any manner participates in the criminality of an act, either as a principal or an accessary.[1]

One who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime.[2]

Whether to allow an accomplice, who has turned state's evidence, a separate trial, or to enter a *nolle prosequi* and admit him as a witness, is discretionary with the court. He is serviceable as a witness until sentenced. To bring the chief offender to justice justifies the practice. Accomplices never corroborate each other; but an informer is not subject to this rule;[3] and the rule is not applicable to civil issues.[4]

The corroboration ought to be as to some fact the truth or falsehood of which goes to prove or disprove the charge.[5] But the testimony of a feigned accomplice does not need corroboration. Whether or not one is a feigned accomplice is for the jury.[6]

Accomplices, not previously convicted of an infamous crime, when separately tried, are competent witnesses for or against each other; and the universal usage is that such a party, if called and examined by the public prosecutor on the trial of his associates in guilt, will not be prosecuted for the same offense, provided it appears that he acted in good faith and that he testified fully and fairly. But it is equally clear that he cannot plead such fact in bar of an indictment against him, nor avail himself of it upon his trial, for it is merely an equitable title to the mercy of the executive, subject to the conditions stated, and can only come before the court by way of application to put off the trial in order to give the prisoner time to apply to the executive for that purpose. Some of the elements of the usage had their origin in the ancient practice of approvement. . . . It is regarded as the province of the public prosecutor to determine whether or not the accomplice shall be examined for the state. In order to acquire the information necessary to determine the question, the prosecutor will grant the accomplice an interview, with the understanding that any communication he may make will be strictly confidential. Interviews are for mutual explanation, and so do not absolutely commit either party; but if the accomplice is subsequently called and examined, he is entitled to a recommendation for executive clemency. The accomplice may be pardoned prior to conviction, or the public prosecutor may *nol. pros.* the indictment, or advise the prisoner to plead guilty with the right to retract and plead to the merits if his application for pardon shall be unsuccessful. Where attempt is made to put him to trial in spite of his equitable right to a pardon, the prisoner may move that the trial be postponed, supporting his motion by his own affidavit, when the court may insist to be informed of all the circumstances; or the court may order that he be acquitted at the trial.[7]

See ACCESSARY; APPROVE, 5; PARDON; PARTICEPS.

ACCORD.[8] Agreement; satisfaction.

A satisfaction agreed upon between the party injuring and the party injured.[9]

An agreement, in the case of a contract, where the creditor agrees to accept some other thing in lieu of that which is contracted or promised to be done.[4]

Used in the plea "accord *and* satisfaction."

When performed, constitutes a bar to all actions.

The money or property must be offered in satisfaction of the claim, and upon the condition that if accepted it is a satisfaction, and the claimant must be made to understand that he takes it subject to such condition.[9]

The bar rests on the agreement and not on the mere reception of property; for whatever amount may have been received, the right of action will not be extinguished, unless it was agreed that the property should be received in satisfaction of the injury. An accord by parol, or by writing not under seal, cannot be set up as a bar to an action of debt founded on a record, or to a judgment in the nature of a record, nor to a debt by specialty, where the debt arises upon the deed; but it may be interposed as a bar to a claim for damages founded upon the breach of a specialty.[4]

Furthermore, an accord must be legal, reasonable, advantageous to the creditor, certain, complete, and be made by the debtor. It may proceed from a partner or a joint wrong-doer for him and his associates, and may be accepted by one co-plaintiff. When a definite sum of money is agreed upon, a less sum is not considered a satisfaction, unless there is an additional benefit.[7]

The technical rule, that an unsealed agreement to accept a smaller sum than the entire debt does not bind the creditor, has been falling into disfavor. It is now held that where a new element enters into the

[1] Polk *v.* State, 36 Ark. 126 (1880), Eakin, J. See too Russ. Crimes, 26; 4 Bl. Com. 34, 331.

[2] People *v.* Bolanger, 71 Cal. 20 (1886): Whart. Cr. Ev. § 440.

[3] 1 Greenl. Ev. § 379.

[4] Kalckhoff *v.* Zoehrlaut, 43 Wis. 379 (1877). See 71 N. Y. 137.

[5] State *v.* Miller, 97 N. C. 488 (1887); Commonwealth *v.* Bosworth, 22 Pick. 399 (1839), cases; State *v.* Maney, 54 Conn. 190 (1886); People *v.* Flath, 100 N. Y. 593 (1886).

[6] People *v.* Bolanger, 71 Cal. 19-20 (1886); 30 *id.* 316.

[7] Whiskey Cases (United States *v.* Ford), 99 U. S. 595, 599-606 (1878), cases, Clifford, J. See also Rex *v.* Rudd, 1 Cowp. 336 (1775), Mansfield, C. J.; Commonwealth *v.* Knapp, 10 Pick. 492-94 (1830); Commonwealth *v.* Holmes, 127 Mass. 429-45 (1879), cases, Gray, C. J.; State *v.* Graham, 41 N. J. L. 16-22 (1879), cases; Oliver *v.* Commonwealth, 77 Va. 590 (1883); 66 Ga. 346; 133 Mass. 402.

[8] F. *accorder*, to agree.

[9] 3 Bl. Com. 15-16.

[4] Way *v.* Russell, 33 F. R. 7 (1887): 1 Swift's Dig. 499; 24 Conn. 613; 75 N. Y. 574.

[9] Preston *v.* Grant, 34 Vt. 206 (1861); Bull *v.* Bull, 43 Conn. 462 (1876).

[9] Mitchell *v.* Hawley, 4 Denio, 417-18 (1847).

[7] See Cumber *v.* Wane, 1 Sm. L. C. 604 [*445], cases; 20 Wall. 309; 40 Ark. 184; 6 Col. 162; 44 Conn. 541; 87 Ind. 256; 88 *id.* 45; 29 Minn. 254-55; 88 Pa. 147; 1 Wash. T. 328; 2 Pars. Contr. 193; 1 Greenl. Ev. § 28.

agreement of compromise, the entire debt is satisfied; as, for example, a promise to pay at an earlier day, at a different place, in a different thing, or a promise by a new party.[1]

ACCORDING. Compare BY, 3; SECUNDUM.

Where a mortgage is conditioned for the payment of money "according to" the tenor of a note, to secure which the mortgage is given, the terms of the note are viewed as imported into the mortgage.[2] See VERBUM, Verba illata, etc.

According to law. After the ending of a life estate, land was to go to the male heir nearest the testator "according to law." *Held*, that the estate was to descend as the law would have given it to the heir.[3]

Since, after a verdict and judgment, a reasonable intendment will be made, on error, in favor of a complaint which shows a substantial cause of action, an averment that an affidavit was made "according to law" will be held to mean that it was made in the time required by law.[4]

In 1809 a testator devised land to his son for life, and then to his children "according to law." The testator died in 1812, and the son in 1860 leaving children. *Held*, that the children were to take equally as the law stood in 1860, when the distribution was to be made.[5]

Where, in an appeal from the judgment of a justice of the peace, the docket entry showed that bail had been given "according to the act of assembly," the recognizance was held to be sufficient.[6]

A bond conditioned for the faithful discharge of the duties of an office "according to law," embraces duties required by laws in force during the term of the officer, whether enacted before or after the execution of the bond.[7]

An administrator is to administer "according to law," that is, to fulfil his functions, to perform all his duties.[8]

See DULY; LAWFUL; VALID; VOID.

ACCOUNT.[9] 1. The primary idea is, some matter of debt and credit, or demand in the nature of debt and credit, between parties. It implies that one is responsible to another for moneys or other things, either on the score of contract or of some fiduciary relation, of a public or private nature, created by law or otherwise.[10]

Some matter of debt and credit, or of a demand in the nature of debt and credit, between parties, arising out of contract, or of a fiduciary relation, or some duty imposed by law.[1]

Current or running account. An account [illegible] which items are being added at intervals; an account open to further charges.

First account; partial account; final account. Designate the number or completeness of accounts [illegible]ted to a court for confirmation.

Mutual accounts. Those having original charges by persons against each other; accounts kept between merchants.

Open account. An account with one or more items unsettled; also, an account with dealings still continuing.

Account rendered. An account exhibiting the creditor's demand delivered to the debtor — as a basis for settlement.

Account stated. An account rendered by the creditor and assented to by the debtor.

An account to be "continuous" must be without break or interruption. "Open" means not closed; "current," running, passing, a connected series. A "continuous, open, current account" is an account which is not interrupted or broken, not closed by settlement or otherwise; a running, connected series of transactions.[2]

Death "closes" accounts in one sense, that is, there can be no further additions on either side, but they still remain "open" for adjustment and set-off, which is not the case with an account "stated;" for that supposes a rendering of the account by the party who is the creditor, with a balance struck, and assent to that balance, expressed or implied.[3]

In the statute of limitations, the exception in favor of "merchants' accounts" applies to actions of *assumpsit* as well as of account. It extends to all accounts "current" which concern the trade of merchandise between merchant and merchant. An account "closed" by the cessation of dealings is not an account "stated."[4]

An "account concerning the trade of merchandise between merchant and merchant" is not barred by the statute of limitations, though none of the items are within six years after the action was brought.

[1] Seymour *v.* Goodrich, 80 Va. 304-5 (1885), cases; Bish. Contr. § 50, cases. On paying a part for the whole debt, see 24 Cent. Law J. 175 (1887).

[2] Scheibe *v.* Kennedy, 64 Wis. 569 (1885).

[3] McIntyre *v.* Ramsey, 23 Pa. 319 (1854).

[4] McElhaney *v.* Gilleland, 30 Ala. 183, 188 (1857).

[5] Van Tilburgh *v.* Hollingshead, 14 N. J. E. 32 (1861).

[6] Harvey *v.* Beach, 38 Pa. 500 (1861).

[7] Dawson *v.* State, 38 Ohio St. 3 (1882). See also 18 N. Y. 115; 32 Minn. 162.

[8] Balch *v.* Hooper, 32 Minn. 162 (1884).

[9] F. *aconter, acompter:* L. *ad-con-putare*, to reckon up together. See COMPUTARE.

[10] Whitwell *v.* Willard, 1 Metc. 217 (1840), Shaw, C. J. Approved, Stringham *v.* Supervisors, 24 Wis. 598 (1869); McWilliams *v.* Allan, 45 Mo. 574 (1870); McCamant *v.* Batsell, 59 Tex. 367 (1883).

[1] Nelson *v.* Posey County, 105 Ind. 288 (1885), Mitchell, J.; Watson *v.* Penn, 108 *id.* 25 (1886).

[2] Tucker *v.* Quimby, 37 Iowa, 19 (1873), Miller, J.

[3] Bass *v.* Bass, 8 Pick. 192 (1829), Parker, C. J.; Volkening *v.* DeGraaf, 81 N. Y. 270-71 (1880); McCamant *v.* Batsell, 59 Tex. 368-69 (1883).

[4] Mandeville *v.* Wilson, 5 Cranch, 18 (1809), Marshall, C. J.

Whether an account concerns "the trade of merchandise" is a fact for the jury. Such accounts include accounts for merchandise bought and sold, and demands for money growing out of the trade of merchandise.[1]

Accounts are "mutual" where each party makes charges against the other in his books, for property sold, services rendered, money advanced, etc., as, for rent due.[2]

The term "mutual accounts" is used in statutes of limitations, declaring that, when suit is founded upon any such account, the time for suing may be reckoned from the last item proved. To constitute such account there must have been reciprocal demands between the parties. An account where there are no credits except payments is not such a mutual account.[3]

In Massachusetts, to a "mutual and open account current" there must be a mutual agreement, express or implied, that the items of the account upon one side and the other are to be set against each other. There must be one account upon which the items upon either side belong, and upon which they operate to extinguish each other *pro tanto*, so that the balance upon either side is the debt between the parties.[4]

A "mutual account" is one based on a course of dealing wherein each party has given credit to the other, on the faith of indebtedness to him. If the items on one side are mere payments on the indebtedness to the other, the account is not mutual. Whether or not an account is a mutual account is a question of fact. The doctrine that the statute of limitations does not begin to run against either party until the last just item is obtained on either side, does not rest on the notion that every credit in favor of one is an admission by him of indebtedness to the other, or a new promise to pay, but upon a mutual understanding, either express or implied from the conduct of the parties, that they will continue to credit each other until, at least, one desires to terminate the course of confidential dealing, and that the balance will then be ascertained, become then due, and be paid by the one finally indebted. Either party may terminate the mutual understanding at any time by actual payment of the balance, by stating the account for that purpose, by demanding a settlement privately, by suit, or by any other act which evinces his determination to deal no longer that way. Without proof of its termination, the law presumes that such a mutual understanding, once proved or admitted, runs through all the dealings of the parties until the complete bar of the statute has attached.[5]

A "partial account" implies that nothing is settled by it, but the matters constituting the items in question in the statement of it.[1]

An "account rendered" and not objected to within a reasonable time is to be regarded as admitted, by the party charged, to be *prima facie* correct. If certain items are objected to, within reasonable time, and others not, the latter are to be regarded as covered by such an admission. When the facts are clear, what is a reasonable time is a matter of law; where the proofs are conflicting, it is a mixed one of law and fact. Between merchants at home, an account presented, and remaining unobjected to after the lapse of several posts, is, ordinarily, by acquiescence, a stated account. The principle is that the silence of a party to whom an account is sent, warrants the inference of an admission of its correctness. This inference is more or less strong according to circumstances. It may be repelled by showing facts which are inconsistent with it, as that the party was absent from home, suffering from illness, or expected shortly to see the other party, and preferred and intended to make his objections in person.[2]

Unless objected to within a reasonable time an account rendered becomes an account stated, and cannot be impeached except for fraud or mistake. What constitutes reasonable time is a question of law.[3]

A "running account" refers to cases of reciprocity and mutuality of dealings between parties, and not to cases where the items are all on one side.[4]

That an account is "settled" is only *prima facie* evidence of its correctness. It may be impeached by proof of unfairness, or mistake, in law or in fact; and if it be confined to particular items it concludes nothing in relation to other items not stated.[5]

Merely rendering an account does not make it "stated." If the other party receives the account, admits the correctness of the items, claims the balance, or offers to pay it, it becomes a stated account.[6]

In stating an account two things are necessary: That there be a mutual examination of each other's items; and, that there be a mutual agreement as to the correctness of the allowance and disallowance of the respective claims, and of the balance, on final adjustment. Yet it is not necessary to show such examination and agreement: these may be implied from circumstances. An omission to object to the account rendered, raises merely an inference that the party is satisfied with it. Any circumstances rebutting such inference, or calculated to raise a counter inference, are competent evidence as to the actual intention of the parties.[7]

[1] Bass *v.* Bass, 8 Pick. 192 (1829), Parker, C. J.; Volkening *v.* DeGraaf, 81 N. Y. 270–71 (1880); McCamant *v.* Batsell, 59 Tex. 368–69 (1883).

[2] Edmonstone *v.* Thomson, 15 Wend. 556 (1836), Savage, C. J.; Ross *v.* Ross, 6 Hun, 81 (1875), cases; Pratt *v.* Runyon, 12 Ind. 177 (1859).

[3] Traylor *v.* Sonora Mining Co., 17 Cal. 596 (1861); *id.* 844; 25 *id.* 122; 1 Ga. 228; 12 Ind. 174; 51 Me. 104; 3 Pars. Contr. 86.

[4] Eldridge *v.* Smith, 144 Mass. 36 (1887), Morton, C. J.; Pub. Sts. c. 197, § 8.

[5] Gunn *v.* Gunn, 74 Ga. 555, 557–68 (1885), cases, Clarke, J.

[1] Leslie's Appeal, 63 Pa. 386 (1869); 39 *id.* 186.

[2] Wiggins *v.* Burkham, 10 Wall. 131 (1869), Swayne, J. See also 1 Story, Eq. §§ 526, 520; 18 N. Y. 289.

[3] Standard Oil Co. *v.* Van Etten, 107 U. S. 334 (1882), cases.

[4] Leonard *v.* United States, 18 Ct. Cl. 385 (1883).

[5] Perkins *v.* Hart, 11 Wheat. 256 (1826), Washington, J.; Hager *v.* Thomson, 1 Black, 93 (1861).

[6] Toland *v.* Sprague, 12 Pet. 335 (1838), Barbour, J.; Zacarino *v.* Pallotti, 49 Conn. 38 (1881).

[7] Lockwood *v.* Thorne, 18 N. Y. 288, 298 (1858); 1 Story, Eq. §§ 526–28; 13 Bradw. 43; 58 N. H. 250; 39 Tex. 118, 389.

Without impugning the rule that an account rendered which has become an account stated is open to correction for fraud or mistake, other principles come into operation, where a party to a stated account, who is under a duty, from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects to make such examination, or to have it made, in good faith, by another; by reason of which negligence, the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection which he could and would have taken had such notice been given. In other words, parties to a stated account may be estopped by their conduct from questioning its conclusiveness.[1]

A complex and intricate account is an unfit subject for examination in court, and ought always to be referred to a commissioner for report, with a view to the entry of a final decree by the court.[2]

It is the difficulty of properly adjusting accounts which confers jurisdiction in equity upon them, without much regard to their singleness or mutuality.[3]

A mistake in one item of an account may be corrected without opening up the whole account, unless the plaintiff can show error or fraud in the settlement as to other items.[4]

Accountable. Liable to demand for the exhibition of an account; under obligation to disclose fully the circumstances of a transaction involving the investment or expenditure of trust funds.

Accountable receipt. A written acknowledgment of the receipt, by the maker of it, of money or other personal property, coupled with a promise or obligation to account for or pay to some person the whole or some part thereof.[5]

Such receipt for money may be in legal effect, though not in form, a promissory note.[6]

[1] Leather Manufacturers' Bank *v.* Morgan, 117 U. S. 107 (1886), Harlan, J. A depositor in the bank sent his check-book to be written up and received it back with entries of credits and debits and his paid checks as vouchers, but, from delay in examining the book and checks, failed to discover that his confidential clerk had raised certain checks to the amount of $10,000, in time to enable the bank to indemnify itself. See also Swayze *v.* Swayze, 37 N. J. E. 190 (1883), cases.

See generally, as to account stated, 22 Cent. Law J. 76 (1886), cases.

[2] Dubourg *v.* United States, 7 Pet. 626 (1833); Tillar *v.* Cook, 77 Va. 479-81 (1883); 13 Bradw. 120; 37 N. J. E. 157, 564, 571; 94 N. Y. 80-81; 17 F. R. 19, 21, cases.

[3] State *v.* Churchill, 48 Ark. 433-36 (1886), cases.

[4] Carpenter *v.* Kent, 101 N. Y. 594 (1886); 2 Barb. 586.

[5] State *v.* Riebe, 27 Minn. 317 (1880), Gilfillan, C. J.; Gen. St. Minn. 1878, c. 96, § 1. And see Mason *v.* Aldrich, 36 *id.* 284 (1886), cases; Commonwealth *v.* Talbot, 2 Allen, 161 (1861); Commonwealth *v.* Lawless, 101 Mass. 32 (1869).

Accountant. One who states in writing the nature, condition, and value of trust property committed to his charge; also, one skilled in stating accounts.

Account-render. An action at law, in fiduciary matters, wherein a jury settles disputed items.

If no account has been made, the remedy is by writ of account *de computo:* commanding the defendant to render a just account to the plaintiff, or show cause *contra.* In this there are two judgments for the plaintiff: that the defendant do account (*quod computet*) before an auditor; and, then, that he pay the plaintiff whatever he is found in arrears. . . . The most ready and effectual way to settle matters of account is by a bill in a court of equity, where a discovery may be had on the defendant's oath. Wherefore, actions of account, to compel a man to bring in and settle his account, are now seldom used; though, when an account is once stated, nothing is more common than an action upon the implied *assumpsit* to pay the balance. . . . For want of discovery at law, the courts of equity have acquired a concurrent jurisdiction with other courts in all matters of account. As incident to accounts, they take concurrent cognizance of the administration of personal assets, and consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. They also take concurrent jurisdiction of all dealings in partnership, and many other mercantile transactions; also of bailiffs, receivers, agents, etc.[1]

The action of account-render is founded upon contract, and the engagement between partners that each shall account to every other for himself, and not for his copartner. It is a several liability; no two are responsible to another jointly.[2]

Where mutual accounts are intricate, a bill in equity is preferable.[3] Compare *Account, Action of.*

Account-book; book-account. See BOOK, Account.

Action of account. Action of account-render, *q. v.*

Proceeds upon the ground that the defendant rightfully had money for some purpose; and he cannot be in default until he has refused or neglected to account after being called upon. The judgments are: that the defendant account with the plaintiff; after accounting, that he pay him the balance found due.[4]

Place to our account. An order [superfluous] on a bill or draft, that the drawee charge the maker with the amount, after payment.[5]

See further AUDIT; BALANCE; CHARGE; DEMAND; REST, 2; SETTLE, 3; VOUCHER; ADMINISTRATOR; AGENT;

[1] 3 Bl. Com. 164, 437. See 1 Story, Eq. §§ 449-59.

[2] Portsmouth *v.* Donaldson, 32 Pa. 204 (1858), Strong, J.

[3] Dubourg *v.* United States, 7 Pet. 625 (1833).

[4] Travers *v.* Dyer, 16 Blatch. 181 (1879); 3 Bl. Com. 164; 2 Bates, Partn. § 899, cases.

[5] Byles, Bills, 91.

ASSIGNEE; EXECUTOR; GUARDIAN; PARTNERSHIP; PASS; RECEIPT; MISTAKE; PAYMENT; SALE; TRUST, 1.

2. The claim, demand, or right of action, for such balance as may be found to be due upon an account current or closed; as, an account in bank, to assign an account.

3. Interest, benefit, behalf: as, in saying that an agent (*q. v.*) acts upon account of his principal; a policy issued upon account of whom it may concern (*q. v.*); a collection (*q. v.*) made for the account of another person.

4. Reason, ground, consideration. See CONDITION.

ACCRESCERE. L. To grow to, come by increase, add to: to accrue, attach. See ACTIO, Non accrevit; JUS, Accrescendi.

ACCRETION. A mode of acquiring title to realty, where portions of the soil are added by gradual deposit, through the operation of natural causes, to that already in possession of the owner.[1] See ACCRESCERE.

The deposit itself is ordinarily called alluvion, *q. v.* Compare AVULSION.

At common law, imperceptible increase to land on the bank of a river by alluvial formations, occasioned by the washing up of the sand or earth, or by dereliction, as where the river shrinks back below the usual water-mark.[2]

When by addition, it should be so gradual that no one can see how much is added each moment of time.[3]

Until new land is made or emerges, there can be no "accretion" to or increase of the land of which it shall constitute a part. The term, importing an addition of what possesses the characteristics of land, cannot, therefore, be construed to include oysters planted opposite to land.[3]

The rule governing additions made to land bounded by a river, lake, or sea, has been much discussed and variously settled by usage and positive law. Almost all jurists and legislators, however, have agreed that the owner of the land, thus bounded, is entitled to these additions. By some, the rule has been vindicated on the principle of natural justice that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion; by others, it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient, that insensible additions to the shore should follow the title to the shore itself.[4]

It is generally conceded that the riparian title attaches to subsequent accretions to the land affected by the gradual and imperceptible operations of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question each State decides for itself. By the common law, such additions to the land on tide or navigable waters belong to the crown.[1]

An aerolite belongs to the owner of the fee of the land upon which it falls. Therefore, a pedestrian upon a highway who first discovers such stone cannot claim title to it, the highway being a mere easement for travel.[2]

ACCROACH.[3] To attempt, or assume, to exercise royal power.[4]

ACCRUE.[5] 1. To be or become added to; to fall due.

Accrued. Due and payable.

Accruing. Falling due; becoming but not yet due.

As, accrued or accruing — dividend, interest, pension, rent.

Accruing costs are such costs as become due and are created after judgment; as, the costs of an execution.[6]

2. To attach, arise, come into existence, commence, enure.

Benefits, and a right or cause of action, are said to accrue at a certain time.[7] See LIMITATION, 3.

Accruer, clause of. A clause in a gift to tenants in common, that upon the death of one tenant his share shall go to the survivor.

Extends only to the original, not to accrued shares, unless (as is ordinarily the case) it is otherwise expressly stated.

ACCUMULATION.[8] A gathering in quantity; also, the sums or other things so gathered.

Accumulative. Heaping up; additional; cumulative, *q. v.*

At common law, the utmost length of time allowed for the contingency of an executory devise to happen in was that of a life or lives in being and one-and-twenty years afterward.[9]

Under this rule, one Peter Thelluson, in 1796, de-

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[1] [3 Washb. R. P. 451. See also 4 Kent, 428; 34 La. An. 838.

[2] [Lammers *v.* Nissen, 4 Neb. 250 (1876), Gantt, J.

[3] Hess *v.* Muir, 65 Md. 597 (1886), Ritchie, J.

[4] Banks *v.* Ogden, 2 Wall. 57 (1864), Chase, C. J. See also New Orleans *v.* United States, 10 Pet. 717 (1836); Jones *v.* Johnston, 18 How. 156 (1855); 2 Bl. Com. 261-62.

[1] Barney *v.* Keokuk, 94 U. S. 337 (1876), Bradley, J.; Steers *v.* City of Brooklyn, 101 N. Y. 56 (1885), cases.

[2] Maas *v.* Amana Society, Ill. (1877): 16 Alb. L. J. 76; 18 Irish Law T. 381.

[3] F. *accrocher*, to draw to one's self: *croc*, a hook.

[4] See 4 Bl. Com. 76; 2 Steph. Hist. Cr. L. Eng. 246.

[5] F. *accreu:* L. *accrescere*, q. v.

[6] 87 Ind. 254; 91 Ill. 95.

[7] 98 U. S. 476; 17 F. R. 873; 1 Story, Eq. § 212.

[8] L. *ad-cumulare*, to amass: *cumulus*, a heap.

[9] 2 Bl. Com. 174; 2 Kent, 353.

vised his fortune to trustees, for accumulation during the lives of three sons and of their sons, *and* during the life of the survivor. At the death of this last survivor the fund was to be divided into three shares — one share for the eldest male lineal descendant of each of his three sons; upon failure of such descendant, the share to go to the descendants of the other sons. The testator left three sons and four grandsons living, and twin sons born soon after his death. It was found that at the death of these nine persons the fund would exceed nineteen million pounds; and, upon the supposition of only one person to take and a majority of ten years, that the sum would exceed thirty-two million pounds. The will was upheld, as within the limits of the common-law rule, by the court of chancery in 1798, and by the House of Lords in 1805.[1]

By statute of 39 & 40 Geo. III (1799), c. 98, known as the Thellusson Act or the Statute of Accumulations, accumulation was forbidden beyond the life of the grantor (or testator), twenty-one years from his death, and during the minority of any person living or in *ventre sa mere* at his death, or during the minority of any person who, under deed or will, would, if of full age, be entitled to the income.[2]

And such also is the law in most of the States; so that directions for accumulation beyond those limitations are void.[3] See ALIENATIO, Rei; DEVISE, Executory; PERPETUITY.

ACCUSARE. L. To lay to one's charge; to accuse, *q. v.*

Accusare nemo se debet. No one is obliged to accuse himself.

Nemo tenetur seipsum accusare. No one is bound to accuse himself.

Nemo tenetur seipsum prodere. No one is bound to betray or expose himself.

It is the privilege of a witness not to answer a question where there is real, not imaginary, danger that the answer may criminate himself.

The rule is intended to preserve the witness from temptation to commit perjury.

A husband cannot testify against his wife, or *vice versa*.[4] But a bankrupt must answer fully as to the disposition of his property.[5] And a member of a public corporation may be compelled to testify against the corporation.[6]

The rule has been relaxed, and a difference made between private crimes or those arising out of commerce or the private relations of society, and public crimes or those relating strictly to the general welfare of the state.[7]

See CRIMINATE; STULTIFY; TURPITUDE.

[1] Thellusson *v.* Woodford, 4 Ves. 227–343; 11 *id.* 112–50.

[2] 4 Kent, 284; Will. R. P. 306.

[3] 4 Kent, 346, 271; Pray *v.* Hegeman, 92 N. Y. 514–15 (1883); Scott *v.* West, 63 Wis. 574–82 (1885), cases.

[4] 1 Greenl. Ev. §§ 330, 340.

[5] 3 Pars. Contr. 519.

[6] 1 Greenl. Ev. § 331. See 1 Bl. Com. 443; 4 *id.* 296; 107 Mass. 181; 10 N. Y. 10, 33.

[7] Whart. Max. 28; Broom, Max. 968, 970; 17 Am. Law Rev. 798.

ACCUSE. To charge with violation of law; specifically, to charge with criminal misconduct. See ACCUSARE.

Accusation. A charge that one has committed a misdemeanor or crime; also, the act of preferring such a charge.

"To accuse" is to bring a charge against one before some court or officer; and the person thus charged is "the accused."[1]

A threat to accuse of a crime does not refer to accusing by way of railing, or slander, or bearing false witness under a separate accusation made by others, but the institution or participation in the institution of a criminal charge before some one held out as competent to entertain such a charge in lawful course.[2]

See CRIME; EXAMINATION, 2; INDICTMENT; STATEMENT, 1.

ACCUSTOMED. See CUSTOM; HABIT.

Where a deed conveyed a water privilege with the power and appurtenances as they then existed, and with the right to rebuild a dam, and to pass and repass in the use of the same over the "accustomed way," it was held that the right of way must be regarded as limited to the last accustomed way.[3]

ACKNOWLEDGMENT. Owning to; avowal, admission.

1. A statement by a debtor that a claim, barred by the statute of limitations, is still a valid obligation.

Takes the case out of the statute, and revives the original cause of action.

An acknowledgment which will revive the original cause of action must be unqualified and unconditional. It must show positively that the debt is due in whole or in part. If connected with circumstances which affect the claim, or if conditional, it may amount to a new *assumpsit* for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown.[3]

A new promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and, if any conditions are annexed, they ought to be shown to be performed. If there be no express promise, but a promise to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds

[1] People *v.* Braman, 30 Mich. 468–70 (1874), cases, Graves, C. J. See also Commonwealth *v.* Andrews, 132 Mass. 264 (1882).

[2] Ferriss *v.* Knowles, 41 Conn. 308 (1874).

[3] Wetzell *v.* Bussard, 11 Wheat. 315, 311–16 (1826), cases, Marshall, C. J.

in different ways, they ought not to go to a jury as evidence of a new promise to revive the cause of action. Any other course would open up all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dangers of being entrapped in careless conversations, and betrayed by prejudices. It may be that in this manner an honest debt may sometimes be lost, but many unfounded recoveries will be prevented.[1]

No case has gone the length of saying that there must be an express promise to pay in terms. A clear, distinct, unequivocal acknowledgment of a debt as an existing obligation, identifying it so that there can be no mistake as to what it refers to, made to a creditor or his agent, takes a case out of the statute.[2]

"I will pay the debt as soon as possible," constitutes a new and sufficient acknowledgment.[3]

Acknowledgment does not necessarily imply words.[4] See further PROMISE, New.

2. The act of a grantor in going before a competent officer and declaring that the instrument he produces is his act and deed.[5]

Also, the official certificate that such declaration was made.

The acknowledgment or the proof which may authorize the admission of a deed to record, and the recording thereof, are provisions for the security of creditors and purchasers. They are essential to the validity of the deed as to those persons, not as to the grantor.[6]

An acknowledgment, regular on its face, makes the instrument evidence, without further proof, and fits it for being recorded. The exact words of the statute need not be followed: it is sufficient if the meaning be clearly and fully expressed.[7]

In the case of a wife, the certificate must show that she was examined separate and apart from her husband; that she was of full age; that the contents of the deed were first made known to her; and that she acted of her own free will. Otherwise, although recorded, her acknowledgment constitutes neither a record nor notice.[8]

Conveyance of the estates of married women by deed, with separate examination and acknowledgment, has taken the place of the alienation of such estates by "fine" in a court of record under the law of England. For fraud in levying a fine, the court of chancery would grant relief, as in the case of any other conveyance. And so now, her deed of conveyance does not bind her if her acknowledgment was obtained by fraud or duress, or if, by reason of infancy or insanity, she was not competent to make the contract. Statute of 18 Edw. I. (1290) enacted that if a *feme covert* should be a party to a fine, she was first to be examined by certain justices; and if she dissented, the fine was not to be levied. This was held to mean that the fine ought not to be received without her examination and consent; but that if it was received, neither she nor her heirs could be permitted to deny that she was examined and freely consented; for this would be contradicting the record, and tend to weaken the assurances of real property.

The object of statutes requiring the separate examination of the wife to be taken by an officer, to be certified by him in a particular form, and to be recorded in the public registry, is not only to protect her by making it the duty of such officer to ascertain and to certify that she has not executed the deed by compulsion or in ignorance of its contents, but to facilitate the conveyance of the estates of married women, and to secure and perpetuate evidence, upon which transferees may rely, that the requirements of the law have been complied with. The duty of the officer involves the exercise of judgment and discretion, and so is a judicial or *quasi* judicial act. The conclusion is that, except in case of fraud, his certificate, made and recorded as the statute requires, is the sole and conclusive evidence of the separate examination and acknowledgment, and that, except where fraud in procuring her execution is alleged, extrinsic evidence of the manner in which the examination was conducted is inadmissible.[1]

Whenever substance is found in a certificate, obvious clerical errors and all technical defects will be disregarded, and, in order to uphold it, the certificate will be read in connection with the instrument and in the light of surrounding circumstances.[2] See EXAMINATION, 5; NOTICE, 1.

3. Admission of a fact; confession of guilt. See CONFESSION, 2.

[1] Bell *v.* Morrison, 1 Pet. 362 (1828), Story, J. See also Moore *v.* Bank of Columbia, 6 *id.* 91–94 (1832); Fort Scott *v.* Hickman, 112 U. S. 163 (1884); Green *v.* Coos Bay Wagon Co., 23 F. R. 67 (1885), cases; Curtis *v.* Sacramento, 70 Cal. 414–15 (1886); Chidsey *v.* Powell, 91 Mo. 636 (1887).

[2] Jones *v.* Lantz, 68 Pa. 326 (1869), Sharswood, J.; Wolfensburger *v.* Young, 47 *id.* 517 (1864); Shaefer *v.* Hoffman, 113 *id.* 5 (1886), cases; 114 *id.* 358; 23 Alb. Law J. 104–5 (1881), cases.

[3] Norton *v.* Shepard, 48 Conn. 141 (1880), cases.

[4] Bailey *v.* Boyd, 59 Ind. 298 (1877).

[5] [Short *v.* Coulee, 28 Ill. 228 (1862), Breese, J.

[6] Lessee of Sicard *v.* Davis, 6 Pet. 136 (1832).

[7] Wickersham *v.* Reeves, 1 Iowa, 417 (1855); Owen *v.* Norris, 5 Blackf. 481 (1840); Becker *v.* Anderson, 11 Neb. 497 (1881); Spitznagle *v.* Vanhessch, 13 *id.* 338 (1882).

[8] See Paxton *v.* Marshall, 18 F. R. 361, 364–68 (1883), cases; Young *v.* Duvall, 109 U. S. 577 (1883); McMullen *v.* Eagan, 21 W. Va. 244–45 (1882), cases; Watson *v.* Michael, *id.* 571–73 (1883), cases; Langton *v.* Marshall, 59 Tex. 298 (1883); Schley *v.* Pullman's Palace Car Co., 120 U. S. 575 (1887), citing Ill. cases; 1 Bl. Com. 444.

[1] Hitz *v.* Jenks, 123 U. S. 301–3 (1887), cases, Gray, J. In this case a notary had taken the acknowledgment in the statutory form, and the wife admitted that the signature was hers, but did not recollect executing the deed, and denied that it was explained to her. *Held*, there being no proof of fraud or duress, evidence to impeach the certificate was properly rejected. See also Davey *v.* Turner, 1 Dallas, *13 (1765); Lloyd *v.* Taylor, *ib.* *17 (1768); Cox *v.* Gill, 83 Ky. 669 (1886); Davis *v.* Agnew, 67 Tex. 210 (1886); Cover *v.* Manaway, 115 Pa. 345 (1887).

[2] King *v.* Merritt, Sup. Ct. Mich. (Oct. 13, 1887), cases

ACQUAINTED. Implies a mutual acquaintance; as where one swears that he is "well acquainted" with an applicant for naturalization.[1]

Having a substantial knowledge of the subject-matter; as of the paper to which a certificate is affixed.[2]

ACQUETS. See PURCHASE, 8.

ACQUIESCENCE.[3] A keeping quiet: consent inferred from silence or from failure to object, the person to be charged having knowledge of the essential facts. Tacit encouragement to an act done; assent.

Imports mere submission, not approbation; as when it is said that the board of trustees of a college acquiesced in legislation affecting their charter.[4]

Implies such knowledge of facts as will enable the party to take effectual action. One may not then rest until the rights of third persons are involved and the situation of the wrong-doer is materially changed.[5]

Where a person tacitly encourages an act to be done, he cannot afterward exercise his legal right in opposition to such consent, if this encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim.[6]

See further AFFIRM, 2; ESTOPPEL; SILENCE; STALE; WAIVER.

ACQUIRE.[7] To obtain, procure: as, to acquire property, a domicil. Compare HOLD, 6.

Acquired. "In the law of descent, includes lands that come to a person in any other way than by gift, devise, or descent, from an ancestor."[8]

After-acquired. Obtained after some event or transaction: as, property acquired after an adjudication in bankruptcy, or after a judgment has been entered.

Acquisition. Procuring a thing — specifically, property; also, the property itself. See INHERIT; PURCHASE, 2, 3.

Original acquisition. When, at the moment, the thing is not another's, *i. e.*, is acquired by first occupancy — by accession, intellectual labor, etc. *Derivative acquisition.* When the thing is obtained from another by his act or the act of the law; as in cases of gift, sale, forfeiture, succession, marriage, judgment, insolvency, intestacy.[1]

The property that a bankrupt acquires, after he has devoted all his possessions to the payment of his debts, is his individually.[9]

Where one makes a deed of land as owner and subsequently acquires an outstanding title, the acquisition enures to the grantee by estoppel.[8] See under COVENANT, 1.

A judgment may not be a lien upon after-acquired land, unless specially made so, as by a *scire facias* or some analogous proceeding.[4]

ACQUIT. F. Exonerated, acquitted, cleared.

Autrefois acquit. Formerly acquitted. Opposed, *autrefois convict.* A plea in bar, that the accused has already been cleared of the charge.[8] See ACQUITTAL, Former.

ACQUITTAL. Setting free; deliverance from a charge or suspicion of guilt; the act or action of a jury in finding that a person accused of a crime is not guilty.

Acquitted. "Set free or judicially discharged from an accusation; released from a debt, duty, obligation, charge, or suspicion of guilt."[6]

Refers to both civil and criminal prosecutions.[6]

Acquittal in fact. A verdict of not guilty. **Acquittal in law.** A discharge by operation of law; as, where one is held as an accessary and the principal is acquitted.[7]

Former acquittal. An acquittal in a former prosecution.

When the facts constitute but one offense, though divisible into parts, a final judgment on a charge of one part bars a prosecution for another part. When the facts constitute two or more offenses wherein the lesser is necessarily involved in the greater, and the facts necessary to convict on a second prosecution would necessarily have convicted on the first, then the first judgment bars another prosecution.[8]

The greater includes the lesser crime.[6] Compare CONVICTION, Former.

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[1] United States *v.* Jones, 14 Blatch. 90 (1877).

[2] Bohan *v.* Casey, 5 Mo. Ap. 106–7 (1878).

[3] L. *acquiescere*, to rest in or upon: *quies*, quiet.

[4] Allen *v.* McKean, 1 Sumn. 314 (1833), Story, J.

[5] Pence *v.* Langdon, 99 U. S. 581 (1878), Swayne, J. See also Matthews *v.* Murchison, 17 F. R. 766 (1883); Ramsden *v.* Dyson, L. R., 1 H. L. 129 (1865).

[6] Swain *v.* Seamans, 9 Wall. 254, 267, 274 (1869), Clifford, J.

[7] L. *acquirere*, to get, obtain: *quaerere*, to seek.

[8] *Re* Millars' Wills, 2 Lea, 61 (1878); Donahue's Estate, 36 Cal. 332 (1868).

[1] [2 Kent, 358, 386.]

[2] Allen *v.* Ferguson, 18 Wall. 4 (1873).

[3] Irvine *v.* Irvine, 9 Wall. 625 (1869).

[4] See Loomis *v.* Davenport, &c. R. Co., 17 F. R. 305 (1882); 1 Jones, Mortg. § 157. See generally Babcock *v.* Jones, 15 Kan. 301 (1875), cases; 21 Cent. L. J. 500–2 (1885), cases.

[5] See 4 Bl. Com. 335.

[6] Dolloway *v.* Turrill, 26 Wend. 400 (1841): Webster

[7] [2 Coke Inst. 364.]

[8] State *v.* Elder, 65 Ind. 285–86 (1879), cases; 58 N. H. 257; 4 Cr. L. M. 411.

[9] 18 Cent. Law J. 392–94 (1884), cases.

ACQUITTANCE. A written discharge from the performance of a duty; also, the writing itself.

Includes a common receipt for money paid.[1]

A receipt for damages may operate as an acquittance, when not a release.[2]

An acquittance under seal is a "release," *q. v.*

ACRE. Formerly, in discussing the law of real estate, for brevity, "black acre" and "white acre" were used to distinguish parcels. See ESTIMATE; MORE OR LESS.

ACT. 1. A thing done or performed; the exercise of power; an effect produced by power exerted.[3] See ACTUM.

"Act" and "intention" may mean the same as "act" alone, for act implies intention, as in the expression "death by his own act or intention."[4]

A service running through several days, as, inventorying attached goods, may be treated as one act.[5]

The law deals with the acts of men as members of society under a contract *honeste vivere, alterum non laedere, suum cuique tribuere:* to live honorably, hurt nobody, and give to every one his due.[6]

Acts are spoken of as unintentional and as intentional, wanton, malicious, and criminal; as of omission and of commission; as reasonable; as of diligence, and of negligence; as of ownership, of sufferance, of trespass; as of concealment and of fraud; as overt; as judicial, and as ministerial, *qq. v.*

What ought to be done is readily presumed. What ought not to be done, when done, may be valid. Equity treats that as done which ought to be done. He who can and ought to forbid, commands, if he does not forbid. He who fails to prevent what he can prevent, does the act himself. When anything is prohibited, everything by which it may be done is also prohibited. When more is done than ought to be done, that which it was proper to do, is accepted as rightly done. What cannot be done directly cannot be done indirectly. Every act involves its usual consequences, *q. v.* See also ESTOPPEL; RELATION, 1; VALID.

Act of bankruptcy. An act which exposes a debtor to proceedings in a court of bankruptcy, *q. v.*

Act of God. Such inevitable accident as cannot be prevented by human care, skill or foresight; but results from natural causes, such as lightning and tempest, floods and inundation.[7]

Something superhuman, or something in opposition to the act of man.[1]

Every "act of God" is an "inevitable accident," because no human agency can resist it; but it does not follow that every inevitable accident is an act of God. Damage done by lightning is an inevitable accident, and also an act of God, but the collision of two vessels, in the dark, is an inevitable accident, and not an act of God.[2]

That may be an "inevitable accident" which no human foresight or precaution can prevent; while "act of God" denotes a natural accident which could not happen by the intervention of man. The latter expression excludes all human agency. Moreover, to excuse a carrier, the act of God must also be the immediate, not the remote, cause of the loss.[3]

Courts and writers have differed as to whether "unavoidable accident" in a bill of lading is exactly equivalent to the exception of the common law "act of God or of the public enemies." Some treat "inevitable accident," "perils of the sea," "of navigation," "of the road," as equivalent to the "act of God" as this phrase is used by judges and lawyers; and others treat them as expressing different ideas. Others again view them as identical for the purpose of making "inevitable accident" mean "act of God," in the sense of a sudden and violent act of nature; while others make them equivalent in order to make "act of God" mean any accident which the carrier cannot, by proper care, foresight, and skill, avoid. Many cases overlook the common custom of merchants (the law in such matters) that all bills of lading contain an exception against losses by inevitable accident, perils of the sea, etc. If a man signs a bill containing the technical phrase "act of God" he will be held according to the usual custom of commerce.

The maxim *actus Dei nemini facit injuriam* does not appear to be different from *lex non cogit ad impossibilia, impotentia excusat legem, impossibilium nulla obligatio est*, and other maxims of the Roman law.

"Act of God" no more excludes human agency than do such terms as *Deo volente, Deo juvante, ex visitatione Dei*, Providential dispensation, or the Roman terms *fataliter, divinitus, casus fortuitus, damnum fatale*, all which originally referred to the intervention of the gods, in the sense that the appropriate human agency was powerless.

When rights depend upon the life of a man, they end with his death, which is called an "act of God," whether from nature, accident, carelessness, or suicide.[4]

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[1] State *v.* Shelters, 51 Vt. 104 (1878), cases.

[2] Mitchell *v.* Pratt, Taney, 448 (1841).

[3] See Chumasero *v.* Potts, 2 Monta. 284–85 (1875).

[4] Chapman *v.* Republic Life Ins. Co., 6 Biss. 240 (1874).

[5] Bishop *v.* Warner, 19 Conn. 467 (1849).

[6] 1 Bl. Com. 40: Justinian.

[7] McHenry *v.* Philadelphia, &c. R. Co., 4 Harr., Del., 461 (1846), Booth, C. J.

[1] Chicago, &c. R. Co. *v.* Sawyer, 69 Ill. 289 (1873), cases, McAllister, J.

[2] Fergusson *v.* Brent, 12 Md. 33 (1857), Le Grand, C. J. See also The Charlotte, 9 Bened. 6–16 (1877), cases; 10 *id.* 310, 312, 320.

[3] Merritt *v.* Earle, 29 N. Y. 117–18 (1864), Wright, J.; Michaels *v.* N. Y. Central R. Co., 30 *id.* 571 (1864), cases.

[4] Hays *v.* Kennedy, 41 Pa. 379–80, 381, 382 (1861), cases, Lowrie, C. J. Dissenting opinion by Thompson, J., 3 Grant, 357–64, cases: "An opinion characterized

The law was first established by the courts of England with reference to carriers by land, on whom the Roman law imposed no liability beyond that of other bailees for reward. Nor did the Roman law make a distinction between inevitable accident arising from what in English law is termed "the act of God," and inevitable accident arising from other causes, but, on the contrary, afforded immunity to the carrier, without distinction, whenever the loss resulted from "*casus fortuitus*," "*damnum fatale*," or "*vis major*"— unforeseen and unavoidable accident.

It is not under all circumstances that inevitable accident arising from the so-called act of God will, any more than inevitable accident in general by the Roman and continental law, afford immunity to the carrier. This must depend upon his ability to avert the effects of the *vis major*, and the degree of diligence which he is bound to apply to that end.

All causes of inevitable accident may be divided into two classes: those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause; and those which have their origin, in whole or in part, in the agency of man, whether in acts of commission or omission, of nonfeasance or misfeasance, or in any other cause independent of the agency of natural forces.

It is not because an accident is occasioned by the agency of nature, and therefore by what may be termed the "act of God," that it necessarily follows that the carrier is entitled to immunity. The carrier is bound to do his utmost to protect the goods from loss or damage, and if he fails herein he becomes liable from the nature of his contract. If by his default in omitting to take the necessary care, loss or damage ensues, he remains responsible, though the so-called act of God may have been the immediate cause of the mischief.

What Story says of "perils of the seas" applies equally to such perils coming within the designation of "acts of God." That is, all that can be required of the carrier is that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse he does all that can be reasonably required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major* as the act of God. It is, therefore, erroneous to say that the *vis major* must be such as "no amount of human care or skill could have resisted" or the injury such as "no human ability could have prevented." [1]

Where, in an action for the loss of goods, the defense is "an act of God" [an unusual flood], the burden of showing that the negligence of the carrier co-operated to produce the loss is on the shipper. Such defense may be shown under a general denial.[2]

Where a duty is imposed upon a person by law he will not be absolved from liability for non-performance occasioned by an act of God, unless he has expressly stipulated for exemption.[3]

See further ACCIDENT; CARRIER; CONDITION; POSSIBILITY.

Act of honor. Acceptance or indorsement of protested paper, to save the credit of a name thereon. See HONOR, 1.

Act of the law. The operation of legal rules upon a fact or facts; operation of law.[4]

A common expression is "act and operation of law."

Succession to property, surrender of leases, and some divorces are said to be created by act of the law.[5]

An act of the law exonerates from liability.[6]

2. A formal written statement that something has been done; as, that an instrument is the maker's act and deed. See ACKNOWLEDGMENT, 2.

3. A law made by a legislative body.

Used abstractly, or with reference to a particular statute: as, an act of Assembly, of Congress, of legislation, or of the legislature; the Civil Rights Act, the Confiscation Acts, the Factor's Act, the Inter-State Commerce Act, the Legal Tender Act, Recording Acts, the Riot Act, Tenterden's Act, the Tenure of Office Act, *qq. v.*

Enact. To establish in the form of positive law, or by written law. Whence enactment.

Enacting clause. The section of a bill or statute which establishes the whole document as a law. Commonly begins "Be it enacted, etc.," that is, by the Senate and House of Representatives (or the People) of a State, or of the United States.

The section of a statute which defines an offense is not the enacting clause.[6]

"Act of Congress" is as strong and unequivocal as "statute of Congress."[7]

The legislature, in exercising a power conferred

by fine discrimination, and by accurate research," 1 Smith's Lead. Cases, 413, where extended quotation is made from it.

[1] Nugent *v.* Smith, L. R., 1 C. P. D. 429-30, 435-36 (1876), cases, Cockburn, C. J.; 1 Story, Bailm. § 512 (*a*). The defendant received a mare to be carried by him as a common carrier by sea. The jury found that her death was caused partly by very rough weather and partly from struggling due to fright, and that the defendant had not been negligent. The Court of Appeals reversed the lower court, holding that the defendant was not liable for the value of the animal.

[1] Davis *v.* Wabash, &c. R. Co., 89 Mo. 349-53 (1886), cases, Ray, J. Same case, 25 Am. Law Reg. 650 (1885) *th.* 658-60, cases.

[2] Central Trust Co. *v.* Wabash, &c. R. Co., 31 F R 441 (1887).

[3] 17 Wall. 373, 376.

[4] See 1 Bl. Com. 123; 15 Wend. 400; 2 Barb 1[illegible] 2 Whart. Ev. §§ 858-62.

[5] Taylor *v.* Taintor, 16 Wall. 376 (1872).

[6] United States *v.* Cook, 17 Wall. 176 (1876).

[7] United States *v.* Smith, 2 Mas. 151 (1820, Story J

enacts laws, and a law is called a statute or an "act." . . . All legislative acts are laws; if not laws, then they are not acts of legislation.[1]

A proposed law is embodied in a *bill*. When this bill is duly passed by the legislative body it becomes an act of that body. When the executive department signs or approves such a bill it becomes a law.[2]

General or public act. A statute which binds the community at large. **Private or special act.** Such act as operates only upon particular persons and private concerns.

Special or private acts are to be formally shown and pleaded, else the judges are not bound to notice them.[3]

There is no statute fixing the time when acts of Congress shall take effect, but it is settled that where no time is prescribed, they take effect from their date. Where the language employed is "from and after the passage of this act," the same result follows. The act becomes effectual from the day of its date. In such cases it is operative from the first moment of that day, fractions of the day not being recognized.[4]

A thing is done in pursuance of an act when the person who does it is acting honestly, under the powers which the act gives, or in discharge of the duties which it imposes.[5]

See further LAW; LEGISLATE; STATUTE.

ACTA. See ACTUM.

ACTING. Performing; serving; attending to the duties of an office; as, the acting — executor, partner, commissioner of patents, reporter of decisions.

Attached to an officer's title, designates not an appointed incumbent, but merely a *locum tenens* who is performing the duties of an office to which he does not himself claim title.[6]

ACTIO. L. A doing, performing: an action, or right of action.

Actio non accrevit infra sex annos. The action has not accrued within six years: the right of action has not arisen, etc.

The Latin form of the plea of the statute of limitations. In strictness, appropriate only when the action has accrued subsequently to the promise. To an action on the promise, the plea is *non assumpsit infra sex annos*.[7] See ACCRUE, 2.

Actio personalis moritur cum persona. A personal action dies with the person.

Applies to actions merely personal, arising *ex delicto*, for wrongs actually done by the defendant, such as trespass, battery, slander: in which the action cannot be revived by or against any representative. But actions arising *ex contractu*, by breach of promise, in which the right descends to the representative, may be revived: being actions against the property rather than against the person.[1]

Expresses the rule at common law with regard to the surviving of personal actions arising *ex delicto*, for injuries to the person, personalty, or realty. By 4 Edw. III (1331), c. 7, the rule was so modified as to give an action in favor of a personal representative for injuries to personalty; by 3 and 4 Will. IV (1833), c. 42, an action was given against personal representatives for injuries to personalty or realty;[2] and by 9 and 10 Vict. (1846), c. 23, known as Lord Campbell's Act, a right of action for damages for the death of the person injured by the wrongful act, neglect, or default of another, is given to near relatives — husband, wife, parent, child. These statutes have been followed in this country.

At common law actions on penal statutes do not survive. Congress has not changed the rule with respect to actions on the penal statutes of the United States.[3] See further DAMAGES.

Non oritur actio. A right of action does not arise — *ex dolo malo*, out of a fraud; — *ex nudo pacto*, out of an engagement without a consideration; — *ex pacto illicito*, upon an unlawful agreement; — *ex turpi causa* or *contractu*, out of an immoral cause or contract.

Whenever illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. Consent cannot neutralize its effect.[4] Whatever the contamination reaches it destroys. See further DELICTUM, In pari, etc.

ACTION. 1. Doing a thing, the exercise of power, physical or legal; the thing itself as done; an act, *q. v.*: as, legislative, judicial, executive action, *qq. v.* See CAUSE, 1 (1).

2. "The lawful demand of one's right"[5] — in a court of justice.[6]

An abstract legal right in one person to prosecute another in a court of justice; a "suit" is the actual prosecution of that right.[7]

An action or suit is any proceeding for the

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[1] People *v.* Tiphaine, 13 How. Pr. 76–77 (1856).

[2] Chumasero *v.* Potts, 2 Monta. 284–85 (1875).

[3] 1 Bl. Com. 86; Unity Township *v.* Burrage, 103 U. S. 454 (1880).

[4] Lapeyre *v.* United States, 17 Wall. 198 (1872), Swayne, J. See also 7 Wheat. 211; 1 Gall. 62; 20 Vt. 638; 21 *id.* 619; 1 Kent, 457.

[5] Smith *v.* Shaw, 21 E. C. L. 126 (1829).

[6] Fraser *v.* United States, 16 Ct. Cl. 514 (1880).

[7] 3 Bl. Com. 308.

[1] 3 Bl. Com. 302.

[2] Russell *v.* Sunbury, 37 Ohio St. 374 (1881). See also Henshaw *v.* Miller, 17 How. 219 (1854); Mitchell *v.* Hotchkiss, 48 Conn. 16 (1880); Tufts *v.* Matthews, 10 F. R. 610–11 (1882), cases; 55 Mich. 338; 143 Mass. 305.

[3] Schreiber *v.* Sharpless, 110 U. S. 80 (1884).

[4] Coppell *v.* Hall, 7 Wall. 556–59 (1868), cases; Ewell *v.* Daggs, 108 U. S. 149 (1883), cases; 107 Mass. 440; 99 N. Y. 85; Broom, Max. 297, 729.

[5] 3 Bl. Com. 116.

[6] McBride's Appeal, 73 Pa. 488 (1873).

[7] Hunter's Will, 6 Ohio, 501 (1854).

purpose of obtaining such remedy as the law allows.[1]

In any legal sense, action, suit, and cause are convertible terms.[2]

The "cause" of this lawful demand, or the reason why the plaintiff can make such demand, is some wrong act committed by the defendant, *and* some damage sustained by the plaintiff in consequence thereof: the two elements must unite.[3] See further CAUSE, 2.

Since all wrongs may be considered as merely a privation of right, the plain, natural remedy for every species of wrong is the being put in possession of the right again. This may be effected by a specific delivery or restoration of the subject-matter to the legal owner, or, where that is not possible or at least not adequate, by making a pecuniary satisfaction in damages. The instruments whereby this remedy is obtained are a diversity of actions or suits. The Greeks and Romans had set forms of actions for the redress of distinct injuries. Our actions are founded upon original writs, and these are alterable by legislation only. The several suits, or remedial instruments of justice, are actions personal, real, and mixed.[4]

Whether a writ of error, a *quo warranto*, a *mandamus*, a *scire facias*, a suit in partition, a suit in equity, a summary proceeding — in some of which the court is the actor, — are actions, in the strict sense, has been variously decided.

Action in personam. An action against the person (of the defendant). **Action in rem.** An action against a thing — an inanimate object out of which satisfaction is sought. See RES, 2.

Action of contract or **ex contractu.** An action for the recovery of damages upon a broken contract. In form: *assumpsit*, debt, or covenant (*qq. v.*) — all founded on promises. **Action of tort** or **ex delicto.** An action for the recovery of personalty withheld, or damages for a wrong not a breach of contract. In form: trespass, case, trover, replevin, or detinue (*qq. v.*) — all founded on torts or wrongs.[5]

Action on the case. See CASE, 3.

Actionable. That for which an action may be maintained; opposed to *non-actionable:* as, actionable — fraud, defamation.

Words are "actionable *per se*" when the natural consequence of what they impute is damage.[6] See LIBEL, 5; SLANDER.

Amicable action. An action entered of record by agreement and without the service of process, to obtain the judgment of the court in a matter of common interest. Opposed, *adversary* action.

Civil action. Recovers a private right or compensation for deprivation thereof. **Criminal action.** Is instituted by the state for an offense to the community or to society.

Civil actions include actions at law, suits in chancery, proceedings in admiralty, and all other judicial controversies in which rights of property are involved.[1]

Civil action is used in contradistinction to criminal action; as, in the act of July 2, 1864, relating to parties as witnesses.[2]

Common-law action. An action maintainable at common law. **Statutory action.** Such form of action as is given by legislative enactment. See REMEDY, Cumulative.

Cross action. An action brought by the defendant in a suit against the plaintiff upon the same subject-matter, the particular cause of action not being available as set-off in the first suit. See SET-OFF.

Equitable action. An action for money had and received is sometimes so called.

Yet, in the absence of special circumstances, courts of equity refuse jurisdiction, because the remedy at law is complete.[3] See ASSUMPSIT, Implied.

Fictitious action. A suit upon a wager, and under pretense of a controversy, to obtain a judicial opinion upon a question of law. See FICTITIOUS, 1; ISSUE, 3, Feigned.

In action. That for which a suit will lie or is pending. See CHOSE.

Joint action. A suit in which all persons obligated or interested on one side of a controversy appear as co-plaintiffs, and all obligated or interested on the other side are made co-defendants. **Joint and several action.** A suit by either one or all persons on one side as plaintiff or co-plaintiffs, and against either one or all on the other side as defendant or co-defendants. **Separate action.** Such action as each person must

[1] Harris *v.* Insurance Co., 35 Conn. 312, 311 (1868); Magill *v.* Parsons, 4 *id.* 322 (1822).

[2] *Exp.* Milligan, 4 Wall. 112 (1866), Davis, J.; 2 McCrary, 180; 18 Blatch. 447; 60 Wis. 478.

[3] Foot *v.* Edwards, 3 Blatch. 313 (1855), Nelson, J.

[4] 3 Bl. Com. 116-17.

[5] See 3 Bl. Com. 117; 13 F. R. 537.

[6] Pollard *v.* Lyon, 91 U. S. 226-28 (1875), cases.

[1] United States *v.* Ten Thousand Cigars, 1 Woolw. 125 (1867).

[2] Green *v.* United States, 9 Wall. 658 (1869). And see 1 Dill. 184; 28 Conn. 580; 69 Ga. 647; 104 Ind. 6, 18; 2 Monta. 70; 51 N. H. 383; 1 Barb. 15; 14 Abb. Pr. 353; 44 Pa. 130; 43 Vt. 297.

[3] Wallis *v.* Shelly, 30 F. R. 748 (1887); Gaines *v.* Miller, 111 U. S. 397-98 (1884), cases.

bring when several complainants cannot pursue a joint remedy. See further JOINT.

Local action. A suit maintainable in some one jurisdiction exclusively. **Transitory action.** A suit maintainable wherever the defendant can be found.

In "local actions," where the possession of land or damages for an actual trespass or waste, etc., affecting land, is to be recovered, the plaintiff must declare his injury to have happened in the very place where it happened; but in "transitory actions," for an injury that might have happened anywhere, as in debt, detinue, slander, the plaintiff may declare in what county he pleases. . . . Transitory actions follow the person of the defendant; territorial suits must be discussed in the territorial tribunal.[1]

Actions are deemed "transitory" when the transactions on which they are founded might have taken place anywhere; and "local," when their cause is, in its nature, necessarily local.[2]

Actions which do not seek the recovery of land may be "local" by common law because they arise out of some local subject or from the violation of some local right or interest; as, waste, trespass *quare clausum*, actions on the case for nuisances to houses, for disturbance of a right of way, for the diversion of a water-course, and the like; also, replevin. These actions are personal and local.[3]

When the action by which a remedy is to be enforced is personal and transitory the defendant may be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance. Thus, as an action in the nature of trespass to the person is transitory, the venue is immaterial.[4] See ACTOR, 1, Sequitur, etc.

Penal action. A suit brought by an officer of government to recover a penalty imposed by statute. **Popular action.** An action also for a penalty, maintainable by any person. Compare *Qui tam action*. See FORFEITURE; PENALTY.

Qui tam action. *Qui tam:* who as well. The emphatic words in the Latin form of a declaration in an action by an informer for a penalty.

Civil in form, but designed to recover a penalty imposed by a penal statute; therefore, partially at least, criminal in nature.[5]

Sometimes one part of a forfeiture, for which a popular action will lie, is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor: and then the suit is called a *qui tam* action, because brought by a person "*qui tam pro domino rege, quam pro se ipso*"— as much for his lord the king, as for his own self.

If the king commences the suit he has the whole forfeiture. If any one has begun such action, no other person then can pursue it; and the verdict in the first suit bars other actions. This caused offenders to induce their friends to begin suit, in order to forestall and prevent other actions: which practice is prevented by 4 Hen. VII (1488), c. 20, enacting that no recovery, otherwise than by verdict, obtained by collusion, shall be a bar to any other action prosecuted *bona fide*.[1] That being the law in England in 1776, such action cannot be prosecuted in the name of an informer unless the right is distinctly given by statute.[2]

Real action. An action whereby the plaintiff claims title to lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life. **Personal action.** Such action whereby a man claims a debt, or a personal duty or damages in lieu thereof, or damages for some injury to his person or property. **Mixed action.** Partakes of the nature of both of the former — by it real property is demanded, with personal damages for a wrong sustained.[3]

A "real action" is brought for the specific recovery of lands, tenements, or hereditaments. It includes every form of action where the judgment is for the title and possession of the land demanded; as, ejectment. A "mixed action" is brought for the specific recovery of land, as in a real action, but has joined with this claim one for damages in respect to such property; as, actions of waste and dower. A "personal action" is brought for the specific recovery of chattels, or for damages or other redress for breach of contract and other injuries of every description, the specific recovery of lands and tenements only excepted.[4] See ACTIO, Personalis, etc.

Right of action. Right to bring a suit; such right as will sustain a suit; in particular, a right of remedy or recovery at law.[5]

See ACTIO; BOOK-ACCOUNT, Action of; CIRCUITY; COMMENCE; CONSOLIDATE; DISCONTINUANCE: FORM, 2; GIST; ISSUE, 3; MULTIPLICITY; PARTY, 2; PEND; PROCEEDING; PROCESS, 1; RES, 2.

ACTIVE. 1. Produced by exertion; resulting from intentional action; opposed to passive: as, active — deceit, waste, *qq. v.*

2. Requiring intelligent direction, personal

[1] [3 Bl. Com. 294, 384.

[2] Livingston *v.* Jefferson, 1 Brock. 209 (1811), Marshall, C. J.

[3] Hall *v.* Decker, 48 Me. 256–57 (1860).

[4] Dennick *v.* Central R. Co. of New Jersey, 103 U. S. 17–18, 21 (1880), cases; Livingston *v.* Jefferson, 4 Hughes, 611–13 (1811), Marshall, C. J.; Oliver *v.* Loye, 59 Miss. 321–23 (1881), cases; R. S. §§ 739–45, cases.

[5] State *v.* Kansas City, &c. R. Co., 32 F. R. 726 (1887), Brewer, J.; R. S. Mo. § 1709.

[1] 3 Bl. Com. 161–62.

[2] O'Kelly *v.* Athens Manuf. Co. 36 Ga. 52 (1867).

[3] [3 Bl. Com. 117–18.

[4] [Hall *v.* Decker, 48 Me. 255–56 (1860).

[5] As to premature actions, see 21 Cent. Law J. 401–12 (1885), cases.

exertion; opposed to passive: as, an active — trust, use, *qq. v.*

ACTOR. 1. Lat. A doer; a plaintiff. See CAVEAT, Actor.

Actor sequitur forum rei. The plaintiff follows the forum of the thing — the thing in suit, or the residence of the defendant.[1]

Personal actions are to be brought before the tribunal of the defendant's domicil. Actions for collisions between vessels may be brought where neither party resides: on the ground that a quasi-contract arises on the part of the wrong-doer to pay the damage he has caused, and that the place of performance is taken to be the port at which the injured vessel first arrives.[2] See ACTION, 2, Local.

Actori incumbit probatio. On the plaintiff rests the proving — the "burden of proof," *q. v.*

2. Eng. (1) A doer, a performer: as, the chief actor in a crime.[3] See PRINCIPAL, 5.

He who institutes a suit; a plaintiff,[4] *q. v.*

He who avers a matter as a fact or law.

(2) A stage-player. See REVIEW, 3.

ACTUAL. Existing in act; really acted; real, at present time; as a matter of fact. Opposed, *constructive:* speculative, implied, legal.

An assault with "actual" violence is with physical force put in action, exerted upon the person assailed.[5]

It is common to speak of an actual or the actual — annexation of a fixture, appropriation of a thing, attachment, battery, breaking, close or curtilage, cost, costs, damage, delivery, escape, eviction, fraud, knowledge, levy, loss, malice, notice, occupation, payment, possession, presence, seizure, use, value, violence, *qq. v.*

ACTUM; ACTUS. L. A thing done: an act; action.

Acta exteriora indicant interiora secreta. Outward acts evince the inward purpose. See OVERT; WILL, 1.

Actus curiæ neminem gravabit. An act of the court shall oppress no one.

A court will not suffer a party to be prejudiced by its own action, as, by delay. On this principle orders are sometimes entered *nunc pro tunc*,[6] q. v.

[1] 2 Kent, 462.

[2] Thomassen *v.* Whitwell, 9 Bened. 115 (1877).

[3] See 4 Bl. Com. 34.

[4] See 3 Bl. Com. 25.

[5] State *v.* Wells, 31 Conn. 213 (1862). See 16 Op. Att.-Gen. 447, 445.

[6] See Cumber *v.* Wane, 1 Sm. L. C. *444-45; 108 U. S. 66 119 *id.* 596; 3 Col. 236; Broom, Max. 122.

Actus Dei nemini facit injuriam. An act of God does wrong to no one.

No one is responsible in damages for the result of an inevitable accident, *q. v.*

Actus legis nemini facit injuriam. An act of the law wrongs no man.

An act of the law is to be so limited in its operation that no right shall be prejudiced.[1]

Actus non facit reum, nisi mens sit rea. An act does not make a man a criminal, unless his intention be criminal.

To constitute a crime the intent and the act must concur: a mere overt act, without wrongful intention, does not make guilt.[2] See CONSEQUENCES; MALICE.

AD. L. At, to, for; according to; on account of.

In compounds assimilates with the consonant following, becoming ac-, af-, ag-, al-, an-, ap-, ar-, as-, at-.

Ad colligendum. For collecting (the goods). See under ADMINISTER, 4.

Ad damnum. To the loss. See DAMNUM.

Ad diem. On the (very) day. See DIES

Ad filum. To the line. See FILUM.

Ad hoc. On this (subject).

Ad idem. To the same (thing or effect) See ASSENT.

Ad interim. In the meantime; temporarily.

Said of one, as an *assignee*, who serves in the place of another; also, of a *receipt* for a premium paid, pending the approval of a risk in insurance against fire. See INTERIM.

Ad litem. For the suit. See GUARDIAN, 2.

Ad majorem cautelam. For the sake of caution. See CAUTELA.

Ad medium filum. To the middle line. See FILUM.

Ad pios usus. For religious purposes. See USE, Pious, p. 1074.

Ad quæstionem. See QUÆSTIO.

Ad quem. To which. See A, 5, A quo.

Ad quod damnum. To the loss which. See DAMNUM.

Ad sectam. At the suit of. See SUIT, 1.

Ad valorem. According to valuation. See DUTY, 2.

ADDITION.[3] 1. Under a statute allowing a mechanic's lien upon an "addition to a former building," the new structure must be a lateral addition. It must occupy

[1] 2 Bl. Com. 123; 69 Ga. 400; Broom, Max. 127, 408.

[2] 4 Bl. Com. 2, 21; 4 N. Y. 159, 163, 195; Broom, Max. 307.

[3] L. *ad-dare*, to add to.

ground beyond the limits of the original building.[1]

A change in a building by adding to its height, or depth, or to the extent of its interior accommodations, is an "alteration," not an addition.[1]

Additional. Given with, or joined to, some other: as, an additional — building, legacy, security.

Embraces the idea of joining or uniting one thing to another so as to form an aggregate.[2]

"Additional security" is that which, united with or joined to the former security, is deemed to make the aggregate sufficient as a security from the beginning.[3]

2. A word or title added to the name of a person to help identify him.

Addition of estate (*status*): yeoman, gentleman, esquire. Addition of degree: knight, earl, marquess, duke — names of dignity. Addition of domicil: place of residence. Addition of mystery or trade: scrivener, laborer, etc.[4]

By 1 Hen. V. (1413), c. 5, an indictment must set forth the Christian name, surname, and the addition of degree, mystery, place, etc.[4] See NAME, 1.

ADDRESS. 1. The part of a bill in equity which describes the court.[5]

2. The name and residence of the drawee in a bill of exchange. See PROTEST, 2.

ADEMPTION.[6] The act by which a testator pays to his legatee, in his life-time, a general legacy which by his will he had proposed to give him at his death; also, the act by which a specific legacy has become inoperative on account of the testator having parted with the subject.[7] Whence adeem, adeemed.

When a parent gives a legacy as a portion, and, afterward, advances in the same nature, the latter presumably satisfies the former.[8]

The ademption of a legacy of personalty is not usually called a "revocation." When ademption is not used the act is called "satisfaction," "payment," "performance," "execution." But these terms, so used, have not their ordinary sense; for their primary relation is to some debt, duty, or obligation resting absolutely upon a party; whereas a will, having no effect in the maker's life-time, does not bind him to anything. "Ademption" is the most significant.[9] See REVOKE.

If a horse, specifically bequeathed, die during the testator's life-time, or be disposed of by him, the legacy will be lost or adeemed, because there will be nothing on which the bequest can operate. The only question, in such case, is, whether the specific thing remains after the death of the testator.

ADEQUATE.[2] Equal, proportionate, fully sufficient, complete. Opposed to inadequate.

1. If a consideration has some value it need not be adequate. Inadequacy is regarded only when gross and when imposition is apparent; but it may prevent specific performance, and justify small damages for a breach of contract.[3]

The immediate parties to a bargain are the judges of the benefits derivable therefrom. To avoid a bargain for inadequate consideration the inadequacy must be so great and manifest as to shock the conscience and confound the judgment of common sense.[4] See BID.

Gross inadequacy alone does not constitute a sufficient reason to impeach the genuineness of a sale made by a trustee. The inadequacy must be such as to shock the conscience or raise a presumption of fraud or unfairness.[5]

Where gross inadequacy of price is coupled with accident, mistake, or misapprehension, caused by a purchaser or other person interested in a public sale, or by the officer conducting the sale, a court of equity will set the sale aside.[6] See INFLUENCE.

2. Where there is an adequate remedy at law for the redress of an injury, resort may not be had to a court of equity. This means a remedy vested in the complainant to which he may at all times resort at his own option, fully and freely, without let or hindrance.[7]

The remedy at law must be plain, adequate, and complete, and as practical and efficient to the ends of justice and to its prompt administration as the remedy in equity. In that case the adverse party has a right to a trial by a jury.[8]

But a judgment and a fruitless execution at law are not necessary.[9]

The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction; the application of the principle to a particular case must de-

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[1] [Updike *v.* Skilliman, 27 N. J. L. 132 (1858), Green, C. J.

[2] State *v.* Hull, 53 Miss. 645 (1876); 139 Mass. 356.

[3] [Termes de la Ley.

[4] 4 Bl. Com. 306; 1 *id.* 407; 10 Cush. 402; 1 Metc., Mass., 151.

[5] See Story, Eq. Pl. § 26.

[6] L. *adimere*, to take away.

[7] See 3 Will. Exec. 1330.

[8] Strother *v.* Mitchell, 80 Va. 154 (1885); Trimmer *v.* Bayne, 7 Ves. *515 (1802).

[9] Langdon *v.* Astor's Executors, 16 N. Y. 39–40 (1857), Denio, C. J.; Same *v.* Same, 3 Duer, 541 (1854); Beck *v.* McGillis, 9 Barb. 56 (1850).

[1] Ford *v.* Ford, 23 N. H. 215–17 (1851), cases, Gilchrist, C. J.

[2] L. *adæquatus*, made equal.

[3] 1 Pars. Contr. 436, 492, cases.

[4] 1 Story, Eq. §§ 244–47; Lawrence *v.* McCalmont, 2 How. 452 (1844).

[5] Clark *v.* Freedman's Sav. & Trust Co., 100 U. S. 152 (1879), cases; Cleere *v.* Cleere, 82 Ala. 588 (1886); Carden *v.* Lane, 48 Ark. 219 (1886), cases.

[6] Cole County *v.* Madden, 91 Mo. 614 (1887), cases; 26 Cent. Law J. 350 (1888), cases.

[7] Wheeler *v.* Bedford, 54 Conn. 249 (1886), Park, C. J.

[8] Morgan *v.* City of Beloit, 7 Wall. 618 (1868), cases.

[9] Case *v.* Beauregard, 101 U. S. 690 (1879).

pend altogether upon the character of the case as disclosed by the pleadings.[1] See further EQUITY.

ADHERING. See TREASON.

ADIT. A horizontal entry to a mine.

A statute which provides that "an adit at least ten feet in, along the lode, from the point of discovery, shall be equivalent to a discovery shaft," contemplates that the ten feet may be wholly or in part open or under cover, dependent upon the nature of the ground.[2]

ADJACENT.[3] Near, but not touching. Applied to lots, is synonymous with "contiguous." In another relation it might have a more extended meaning.[4] See ADJOINING; CONTIGUOUS; VICINITY.

Certain acts of Congress authorized the defendant to take from public lands "adjacent" to its road materials necessary for the construction and repair of its railway. *Held*, that the reference was to such materials as could be conveniently reached by ordinary transportation by wagons, and that the privilege did not include the right to transport timber to distant parts of the road.[5]

Where the "adjacent" ends and the non-adjacent begins may be difficult to determine. On the theory that the material is taken on account of the benefit resulting to the land from the construction of the road, the term ought not to be construed to include any land save such as by its proximity to the line of the road is directly and materially benefited by its construction.[6]

ADJOINING.[7] Touching or contiguous, as distinguished from lying near or adjacent; in contact with.[8]

In popular use seems to have no fixed meaning. Frequently expresses nearness.[9]

What is "adjacent" may be separated by the intervention of a third object. What is "adjoining" must touch in some part. What is "contiguous," strictly speaking, should touch along one side.[9]

Towns contiguous at their corners are adjoining.[10]

The whole yard of a house of correction, though divided by a street, from which it is fenced off, is adjoining or appurtenant to the house.[11]

Compare ABUT; ADJACENT; APPERTAIN.

[1] Watson *v.* Sutherland, 5 Wall. 79 (1866).

[2] Electro-Magnetic Mining, &c. Co. *v.* Van Auken, 9 Col. 207 (1886); Gray *v.* Truby, 6 *id.* 278 (1882); Gen. Laws Col. 630, § 7.

[3] L. *adjacere*, to lie near.

[4] Municipality No. Two, 7 La. An. 79 (1852), Eustis, C. J. See Continental Improv. Co. *v.* Phelps, 47 Mich. 299 (1882).

[5] United States *v.* Denver, &c. R. Co. 31 F. R. 886, 889 (1887), Hallett, J.

[6] United States *v.* Chaplin, 31 F. R. 890, 896 (1887), Deady, J.

[7] F. *adjoinder:* L. *ad-jungere*, to join to.

[8] *Re* Ward, 52 N. Y. 397 (1873); Miller *v.* Mann, 55 Vt. 479 (1882); Akers *v.* United R. Co., 43 N. J. L. 110 (1881).

[9] Peverelly *v.* People, 3 Park. Cr. R. 59, 72 (1855); Crabbe, Syn.

[10] Holmes *v.* Carley, 31 N. Y. 289, 293 (1865).

[11] Commonwealth *v.* Curley, 101 Mass. 25 (1869).

ADJOURN.[1] To put off, or defer to another day specified; also, to suspend for a time. to defer, delay.[2]

Referring to a sale or a judicial proceeding, may include fixing the time to which the postponement is made.[3]

Adjournment. Putting off until another time and place.[3]

A continuation of a previous term of court.[4]

A continuance of a session from one day to another.[5] See VACATION.

ADJUDGE. To decide judicially; to adjudicate; sometimes, to declare or deem, but not implying any judgment of a judicial tribunal.

As in a statute declaring that "all lotteries are hereby adjudged to be common nuisances."[6] Compare DEEM.

ADJUDICATA. See ADJUDICATUS.

ADJUDICATE. To determine in the exercise of judicial power; to pronounce judgment in a case.

Adjudicated. Judicially determined: as, an adjudicated — case, bankrupt.

Adjudication. Determination by judicial authority.

Former adjudication. Judicial determination of a matter previously in litigation.

When the judgment, rendered in the former trial between the same parties, is used as a technical estoppel, or is relied upon by way of evidence as conclusive *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined — that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as between the parties; and where the record does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears extrinsically that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its determination, it will not be concluded.

The former adjudication is a finality, concluding

[1] F. *adjorner*, to put off to another day.

[2] La Farge *v.* Van Wagenen, 14 How. Pr. 58 (1857).

[3] Wilson *v.* Lott, 5 Fla. 303 (1853).

[4] Van Dyke *v.* State, 22 Ala. 60 (1853); 6 Wheat. 109.

[5] Trammell *v.* Bradley, 37 Ark. 379 (1881); 1 Bl. Com. 187.

[6] State *v.* Price, 11 N. J. L. 218 (1830); Blaufus *v.* People, 69 N. Y. 111 (1877).

[7] Packet Company *v.* Sickles, 5 Wall. 592 (1866), cases, Nelson, J.; Aurora City *v.* West, 7 *id.* 109-8 (1868), cases; Goodenow *v.* Litchfield, 59 Iowa, 231 (1882); *ib.* 549.

parties and privies, as to every matter received to sustain or to defeat the claim, and as to what might have been offered for that purpose. But where the second action is upon a different demand, the former judgment is an estoppel only as to the matters in issue upon the determination of which the finding was rendered.[1]

A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, from the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,— as, for example, if it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was litigated and upon which the judgment was rendered,— the whole subject-matter of the action will be at large, and open to new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.[2]

When the second suit involves other matter as well as the matters in issue in the former action, the former judgment operates as an estoppel as to those things which were in issue there, and upon the determination of which the first verdict was rendered. Extrinsic evidence, when not inconsistent with the record and not impugning its verity, is admissible to show that a former action involved matters in issue in the suit on trial, and were necessarily determined by the first verdict.[3]

If a former adjudication is not pleaded as an estoppel evidence may be received to show the truth.[4]

It cannot be said that a case is not an authority on one point because, although that point was properly presented and decided, something else was found in the end which disposed of the whole matter.[5] See ADJUDICATUS, Res, etc.

ADJUDICATUS. L. Decided, settled, adjudged, adjudicated, *q. v.*

Res adjudicata, or res judicata. A thing adjudicated; a case decided; a matter settled. Plural, *res adjudicatæ* or *judicatæ*.

To make a matter *res judicata* there must be concurrence of four conditions: identity — in the thing sued for, of the cause of action, of the parties to the action, and of the quality in the persons.[1]

Transit in rem judicatam. It passes into a thing adjudicated; it becomes a judgment.

Applies to a contract upon which a judgment has been obtained.[2]

ADJUST.[3] To determine what is due; to settle; to ascertain: as, to adjust a claim, a demand, a right.

Adjuster. He who determines the amount of a claim; as, a claim against an insurance company.

Adjustment. Settlement of the relative rights of parties, of a demand or cross-demands of any nature; in particular, the settlement of the claim of an insured party after a loss.[4]

Unadjusted. Applied to a demand — that the amount is uncertain, not agreed upon.[5]

ADMEASUREMENT. Ascertainment; apportionment.

A writ which lay against one who usurped more than his share; as, of pasture, dower or other right.[6]

ADMINICULAR.[7] Supporting; aiding; strengthening.

Describes testimony adduced to explain or complete other testimony.[8]

ADMINISTER. 1. To dispense, supply, furnish, give: as, to administer poison, or a stupefying mixture.

Not simply to prescribe or give a drug, but to direct and cause it to be taken.[9]

That offense is not to be confined to the manual administering of poison. So construed, the law would be substantially without effect, and would not reach the large class of offenders at whom it is aimed. "Administer" has a far more extended meaning — to furnish or cause to be furnished and taken, to give or cause to be taken, by any mode.[10]

Etymologically, applicable to anything that can be done by the hand to or for another. Neither fraud

[1] Cromwell *v.* County of Sac, 94 U. S. 351-58 (1876), cases, Field, J.; *ib.* 364-66, cases; Lumber Company *v.* Buchtel, 101 *id.* 639 (1879); Litchfield *v.* Goodenow, 123 *id.* 550-51 (1887): 1 Greenl. Ev. § 523; Gilmer *v.* Morris, 30 F. R. 459 (1887), cases.

[2] Russell *v.* Place, 94 U. S. 608 (1876), cases, Field, J.; Corcoran *v.* Chesapeake, &c. Canal Co., *ib.* 745 (1876). See also Foye *v.* Patch, 132 Mass. 109-11 (1882), cases; McCalley *v.* Robinson, 70 Ala. 433 (1881); Moore *v.* City of Albany, 98 N. Y. 410 (1885); Withers *v.* Sims, 80 Va. 651 (1885); Bennitt *v.* Star Mining Co., 119 Ill. 14-15 (1886), cases.

[3] Wilson's Executor *v.* Deen, 121 U. S. 526, 533 (1887).

[4] Metas *v.* Gill, 44 Ohio St. 258-60 (1886), cases.

[5] Railroad Companies *v.* Schutte, 103 U. S. 143 (1880).

[1] Atchison, &c. R. Co. *v.* Commissioners, 12 Kan. 135 (1873).

[2] See 11 Pet. 100; 2 Sumn. 486; 15 F. R. 300; 28 Minn. 179, 180; 76 Mo. 38; 85 N. C. 456; 42 N. J. L. 117; 18 Johns. 463; 19 S. C. 156.

[3] L. *ad-justus*, according to right.

[4] See 3 Kent, 240, 335; 2 Phillips, Ins. §§ 1814-15.

[5] Richardson *v.* Woodbury, 43 Me. 214 (1857).

[6] 3 Bl. Com. 183, 238; 3 Kent, 418.

[7] L. *adminiculum*, a prop.

[8] See 1 Greenl. Ev. § 606.

[9] [Robbins *v.* State, 8 Ohio St. 165 (1857).

[10] [La Beau *v.* People, 34 N. Y. 229-33 (1866).

nor deception is a necessary ingredient in the act of administering poison. To force poison into the stomach of another; to compel another by threats of violence to swallow poison: to furnish poison to another for the purpose and with the intention that the person shall commit suicide therewith, and which poison is accordingly taken for that purpose; or to be present at the taking of poison by a suicide, participating in the taking by assistance, persuasion, or otherwise, although the party intends and agrees himself also to commit suicide,— each is a mode of "administering" poison. The word does not then always imply service.[1] See ATTEMPT; NOXIOUS.

2. To dispense, direct the application of: as, to administer the law, justice.[2]

Administrable. Capable of being administered or rendered effective: as, an administrable decree or law.

3. To propound the form of; to give, tender: as, to administer an oath.

4. To manage, to settle: as, to administer the estate of an intestate or of a testator who has no executor.

Administered. Applied to legal ends or uses; opposed to **unadministered:** as, the administered or unadministered effects of a decedent.[3]

Administrator. A man appointed by a competent court to settle the affairs of a decedent's estate. **Administratrix.** A woman charged with that duty.

The former word is generally used, in statutes and decisions, to designate the officer.

Administration. The service rendered, or the charge or duty assumed, in the settlement of a decedent's estate.[4]

While administrator designates a representative named by the court, in opposition to an executor, who is designated by will, administration may mean the management of an estate by either an executor or an administrator. See REPRESENTATIVE, (1).

Maladministration; misadministration. In law-books, in which they are often interchanged, these words mean wrong administration.[5]

Waste and embezzlement are examples.[6]

Administration ad colligendum. For collecting — and preserving perishable goods.[6]

Administration cæterorum. Of the rest — of the goods which cannot be administered under the limited power already granted.[1]

Administration cum testamento annexo. With the will attached — to the letters.

The Latin words are abbreviated *c. t. a.*

Obtains either when no executor is named or when he who is named will not or cannot serve.

The incumbent follows the statute of distributions, unless otherwise directed by the will.

The administrator, in such case, succeeds to all the ordinary powers of the executor. When the will expressly constitutes the executor a trustee for some special purpose, or vests in him a discretionary power in reference to some matter outside of the ordinary powers and duties of an executor, or charges him with some duty indicating a special confidence reposed in him, such duty or power does not pass to an ordinary administrator.[2]

Administration de bonis non. Concerning goods not — already disposed of.

The Latin words are abbreviated *d. b. n.* Occurs where another administrator has died, or been discharged, leaving a part of the estate unsettled.

Administration de bonis non, cum testamento annexo. Upon goods not administered, and with the will annexed to the letters.

The Latin words are abbreviated *d. b. n., c. t. a.* Occurs where an executor has died, or been discharged, leaving a part of the estate yet to be settled.

An administrator *de bonis non* cannot sue the former administrator or his representative for a *devastavit* or for delinquencies in office, because the latter is liable directly to creditors and the next of kin. The former has to do only with the goods of the intestate unadministered. If any such remain in the hands of the discharged administrator or his representative, *in specie*, he may sue for them either directly or on the bond. Regularly, a decree against the administrator for an amount due, and an order for leave to prosecute his bond, are prerequisites to the maintenance of a suit thereon.[3] But otherwise, under statutes.

The preceding administration must have become vacant by resignation, removal, or death.[4]

Administration durante absentia. During absence — when the absence of the proponent of a will or of the executor delays or imperils settlement of the estate.[5]

Administration durante minori ætate. During minority — while the executor named is under lawful age; at common law seventeen.

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[1] Blackburn *v.* State, 23 Ohio St. 162-64 (1872); 11 Fla. 256; 4 Car. & P. 368.

[2] See 3 Bl. Com. 72.

[3] See United States *v.* Walker, 109 U. S. 263-64 (1883).

[4] See 2 Bl. Com. 490; 92 N. Y. 74; 18 S. C. 351.

[5] Minkler *v.* State, 14 Neb. 188 (1883); Martin *v.* Elsarbe, 70 Ala. 339 (1881); 37 *id.* 399; 108 U. S. 199, 206.

[6] 2 Bl. Com. 505.

[1] See 1 Will. Exec. 585.

[2] Pratt *v.* Stewart, 49 Conn. 339 (1881). Powers as to realty, 24 Am. Law Reg. 689-706 (1885), cases.

[3] Beall *v.* New Mexico, 16 Wall. 540-42 (1872), cases; United States *v.* Walker, 109 U. S. 260-61 (1883), cases.

[4] Sims *v.* Waters, 65 Ala. 443 (1880). See also Conklin *v.* Egerton, 21 Wend. 432 (1839); Zebach *v.* Smith, 3 Binn. *69 (1810); 10 Ark. 465.

[5] See 5 Rawle, 264; 16 Wall. 540.

His guardian, or other suitable person, may then take out letters *cum testamento annexo*.

Administration pendente lite. While a suit continues — over an alleged will or the right of an appointment.

The incumbent's duty is limited to filing an inventory, caring for the assets, collecting and paying debts.[1]

Ancillary administration. Subordinate to another administration, and for collecting the effects of a non-resident.[2]

Any surplus beyond the claims of local creditors is paid over to the domiciliary representative.[3]

Foreign administration. Granted at decedent's domicil in another State or country.

Ground for a new probate, ancillary in nature. But a few courts hold that new letters need not be issued.[4]

Letters confer no authority beyond the limits of the State granting them. The title acquired by the administrator of the domicil is a fiduciary one, enforceable in another State only by permission of its laws. No State can be required to surrender the effects or debts due to an intestate domiciled elsewhere to the prejudice of its own citizens. Although the right of the domiciliary administrator may be recognized *ex comitate*, it is subject to the rights of creditors where the assets exist or the debtor resides.[5]

Limited administration. Restricted in time, power, or as to effects.[6]

Public administration. Conducted by a special public officer, or the guardians of the poor, where there is no relative entitled to apply for letters.

Special administration. Limited, either in time or in power.

The instrument given by the officer of probate to the person who proposes to administer upon the estate of an intestate is called the *letters of administration*. This instrument confers authority to take charge of and to settle the estate, collecting dues, paying debts, etc.; and comprises: a copy of the will, if there be a will and no executor; a copy of the decree of allowance of such will in probate; a certificate of the name of the appointee, his rights, duties, etc. The faithful discharge of his duties is secured by an *administrator's bond*, — an obligation entered into by the nominee, with sufficient sureties, and approved by the court.[1]

As against strangers letters of administration are not evidence of death, but merely of their own existence; *i. e.*, that the proceedings have been regularly had, and that the appointee is entitled to the office. Being like an exemplification, they need not be proved.[2] Compare LETTERS, 4, Testamentary.

An administrator represents the personal property of his decedent. He is a trustee thereof for creditors, distributees, and heirs; and is an officer of the court. He takes title from the time of his appointment. He stands in privity with the deceased, succeeding to all his rights, but not to his contract duties of a purely personal nature. He is liable to the amount of the assets. The nearest of kin is preferred for the office: descendants to ancestors; males to females; and, where there is no kin, a creditor of the estate. He is held to the care of a man of ordinary prudence,[3] and to the utmost good faith. Where there are two or more appointees, each is the other's agent; and all sue and are to be sued.

The chief duties of an administrator are to bury the deceased; give public notice of the grant of letters; make an inventory; collect the assets; pay the debts. He may not buy any part of the estate for himself; nor mix the estate's funds with his own; nor let the assets lie idle; nor use them to his own gain. On the more important matters he should seek and follow the direction of the court. For debts and improvements he is to first exhaust the personalty; after that he may convert realty. The law of the decedent's domicil governs the disposal of his personalty, the law of the place where situated his realty.[4]

See ADMINISTRARE; ASSETS; COMPROMISE; EXECUTOR; IMPROVIDENT; INCAPABLE; PERISHABLE; PRIVITY; SETTLE, 3; TRUST, 1; VOUCHER; WITNESS.

ADMINISTRARE. L. To wait upon, serve; to dispose of, administer.

Plene administravit. He has fully administered. **Plene administravit præter.** He has fully administered except —.

The emphatic words of pleas by an executor or administrator: the former plea meaning that he has lawfully disposed of all assets that have come into his hands; the latter plea, that he has administered all assets except an amount which is not sufficient to satisfy the plaintiff's claim.

[1] See 4 Watts, 36; 16 S. & R. 420.

[2] 21 Cent. Law J. 186–90 (1885), cases.

[3] See 11 Mass. 263; 132 *id.* 452; 44 Ill. 202; 32 Barb. 190; 86 Pa. 131.

[4] See Wilkins *v.* Ellett, 108 U. S. 256 (1883); 2 Ala. 429; 18 B. Mon. 582; 18 Miss. 607; 12 Vt. 589.

[5] Moore, Adm'x, *v.* Jordan, 36 Kan. 275 (1887), cases, Johnston, J; Story, Confl. Laws, § 512; Wyman *v.* Halstead, 109 U. S. 654 (1884), cases.

[6] See McArthur *v.* Scott, 113 U. S. 399 (1885), cases.

[1] See Beall *v.* New Mexico, 16 Wall. 543 (1872); Stov all *v.* Banks, 10 *id.* 583 (1870).

[2] Mutual Benefit Life Ins. Co. *v.* Tisdale, 91 U. S. 243 (1875); Devlin *v.* Commonwealth, 101 Pa. 276 (1882), cases.

[3] See Moore *v.* Randolph, 70 Ala. 584 (1881); Bowersox's Appeal, 100 Pa. 437 (1882).

[4] See generally Williams, and Schouler, on Executors, &c.; 2 Bl. Com. 489; 2 Kent, 409; 1 Pars. Contr 127; 13 How. 466–67.

Unless the defendant falsely pleads *plene administravit* he is not liable to a judgment beyond the assets in his hands. The plea is not necessarily false because not sustained. The jury, if no *devastavit* is averred, must find the amount of the assets, if any, before a judgment can be rendered.[1]

See ACCIDERE, Quando, etc.; BONA, De bonis; DEVASTAVIT.

ADMIRALTY. A court exercising jurisdiction over controversies arising out of the navigation of public waters; also, the system of jurisprudence which pertains to such controversies.

So named because, in England, originally held before the lord high admiral.[2]

"The judicial Power shall extend . . . to all cases of Admiralty and maritime Jurisdiction."[3]

The principal subjects of admiralty jurisdiction are maritime contracts and maritime torts, including captures *jure belli*, and seizures on water for municipal and revenue forfeitures. (1) Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation. (2) Torts and injuries of a civil nature committed on navigable rivers. Jurisdiction in the former case depends upon the nature of the contract, in the latter entirely upon the locality.[4]

The jurisdiction is not limited to tide-waters, but extends to all public navigable lakes and rivers, where commerce is carried on between different States, or with a foreign nation — wherever ships float or navigation successfully aids commerce.[5]

Courts of admiralty exist in all commercial countries, for the safety and convenience of commerce, the speedy decision of controversies where delay would often be ruin, and to administer the laws of nations in seasons of war, as to captures, prizes, etc. . . . A wide range of jurisdiction was necessary for the benefit of commerce and navigation: these needed courts acting more promptly than courts of common law and not entangled with the niceties and strictness of common-law pleadings and proceedings. . . . The acts of 1789 and 1845 save a concurrent remedy at common law in any Federal or State court, and secure a trial by jury as a matter of right in the admiralty courts. Congress may modify the practice in any respect it deems conducive to the administration of justice.[6]

By the act of September 24, 1789, § 9, the district courts have exclusive original cognizance "of all civil causes of admiralty or maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it."[1] The saving does not authorize a proceeding *in rem* to enforce a maritime lien, in any common-law court. Common law remedies are not applicable to enforce such a lien, but are suits *in personam*, though such suits, under special statutes, may be commenced by attachment of property.[2]

The act of February 26, 1845, limits the powers granted by the act of 1789, as regards cases arising upon the "lakes, and navigable waters connecting said lakes;" limits jurisdiction to vessels of twenty tons burden or upward, enrolled or licensed for the coasting trade, or employed in commerce between places in different States; and grants a jury trial if either party demands it. The jurisdiction is expressly made concurrent with such remedies as may be given by State laws. Otherwise, the jurisdiction granted by the act of 1789 is exclusive in the district courts.[3]

Jurisdiction, in "civil cases," extends to all contracts, claims, and services essentially maritime: among which are bottomry bonds, contracts of affreightment and contracts for conveyance of passengers, pilotage on the high seas, wharfage, agreements of consort-ship, surveys of vessels, damages by the perils of the seas, the claims of material-men and others for the repair and outfit of ships belonging to foreign nations or to other States, and the wages of mariners; and also to civil marine torts and injuries, among which are assaults and other personal injuries, collisions, spoliation and damage, illegal seizures or other depredations of property, illegal disposition or withholding possession from the owners of ships, controversies between part owners as to the employment of ships, municipal seizures of ships, cases of salvage and marine insurance.[4]

Admiralty courts are international courts. As originally constituted they are the appropriate tribunals for controversies between foreigners.[5]

They have jurisdiction of collisions on the high seas between vessels owned by foreigners of different nationalities.[6]

They may estimate damages for death by negligence, when the court has jurisdiction of the vessel and of the subject-matter.[7]

In England there are two courts: the "instance" and the "prize" court, *qq. v.* The same judge presides in both. In the United States this double jurisdiction is vested in the district court.[8]

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[1] Smith *v.* Chapman, 93 U. S. 42 (1876); 8 Wheat. 675; 5 Cranch, 19; 15 Johns. 383; 89 N. C. 416; 19 S. C. 252; 2 Kent, 417.

[2] 4 Bl. Com. 268.

[3] Constitution, Art. III, sec. 2.

[4] The Belfast, 7 Wall. 637 (1868), cases. Clifford, J.; New England Ins. Co. *v.* Dunham, 11 *id.* 29, 31 (1870).

[5] The Genesee Chief *v.* Fitzhugh, 12 How. 454-59 (1851), Taney, C. J.; The Hine *v.* Trevor, 4 Wall. 562-70 (1866), cases; The Belfast, 7 *id.* 639-41 (1868); The Eagle, 8 *id.* 20-26 (1868); New England Ins. Co. *v.* Dunham, 11 *id.* 28-29 (1870); *Exp.* Easton, 95 U. S. 70 (1877).

[6] The Genesee Chief, *supra;* N. E. Ins. Co. *v.* Dunham, *supra;* 2 Story, Const. § 1672; 1 Brown's Adm. 353; 20 F. R. 68.

[1] R. S. § 563, (8).

[2] The Belfast, 7 Wall. 644, 625 (1868); The Moses Taylor, 4 *id.* 428-31 (1866); The Hine, *ib.* 568 (1866).

[3] R. S. § 566; The Hine, 4 Wall. 569 (1866); The Eagle, 8 *id.* 20-26 (1868); 2 Kent, 365.

[4] *Exp.* Easton, 95 U. S. 68 (1877), Clifford, J. See also De Lovio *v.* Boit, 2 Gall. 398 (1815), Story, J.; 4 Woods, 267; 17 F. R. 387-88, cases.

[5] Thomassen *v.* Whitwell, 9 Bened. 115 (1877); The Belgenland, 114 U. S. 355, 361 (1885).

[6] The Luna, 13 Rep. 6 (E. D. Pa., 1881).

[7] *Exp.* Gordon, 104 U. S. 517-18 (1881), cases.

[8] 1 Kent, 353.

A "mixed case" in admiralty is a contract which does not depend altogether upon locality as the test of jurisdiction; as, a contract for supplies, a charter-party, and the like; but not a tort begun on land and completed on navigable water,[1] nor a policy of insurance upon a ship and its cargo against marine perils.[2]

The libelant propounds the substantive facts, prays for appropriate relief, and asks for process suited to the action, which is *in rem* or *in personam*. The respondent answers those facts by admitting, denying, or declaring his ignorance thereof, *and* alleges the facts of his defense to the case made by the libel. The proofs must substantially agree with the allegations. There are no common-law rules of variance or departure. The court grants relief on the case made out.[3]

The criminal jurisdiction of the Federal courts does not extend to the Great Lakes and their connecting waters; as, for example, the Detroit river. See SEA, High.[4]

See further ACCIDENT; CANAL; COLLISION, 2; CONSORT, 2; DAMAGES; FIDEJUSSOR; LAKES; LIBEL, 4; MARINE; MARITIME; MONITION; NAVIGABLE; PETITORY; RES, 2; SEA; STIPULATION, 1; TIDE; TORT, 2.

ADMISSION.[5] 1. Receiving; reception. Whence admit, admissible, inadmissible, non-admission.

Used of assenting to, allowing, or receiving — a claim, a will to probate, any other writing, or testimony.

Also applied to making a person a member of a privileged class or body, as of the legal profession, or of a partnership or association. See DELECTUS.

2. Recognition as fact or truth; acknowledgment, concession; also, the expression in which such assent is conveyed.

In evidence, applied to civil transactions, and to facts, in criminal cases, not involving criminal intent.[6]

In pleading, what is not denied is taken as admitted.

Direct or express admission. An admission made openly and in direct terms. **Implied admission.** Results from an act done or undone; as, from character assumed, from conduct or silence.

Incidental admission. Is made in another connection, or involved in some other fact admitted.

Judicial or solemn admission. So plainly made in pleadings filed, or in the progress of a trial, as to dispense with the stringency of some rule of practice.

Partial admission. In equity practice, delivered in terms of uncertainty, with explanation or qualification. **Plenary admission.** Without any qualification.[1]

Admissions are treated as "declarations against interest" and, therefore, probably true. In the absence of fraud they bind all joint parties and privies.[2]

The credibility of an admission is a question of fact. The admission of a right is not the same as of a fact. All the words must be considered. May be by a document, conduct, predecessor in title, agent, attorney, referee, joint party, trustee, officer, principal, husband, wife.[3]

Where the act of the agent will bind the principal, his admission respecting the subject-matter will also bind him if made at the same time, and constituting part of the *res gestæ*.[4]

But an act done by an agent cannot be varied, qualified, or explained, either by declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. The reason is, the agent to do the act is not authorized to narrate what he had done or how he had done it, and his declaration is no part of the *res gestæ*.[5]

For example, the declaration of the engineer of a train which met with an accident, as to the speed at which the train was running, made from ten to thirty minutes after the accident occurred, is not admissible against the company in an action by a passenger to recover damages for injuries sustained. "His declaration, after the accident had become a completed fact and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of eighteen miles an hour, was not explanatory of anything in which he was engaged. It did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narrative of a past occurrence, not a part of the *res gestæ* — simply an assertion or representation, in the course of a conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the *res gestæ* simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it. If his declaration had been made the next day after the accident, it would scarcely be claimed that it was admissible evidence against the company. And yet the circumstance that it was made between ten and twenty minutes — an appreciable period of time — after the

[1] The Plymouth, 3 Wall. 34–35 (1865), cases.

[2] New England Ins. Co. *v.* Dunham, 11 Wall. 1 (1870).

[3] Dupont de Nemours *v.* Vance, 19 How. 171 (1856); The Clement, 2 Curtis, 366 (1855).

[4] *Exp* Byers, 32 F. R. 404 (1887), Brown, J.

[5] L. *ad-mittere*, to send to: receive.

[6] 1 Greenl. Ev. § 170.

[1] See 1 Greenl. Ev. §§ 194–211; 1 Chitty, Pl. 600.

[2] 1 Greenl. Ev. § 169.

[3] See Whart. Ev. Ch. XIII.

[4] Story, Agency, § 134. See also 1 Greenl. Ev. § 113.

[5] Packet Company *v.* Clough, 20 Wall. 540 (1874), Strong, J.; American Life Ins. Co. *v.* Mahone, 21 *id.* 157 (1874); Barreda *v.* Silsbee, 21 How. 164–65 (1858), cases; Whiteside *v.* United States, 93 U. S. 247 (1876); Xenia Nat. Bank *v.* Stewart, 114 *id.* 228 (1885), cases.

accident, cannot, upon principle, make this case an exception to the general rule. If the contrary view should be maintained, it would follow that the declaration of the engineer, if favorable to the company, would have been admissible in its behalf as part of the *res gestæ*, without calling him as a witness — a proposition that would find no support in the law of evidence. The cases have gone far enough in the admission of the subsequent declarations of agents as evidence against their principals. These views are fully sustained by adjudications in the highest courts of the States."

Contra. "As the declaration was made between ten and thirty minutes after the accident, we may well conclude that it was made in sight of the wrecked train, in the presence of the injured parties, and whilst surrounded by excited passengers. The engineer was the only person from whom the company could have learned of the exact speed of the train at the time. . . It would seem, therefore, that his declaration, as that of its agent or servant, should have been received."

"The modern doctrine has relaxed the ancient rule that declarations, to be admissible as part of the *res gestæ*, must be strictly contemporaneous with the main transaction. It now allows evidence of them when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it. . . . . What time may elapse between the happening of the event . . and the time of the declaration, and the declaration be yet admissible, must depend upon the character of the transaction itself. . . The admissibility of a declaration, in connection with evidence of the principal fact, as stated by Greenleaf, must be determined by the judge according to the degree of its relation to that fact, and in the exercise of a sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. The principal points of attention are, he adds, whether the declaration was contemporaneous with the main fact, and so connected with it as to illustrate its character." [1]

See ACQUIESCENCE; COMPROMISE; CONFESSION, 2; DECLARATION, 1; DEMURRER; ESTOPPEL; EVIDENCE; PART, 1; SILENCE.

ADMIXTURE. See ACCESSION: CONFUSION, Of goods.

ADMONITION.[1] A judicial reprimand to an accused person about to be discharged. Whence admonitory.

ADOPT.[2] To choose: take, receive, accept. Whence adoption.

1. To make as one's own what formerly was not so; to appropriate: as, to adopt a symbol or design for a trade-mark, *q. v.*

2. To assent to what affects one's right; to approve, ratify: as, to adopt the unauthorized act of an agent; to adopt a by-law, a charter, a constitution, an amendment.

To "adopt" a route for the transportation of the mails is to take the steps necessary to cause the mail to be transported over that route.[3]

3. To take a stranger into one's family as son and heir; to accept the child of another as one's own child and heir.[4]

"Adopted child" and "adopted parent" are correlative expressions. "Adopting parent" and (but less frequently) "adopter" are also used.

Adoption, in this sense, is regulated by statute in each State. The child becomes in a legal sense the child of the adopted parent. At the same time it remains the child of its natural parents, and is not deprived of the right of inheriting from them, unless expresely so provided by statute.[5]

In the Roman law adoption was an act by which a person undertook to rear the child of another and appoint such child as his heir. Some special authority of law was necessary to constitute the relation. No right to adopt a child exists at common law. The methods known in modern law are by a decree of a competent court and by indenture.[6]

Adoption was unknown to the common law, but was recognized in the civil law from its earliest days. The effect was to make a stranger the son and heir of the adopting person. The stranger entered the family and came under the power of its head; he became as a child, and his children as grandchildren, of the adopter. Under the Spanish law as it existed while Texas was part of Mexico, no person having a legitimate child living could adopt a stranger as co-heir with his child. The statute law of that State has imported the civil law, modified in important respects. It gives the adopted party the position of a child so

[1] Vicksburg & Meridian R. Co. *v.* O'Brien, 119 U. S. 99, 105-6 (Nov. 1, 1886), cases, Harlan, J.; Bradley, Woods, Matthews, and Gray, JJ., concurring; Waite, C. J., Field, Miller, and Blatchford, JJ., dissenting,— opinion, pp. 107-9, by Field, J., citing, as in point, the declaration of the engineer and the ruling in Hanover R. Co. *v.* Coyle, 55 Pa. 396, 402 (1867). And see Northern Pacific R. Co. *v.* Paine, 119 U. S. 560 (1877); N. J. Steamboat Co. *v.* Brockett, 121 *id.* 649 (1887). "The true rule is correctly stated by Greenleaf, with its limitations." Darling *v.* Oswego Falls Manuf. Co., 30 Hun, 279, 280-82 (1883), cases. See further, as to *res gestæ*, Little Rock, &c. R. Co. *v.* Leverett, 48 Ark. 333-43 (1886), cases — declaration by injured brakeman; Keyser *v.* Chicago, &c. R. Co., Sup. Ct. Mich. (1887), cases — declaration by an engineer: 36 Alb. Law J. 202, 203, cases; Williamson *v.* Cambridge R. Co., 144 Mass. 150 (1887) — declaration by conductor of a street car.

[1] L. *ad-monere*, to advise.

[2] L. *adoptare*, to choose.

[3] Rhodes *v.* United States, 1 Dev. 47 (1856).

[4] See Vidal *v.* Commagere, 13 La. An. 157 (1858): Webster.

[5] Wagner *v.* Varner, 50 Iowa, 534 (1879). See, as to inheriting lands in another State or country, Roes *v.* Ross, 129 Mass. 245-68 (1880), cases.

[6] Ballard *v.* Ward, 87 Pa. 361 (1879); Shafer *v.* Enea, 54 *id.* 306 (1867), Strong, J.; 8 W. N. C. 14; 10 *id.* 80.

far as to make him an heir, but does not make him a member of the adopter's family. It allows him to inherit, to an extent, along with legitimate children.[1]

ADS. See VERSUS.

ADULT.[2] A person twenty-one or more years of age.

Where an assault becomes "aggravated, when committed by an adult male on a female or a child, or by an adult female on a child," "adult" means a person who has attained the age of twenty-one.[3]

Some processes may be served upon an adult member of a man's family. See AGE; INFANT; NEGLIGENCE.

ADULTERATE. To mix with food, drink, or drugs, intended for sale, other matter inferior in quality, and, perhaps, deleterious in character.

In some States no recovery can be had for a sale of adulterated liquors.

Watered milk may not be "adulterated" milk unless expressly declared so by statute.[4] See OLEOMARGARINE; POLICE, 2; SEAL, 5.

ADULTERY.[5] Criminal intercourse between a married person and one of the opposite sex whether married or single.[6]

Sexual connection between a married woman and an unmarried man or a married man other than her own husband.[7]

At common law adultery cannot be committed with a single woman. The child of such is *filius nullius*, possesses no inheritable blood, and cannot therefore be imposed as a legitimate heir upon a husband, for the mother has no husband, and cannot consequently occasion an adulteration of issue. The heinousness of the offense, by that law, consists in exposing an innocent husband to the maintenance of another man's child and to having it succeed to his estate. For the offense there lay, not an indictment, but a civil action for damages for the private wrong.[8]

By the civil law adultery could only be committed by the unlawful sexual intercourse of a man with a married woman. In the English ecclesiastical courts the offense is (or was) established by showing that the husband has had illicit intercourse with a married or an unmarried female.[9]

To sustain the charge there must be proof of actual marriage. Reputation and cohabitation (*q. v.*) are not enough; there must be strict proof of the fact.[1]

In allegations for divorce, although presumptive evidence alone is sufficient to establish the fact of adulterous intercourse, the circumstances must lead to it not only by fair inference but as a necessary conclusion; appearances equally capable of two interpretations, one of them innocent, will not justify the presumption of guilt. Evidence simply showing full and frequent opportunity for illicit intercourse is not alone sufficient.[2]

"Living in adultery" means living in the practice of adultery.[3] It is not necessary that the parties live together in the same house continually, as man and wife. An habitual illicit intercourse between them, though living apart, constitutes the offense.[4]

Adulterine. Children begotten in adultery.

See BIGAMY; CONDONE; CONVERSATION, 1; DIVORCE; POLYGAMY.

ADVANCE.[5] 1. To move forward on a list or calendar of causes, for early consideration; as, to advance a cause — whence advanced cause.

2. To supply beforehand; to loan before work is done or goods made: as, to advance materials or moneys.[6]

An advance of money on a contract is a payment made before an equivalent is received.[7]

In maritime insurance, has no fixed meaning; commonly refers to advances to a crew or on account of freight; may include money expended by a fishing vessel for bait.[8]

In a will, "advanced" and "loaned" may be interchanged.[9]

In a will, may not be restricted to "advancement" within the meaning of a statute, but may include any benefit conferred which the testator might have considered an appropriation of his estate.[10]

In its strict legal sense, "advances" does not mean gifts — advancements, but a sort of loan; and, in its ordinary sense, includes both loans and gifts — loans more readily, perhaps, than gifts.[11]

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[1] Eckford *v.* Knox, 67 Tex. 204 (1886), cases, Willie, C. J. See also Barnhisel *v.* Ferrell, 47 Ind. 338 (1874); 14 Am. Law Reg. 632-34 (1875), cases; 1 South. Law Rev. 70-85 (1875), cases; 3 Cent. Law J. 397 (1876).

[2] L. *adultus*, grown up.

[3] George *v.* State, 11 Tex. Ap. 95 (1881). Compare Bell *v.* State, *id.* (1885): 21 Cent. Law J. 221, cases.

[4] People *v.* Tauerback, 5 Park. Cr. 311 (1864); 132 Mass. 11-14; 2 Q. B. D. 530. See generally "Adulteration of Food," 22 Am. Law Rev. 95-106 (1888), cases.

[5] L. *adulterare*, to make impure, corrupt.

[6] Miner *v.* People, 58 Ill. 60 (1871).

[7] Hood *v.* State, 56 Ind. 271-74 (1877); 27 Minn. 300.

[8] State *v.* Lash, 16 N. J. L. 384-90 (1838); State *v.* Wallace, 9 N. H. 517 (1838); Matchin *v.* Matchin, 6 Pa. 336-37 (1847). See Leviticus, xx, 10; Deut. xxii, 22-28.

[9] Commonwealth *v.* Call, 21 Pick. 511-13 (1839). See also State *v.* Fellows, 50 Wis. 65 (1880); 1 Crim. Law Mag. 579-82 (1880), cases; 1 Law Quar. Rev. 471-74 (1885).

[1] Miner *v.* People, 58 Ill. 60 (1871); 16 *id.* 85; Montana *v.* Whitcomb, 1 Monta. 362 (1871).

[2] Pollock *v.* Pollock, 71 N. Y. 141-42, 144-48 (1877), cases; Loveden *v.* Loveden, 2 Hagg. 1 (1810); 1 Whart. Ev. § 225.

[3] Goodwin *v.* Owen, 55 Ind. 349 (1876).

[4] Smith *v.* State, 39 Ala. 555 (1865); 14 *id.* 609.

[5] F. *avancer*, to go forward: *avant*, before.

[6] Powder Company *v.* Buckhardt, 97 U. S. 117 (1877), Hunt, J.

[7] Gibbons *v.* United States, 1 Dev. 51, § 145.

[8] Burnham *v.* Boston Mar. Ins. Co., 139 Mass. 399 (1885).

[9] Wright's Appeal, 89 Pa. 70 (1879).

[10] Barker *v.* Comins, 110 Mass. 488 (1872).

[11] Nolan's Executors *v.* Bolton, 25 Ga. 355 (1858).

A mortgage for "future advances" is valid at common law and throughout the United States, except where forbidden by local law.[1] See GUARANTY, 2.

Advancement. Giving, by anticipation, the whole or a part of what it is supposed a child will be entitled to on the death of the giver.[2]

A pure and irrevocable gift made by a parent to a child in anticipation of such child's future share of the parent's estate.[3]

A giving by a parent to a child or heir, by way of anticipation, of the whole or a part of what it is supposed the donee will be entitled to on the death of the party making it.[4]

"Advancements" means money or property given by a father to his children as a portion of his estate, and to be taken into account in the final partition or distribution thereof. "Advances" has a broader signification: it may characterize a loan or a gift, or money advanced, to be repaid conditionally.[5]

There is no intention to have a "gift" chargeable on the child's share of the estate. In "debt" the relation of debtor and creditor still exists.[6]

If, after an advancement, a will be made, the intention of the testator with respect thereto is a matter of fact determinable from the will and extrinsic testimony.[7]

Proof that gifts were made is not sufficient: it must appear that they were intended as advancements.[8]

Advancement is always a question of intention; and this must be proven to have existed at the time of the transaction. Thus, declarations of a parent that money, for which he held a note, was an advancement will establish it as such. The declarations must be of the *res gestæ*, accompanying the act.[9] See HOTCHPOT.

ADVANTAGE. See BENEFIT; COMMODUM; INTEREST, 1.

ADVENTURE.[10] 1. An enterprise of hazard.

2. A partnership for a single transaction.

3. Goods sent abroad to be disposed of for the benefit of the owner.

Also called a *marine* adventure; and evidenced by a *bill of adventure*.

In marine insurance, synonymous with "perils." Describes the enterprise or voyage insured against.[1]

ADVERSARY. See ADVERSE, 2.

ADVERSE.[2] 1. Acting against or in a contrary direction; opposed to; conflicting with, contrary to, the interest of another. In some senses, opposed to *amicable*.

As, an adverse — claim, conveyance, employment, enjoyment, interest, judgment, party, possession, proceeding, service, suit, title, verdict, use, *qq. v.*

2. Biased, hostile: as, an adverse witness.

Adversary.[3] Having an opposite party adverse; not amicable.

As, an adversary — action, judgment, proceeding.

ADVERSUS. See A, 8; VERSUS.

ADVERTISEMENT.[4] Information given by hand-bill or newspaper. See LETTER, 3; REWARD, 1.

Official advertisement. Such as is made by some public authority and in pursuance of law.

Advertisement in a newspaper, under direction of law, is equivalent to notice; as, of a proceeding in court, of the dissolution of a partnership. See PUBLICATION, 1.

The exclusive right to employ a particular method of advertising, as by a card displaying paints of various colors, is not the subject of a copyright.[5]

ADVICE. Counsel, opinion; information given, or, perhaps, consultation had, as to action or conduct. Compare ADVISE; INOPS, Consilii. See INFLUENCE.

As per advice. On a bill of exchange, deprives the drawee of authority to pay the bill until in receipt of the **letter of advice**: the drawer's letter containing information as to paying the bill.[6] See under LETTER, 3.

ADVISE. Where a statute authorizes a trial judge to "advise" the jury to acquit an accused person, a request by counsel that the

[1] Lawrence *v.* Tucker, 23 How. 27 (1859), cases; Jones *v.* Guaranty, &c. Co., 101 U. S. 626 (1879); Nat. Bank of Genesee *v.* Whitney, 103 *id.* 99 (1880).

[2] [Osgood *v.* Breed's Heirs, 17 Mass. 358 (1821), Parker, C. J.

[3] Yundt's Appeal, 13 Pa. 580 (1850); 89 *id.* 341.

[4] Wallace *v.* Reddick, 119 Ill. 156 (1886), Scott, C. J.; Grattan *v.* Grattan, 18 *id.* 170 (1856), cases, Skinner, J.; Kintz *v.* Friday, 4 Dem., N. Y., 542-43 (1886), cases.

[5] Chase *v.* Ewing, 51 Barb. 612 (1868).

[6] Weatherhead *v.* Field, 26 Vt. 668 (1854).

[7] Wright's Appeal, 89 Pa. 70 (1879).

[8] Comer *v.* Comer, 119 Ill. 180 (1886).

[9] Merkel's Appeal, 89 Pa. 343 (1879); Holliday *v.* Wingfield, 59 Ga. 208 (1877); Dillman *v.* Cox, 23 Ind. 442 (1864); Fellows *v.* Little, 46 Vt. 35 (1865); Clark *v.* Wilson, 27 Md. 700 (1867); Eshleman's Estate, 74 Pa. 47 (1873); Dunham *v.* Averill, 45 Conn. 87 (1877); Rickenbacker *v.* Zimmerman, 10 S. C. 115-16 (1877), cases; 67 Law Times, 261.

[10] F. *aventure*, chance: L. *adventurus*, about to happen. Compare MISADVENTURE.

[1] Moores *v.* Louisville Underwriters, 14 F. R. 888 (1882), Hammond, J.

[2] L. *adversus*, opposed to.

[3] Ad'versary.

[4] Advertise'; adver'tisement or -tise'ment.

[5] Ehret *v.* Pierce, 18 Blatch. 302 (1880).

[6] See Byles, Bills, 91.

court "instruct" the jury to acquit should be denied.[1] Compare ADVICE; INSTRUCT, 2.

Advisable. See DISCRETION, 2.

Advisor. See COMMUNICATION, Privileged, 1; ATTORNEY.

Advisory. Containing counsel or a suggestion, yet not concluding or binding.

The verdict of a jury on an issue out of chancery is advisory;[2] a judge's opinion on the facts in a case may be regarded as advisory;[3] a nomination to an office may be an advisory designation.

ADVOCATE.[4] See JUDGE-ADVOCATE.

An assistant; an associate in conducting a lawsuit.

A person who makes a profession of presenting cases orally.

"Of advocates, or (as we more generally call them) counsel, there are two species or degrees: barristers and sergeants."[5]

In the United States no distinction is made between an advocate and an attorney, *q. v.*

ADVOWSON.[6] Taking into protection. The right of presentation to a church or ecclesiastical benefice.

Advowsons are (were) appendant, or in gross; and presentative, collative, or donative.[7]

ÆDIFICATA. See SOLUM, Ædificata.

ÆQUITAS. L. Equity.

Æquitas sequitur legum. Equity follows the law.

Where the law, or the common law, is ineffectual, equity affords relief, following at the same time the rules of law.[8] See EQUITY.

ÆROLITE. See ACCRETION.

ÆS. L. Money.

Æs alienum. Another's money. **Æs suum.** One's own money.

The principle of bankrupt and insolvent laws is fairly expressed by the phrase "*æs alienum*," which, in Roman law, signified a debt. The property of a debtor, to the extent of his indebtedness, belongs to his creditors.[9]

ÆSTIMATIO. See CAPUT, Æstimatio.

AFFAIRS. Things done or to be done; business interests.

A word of large import. A receiver who has the management of the "affairs of a railroad company" must necessarily have control and management of the road.[1]

AFFECT. To act upon; to concern: as, cases affecting public ministers.

Often used in the sense of acting injuriously upon a person or thing; as in a proviso that an act shall not affect any confirmed claim to lands.[2]

AFFECTION. See CONSIDERATION, 2.

AFFIDAVIT.[3] A voluntary oath, before some judge or officer of a court, to evince the truth of certain facts; as, the facts upon which a motion is grounded.[4]

Affiant. One who makes an affidavit.

An affidavit is simply a declaration, on oath, in writing, sworn to by the declarant before a person who has authority to administer oaths.[5]

It does not depend upon the fact whether it is "entitled" in any cause or in a particular way. Without a caption it is an affidavit.[6]

It is not necessary that the party sign the statement, unless a statute expressly so require. It is the official certificate which gives authenticity to the written oath.[6]

In common parlance, any form of legal oath which may be taken.[7]

Hence, in a statute, may mean simply an oral oath.[7]

The officer must sign the jurat; otherwise the document is not an affidavit.[8]

The certificate is no part of the affidavit, but the *prima facie* evidence that it is the affidavit of the person by whom it purports to have been made.[9]

Counter affidavit. An affidavit made or filed in opposition to the averments contained in another affidavit.

Supplemental affidavit. An affidavit containing averments upon the same subject-matter as another affidavit previously presented, and designed to remedy some defect in that other.[10]

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[1] People *v.* Horn, 70 Cal. 18 (1886); Cal. Penal Code, § 1118.

[2] Watt *v.* Starke, 101 U. S. 252 (1879).

[3] Nudd *v.* Burrows, 91 U. S. 439 (1875).

[4] L. *advocatus*, one called upon.

[5] 3 Bl. Com. 26.

[6] Advow'zon. L. *advocatio*, patronage.

[7] 2 Bl. Com. 21-22; 21 E. L. & Eq. 417.

[8] 2 Bl. Com. 330; 3 *id.* 441; 1 Story, Eq. § 64; 10 Pet. 210; 15 How. 299.

[9] 3 Pars. Contr. 428.

[1] Tompkins *v.* Little Rock, &c. R. Co., 15 F. R. 12 (1882).

[2] Ryan *v.* Carter, 93 U. S. 83 (1876).

[3] L. *affidavit*, he has made oath: *ad fidem dare*, to pledge faith for.

[4] 3 Bl. Com. 304; 2 Tex. Ap. 508.

[5] Harris *v.* Lester, 80 Ill. 311 (1875), Scott, C. J.

[6] Hagardine *v.* Van Horn, 72 Mo. 371 (1880). See 8 Iowa, 320; 16 N. J. L. 125.

[7] Baker *v.* Williams, 12 Barb. 557, 580 (1850). See 77 N. C. 334; 28 Wis. 463.

[8] Morris *v.* State, 2 Tex. Ap. 508 (1877); State *v.* Richardson, 34 Minn. 118 (1885); 18 *id.* 90.

[9] Hitsman *v.* Garrard, 16 N. J. L. 126 (1837); Hagardine *v.* Van Horn, 72 Mo. 371 (1880).

[10] See Callan *v.* Lukens, 89 Pa. 136 (1879); 1 T. & H. § 423.

Among the more common affidavits in use in civil practice are:

Affidavit of cause of action, which avers that a just cause of action exists.

Affidavit of claim, which verifies the statements of facts upon which a claim or demand is made.

Affidavit of defense, which verifies the statements of facts upon which a defendant resists a demand made upon him. See DEFENSE, 2, Affidavit, etc.

Affidavit of or *to the merits* (q. v.), which is to the sufficiency of the facts which constitute a defense in a civil action, instead of resistance upon technical grounds.

Affidavit to hold to bail, which is that the cause of action, brought for a civil injury, is valid.

Affidavits serve to verify allegations of fact not already matters of record, and thereby qualify them for judicial action; also, to initiate remedies, giving to statements the impress of good faith and probable cause. They are no part of the record in a case unless specially made so.[1]

Compare COMPLAINT, 2; DEPOSITION. See APPARERE, De non, etc.; CAPTION, 2; JURAT; KNOWLEDGE, 1; OATH; RECORD.

AFFILIATION. See FILIATION.

AFFINITAS. L. Nearness; affinity.

Affinitas affinitatis. The tie between the respective kindred of a married couple.

Affines. Relations by marriage.

AFFINITY. Relation by marriage. See AFFINITAS.

The tie which arises from marriage between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband.[2] Opposed, *consanguinity.*

There is no affinity between the blood relations of the husband and of the wife.[3] See CONSANGUINITY; RELATION, 3.

AFFIRM.[4] 1. To aver a thing as established or certain, or as existing, or as provable as a fact. Whence affirmative, affirmation.

Affirmative (1), *adj.* Asserting as true; declaratory of what exists or is to be or to be done; positive. Opposed, *negative.*

As, affirmative or an affirmative — allegation, averment, condition, covenant, defense, evidence, pleading, representation, statute, warranty, words, *qq. v.*

(2), *n.* The affirmative: the party who maintains or supports. Opposed, *the negative.*

The burden of proof rests upon him who holds the affirmative of an issue.[1] See PROOF, Burden of.

Affirmative pregnant. An affirmative allegation implying a negative in favor of the adverse party.

Opposed, *negative pregnant:* a negative allegation involving or admitting of an affirmative implication, or, at least, an implication favorable to the adverse party.[2] See NEGATIVE.

Affirmatively. (1) In positive terms; by positive testimony, and not by way of inference.

Error in judicial action, not being presumed, must be shown affirmatively.[3]

(2) In favor of what is proposed; approvingly.

A legislative committee is said to report a bill affirmatively, or negatively.

2. To make binding what before was not obligatory, but voidable; to confirm, to ratify, *qq. v.* Opposed, *disaffirm.* Whence affirmance, disaffirmance.

An infant, to avoid a deed, must disaffirm within a reasonable time after his majority is attained. While the decisions differ as to what constitutes a disaffirmance, the preponderance of authority is that mere inertness or silence, continued for a period less than prescribed by the statute of limitations, unless accompanied by voluntary affirmative acts manifesting an intention to assent to the conveyance, will not bar his right to avoid the deed. He cannot disaffirm while infancy continues.[4] See DISABILITY; RESCISSION; VOIDABLE.

3. To support or confirm: as, for a court of review to affirm the judgment or order of a lower court. Opposed, *reverse.* Whence affirmance, affirmed. See CURIA, Per curiam.

4. To attest by a solemn declaration, made in a judicial inquiry, to speak the truth. Whence affirmant, affirmation.

An affirmation, which is generally made by such persons as interpret the words of Scripture "Swear

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[1] 65 Pa. 81; 100 U. S. 222.

[2] 1 Bl. Com. 434.

[3] Paddock *v.* Wells, 2 Barb. Ch. 333 (1847); 1 Denio, 95, 97; 29 Me. 545.

[4] F. *a former*, to fix: L. *ad-firmus*, steadfast.

[1] 1 Greenl. Ev. § 74; 119 Ill. 357.

[2] Gould, Plead. 295; Steph. Pl. 381.

[3] 101 U. S. 601.

[4] Sims *v.* Everhardt, 102 U. S. 309, 312 (1880), cases. Brazee *v.* Schofield, *id.* (1883); Dawson *v.* Helmes, 30 Minn. 113 (1882), cases; Wilson *v.* Branch, 77 Va. 71-72 (1883), cases; Catlin *v.* Haddox, 49 Conn. 492 (1882), cases; Nathans *v.* Arkwright, 66 Ga. 186 (1880); Adams *v.* Beall, Sup. Ct. Md. (1887), cases: 8 Atl. Rep. 664; 32 Am. Law Reg. 713-15 (1887), cases; Bishop, Contr §§ 936-41, cases.

not at all," etc., as prohibitory of an oath, does not, like an oath, involve an appeal to the Supreme Being.

A common form is, "You do solemnly, sincerely, and truly declare and affirm, that you will state the truth," etc. Upon assent to this interrogation the affirmant is bound as by oath, and liable to punishment as for perjury. See OATH; PERJURY.

AFFIRMANTI. See PROBARE, Probatio.

AFFIX. See FIXTURE; SEAL, 1.

AFFRAY.[1] The fighting of two or more persons in some public place to the terror of his majesty's subjects.[2]

When persons come together without a premeditated design to disturb the peace, and suddenly break out into a quarrel among themselves.[3]

More of a private nature than a "riot."[3]

If the fighting be in private it is an "assault." Actual or attempted violence is essential; the "terror" is presumed. An abettor is a principal.[3] See ABET; ACCIDENT.

AFFREIGHTMENT. See FREIGHT.

AFORE. Before; formerly; previously.

Aforesaid. Spoken of formerly. See SAID.

Aforethought. Conceived beforehand. See MALICE.

AFRICAN. See CITIZEN; COLOR, 1; SLAVERY.

AFTER. Further off, behind: subsequent to a date or event; exclusive of; subject to.

Where time is to be computed "after" a day that day is excluded.[4]

In the devise to A, "after" providing for B — subject to, after taking out, deducting or appropriating.[5]

Does not necessarily refer to time; may refer to order in point of right or enjoyment. "After settling my estate" is equivalent to "subject to the settlement."[6]

"After the charges herein," and "after the payment of my debts," means subject to the charges, subject to the payment of the debts.[7] See ON.

A contract to pass a title "after" payment of the purchase price is to be understood as if it read "upon" payment.[1] See MATURITY, 2.

After-acquired. Obtained after some event: as, property acquired after a will was made, or after an adjudication in bankruptcy, or after a judgment is recovered. See ACQUIRE.

After-discovered. Came to light or was disclosed after an event or occurrence: as, after-discovered evidence, an after-discovered principal. See AGENT; AUDITA QUERELA; DISCOVERY, 3.

AFTERNOON. See DAY.

A complaint for not closing a saloon "at nine o'clock" and keeping it open till "past eleven in the afternoon" is not bad for failing to show that nine o'clock at night was meant.[2]

AG. Against; agreeing.

AGAINST. In opposition to; opposed; contrary to; adversely to. Compare CONTRA.

An enactment that neither party shall be allowed to testify "against" each other, as to any transaction with the deceased person whose estate is interested in the result, has been construed to allow the representative of the decedent to compel the opposite party to testify *for* the estate.[3]

A verdict in disobedience of instructions upon a point of law may be said to be "against law."[4]

Against the form of the statute. In an indictment alleges that a statute has been broken. See further FORM, 2, Of statute.

Against the peace. Words in use to charge a breach of the peace. See PEACE, 1.

Against the will. Words used to charge violence. See WILL, 1.

AGE. A period in life at which a person may do an act which, before that time, he could not do; "of age."

The period at which one attains full personal rights and capacity.

The time of life when a particular power or capacity becomes vested; as, in the phrases age of consent, age of discretion, *qq. v.*[5]

Full age. Twenty-one; majority.

Attained the day preceding the anniversary of birth. Considered as arbitrarily fixed, but very generally adopted.[6]

An infant is liable, as for deceit, for an injury re-

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[1] F. *affraier*, to terrify,—4 Bl. Com. 145. "It affrighteth or maketh afraid,"—3 Coke, 158. L. L. *ex fredare*, to break the peace: disturb, frighten,—Skeat. L. *frigus*, shudder from fear,—Webster.

[2] 4 Bl. Com. 145; Order of Friends *v.* Garrigus, 104 Ind. 130 (1884); 70 Ala. 26; 33 Ark. 178; Rosc. Cr. Ev. 270; Arch. Cr. Pl. 1709.

[3] People *v.* Judson, 11 Daly, 33 (1849), Daly, J.—Astor Place Riot Case.

[4] Sheets *v.* Selden, 2 Wall. 190 (1864); 2 Hill, 355.

[5] Hooper *v.* Hooper, 9 Cush. (1851); 9 Pet. 470.

[6] Lamb *v.* Lamb, 11 Pick. 378 (1831), Shaw, C. J.; Minot *v.* Amory, 2 Cush. 337 (1848).

[7] King *v.* King, 14 R. I. 146 (1883); *id.* 516. See also 68 Wis. 301, 573, 588; 9 H. L. Cas. 1.

[1] Hawley *v.* Kenoyer, 1 Wash. T. 611 (1879).

[2] People *v.* Husted, 52 Mich. 624 (1884).

[3] Dudley *v.* Steele, 71 Ala. 426 (1882).

[4] Declez *v.* Save, 71 Cal. 553 (1887); 40 *id.* 545; 4 Bosw 202.

[5] [Abbott's Law Dict.

[6] 1 Bl. Com. 463; 2 Kent, 233.

sulting from his fraudulent representation that he is of full age.[1] See ACKNOWLEDGMENT, 2; MUTUAL, 1.

Lawful age. The period in life when a person may do a particular act, or serve in a given relation.

Non-age. Under the age at which the law has conferred ability to perform an act; minority.

At common law a male at twelve may take the oath of allegiance; at fourteen choose a guardian, and, if his discretion be proved, make a will of personalty; at seventeen be an executor; at twenty-one is at his own disposal, may alien his property and make all contracts. A female, by the common law, may, at seven, be betrothed or given in marriage; at nine is entitled to dower; at twelve is of years of maturity, may consent to marriage, and, if proved to have sufficient discretion, may bequeath her personalty; at fourteen is of years of legal discretion, and may choose a guardian; at seventeen be an executrix; at twenty-one dispose of herself and her lands.[2]

A male from eighteen to forty-five is liable to military service; at twenty-five is eligible as a Representative, at thirty as a Senator, and at thirty-five as President.

See ADULT; INFANT; INFLUENCE; INSANITY; SEDUCTION; WHEN.

AGENDO. See ARREST, 2 (3).

AGENT.[3] A person employed by another to act for him. Opposed, *principal*.

Agency. The relation between two persons as principal and agent.

The term agent includes many classes of persons to which distinctive appellations are given; as, a factor, broker, attorney, cashier, director, auctioneer, clerk, partner, supercargo, consignee, ship's husband, master of a vessel, *qq. v.*

The relation is founded upon contract, but not for the doing of an unlawful act or an act of a strictly personal nature.

General agent. An agent empowered to transact all business of a particular kind.

Special agent. An agent employed to do a single act or for a special transaction.

A "special agency" exists when there is a delegation of authority to do a single act; a "general agency" when there is a delegation to do all acts connected with a particular trade, business, or employment.[4]

To constitute one a general agent it is not necessary that he should have done before an act the same *in specie* with that in question. It is enough if the transaction involves the same general power that he has usually exercised, though applied to a new subject-matter.[1]

The principal is responsible for the acts of his general agent when acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private instructions; but where the agency is special and temporary, and the agent exceeds his employment, the principal is not bound.[2]

The doctrine of general agency does not apply to non-trading partnerships: as to them there is no presumption of authority to support the act of a partner.[3]

Public agent. A person by whom a power of government is exercised.

Public agents represent the legislative, judicial, and executive departments of government. They have such power only as has been specifically conferred upon them.[4]

Sub-agent. A person selected by an agent to perform a part or all of the duties of the employment.

An agent is answerable to his principal for the act of his sub-agent although the principal knows that the sub-agent has been employed.[5]

When an agent has power to employ a sub-agent the acts of the latter, or notice given him in the transaction of the business, have the same effect as if done or received by the principal.[6]

Universal agent. One who is appointed to do all the acts which the principal personally can do, and which he may lawfully delegate the power to another to do.[7]

Such agency may potentially exist; but it is difficult to conceive of its practical existence, since it puts the agent completely in the place of the principal.[8]

An infant, or *feme covert* (her husband consenting), may serve another as agent; but not so a person who has an adverse interest of employment.[8]

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[1] Rice *v.* Boyer, 108 Ind. 472–80 (1886), cases.

[2] 1 Bl. Com. 463.

[3] L. *agens, agentis*, doing, acting.

[4] Story, Agency, § 17; *id.* §§ 127, 133; Keith *v.* Herschberg Optical Co., 48 Ark. 145 (1886), cases, Smith, J.; 41 Ind. 288; 35 Iowa, 281; 102 Mass. 225; 9 N. H. 263; 14 N. Y. 421; 16 *id.* 133, cases.

[1] Commercial Bank of Erie *v.* Norton, 1 Hill, 504 (1841); Merchants' Bank *v.* State Bank, 10 Wall. 650 (1870); Mining Co. *v.* Anglo-Californian Bank, 104 U. S. 192 (1881).

[2] Minn *v.* Commission Co., 15 Johns. 54 (1818); Scott *v.* McGrath, 7 Barb. 55 (1849), cases; Adriatic Ins. Co. *v.* Treadwell, 108 U. S 365-66 (1883); Bohart *v.* Oberne 36 Kan. 289 (1887); Bickford *v.* Menier, Ct. Ap. N. Y. (Dec. 13, 1887): 26 Cent. Law J. 236; *ib.* 239–41 (1888), cases; 2 Kent, 620; Smith, Contr. 363; cases *ante*.

[3] Pease *v.* Cole, 53 Conn. 60–65 (1885), cases. The question was whether one member of a partnership for conducting a theater could bind his partner by a promissory note in the name of the firm, the copartner having no knowledge of the transaction.

[4] Whiteside *v.* United States, 93 U. S. 257 (1876), cases; Anthony *v.* County of Jasper, 101 *id.* 699 (1879); *Exp.* Virginia, 100 *id.* 347 (1879); Virginia *v.* Rives, *ib.* 313 (1879)

[5] Barnard *v.* Coffin, 141 Mass. 40 (1886), cases.

[6] Hoover *v.* Wise, 91 U. S. 310 (1875), cases; Story Agency, §§ 452, 454.

[7] Story, Agency, § 21.

[8] Wharton, Agency, § 14; Story, Agency, § 4

The act of an agent, done in the usual way in the line of his employment, binds the principal.[1] His authority is limited to the usual and ordinary means of accomplishing the business intrusted to him.[2]

Knowledge in the agent is knowledge in the principal.[3]

The rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired in a prior transaction and present to his mind at the time he is acting as agent, provided it be of a character he may communicate to his principal without breach of professional confidence. The general rule, that the principal is bound by the knowledge of his agent, is based on the principle of law that it is the agent's duty to communicate his knowledge and the presumption that he will perform that duty.[4]

Where the principal has employed the agent to do an act upon the existence of a fact peculiarly within the latter's knowledge, and of the existence of which the execution of the power is a representation, a third person, dealing with the agent in good faith, may rely upon such representation, and the principal be estopped from denying the truth of the representation.[5]

But where communication by the agent would prevent him from consummating his own fraudulent purpose, the knowledge he possesses will not be imputed to the principal. In this sense, for example, a director of a corporation, acting wholly for himself, cannot be treated as the agent of the corporation. Uncommunicated notice received by the agent in prosecuting his private business will not bind the employer.[6]

An agent's act affecting negotiable paper requires specific authority.[7]

He is to exercise the highest good faith toward his principal.

He may make no profit secretly out of funds belonging to the principal.[8] See TRUST, 1.

The principal is answerable for the agent's act of negligence (*q. v.*) done in the course of the employment.[9]

He should name the principal as the contracting party in the body of a contract, and sign as agent.[1]

A note made by an agent with the principal unnamed in the body, but signed "B, agent for A," or "B for A," is the note of A, the principal. But inserting "for," "in behalf of," or "as" the principal, and signing the name of the agent, does not make the contract the principal's.[2]

In a bill payable to and indorsed by "B, agent," the word "agent" is a *designatio personæ*, and he may show by parol that he was merely an agent, as the plaintiff knew.[3]

Only where the power as given is under seal need the agent use the principal's name with a seal.[4] See further SEAL, 1.

Under a deed of trust a person may be the agent of another to buy and sell, without exposing the donor's bounty to liability for the agent's former debts.[5] See further TRUST, 1.

An agent who discloses the name of his principal is not liable on a contract, unless he agrees to be held.[6] The principal may sue on a contract made in the name of his agent.[7] But where a third party discovers the undisclosed principal he may sue either the principal or the agent.[8]

Where the principal and the agent are liable on a contract, each continues liable until satisfaction is made.[9]

An agency is dissolved (1) by revocation — (*a*) by the principal, except when the power is "coupled with an interest" or given for value, is part of a security, or a severable portion is executed and there exists no indemnity for the rest. Revocation takes effect from the time of notice. (*b*) The agent may renounce at any time, paying damages, if any, as to the part unexecuted. (2) By termination — by insanity or death, except when coupled with an interest; not, necessarily, by marriage or bankruptcy. (3) By extinction of the subject-matter or of the principal's power over the same. (4) By operation of law, in various ways. (5) By complete execution of the trust.[10]

See further ADMISSION, 2; ATTORNEY; COLLECTION;

[1] Barreda *v.* Silsbee, 21 How. 164–65 (1858), cases; Hoffman *v.* Hancock Mut. Life Ins. Co., 92 U. S. 164 (1875), cases; Whiteside *v.* United States, 93 *id.* 257 (1876), cases.

[2] Williams *v.* Getty, 31 Pa. 461 (1858).

[3] Hoover *v.* Wise, 91 U. S. 310 (1875), cases; Smith *v.* Ayer, 101 *id.* 320 (1879); Vicksburg, &c. R. Co. *v.* O'Brien, 119 *id.* 105 (1886).

[4] The Distilled Spirits, 11 Wall. 366–68 (1870), cases, Bradley, J.

[5] Bank of Batavia *v.* New York, &c. R. Co., Ct. Ap. N. Y. (1887): 7 Cent. Rep. 822. Cases *pro* and *con*, 26 Am. Law Reg. 876–81 (1887), cases.

[6] Innerarity *v.* Merchants' Nat. Bank, 139 Mass. 333–35 (1885), cases; Wilson *v.* Second Nat. Bank of Pittsburgh, Sup. Ct. Pa. (1886): 6 Cent. Rep. 756; Frenkel *v.* Hudson, 82 Ala. 162–63 (1886), cases.

[7] 1 Pars. Contr. 62; The Floyd Acceptances, 7 Wall. 676 (1868); Anthony *v.* County of Jasper, 101 U. S. 699 (1879).

[8] Northern Pacific R. Co. *v.* Kindred, 3 McCrary, 631 (1881), cases.

[9] Philadelphia, &c. R. Co. *v.* Quigley, 21 How. 209–10 (1858), cases; The Clarita, 23 Wall. 12 (1874); The Cahill, 9 Bened. 353–54 (1878), cases.

[1] Gottfried *v.* Miller, 104 U. S. 527 (1881), cases.

[2] Barlow *v.* Congregational Society, 8 Allen, 460, 463–64 (1864), cases, Gray, J.

[3] Bartlett *v.* Hawley, 128 Mass. 92 (1876), Gray, C. J.; 29 Minn. 121; 38 Ohio St. 444–45.

[4] Stanton *v.* Camp, 4 Barb. 276 (1848); Whitney *v.* Wyman, 101 U. S. 392 (1879).

[5] Nichols *v.* Eaton, 91 U. S. 725–30 (1875), cases.

[6] Whitney *v.* Wyman, 101 U. S. 392, 396 (1879); Cragin *v.* Lovell, 109 *id.* 194, 198 (1883), cases.

[7] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 381 (1848); Ford *v.* Williams, 21 *id.* 289 (1858).

[8] Wharton, Agency, § 464, cases; Merrill *v.* Kenyon, 48 Conn. 317 (1880), cases: Beymer *v.* Bonsall, 79 Pa. 300 (1875); N. Y., &c. Steamship Co. *v.* Harbinson, 15 F. R. 688 (1883), cases; *ib.* 694–96, cases.

[9] Story, Agency, § 295; Wharton, Agency, § 473; Beymer *v.* Bonsall, 79 Pa. 300 (1875).

[10] Story, Agency, §§ 462–500; Frink *v.* Roe, 70 Cal. 306 (1886); 2 Kent, 643; 4 Pet. 344.

DELEGATUS; DESCRIPTIO; DIRECTOR; DISABILITY; FACERE, Qui facit; INTEREST, 2 (2), Coupled, etc.; LIVERYMAN; MANAGING; PARTNERSHIP; PRINCIPAL, 4; PROXY; RATIFICATION; RES, 2, Gestæ; SERVANT, 3; TORT, 2.

AGGRAVATION.[1] Whatever adds to the weight of an act — in its consequences or guilt. Opposed, *mitigation*.

Something done by the defendant, on the occasion of committing the trespass, which to some extent is of a different legal character from the principal act complained of.

As, where a plaintiff declares in trespass for entering his dwelling-house, and alleges in addition that the defendant also destroyed goods in the house and assaulted the domestics.[2] See DAMAGES, Special.

Aggravated. Increased, in severity or enormity: as, aggravated assault and battery, which is a more serious offense than simple assault and battery, *q. v.*

AGGREGATE. See CORPORATION, Aggregate.

AGGREGATIO MENTIUM. L. Collection of purposes; collected intentions; agreement.

Essential to a contract; where there is a misunderstanding, wanting.[3]

Not the origin of "agreement." That derivation was suggested by the harmony of intention which is essential.[4] See AGREEMENT; ASSENT.

AGGRIEVED.[5] Damaged, injured, exposed to loss: as, that the party aggrieved may appeal or have a writ of error.

The "party aggrieved" is he against whom an appealable order or judgment has been entered;[6] a party prejudiced by the judgment;[7] one against whom error has been committed by a decree or judgment entered;[8] one whose pecuniary interest is directly affected by the order or decree — whose right of property may be established or divested by the order or decree.[9]

Before a person can be said to be "aggrieved," so as to be entitled to an appeal within the meaning of § 1296 of the code of New York, the adjudication must have binding force against his rights, his person, or his property. The fact that an order may remotely or contingently affect interests which a receiver represents does not give him a right of appeal.[1]

In the New York act of 1858, the party aggrieved by proceedings relative to any assessment for local improvements in the city of New York may apply to vacate the same. This refers to the person injured by the proceedings. The injury must be a direct, not a remote or consequential, result.[2]

AGIST.[3] Originally, to feed cattle in the king's forest: a service performed for a consideration by officers called "agisters" or "gist-takers." Now, to pasture animals for pay.

Agistment. Where a man takes in a horse or other cattle to graze and depasture in his grounds.[4]

Agister. One who takes the cattle of another into his own ground to be fed for a consideration to be paid by the owner.

He has a lien for the keep; and may maintain trespass or trover against a stranger for taking the animals away.[5]

While he does not insure the safety of an animal he is responsible for ordinary negligence in the care he takes of it.[6]

He, and not the owner, is liable for injuries done by beasts prone to commit trespasses.[7]

AGNATI. See NATUS, Agnati.

AGNOSTIC. See OATH.

AGREE.[8] To concur in thought; to unite in mental action, be of one mind, assent. Opposed, *disagree*.

May be read "grant;" as where a grantor agrees that no building shall be erected on an adjoining lot.[9]

Arbitrators, judges, and jurors, are said to agree, and to disagree.

Agreed balance. See BALANCE.

Agreed statement of facts. Facts submitted as true to a court, for an opinion upon the law in the case. See CASE, 2, Stated.

Agreement. Union of minds to a thing; concurrence of intention; mutual assent. More specifically, a mutual agreement, a contract.

Consists of two or more persons being of

[1] L. *aggravare*, to add to a load: *gravis*, heavy.

[2] Hathaway *v.* Rice, 19 Vt. 107 (1846), Royce, C. J. See also Steph. Plead. 257; 3 Am. Jur. 287–313.

[3] Utley *v.* Donaldson, 94 U. S. 49 (1876).

[4] 1 Pars. Contr. 6.

[5] F. *agrever*, to overwhelm: L. *ad-gravis*.

[6] Ely *v.* Frisbee, 17 Cal. 261 (1861).

[7] People *v.* Pfeiffer, 59 Cal. 91 (1881); 8 *id.* 315

[8] State *ex rel. v.* Boyle, 6 Mo. 59 (1878).

[9] Dietz *v.* Dietz, 38 N. J. E. 485 (1884).

[1] Ross *v.* Wigg, 100 N. Y. 246 (1885), Earl, J.

[2] Matter of Walter, 75 N. Y. 357 (1878); 91 *id.* 2; 100 *id.* 246; 141 Mass. 208; 143 *id.* 235.

[3] F. *giste*, abode: L. *jacere*, to lie.

[4] 2 Bl. Com. 452.

[5] Bass *v.* Pierce, 16 Johns. 596 (1853).

[6] Story, Bailm. § 443, cases.

[7] Rossell *v.* Cottom, 31 Pa. 526–29 (1858), cases; Reddick *v.* Newburn, 76 Mo. 424 (1882); Kemp *v.* Phillips, 55 Vt. 69 (1883). Case of agistment of 1,200 head of cattle. Teal *v.* Bilby, 123 U. S. 572 (1887).

[8] F. *agreer*, to receive with favor.

[9] Hogan *v.* Barry, 143 Mass. 538 (1887).

the same mind, intention, or meaning, concerning the matter agreed upon.[1]

The expression by two or more persons of a common intention to affect their legal relations.[2] See UNDERSTANDING.

In the Statute of Frauds is not understood in the loose sense of a promise or undertaking, but in its more proper and legal sense of a mutual contract on consideration between two or more parties.[3]

In a popular sense frequently declares the engagement of one person only. When a man "agrees" to pay money or to do some other act, the word is synonymous with "promise," "engage."[4]

In popular signification means no more than concord, the union of two or more minds, concurrence of views and intention. Every thing done or omitted by the compact of two or more minds is universally and familiarly called an agreement. Whether a consideration exists is a distinct idea which does not enter into the popular notion. In most instances any consideration, except the voluntary impulse of minds, cannot be ascribed to the numberless agreements that are made daily. . . In its broad sense, synonymous with the concord of two or more minds, or mutual assent. . . If there is nothing to limit the meaning, regards promises only, not their consideration.[5]

In which ever sense understood in the Statute of Frauds the requirement is that it be in writing — if not to be performed within a year.[6]

The meaning of the contracting parties is their agreement.[7]

Also, the writing which preserves the evidence of the reciprocal promises.

Articles of agreement. The memorandum of the terms of an agreement; an agreement in writing.

Should state the names and residence of the parties, the subject-matter, the promises to be performed, the date, and any other elements of the contract.

See AGGREGATIO; ASSENT; CONTRACT; CONVENTIO; PARTY, 2; MERGER, 2; PERFORMANCE; RESCISSION.

AGRICULTURE. A person engaged in agriculture is engaged in raising cereals and stock. "Agriculture," in its general sense, is the cultivation of the ground for the purpose of procuring vegetables and fruits for the use of man and beast; or, the act of preparing the soil, sowing and planting seeds, dressing the plants, and removing the crops. In this sense the word includes gardening or horticulture, and the raising or feeding of cattle and other stock. In a more common and appropriate sense — that species of cultivation which is intended to raise grain and other field crops for man and beast; "husbandry," as defined by Webster.[1]

A person who cultivates a one-acre lot and is also a butcher and a day laborer is not "engaged in agriculture," within the meaning of an exemption law.[1]

A person is "actually engaged in the science of agriculture" when he derives the support of himself and family, in whole or in part, from the tillage and cultivation of fields. He must cultivate something more than a garden, though it may be less than a field. If the area cultivated can be called a *field*, the employment is "agriculture," as well in contemplation of law as by the etymology of the word. This condition being fulfilled, the uniting of other business not inconsistent with the pursuit of agriculture will not take away the protection of a law exempting one horse, harness, and a plow from levy and sale.[2]

See CROP; CULTIVATION; HORSE; IMPLEMENTS; TOOLS.

AID.[3] 1. Help; assistance; support.

Aid and abet. In common parlance, assistance, co-operation, encouragement.[4]

Assistance rendered by acts, words of encouragement, or support; or presence, actual or constructive, to render assistance should it become necessary.[5] See DECOY.

Aider and abettor. One who assists another in the accomplishment of a common design or purpose.

He must be aware of and consent to the design.[6]

Mere presence is not enough: something must be said or done showing consent to the felonious purpose and contributing to its execution.[7]

Aiders and abettors cannot be punished under a statute which creates a felony, unless the statute applies to all who are guilty, and not alone to the person actually committing the offense. Thus under a statute for confining in the penitentiary "any woman who shall endeavor to conceal the birth of her bastard child," aiders and abettors cannot be punished.[8] See CONSPIRACY; FELONY; PRINCIPAL, 5; LIQUOR, *ad fin.*

[1] Leake, Contr. 12.

[2] [Anson, Contr. 3.

[3] [Wain v. Warlters, 5 East, *17 (1804), Ellenborough, C. J.

[4] Packard v. Richardson, 17 Mass. 131 (1821), Parker, C. J.

[5] Sage v. Wilcox, 6 Conn. 85-94 (1826), Hosmer, C. J. See also Packard v. Richardson, 17 Mass. 131-34 (1821); Marcy v. Marcy, 9 Allen, 10-11 (1864), Bigelow, C. J.; Woodworth v. State, 20 Tex. Ap. 382 (1886); 31 F. R. 849.

[6] Marcy v. Marcy, 9 Allen, 10-11 (1864).

[7] Whitney v. Wyman, 101 U. S. 396 (1879), Swayne, J.

[1] Simons v. Lovell, 7 Heisk. 515 (1872), Sneed, J.

[2] Springer v. Lewis, 22 Pa. 193 (1853), Woodward, J.; 62 Me. 526; 64 Ga. 128.

[3] F. *aider:* L. *adjutare* (*ad-jurare*), to help.

[4] United States v. Gooding, 12 Wheat. 476 (1827), Story, J.

[5] Rainford v. State, 59 Ala. 108 (1877), Stone, J.

[6] Adams v. State, 65 Ind. 574-75 (1879), cases, Hawk, J.; United States v. Snyder, 14 F. R. 555 (1882): 1 Sup. R. S. 858; 127 Mass. 17.

[7] Kemp v. Commonwealth, 80 Va. 450 (1885), cases.

[8] Frey v. Commonwealth, 88 Ky. 190 (1885). See generally 18 Cent. Law J. 446 (1884) — *Canad. Law Times.*

Aid and comfort. In treason, any overt act which, if successful, would advance the interests of a treasonable design.[1]

Actual assistance is not essential.[1]

The subject of a foreign nation who furnished munitions of war to the Confederates, or did an act which would have rendered him liable to punishment for treason had he owed allegiance to the United States, gave "aid and comfort" to the rebellion, within the meaning of the act of March 12, 1863 (12 St. L. 820), and cannot recover the proceeds of property captured and paid into the treasury.[2]

Municipal aid. Assistance rendered by a municipal or a *quasi* municipal corporation, as, a township or a county, toward some work of internal improvement. Whence *aid bonds*.[3]

A steam grist-mill may or may not be a work of that nature.[4]

The legislature of a State, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in any work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. And this authority can be conferred in such a manner that the object may be attained with or without the sanction of a popular vote.[5] See BOND, Municipal; CORPORATE, Purpose.

2. Cure, remedy, supply. Whence aid and aider by verdict. See VERDICT.

Aid societies. See BENEFIT, Society.

AIR. A qualified property may be had in the air or atmosphere.[6]

The private owner of property has a natural right to purity of air; and, formerly, a like right to its free passage. Easements relative thereto are: a right to pollute it to an extent justified by the customary business of the locality; and, to send noise through it.[7]

No man may so use the air as to injure his neighbor. To poison or materially change it is a nuisance.[8]

An easement in the air coming over another's land cannot be acquired in the United States.[1]

Upon a conveyance, the right to air coming over other land of the grantor is implied as an easement of necessity.[2]

The right to pure air is an incident to land. While in cities the causes of pollution cannot be as easily traced as in sparsely inhabited places, yet, when the source of a well-defined nuisance is definitely known, the courts will protect the rights of any person injured by it. Each case must rest upon its own merits. The rule by which a court will be guided is the maxim that every one must so use his own property as not to injure another.[3]

See HEALTH; NUISANCE; OCCUPANCY; PROPERTY, Qualified; UTERE, Sic, etc.

A. J. See A, 3.

ALASKA. See TERRITORY, 2.

Congress has power, in its discretion, to prohibit the importation, manufacture, and sale of intoxicating liquors in the district of Alaska, and to make the violation of the prohibition a crime.[4]

ALCOHOL. See DISTILLER; LIQUOR.

An act of Congress approved May 20, 1887 (24 St. L. 69), the substance of which has been enacted in many of the States, provides —

"Section 1. That the nature of alcoholic drinks and narcotics, and special instruction as to their effects upon the human system, in connection with the several divisions of the subject of physiology and hygiene, shall be included in the branches of study taught in the common or public schools, and in the military and naval schools, and shall be studied and taught as thoroughly and in the same manner as other like required branches are in said schools, by the use of textbooks in the hands of pupils where other branches are thus studied in said schools, and by all pupils in all said schools throughout the Territories, in the military and naval academies of the United States, and in the District of Columbia, and in all Indian and colored schools in the Territories of the United States.

"Sec. 2. That it shall be the duty of the proper officers in control of any school described in the foregoing section to enforce the provisions of this act; and any such officer, school director, committee, superintendent, or teacher who shall refuse or neglect to comply with the requirements of this act, or shall neglect or fail to make proper provisions for the instruction required and in the manner specified by the first section of this act, for all pupils in each and every school under his jurisdiction, shall be removed from office, and the vacancy filled as in other cases.

"Sec. 3. That no certificate shall be granted to any person to teach in the public schools of the District of Columbia or Territories, after January 1, 1888, who has not passed a satisfactory examination in physiology and hygiene, with special reference to the nature and

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[1] [United States *v.* Greathouse, 4 Saw. 458 (1863), Field, J.

[2] Young *v.* United States, 97 U. S. 62 (1877).

[3] See 4 Neb. 455; 104 Ill. 285.

[4] Township of Burlington *v.* Beasley, 94 U. S. 310 (1876); Osborne *v.* County of Adams, 106 *id.* 181 (1882).

[5] Thomson *v.* Lee County, 3 Wall. 330 (1865); James *v.* Milwaukee, 16 *id.* 159 (1872); Kenicott *v.* The Supervisors, *ib.* 452 (1872); Railroad Co. *v.* County of Otoe, *ib.* 667 (1872); Town of Concord *v.* Savings Bank, 92 U. S. 625 (1875); Fairfield *v.* County of Gallatin, 100 *id.* 47 (1879); Quincy *v.* Cooke, 107 *id.* 549 (1882); Ottawa *v.* Carey, 108 *id.* 123 (1883); Lewis *v.* City of Shreveport, *ib.* 286 (1883); City of Savannah *v.* Kelly, *ib.* 184 (1883); Grenda County Supervisors *v.* Bragden, 112 *id.* 261 (1884), cases.

[6] 2 Bl. Com. 14.

[7] 10 A. & E. 590; 4 DeG. & S. 315; 11 H. L. C. 650; 10 C. B. 268; 19 W. R. 804; 4 Bing. N. C. 183.

[8] Appeal of Penn. Lead Co., 96 Pa. 116, 123 (1880); 2 Ld. Ray. 1163.

[1] Randall *v.* Sanderson, 111 Mass. 119 (1872), cases: 54 N. Y. 439; 25 Tex. 238; 17 Am. L. Reg. 440, note.

[2] Washb. Easem. 618; 115 Mass. 204; 34 Md. 1.

[3] Sellers *v.* Parvis, &c. Co., 30 F. R. 166 (1886).

[4] Nelson *v.* United States, 30 F. R. 112 (1887).

the effects of alcoholic drinks and other narcotics upon the human system."

ALDERMAN.[1] Originally, a senior: a superior in wisdom or authority.

A word of frequent occurrence among the Anglo-Saxons. All princes and rulers of provinces, all earls and barons, were aldermen in a general sense: but the word applied more particularly to certain chief officers.

In modern times, an officer in municipal corporations who is a kind of "assessor" to the chief magistrate.[2]

In England he sat with the bishop at the trial of causes, applying the common, while the latter expounded the ecclesiastical, law. Aldermen also sat as justices of assize, and exercised such powers of government as were conferred by the charters of their cities or towns, in that character taking cognizance of both civil and criminal matters. The term has designated an officer having judicial as well as civil power, in England from a period beyond the Conquest.[3]

In American cities "the aldermen" are a legislative body with limited judicial power, as, in matters of internal police; in some cities they hold separate courts and exercise magisterial authority.[4]

In some cities their sole functions are those of a magistrate of a court not of record and of limited statutory jurisdiction in civil and criminal matters; corresponding, in these respects, to justices of the peace in boroughs and townships. See COUNCIL, 2; JUSTICE, 2; MAGISTRATE.

ALE. See LIQUOR.

ALEATORY.[5] Depending upon an event the outcome of which is unknown; resting upon a contingency.

Applied, mainly, to annuities and insurance contracts. It is of the essence of all aleatory contracts that there should be risk on one side or on both sides.[6]

ALIA. See ALIUS.

ALIAS. L. 1. Otherwise; also used for—

Alias dictus. Otherwise called.

Alias, in the expression "A, *alias* B," denotes that those names are different descriptions of the same person. The word was formerly employed in connection with *dictus*—otherwise called. The use of *alias* alone to express the whole meaning has long obtained. The term has become familiar as equivalent to "otherwise called" or "otherwise known as." Generally the true name precedes the *alias dictus*. The term so used will avoid a variance or misnomer.[7]

2. At another time; formerly; before.

An *alias* execution is a process issued, upon a *scire facias* or otherwise, where the original execution has been returned, lost, or legally extinguished as a writ. It is another and different execution actually issued at a different time.[1]

ALIBI. L. In another place; elsewhere. The defense that at the time laid in the charge of an offense the accused was in another place.

Being proven, the conclusion is "not guilty."

To convict, the jury must be satisfied beyond a reasonable doubt that the accused was at the place charged.[2]

The defense must cover the time when the offense is shown to have been committed, so as to preclude the possibility of presence at the *locus in quo*. This impossibility is to be proven like any other fact.[3]

The court, without discrediting the defense in the particular case, may observe generally that the defense is open to suspicion, because it offers opportunity and temptation to employ false witnesses, and because it may mislead through a mistake of honest witnesses as to the precise day and hour.[4]

ALIEN.[5] 1, *n.* One born in a strange country under obedience to a strange prince, or out of the liegeance of the king.[6]

One born out of the king's dominion or allegiance.[7]

A citizen or subject of a foreign state.[8]

In California a "non-resident alien" who may take by succession is one who is neither a citizen of the United States nor a resident of that State.[9]

Alienage; alienism. The legal status or condition of an alien.

Alien born. A naturalized citizen or subject.

Alien enemy. One who owes allegiance to an adverse belligerent.[10]

Alien friend. A citizen or subject of a friendly power; one whose country is at peace with ours.[11]

By the common law a person born within the dominion of the United States is a natural-born citizen

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[1] A. S. *ealderman*, elder-man, elder: *eald*, old.

[2] Brown's Law Dict.; Spelman, Gloss.

[3] Purdy *v.* People, 4 Hill, 409, 387 (1842), Walworth, Ch. See 1 Hume, Eng. 69.

[4] [Bouvier's Law Dict.]

[5] Pronounced ā'-le-ā-tō-ry. L. *alea*, a die: chance.

[6] Moore *v.* Johnston, 8 La. An. 489 (1852); Henderson *v.* Stone, 6 Mart. 699 (1823); May, Ins. § 5.

[7] Kennedy *v.* People, 39 N. Y. 250-52 (1868); 3 Salk. 223; 4 Johns. 118.

[1] Roberts *v.* Church, 17 Conn. 145 (1845).

[2] Howard *v.* State, 50 Ind. 192-3 (1875), cases.

[3] Briceland *v.* Commonwealth, 74 Pa. 469 (1873); State *v.* Northrup, 48 Iowa, 583 (1878); People *v.* O'Neil, 59 Cal. 259 (1881); Ware *v.* State, 67 Ga. 349 (1881); Savage *v.* State, 18 Fla. 975 (1882); State *v.* Beaird, 34 La. An. 106 (1882).

[4] See State *v.* Blunt, 59 Iowa, 469 (1882); Dawson *v.* State, 62 Miss. 243 (1884); 6 Crim. Law Mag. 655-63 (1885), cases; 22 Am. Law Rev. 297-98 (1888), cases.

[5] L. *alienus*, strange, a stranger.

[6] [Coke, Litt. 1:28 *b*.

[7] 1 Bl. Com. 373.

[8] Milne *v.* Huber, 3 McLean, 219 (1843); 2 Kent, 50.

[9] State *v.* Smith, 70 Cal. 156 (1886); Civil Code, § 673

[10] 1 Kent, 72.

[11] [1 Bl. Com. 372.

whatever the status of his parents. An exception is made of the children of ambassadors.[1]

An "alien born" may not purchase lands for his own use, for the king is thereupon entitled to them. One reason is that if he could purchase, the nation might in time become subject to foreign influence. But he may acquire personalty, which is of a movable nature; besides that, trade demands this indulgence. As a consequence he may maintain actions concerning personalty, and dispose of it by will. An "alien enemy," however, has no rights unless by the sovereign's special favor.[2]

By the common law an alien may *take* lands by purchase, though not by descent; in other words, while he cannot take by the act of the law he may take by the act of the party. But he has no capacity to *hold* lands, and they may be seized into the hands of the sovereign. Until so seized, the alien has complete dominion over them. In this regard alien friends and alien enemies are alike. The title is devested by office-found,[3] *q. v.*

Disabilities as to holding realty have been removed in the States. See LAND, Public.

At common law an alien is protected in his person, as to such property as he may own, in his relative rights, and in his reputation. In return for protection he is required to pay taxes. He cannot become President, nor, in some States, governor. Seven years after he has been naturalized he may be elected to Congress. Unnaturalized, he could not be adjudged a bankrupt, he cannot take out a copyright, nor can he exercise any political right. See PATENT, 2; TRADE-MARK.

See further ALLEGIANCE; CITIZEN; DENIZEN; IMMIGRATION; NATURALIZE.

Alien and sedition laws. See SEDITION.

2, *v.* To transfer; to alienate, *q. v.*

Alienable. Admitting of transfer from one person to another. **Inalienable,** less frequently **unalienable,** not subject to transfer or devestment.

"Inalienable rights" are such rights as cannot be bartered, given or taken away except in punishment of crime.[4]

An "unalienable right" is one which cannot be surrendered to government or society, because no equivalent can be received for it, and one which neither the government nor society can take away, because they can give no equivalent. Of such is the right of conscience.[5]

ALIENATE. See ALIENATIO.

To transfer property to another; to make a thing another man's.

In common law to alienate realty is voluntarily to part with ownership in it, by bargain and sale, conveyance, gift, or will.[1]

The right, originally, was a right in the owner of realty to divert it from his heir.[1]

To transfer or convey a title.[2]

An entry to foreclose does not do this.[3]

Alienee. He to whom property — realty, is transferred. **Alienor.** He by whom realty is transferred.

Alienation. Any method whereby an estate is voluntarily resigned by one man and accepted by another, whether that be effected by sale, gift, marriage, settlement, devise, or other transmission of property by the mutual consent of the parties.[3]

An act whereby one man transfers the property and possession of lands, tenements, or other things, to another.[4]

A transfer short of a conveyance of the title is not an alienation of an estate.[5]

Absolute alienation. A transfer of realty without condition or qualification.

Conditional alienation. A transfer of realty made to rest upon some event yet to happen, or upon some act yet to be done; as, a covenant to convey an estate. See CONDITION.

Blackstone describes four modes of alienation or transfer of title to real estate which he calls "common assurances:" by matter *in pais* or deed; by matter of record in the courts; by special custom; by devise.[6]

See CONVEYANCE, 2; MORTGAGE; TRANSFER.

ALIENATIO. L. Transfer, alienation.

From *alienare*, to make to be the property of another: *alienus*, another.

Alienatio rei præfertur juri accrescendi. The alienation of a thing is preferred in law to its accumulation. Alienation, rather than the accumulation, of property is favored.[7]

Limitations upon alienation, imposed by public policy or by general statutes, are designed to prevent perpetuities and accumulations of realty in corpora-

[1] Town of New Hartford *v.* Town of Canaan, 54 Conn. 40-45 (1886), cases.

[2] 1 Bl. Com. 372.

[3] Fairfax *v.* Hunter, 7 Cranch, 619-21 (1813), Story, J.; Conrad *v.* Waples, 96 U. S. 289-90 (1877); Phillips *v.* Moore, 100 *id.* 212 (1879); Hauenstein *v.* Lynham, *ib.* 484 (1879).

[4] Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 756 (1884), Field, J.

[5] Hale *v.* Everett, 53 N. H. 60 (1868).

[1] [Burbank *v.* Rockingham Mut. Fire Ins. Co., 24 N. H. 558 (1852). See also Lane *v.* Maine Mut. Fire Ins. Co., 12 Me. 48 (1835); 13 R. I. 622.

[2] Huntress *v.* Place, 137 Mass. 409 (1884).

[3] 2 Bl. Com. 287.

[4] Boyd *v.* Cudderback, 31 Ill. 119 (1863); 1 N. Y. 48.

[5] Masters *v.* Madison County Ins. Co., 11 Barb. 630, 629 (1852).

[6] United States *v.* Schurz, 102 U. S. 397 (1880); 2 Bl. Com. 294.

[7] See 2 Bl. Com. 175, 288; 3 Kent, 507; 4 *id.* 181, 441; 59 Pa. 342; 76 Va. 144.

tions and ecclesiastical bodies, and to protect creditors against fraud by debtors. But there is no reason why a person who is solvent should not make another, who parts with nothing, an object of bounty, thereby protecting him from the ills of life, the vicissitudes of fortune, improvidence, etc.[1] See ACCUMULATION; TRUST, 1.

ALIENI. See under ALIUS.

ALIKE. See EQUAL; EQUIVALENT.

ALIMONY.[2] Support; provision; allowance for necessaries or maintenance.

1. An allowance made to a woman for her support out of her husband's estate, after a divorce *a mensa et thoro.*[3]

Applicable to all allowances, whether annual or in gross, made to a wife upon a decree of divorce — either from bed and board or from the bond of matrimony.[4]

Alimony pendente lite or temporary. An allowance at the institution of the suit to pay the expenses thereof and to supply the wife with necessaries. **Permanent alimony.** An allowance for future maintenance at the time a divorce is decreed.

Originally allowed because the wife was without other means of support or of obtaining the money necessary to defray her expenses in the suit, the husband owning everything. Where she has sufficient separate property that reason does not exist.[5]

Not the separate property of the wife, but a portion of the husband's estate for her subsistence. At her death arrears belong to the husband, subject to the payment of her debts.[6]

The amount, which is largely discretionary with the court, is usually proportioned to the rank of the parties, and is, ordinarily, about one-third of their joint income.[7]

The allowance is based upon the existence of the marriage relation, the ability of the husband, and the circumstances of the wife.[8]

To entitle the wife to permanent alimony there must have been a valid marriage; by the common law the marital relation must continue to exist — a rule generally changed by statute; the separation must be by decree; and she must not be the guilty party — except in a few of the States. An independent suit for an allowance is not maintainable. In a few States a gross sum is given. The right ceases upon re-cohabitation.

A wife under sentence of separation from bed and board is entitled to make a domicil for herself; and, by her next friend, she may sue her husband for the alimony decreed.[1]

Consult the statutes and decisions of each State. See DIVORCE.

2. In Louisiana the necessary expenses of a municipality; also, funds therefor.

The duty of levying a tax to pay registered judgments is subordinate to the duty of first providing for "the necessary alimony or support of the city."[2]

"The duty of providing for the alimony of the city is lodged in the discretion of the common council, in the legal exercise of which the courts may not interfere."[3]

ALIO; ALITER. See under ALIUS.

ALIUD. See CONCEAL, 5.

ALIUNDE. See under ALIUS.

ALIUS. L. Another, other; different. Plural, *alii.*

Alia enormia. Other wrongs. See ENORMIA; INTER, Alia.

Alieni generis. Of another kind.

Alieni juris. Under another's right or authority. See JUS, Sui, etc.

Alio intuitu. Under another aspect.

Alios. Other persons. Whence *et al.*, and *et als.*, q. v. See also A, 8.

Aliter. In another manner; otherwise — held or decided.

Introduces an exception to a rule or general principle.

Aliunde. From another — person, place, or source.

Designates evidence derived from an extrinsic source; as, testimony offered to contradict, vary, or explain the terms of a written instrument, or to explain an ambiguity therein.[4] Compare DEHORS. See PAROL, 2, Agreement.

ALIVE. See DEATH.

When an animal is stolen "alive" it is not necessary, in the indictment, to state the fact: the law presumes it; but when dead, that fact must be stated.[5]

ALL. Compare A, 4; EVERY; OMNIS.

May mean "each" or "every one."[6]

In the acts of legislatures, as in common parlance, "all," being a general rather than a universal term, is to be understood in one sense or the other according to the demands of sound reason.[7]

[1] Nichols *v.* Eaton, 91 U. S. 725 (1875). As to restraints in wills, see 18 Cent. Law J. 307-8 (1884), cases.

[2] L. *alimonia: alere*, to nourish, support, supply.

[3] 1 Bl. Com. 441; 1 Kent, 128; 36 Ga. 319; 18 Ill. 40; 98 N. C. 420.

[4] Burroughs *v.* Purple, 107 Mass. 432 (1871), cases, Gray, J.

[5] Westerfield *v.* Westerfield, 36 N. J. E. 197 (1882); Collins *v.* Collins, 80 N. Y. 1, 11-12 (1880).

[6] Holbrook *v.* Comstock, 16 Gray, 110 (1860), cases.

[7] 1 Bl. Com. 441-42; Bacon *v.* Bacon, 43 Wis. 203 (1877).

[8] Daniels *v.* Daniels, 9 Col. 150-51 (1885), cases.

[1] Barber *v.* Barber, 21 How. 590-98 (1858), cases. As to right to, after divorce, see 24 Am. Law Reg. 1-21 (1885), cases; and generally 26 *id.* 33-37 (1887), cases.

[2] Marchand *v.* New Orleans, 37 La. An. 18 (1885).

[3] United States *v.* New Orleans, 31 F. R. 537 (1887).

[4] 1 Greenl. Ev. § 291.

[5] Kollenberger *v.* People, 9 Col. 236 (1886); 1 Whart. Cr. L. § 359.

[6] Sherburne *v.* Sischo, 143 Mass. 442 (1887); Towle *v.* Delano, 144 *id.* 100 (1887).

[7] Kieffer *v.* Ehler, 18 Pa. 391 (1852); Stone *v.* Elliott, 11 Ohio St. 258 (1860).

All cases. See CASE, 1.

All faults. See FAULT, 2.

All-fours. Entirely alike.

Cases or decisions are said to be or to run "upon all-fours" when alike in such circumstances as affect their determination. The expression is metaphorical — from the running of mated quadrupeds.

All rights reserved. See RESERVE, 2.

ALLEGARE. L. To lay before one: to relate, allege.

Allegans contraria non est audiendus. He who alleges contradictory things is not to be listened to.

"A man shall not blow hot and cold." In Scotch phrase, no man may "approbate and reprobate."[1] See ESTOPPEL.

Allegans turpitudinem. See TURPITUDE, Allegans, etc.

Allegata et probata. Allegations and proofs.

A rule of evidence is, that the *allegata* and the *probata* must agree: the proofs must correspond with the averments.[2] See ALLEGATION.

ALLEGATION. Statement of what one can prove; positive assertion; an averment in pleading. See ALLEGARE.

Alleged. Asserted; claimed, claimed to be; charged: as, an alleged — fact, forgery, offense, deed, will, signature, execution.

Material allegation. Such an averment in the pleadings of an opponent as requires answer — by explanation or denial. Opposed, **immaterial allegation.**

A material allegation is one which is essential to the claim or defense, which could not be stricken from the pleading without leaving it insufficient.[3]

Defensive or responsive allegation. An averment by way of defense. **Rejoining allegation.** Complainant's reply to a defensive allegation.[4]

The rule is that the proof must correspond with the allegations in a declaration (or bill), but the requirement is fulfilled if the substance of the declaration is proved. The purpose of the rule is that the opposite party may be fairly apprised of the specific nature of the questions involved in the issue. Formerly the rule was applied with great strictness, but the modern decisions are more liberal and reasonable. . . The rule established by recent statutes and decisions is that no variance between the allegations of a pleading and the proofs offered to sustain it shall be deemed "material" unless of a character to mislead the opposite party in maintaining his action or defense on the merits. Irrespective of statutes, however, no variance ought ever to be regarded as material where the allegation and proof substantially correspond.[1]

See ANSWER, 3; DESCRIPTION, 4; REDUNDANCY; SAID; VARIANCE.

ALLEGHENY CITY. See COMMON, 2.

ALLEGIANCE.[2] The tie, or *ligamen*, which binds the subject to the king in return for that protection which the king affords the subject.[3]

When acknowledgment was made to the absolute superior, who was vassal to no man, it was in early times no longer called the oath of fealty (*q. v.*), but the oath of allegiance: therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception. . . There is an implied, original, and virtual allegiance owing from every subject to his sovereign, antecedently to any express promise.[3]

Acquired allegiance. Such allegiance as is due from a naturalized citizen.[4]

Local allegiance. Such allegiance as is due from an alien, or stranger born, as long as he continues within the king's dominions and protection.[4]

Natural allegiance. Such allegiance as is due from all men born within the king's dominions, immediately upon their birth. Also called *absolute* or *permanent* allegiance.[4]

Allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign whose protection he is under. Allegiance *by birth* arises from being born within the dominions and under the protection of a particular sovereign. . . A person born on the ocean is a subject of the prince to whom his parents owe allegiance. The child of an ambassador is a subject of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince.[5]

Allegiance is the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. . . It may be an absolute and permanent obligation, or a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or, at least, until, by some open and distinct act, he renounces it and becomes a citizen or subject of another

[1] See Broom, Max. 169, 294; 60 Cal. 600; 10 Mass. 163; 50 Mich. 126; 70 Pa. 274; 61 Wis. 261; 62 *id.* 67, 326.

[2] 10 Pet. 209; 2 Sumn. 209; Story, Eq. Pl. § 257; 71 Ala. 80.

[3] [Rhemke *v.* Clinton, 2 Utah, 236 (1879): Civil Pract. Act, § 66; Lusk *v.* Perkins, 48 Ark. 247 (1886).

[4] See 3 Bl. Com. 100.

[1] Nash *v.* Towne, 5 Wall. 698-99 (1866), Clifford, J.; Brown *v.* Pierce, 7 *id.* 211 (1868).

[2] F. *a-ligance*, homage: L. *ad-ligare*, to tie, bind.

[3] 1 Bl. Com. 366-69; 20 Johns. 191-92.

[4] 1 Bl. Com. 369-70; 44 Pa. 501.

[5] Inglis *v.* Trustees of Sailors Snug Harbor, 3 Pet. 155 (1830), Story, J.; Shanks *v.* Dupont, *ib.* 242 (1830).

government or sovereign. An alien whilst domiciled in the country owes a local and temporary allegiance, which continues during the period of his residence.[1]

At common law natural allegiance could not be renounced except by permission of the sovereign to whom it was due.[2] This was changed by the act of Congress of July 27, 1868,[3] and by statute of 33 Vict. c. 14, May 10, 1870.

Whether natural allegiance revives upon return of the naturalized citizen to his native country is not settled.[4]

See EXPATRIATION; INDIAN; NATURALIZATION; TREASON; WAR.

ALLEY. See ROAD; WAY.

When not qualified by "private," is conventionally understood, in its relation to towns and cities, to mean a narrow street in common use.[5]

ALLISION. See COLLISION.

ALLOCATUR. L. It is allowed.

The name of a writ permitting a thing requested.

As, an order or proceeding — to remove an indictment, to stay execution of a sentence, that special bail be furnished, that a *quo warranto* issue, that a bill of costs be referred to an auditor.

Non allocatur. It is not allowed.

Special allocatur. The allowance of a writ of error required in particular cases.

ALLODIAL.[6] From the low Latin *allodium:* every man's own land, which he possesses in his own right, without owing any rent or service to a superior — property, in the highest degree. Opposed, *feodum*, a fee.[7]

Wholly independent, and held of no superior.[8]

Held in free and absolute ownership.[9]

"All lands . . are declared to be allodial, and feudal tenures are prohibited" — constitution of Wisconsin. This means little more than if the framers had said "free" or "held in free and absolute ownership," as contradistinguished from feudal tenures, the prohibition of which, with their servitudes and attendant hindrances to free and ready transfer of realty, constituted the chief object of the provision.[10] See FEE, 1 (1); TENURE, 1.

[1] Carlisle *v.* United States, 16 Wall. 154 (1872), Field, J.

[2] 1 Bl. Com. 369; 2 Kent, 449; 8 Op. Att.-Gen. 139; 9 *id.* 356.

[3] R. S. § 1999.

[4] Whart. Confl. L. § 6; 18 Am. Law Reg. 595, 665 (1879).

[5] Bailey *v.* Culver, 12 Mo. Ap. 183 (1882).

[6] Ger. *al-ód*, all one's own: the whole estate,— Skeat.

[7] 2 Bl. Com. 105.

[8] 2 Bl. Com. 47, 60.

[9] 3 Kent, 495, 488, 496.

[10] Barker *v.* Dayton, 28 Wis. 384 (1871), Dixon, C. J. See 1 Washb. R. P. 16, 41; 9 Cow. 512.

ALLONGE.[1] A paper attached to a bill or note for such indorsements as the original paper itself will not hold.

When an indorsement is made on a paper attached to and made part of a note, such paper is called an "allonge." The reason for using it is, there is no room on the note for the indorsement. This does not mean that there must be an actual physical impossibility of writing the indorser's name on the original paper. All that the mercantile law requires is that when it is inconvenient to write on the back of the note the real contract between the vendor and vendee, which, if so written, would pass the title, it may be written on another paper and attached to it with like effect. There are cases showing that an assignment of a number of notes at once, by a separate paper, never attached to either of the notes or intended to be, is not an indorsement.[2]

ALLOPATHY. See MEDICINE.

ALLOT. 1. To set apart a thing to a person as his share: as, to allot a fund, land. Whence allottee, allotment.

As usually understood, to set apart a portion of a particular thing or things to some person: as, to allot to a widow a portion of her husband's estate.[3]

2. To assign, appoint: as, to allot the justices of the Supreme Court to circuits.

ALLOW. To approve of, sanction; to permit, consent to. Opposed, *disallow*. See PERMIT; SUFFER.

In its ordinary sense, to grant, admit, afford, or to yield, to grant license to, permit. Implies a power to grant some privilege or permission.[4]

Allowance. The act of permitting or giving; also, whatever is given as a share or portion.

As, to allow, and the allowance of — an account, alimony, an amendment, an appeal, a bill of exceptions, a claim, a pardon, a pension, a sum to an insolvent.

"Allowing" claims against estates: the sanction or approbation which the court gives to the acts of an executor or administrator as manifested by his account.[5]

Allowance to a widow of money in lieu of dower: something substituted by way of compensation for another thing.[6]

[1] Al-lŭnj'. F. *allonger*, to lengthen.

[2] Crosby *v.* Roub, 16 Wis. 626-27 (1863); Folger *v.* Chase, 18 Pick. 67 (1836); French *v.* Turner, 15 Ind. 68 (1860); Osgood *v.* Artt, 17 F. R. 577 (1883); Story, Bills, § 204, Prom. Notes, §§ 121, 151.

[3] Glenn *v.* Glenn, 41 Ala. 586 (1868.)

[4] Doty *v.* Lawson, 14 F. R. 901 (1883).

[5] Gildhardt's Heirs *v.* Starke, 1 How., Miss., 457 (1836).

[6] Glenn *v.* Glenn, 41 Ala. 584, 586 (1868).

Allowance to a child or other dependent: ordinarily, only another name for a gift or gratuity.[1]

The honorable discharge of a soldier from service does not restore him allowances forfeited by desertion (included in which is a bounty), that is, everything which could be recovered from the government in consideration of enlistment and services. The forfeiture must first be removed.[2]

ALLOY. See COIN.

ALLUVIO. L. That which is washed to a place.

Alluvio maris. The washing of the sea.

Jure alluvionis. By right of alluvion. See ALLUVION.

ALLUVION. By the common law the addition made to land by the washing of the sea, a navigable river or other stream, whenever the increase is so gradual that it cannot be perceived in any one moment of time.[3] See ALLUVIO.

An addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from "reliction" and the opposite of "avulsion."[4] See AVULSION; DERELICTION, 1.

The test as to what is gradual and imperceptible is, that, though the witnesses may see from time to time that progress has been made, they could not perceive it while going on. Whether it is the effect of natural or artificial causes makes no difference. The right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and the owner of flocks and herds to their natural increase. The maxim *qui sentit onus debet sentire commodum* lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss he must bear it; if a gradual gain, it is his. The principle applies alike to streams that do, and to those that do not, overflow their banks, and where dykes and other defenses are, and where they are not, necessary to keep the water within its proper limits.[4]

It is generally conceded that the riparian title attaches to subsequent accretions to the land affected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each State decides for itself. By the common law such additions to land on navigable (tide) waters belong to the crown.[1]

The right to alluvion depends upon the fact of the contiguity of the estate to the river. The accretion belongs to the strip of land to which it attaches, rather than to a larger portion from which the strip, when sold, was separated.[2]

See ACCESSION; ACCRETION; BATTURE; RIPARIAN.

ALMS-HOUSE. A house appropriated to the use of the poor.[3]

Within the meaning of an act exempting property from taxation, will include a house used solely for the "purpose of affording pecuniary and other relief to persons of Swiss origin in need of assistance."[3]

ALONE. See SEPARATE, 2.

A granted to B, for the use of C "alone," the right to take water anywhere on his donation. *Held*, that "alone" signified that the grant was for the "sole" benefit of C.[4]

ALONG. Over against in length; lengthwise of. Compare BY, 1; PARALLEL.

"By the length of, as distinguished from across; lengthwise of;" as, a railway along a highway.[5]

A sidewalk "along the line" of land does not import that the sidewalk must at all points touch or be parallel to such line.[6]

"Along a line" means up to, extending to, reaching to, that line.[7]

In the expression "on, over, and along" an alley, is synonymous with on or over, not by the side of.[8]

An insurable interest on property of a railroad "along its route" means property in proximity to the rails upon which the engines run: which may be outside the lines of the roadway or lawfully within those lines.[9]

"Along the bank" of the Chattahoochee is definite enough to exclude the idea that any part of the river or its bed was not to be within the State of Georgia — by the cession of her unsettled territory to the United States in 1802. The call excludes the idea that a line was to be traced at the edge of the water as that may be at one time or another; — it is for "the bank," the fast land which confines the water of the river in its channel or bed in its whole width. Wherever the bed may be it belongs to Georgia, and not to Alabama. The line is to be determined, in each trial, by the jury.[10]

[1] Taylor *v.* Staples, 8 R. I. 179 (1865). See also Bacon *v.* Bacon, 43 Wis. 208 (1877).

[2] United States *v.* Landers, 92 U. S. 79, 80 (1875), Field, J.; 13 Op. Att.-Gen. 198.

[3] Lovingston *v.* St. Clair County, 64 Ill. 56, 60 (1872), cases, Thornton, J.

[4] County of St. Clair *v.* Lovingston, 23 Wall. 68 (1874), Swayne, J. See 18 La. An. 129; 2 Bl. Com. 262; 3 Kent, 428; 2 Washb. R. P. 58, 452.

[1] Barney *v.* City of Keokuk, 94 U. S. 837 (1876), Bradley, J. See also New Orleans *v.* United States, 10 Pet. 717 (1836); 16 F. R. 816.

[2] Saulet *v.* Shepherd, 4 Wall. 508 (1866).

[3] People *ex rel.* Swiss Society *v.* Commissioners of Taxes, 36 Hun, 311 (1885): Webster.

[4] Salem Capital Flour Mills Co. *v.* Stayton Water Ditch & Canal Co., 33 F. R. 154 (1887).

[5] County of Cook *v.* Great Western R. Co., 119 Ill. 226 (1886): Webster.

[6] Commonwealth *v.* Franklin, 133 Mass. 570 (1882).

[7] Benton *v.* Horsley, 71 Ga. 626 (1883).

[8] Heath *v.* Des Moines, &c. R. Co., 61 Iowa, 14 (1883).

[9] Grand Trunk R. Co. *v.* Richardson, 91 U. S. 472 (1875). See also 13 Metc. 99; 42 Me. 585-86; 27 Alb. L. J. 385.

[10] Howard *v.* Ingersoll, 13 How. 416-17 (1851).

ALS. See ALIUS, Alios.

ALSO. In wills, most frequently points out the beginning of a new devise or bequest. Imports no more than "item," and may mean the same as "moreover," but not the same as "in like manner."[1] Compare LIKEWISE.

ALTER.[2] To make a thing different from what it was; as, by cutting out a brand-mark.[3]

The word implies "another." A thing which ceased to exist can in no proper sense be said to be "altered." If altered it has merely changed its form or nature, but still has an existence. Thus, in forgery making may be by an original fabrication or by merely changing a thing already made into another thing. An altered note is still a note.[4]

To "alter judicial districts" means to change them. It is not a violation of usage to speak of the increasing or diminishing of a given number as an alteration or change in the number.[5]

Alteration. 1. A change or substitution of one thing for another: as, the alteration of a way.[6] See ADDITION, 1.

2. An act done upon an instrument by which its meaning or language is changed.

If what is written or erased has no tendency to produce this result or to mislead it is not an "alteration." The term applies to the act of the party entitled under the instrument and imports some fraud or improper design to change its effect. The act of a stranger is a mere "spoliation" or mutilation of the instrument, and does not change its legal operation as long as the original writing remains legible, and, if it be a deed, any trace of the seal remains.[7]

Material alteration. Such alteration as changes the language or meaning of the contract in a material particular. *Immaterial alteration.* Such merely verbal change as does not vary the contract in an essential particular.[8]

Suspicious alteration. Such change, apparent upon inspection, as would lead a man of ordinary caution to infer that the instrument had been illegally tampered with; or such apparent change in the language as would deter such person from accepting the instrument as reliable evidence of indebtedness or of an obligation.

That is a "material alteration" which causes the instrument to speak a language different in legal effect from what it originally spoke;[1] or which gives the instrument a different legal effect.[2]

A material alteration made without consent after execution avoids the instrument; but not so as to words which the law would supply. The question of materiality is for the court. If attested as made before execution does not detract from credit; nor, if it is against the interest of the holder. If suspicious upon its face, the law presumes nothing, but leaves questions of time, person, and intent, to the decision of a jury. If immaterial, presumed to have been made before execution. But some authorities require explanation before any altered instrument can be admitted in evidence.[3]

It will not be presumed that a party would sign a document with material clauses interlined or in the margin. The rule is strict as to negotiables. The burden of explaining alterations in ancient writings is not imposed when they are taken from their proper repository. Formal blanks may always be filled.[4]

The material alteration of a written contract by a party to it discharges a party who does not authorize or consent to the alteration, because it destroys the identity of the contract and substitutes a different agreement. Any change which alters the contract, whether increasing or diminishing liability, is "material."[5]

Some authorities hold that where there are no particular circumstances of suspicion the presumption of law is that the alteration was made contemporaneously with the execution, giving as a reason that a deed cannot be altered after its execution without fraud, which is never assumed without proof; other authorities hold the presumption to be the other way, and require an explanation of the alteration before the deed can be admitted in evidence.[6]

In the absence of proof the presumption is that a correction by erasure in a deed (a patent to land) was made before execution. This doctrine rests upon principle. "A deed cannot be altered after it is executed without fraud or wrong; and the presumption is against fraud or wrong." The cases are not uniform in this country, but the most stringent ones leave the question to the jury.[7]

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[1] Evans v. Knorr, 4 Rawle, 68-70 (1833), cases; 23 Ill. 366.

[2] L. L. *alterare:* L. *alter*, other, another.

[3] Smith v. Brown, 1 Wend. 236 (1828).

[4] Haynes v. State, 15 Ohio St. 457 (1864).

[5] People v. Sassovich, 29 Cal. 484 (1866).

[6] Johnson v. Wyman, 9 Gray, 189 (1857). Shaw, C. J.

[7] 1 Greenl. Ev. § 566.

[8] See Woodworth v. Bank of America, 19 Johns. 391 (1821): 10 Am. Dec. 267-73 (1879), cases.

[1] 1 Greenl. Ev. § 565; 9 Baxt. 462.

[2] Eckert v. Pickel, 59 Iowa, 547-48 (1882); 51 *id.* 675; 30 Minn. 154; 76 Va. 545, 544; 18 Ct. Cl. 565.

[3] 1 Greenl. Ev. §§ 564-68; 61 Ala. 269; 2 Bl. Com. 308.

[4] 1 Whart. Ev. §§ 621-32, 732, cases.

[5] Mersman v. Werges, 112 U. S. 141 (1884), cases. Gray, J.; Angle v. Northwestern Mut. Life Ins. Co., 92 *id.* 342 (1875).

[6] Malarin v. United States, 1 Wall. 288 (1863). Field, J

[7] Little v. Herndon, 10 Wall. 31 (1869), cases. Nel

A voluntary alteration of any instrument under seal, in a material part, to the prejudice of the obligor or maker, avoids it — unless done with the assent of the parties affected. Such act differs from spoliation by a stranger, or accidental alteration by mistake, in which case the instrument retains its effect. In respect to commercial paper the rule is more stringent, the law casting on the holder the burden of disproving any apparent material alteration on the face of the paper. The ground of the rule is public policy to insure the protection of the instrument from fraud and substitution. The purpose is to take away the motive for alteration by forfeiting the instrument on discovery of the fraud.[1]

See FORGE, 2; NOTE, 2, Raised; RATIFICATION.

ALTERNATIVE.[2] Offering a choice between two acts, courses, or things: as, an alternative—covenant, obligation, judgment.

An alternative writ commands the respondent to do a certain thing or show cause why he should not do it: as, an alternative *mandamus*,[3] q. v.

Alternative pleadings are ill; and alternative judgments, decrees, and sentences are, as a rule, invalid. See OR, 2; RELIEF, 2.

ALWAYS. See PROVIDED.

AM. Amended, amendment; American.

AMALGAMATE. See CONSOLIDATE, Associations.

AMBASSADOR. See MINISTER, 3.

AMBIGUITAS. See AMBIGUITY.

AMBIGUITY.[4] The effect of words that have either no definite sense or a double sense.[5]

Ambiguity or duplicity is predicable only of language as to which it is needful to make a choice of readings; while "indistinctness," "obscurity," and "uncertainty" include these, and also cases of language devoid of sense or which does not present any meaning with clearness or precision. The case of a blank left for a name should be deemed an uncertainty.[6]

Patent ambiguity. Such ambiguity as appears upon the face of the writing itself.

Latent ambiguity. Where a writing is perfect and intelligible upon its face, but, from some circumstance admitted in proof, a doubt arises as to the applicability of the language to a particular person or thing.[1]

Ambiguitas patens is that which appears to be ambiguous upon the instrument. *Ambiguitas latens* is that which seems certain and without ambiguity for anything that appears upon the instrument, but there is some collateral matter out of the deed that breeds the ambiguity.[2]

A "latent ambiguity" is where you show that words apply equally to two different things or subject-matters.[3]

Evidence is then admissible to show which thing or subject was intended.[3]

Difficulty in applying the descriptive portion of a deed to the external object usually arises from a latent ambiguity, which, having its origin in, is to be solved by, parol evidence.[4]

A "patent ambiguity" means an inherent ambiguity which cannot be removed either by the ordinary rules of legal construction or by the application of extrinsic and explanatory evidence, showing that impressions *prima facie* unintelligible are yet capable of conveying a certain, definite meaning.[5]

The court has to do with cases of patent ambiguity; the jury with a case of latent ambiguity. When the intention cannot be ascertained the defect is incurable.

Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur. A latent ambiguity of words is supplied by evidence; for whatever arises ambiguous from a fact [extrinsic] may be removed by evidence of the fact.[6]

Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est. As long as in the words there is no ambiguity, then no interpretation contrary to the words is to be made.[7]

A cardinal canon of interpretation, both of deeds and of statutes. The words, the context, and the subject-matter, are to be considered equally with the effect and consequences or the spirit and reason, if not before them.[8]

son, J., quoting Campbell, C. J., in Doe *v.* Catomore, 71 E. C. L. 746 (1851).

[1] Neff *v.* Horner, 63 Pa. 330-31 (1869), cases. See also Batchelder *v.* White, 80 Va. 108 (1885), cases; Fuller *v.* Green, 64 Wis. 165 (1885), cases; State *v.* Churchill, 48 Ark. 437-40 (1886), cases; 2 Daniel, Neg. Inst. §§ 1373-75, cases; 30 Alb. Law J. 245-49 (1884), cases; Bishop, Contr. §§ 745-76, cases.

[2] L. *alter*, other.

[3] [3 Bl. Com. 273, 111.

[4] L. *ambiguus*, doubtful.

[5] [Ellmaker *v.* Ellmaker, 4 Watts, 90 (1835), Gibson, C. J.

[6] Abbott's Law Dict.

[1] Stokeley *v.* Gordon, 8 Md. 505-9 (1855).

[2] [Lord Bacon, Max. Reg. 23 (25), Law Tracts, 99-100. Approved, Lathrop *v.* Blake, 23 N. H. 60 (1851); Lycoming Mut. Ins. Co. *v.* Sailer, 67 Pa. 113 (1870); Deery *v.* Cray, 10 Wall. 270 (1869); Hawkins *v.* Garland, 76 Va. 152 (1882). See 1 Greenl. Ev. §§ 297-300; 1 Whart. Ev. §§ 956-57, 961, 1006.

[3] Smith *v.* Jeffryes, 15 M. & W. *562 (1846), Alderson, B.; Webster *v.* Paul, 10 Ohio St. 534 (1860); 40 Ark. 241.

[4] Reed *v.* Proprietors of Locks, 8 How. 290 (1850); Moran *v.* Prather, 23 Wall. 501 (1874).

[5] Brown *v.* Guice, 46 Miss. 302 (1872), Peyton, C. J.

[6] Bacon, Max. 23; Broom, Max. 608; 2 Kent, 557; 13 Pet. 97; 100 Mass. 60; 8 Johns. 90; 67 Pa. 112.

[7] Broom, Max. 617; 2 Bl. Com. 379; 8 Mass. 201.

[8] Dame's Appeal, 62 Pa. 420 (1869), Sharswood, J.; *cf. id.* 136, 251; 34 La. An. 227, 957.

A latent ambiguity in a will, which may be removed by extrinsic evidence, may arise: (1) When the will names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or (2) when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence; or, if in existence, the person is not the one intended, or the thing does not belong to the testator. When a careful study of the testator's language, applied to the circumstances by which he was surrounded, discloses an inadvertency or mistake in a description of a person or thing which can be corrected without adding to his language — thus making a different will, — the correction should be made.[1]

One Gilmer, after making bequests to two Presbyterian churches in Illinois, and other bequests, left the rest of his estate "to be divided equally between the board of foreign missions and the board of home missions." *Held*, that there was a latent ambiguity respecting the object of the residuary gift, but that the ambiguity could be removed by extrinsic evidence; that the evidence introduced, taken in connection with the bequests to the Presbyterian churches, showed that the testator meant the Board of Foreign Missions and the Board of Home Missions of the Presbyterian Church of the United States of America, of which he was a member and an officer, and not any board of missions controlled by the Baptist, Methodist, Episcopalian, or other denomination.[2]

AMBULATORY.[3] 1. Moving about from one place to another; not held in any one place; not stationary.

The court of common pleas while it followed the king's household was said to be ambulatory.

2. Not fixed in legal character; not yet settled past alteration; revocable.

In this category is a sheriff's return until filed; and a will, to the last moment of testamentary rationality.

Voluntas testatoris est ambulatoria usque ad mortem. The will of a testator is ambulatory (alterable, revocable) up to his death.[4]

AMBUSH. The act of attacking an enemy unexpectedly from a concealed station. A concealed station where troops or enemies lie in wait to attack by surprise; an ambuscade. Troops posted in a concealed place, for attacking by surprise.[1] See DISGUISE.

AMENDMENT.[2] 1. Correction of a fault; the curing of a defect; alteration for the better; improvement. Whence amendatory.

"Amend," in its most comprehensive sense, means to better. . . When a defendant is allowed to withdraw one plea or answer and to substitute another which rightly sets out his defense, it is a change for the better — an "amendment."[3]

Also, the writing or instrument made or proposed, which embodies the improvement.

Used of the correction, proposed or actually made: of an error in the pleadings or proceedings in a pending cause; of changes in bills, statutes, and ordinances, by lawmakers; of alterations in charters and by-laws; of changes in constitutions.

Material amendment. In pleading, such change in the substance of a party's case as destroys its former identity and occasions surprise (*q. v.*) in his adversary.

At common law, proceedings being *in fieri* till judgment, the courts allow amendments up to that point. After judgment enrolled, no amendment is permitted at a subsequent term; for only during the first term is the record in the breast of the court.[4] See further RECORD, 2.

An indictment, being a finding upon the oaths of the grand jury, can be amended only by their consent. See INDICTMENT.

Allowing amendments is incidental to the exercise of all judicial power, and indispensable to the ends of justice. Usually to permit or refuse any particular amendment rests in the discretion of the court; the result is not assignable for error.[5]

An appellate court will regard as made such amendment to a verdict as should have been made in the court below.[6]

A bill in equity may be amended, when found defective in parties, in prayers for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but yet not forming the substance itself, or for putting in new matter to meet the allegations in the answer. That is to say, by amendment the plaintiff may not make a new bill.[7]

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[1] Patch *v.* White, 117 U. S. 217-19 (1886), cases, Bradley, J. See also Senger *v.* Senger's Executor, 81 Va. 694-97 (1886), cases; Webster *v.* Morris, 66 Wis. 397 (1886), cases; 64 *id.* 355.

[2] Gilmer *v.* Stone, 120 U. S. 586, 588-90 (1887), cases, Harlan, J. In Hannen *v.* Moulton, 28 F. R. 5-11 (1885), a devise of 1,500 acres of land was held defective on account of a latent ambiguity. See generally 5 Am. Law Reg. 140-48 (1866), cases.

[3] Ambulatory. L. *ambulare*, to walk or move about.

[4] Coke, Litt. 112 *b*; 2 Bl. Com. 503; 4 Ves. 210; 10 *id.* 379; 149 Mass. 221; 1 Story, Eq. § 606 *a*.

[1] Dale County *v.* Gunter, 46 Ala. 142 (1871), Peck, C. J.

[2] F. *amender:* L. *emendare*, to free from fault.

[3] [Diamond *v.* Williamsburg Ins. Co., 4 Daly, 500 (1873), Daly, C. J.

[4] 3 Bl. Com. 407-8.

[5] Tilton *v.* Cofield, 93 U. S. 166 (1876); International Bank *v.* Sherman, 101 *id.* 406 (1879); Tiernan *v.* Woodruff, 5 McLean, 138 (1850), cases; 11 F. R. 781; 13 *id.* 653-55, cases; 132 Mass. 194.

[6] Shaw *v.* North Penn. R. Co., 101 U. S. 567 (1879).

[7] Shields *v.* Barrow, 17 How. 144 (1854); Story, Eq. Pl. § 884.

In reference to amendments of equity pleadings generally, the courts have found it impracticable to lay down a rule for all cases. Their allowance, at every stage, must rest in discretion — a discretion depending largely upon the special circumstances of each case. But the ends of justice should never be sacrificed to mere form, nor by a too rigid adherence to technical rules of practice. Where the application comes after the litigation has continued some time, or when granting it would cause serious inconvenience or expense to the opposite side, great caution should be exercised. Where it would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs, an amendment should rarely, if ever, be permitted.[1] See JEOFAIL.

2. Amendments to constitutions are made in pursuance of directions contained in the instruments themselves.[2]

What here follows relates, as will be seen, to the Constitution of the United States.

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided . . that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."[3]

The President's approval of a proposed amendment is not necessary.[4]

The amendments themselves thus far made (May, 1889) are designated as "Articles in Addition to, and Amendment of the Constitution," etc., and are numbered "Articles I, II," etc., up to XV.

Upward of one hundred amendments were proposed by the minorities in the several conventions that adopted the Constitution. The First Congress referred them to a committee of one member from each State. Twelve articles were agreed to for submission to the States. The first two, relating to the number and the pay of the members of the lower House, were rejected, and the remaining ten ratified, December 15, 1791.[5]

Most of these ten amendments are denials of power which had not been expressly granted, and which cannot be said to have been "necessary and proper for carrying into Execution" other powers. . . They tend to show that in the judgment of those who adopted the Constitution there were powers created by it which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted.[1]

They left the authority of the States where they found it, and added nothing to the already existing powers of the United States.[2]

The feeling that the Constitution as proposed for ratification contained no formal Bill of Rights led to the adoption of the ten amendments. All are designed to operate as restraints upon the general Government; most of them are for the protection of the private rights of persons and property. Notwithstanding this reproach, however, there are many provisions in the original instrument of this latter character.[3]

The provisions of the fifteen amendments will be found quoted and commented upon under the following titles:

I — ASSEMBLY; LIBERTY, 1, Of speech, Of the press; RELIGION.

II, III — MILITIA.

IV — SEARCH, Warrant.

V — CRIMINATE; INDICTMENT; JEOPARDY; PROCESS, 1, Due, etc.; TAKE, 8.

VI — CRIME.

VII — JURY, Trial by.

VIII — BAIL, 2; FINE, 2; PUNISHMENT, Cruel, etc.

IX, X — CONSTITUTION, p. 288; POWER, 3.

XI — SUIT, p. 990.

XII — ELECTORS, Presidential.

XIII, XIV, XV — CITIZEN.

And see generally CONSTITUTION; EXPRESSIO; GOVERNMENT; STATE, 3 (2).

AMENDS. Reparation; compensation for wrong done; satisfaction.

By 24 Geo. II (1751), c. 24, re-enacted in several States, a tender of amends to the party injured by a mistake made by a magistrate, acting as such, is a bar to a contemplated action.[4]

Any sum may be tendered, because, in torts, the standard of damages is uncertain and the party is as likely to recover at trial less than more than the sum tendered.[5]

In some States a like tender may be made by a minister or a magistrate who marries a minor without the consent of the parent or guardian; also, for involuntary trespasses committed by constables, revenue officers, and perhaps some other ministerial officers.[6]

See COMPENSATION, 2-4; DISTRESS; TENDER, 2.

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[1] Hardin *v.* Boyd, 113 U. S. 761 (1885), Harlan, J. Approved, Richmond *v.* Irons, 121 *id.* 47, 46 (1887); Coubrough *v.* Adams, 70 Cal. 378 (1886): 17 *id.* 285.

[2] See Prohibitory Amendment Cases, 24 Kan. 709-12 (1881); *Re* Constitutional Convention, 14 R. I. 651 (1883).

[3] Constitution, Art. V.

[4] Hollingsworth *v.* Virginia, 3 Dall. 378 (1798).

[5] See 1 Story, Const. §§ 301-5; 1 McMaster, Hist. Peop. U. S. 501, 555. While the proposed Constitution was before the people for adoption, the explanation that it did not need a Bill of Rights — the Government being "limited," having only such powers as were specially granted to it — "satisfied not one State." 2 Bancroft, Const. 241-42, *et seq.*

[1] Legal Tender Cases, 12 Wall. 535 (1870), Strong, J

[2] United States *v.* Cruikshank, 92 U. S. 522 (1875); Twitchell *v.* Pennsylvania, 7 Wall. 325-27 (1868), cases

[3] Kring *v.* Missouri, 107 U. S. 226 (1882), Miller, J See also Spies *v.* Illinois (Anarchists' Case), 123 *id* 131 (1887), cases; 8 Saw. 262.

[4] 3 Bl. Com. 16.

[5] 3 Shars. Bl. Com. 16; 3 Watts, 317; 5 S. & R. 209, 517

[6] See Arch. Pract. 1372, 1174, 1373.

AMERCE.[1] To be amerced, or *à mercie*, is to be at the king's mercy with respect to a fine to be imposed. Later, simply to be fined. Whence amercement.

Before the jury deliver their verdict the plaintiff is to appear in court, by himself or attorney, to answer the amercement to which he is liable in case he fails in his suit, as a punishment for his false claim. The amercement is disused, but the form remains. It was an arbitrary amount, unliquidated; a "fine" was a fixed sum imposed upon one not a party for some fault or misconduct.[2]

Now used of a mulct or penalty imposed by a court upon its own officers for neglect of duty. In several States, also, amercement is the remedy against a sheriff for failing to levy an execution or make return of proceeds of a sale according to statute.[3]

AMERICA. See DISCOVERY, 1; STATE, 3 (2), p. 966.

American. In the general mind now describes a descendant of Europeans, born in America, and is especially applied to an inhabitant of the United States.[4]

AMI. F. A friend. Also spelled *amy*. Compare AMICUS.

Alien ami. An alien friend. See ALIEN, 1.

Prochein ami. Next friend.

One admitted by a court to prosecute for an infant, because otherwise the infant might be prejudiced by the refusal or neglect of his guardian. He is a species of attorney; and the court controls his actions.[5] See FRIEND, Next; GUARDIAN, Ad litem.

AMICABLE. Friendly; agreed to; prosecuted by consent of all parties; opposed to adverse, adversary: as, an amicable action, an amicable *scire facias* to revive a judgment, mortgage, or other lien.

An amicable lawsuit is a suit instituted seriously but in a friendly spirit, that some matter in controversy, by judicial decree, may be settled definitely, as cheaply and with as little delay as possible.[6]

AMICUS. L. A friend. Compare AMI.

Amicus curiæ. A friend of the court.

Imports friendly intervention of counsel to remind the court of some matter of law which has escaped its notice and in regard to which it appears to be in danger of going wrong. It is not his function to take upon himself the management of a cause.[1]

AMNESTY. Has no technical meaning in the common law: is merely the synonym of "oblivion," which, in English law, is the synonym of "pardon." The literal meaning is "removal from memory."[2]

Properly belongs to international law, applying to rebellions which by their magnitude are brought within that law.[3]

"Pardon" is remission of guilt; "amnesty" an act of oblivion or forgetfulness.[3]

By act of May 22, 1872, the political disabilities imposed by the third section of the XIVth Amendment were removed from all persons except members of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service, heads of departments, and foreign ministers, of the United States.[4] See OATH, Of office; PARDON.

AMONG. Intermingled with.

Commerce among the States cannot stop at the external line of each State, but may be introduced into the interior. . . Comprehensive as "among" is it may properly be restricted to that commerce which concerns more States than one. . . Commerce among the States must of necessity be commerce with the States.[5] See COMMERCE.

Each child has a share where a power is distributed "amongst" children.[6] See BETWEEN.

AMORTISE. See MORTMAIN.

AMOTION.[7] Turning out; removal.

1. Turning out the legal proprietor of an estate in realty before the termination of the estate;[8] an eviction. See EVICTION; OUSTER.

2. Removal of a corporate officer from office, as distinguished from depriving a member of his privilege of membership[9]—expulsion, disfranchisement.

This right, for just cause, is a common-law incident to all corporations Where the appointment is during good behavior, or the removal is for a specified cause, an opportunity to be heard should be afforded.[9]

Among the various causes are—*first*, such as have no immediate relation to the office yet are in them-

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[1] F. *amercier*, to fine: L. *merces*, wages, detriment, pains.

[2] 3 Bl. Com. 376, 378; 4 *id.* 379–80.

[3] Abbott, Bouvier, Law Dicts.

[4] [Beardsley *v.* Bridgeport, 58 Conn. 493 (1885), Pardee, J., where the word is used in a charitable bequest.

[5] Tidd, Pract. 100, n; Tucker *v.* Dabbs, 12 Heisk. 19–20 (1883); 10 Abb. Pr. 40.

[6] Thompson *v.* Moulton, 20 La. An. 537 (1868); Lord *v.* Veazie, 8 How. 255 (1850), Taney, C. J.

[1] Taft *v.* Northern Transp. Co., 56 N. H. 416 (1876), Cushing, C. J. See also 11 Pitts. Leg. J. 321–22 (1864); 109 U. S. 68; 2 Mass. 215; 11 Tex. 698; 11 Gratt. 656.

[2] Knote *v.* United States, 10 Ct. Cl. 407 (1874).

[3] *Exp.* Law, 35 Ga. 296 (1865): Pardoning Power, 11 Op. Att.-Gen. 228 (1865).

[4] 17 St. L. 142. See, as to President granting a general amnesty, 8 Am. Law Reg. 513–32, 577–89 (1869), cases.

[5] Gibbons *v.* Ogden, 9 Wheat. 194, 196, 227 (1824), Marshall, C. J.; 14 How. 573; 3 Wall. 782; 9 *id.* 43.

[6] 4 Kent, 343.

[7] L. *a-movere*, to move from, remove.

[8] [3 Bl. Com. 198–99.

[9] See 2 Kent, 297; Bouvier, cases.

selves of so infamous a nature as to render the offender unfit to execute any public franchise — but indictment and conviction must then precede; *second*, such as are only against his oath and the duty of his office as a corporator and amount to a breach of the tacit condition annexed to his office; *third*, such as are offenses not only against the duty of his office, but are indictable at common law.[1] See TENURE, Of office.

AMOUNT. See DESCRIPTION, 1, 4; DISPUTE; EXCEEDING; MORE OR LESS; SUM.

AMPLIARE. See JUDEX, 2, Boni, etc.

AMUSEMENT. See ENTERTAINMENT; GAME, 2; RIGHT, 2 (2), Civil rights; THEATER; TICKET.

AN. See A, 4; AD; ANTE; ANY.

ANALOGY. See ARGUMENTUM, A simile.

ANARCHY.[2] The absence of government; a state of society in which there is no law or supreme power.[3]

"If the conspiracy had for its object the destruction of the law and government, it had for its object the bringing about of practical anarchy. And when murder has resulted from the conspiracy and the perpetrators are on trial for the crime, whether or not they were anarchists may be a proper circumstance to be considered in connection with other circumstances, with a view of showing what connection, if any, they had with the conspiracy and what were their purposes in joining it."[3]

See further as to case cited, ACCESSARY; CHALLENGE, 4; CHARACTER; CHARGE, 2 (2, c); CONSPIRACY; COURTS, United States; CRIMINATE; DOUBT, Reasonable; JURY; MALICE; OPINION, 2.

ANCESTOR.[4] The last person actually seized of an inheritance.[5]

In the law of descents the prepossessor of an estate.[6]

The ascendant of an intestate in the right line, as father, mother, grandfather, grandmother.[7]

The person from whom an estate descends; not a progenitor, in the popular acceptation.[8]

It is the *immediate*, and not the *remote*, ancestor from whom the estate descends.[9]

After the rule was adopted that inheritances might ascend, the ancestor was the person from whom the inheritance devolved upon the heir, and a child might, therefore, be the ancestor of his parent.[1]

Common ancestor. The parent from whom designated persons have sprung.

In the Ohio statute of descents the ancestor is any one from whom the estate is inherited. The ancestor from whom it must "have come to the intestate" is he from whom it was immediately inherited. Such ancestor takes the place of the first purchaser under the English canons of descent. . . No remote ancestor has any favorable estimation here. Neither the primary definition nor the legal sense of the word agrees with the most popular and obvious signification. He from whom the estate was immediately inherited is the ancestor, the *propositus*, from whom the estate came.[2]

Embraces collaterals as well as lineals through whom an inheritance is derived, and refers to the immediate ancestor.[3]

Uncles, aunts, and other collateral "antecessors" who are not in fact "ancestors" are sometimes designated as "collateral ancestors." In its ordinary import "ancestors" includes only those from whom the person spoken of is lineally descended on the father's or the mother's side. When used in a sense different from its ordinary import of lineal antecessors, so as to embrace all the blood relatives preceding the person referred to, it is qualified or enlarged by some other term.[4]

"Maternal ancestor" in the Massachusetts statute of 1851, c. 211 (relating to illegitimate children), is limited to progenitors in the direct ascending line, according to the common meaning and the only sense in which "ancestor" is used throughout the statute of descents and distributions.[5]

See further CONSANGUINITY; DESCENT; HEIR; INHERIT.

ANCHOR. See A, 3, A 1; APPURTENANCE; FURNITURE, Of ship.

A vessel fastened to a pier is not "lying at anchor;"[6] nor is a vessel purposely beached, though having an anchor out for caution.[7]

ANCIENT.[8] 1. Created, made, conceded, or established at a day now long past; beginning with a period indefinitely early; dating from a time so remote as to acquire or have attached some right or privilege accorded in view of long continuance: as,

[1] Rex *v.* Richardson, 1 Burr. 538 (1758), Mansfield, C. J.; 1 B. & Ad. 936; L. R., 5 H. L. 636. See generally 24 Cent. Law J. 99 (1887), cases.

[2] Gk. *anarchi'a*, lack of government: *an'archos*, without a chief.

[3] [Spies *et al. v.* People, 122 Ill. 253 (Sept. 14, 1887), Magruder, J.,—"Anarchists' Case." [Webster's Dict. Same case, 9 Cr. Law Mag. 829, 926-35, cases; 12 N. E. Rep. No. 16; 18 Chic. Leg. News, 309, 411.

[4] F. *ancessour*, a fore-goer: L. *antecessor: ante cedere*, to go before.

[5] 2 Bl. Com. 209, 443; 2 Kent, 404, 419.

[6] [McCarthy *v.* Marsh 5 N. Y. 275 (1851).

[7] [Valentine *v.* Wetherill, 31 Barb. 659 (1859).

[8] Bailey *v.* Bailey, 25 Mich. 188 (1872).

[9] Murphy *v.* Henry, 35 Ind. 450 (1871).

[1] Lavery *v.* Egan, 143 Mass. 391 (1887), Field, J.

[2] Lessees of Prickett *v.* Parker, 3 Ohio St. 396-97 (1854). See also Gardner *v.* Collins, 2 Pet. 91 (1829).

[3] Wheeler *v.* Clutterbuck, 52 N. Y. 71 (1873).

[4] Banks *v.* Walker, 3 Barb. Ch. 446-47 (1848), Walworth, Ch.

[5] Pratt *v.* Atwood, 108 Mass. 42 (1871), Gray, J.

[6] Walsh *v.* N. Y. Floating Dry-Dock Co., 77 N. Y. 459 (1879).

[7] Reid *v.* Lancaster Fire Ins. Co., 19 Hun, 286 (1879).

[8] F. *ancien*. L. *antianus*, of a former time, old. Formerly, antient,—2 Bl. Com. 99; 3 *id.* 274; 4 *id.* 380.

ancient — demesne, house, lights, wall, writings, *qq. v.*

2. A corruption or misprint of *enceinte*, pregnant — infirm: as, an ancient witness. See DEPOSITION.

ANCILLARY.[1] Auxiliary; subordinate; incidental; additional.

The king's court is not ancillary to any other.[2] Thus also are or may be related — one constitutional power to another;[3] implied powers in a corporation;[4] a writ of *certiorari* to a writ of *habeas corpus*; a *capias*, originally, to a summons, judgment or decree, to secure obedience or enforcement; a sequestration to preserve from waste movables on mortgaged property;[5] a commission to aid the court by hearing and report;[6] one bill in equity to another bill;[7] an attachment to another proceeding;[8] an action in aid of an execution at law to the original suit;[9] an act toward the performance of an agreement;[10] an administration (*q. v.*) subordinate to another;[11] parol testimony in some relations;[12] an outbuilding, to a dwelling-house; a statute, to a constitutional amendment.[13]

ANCIPITIS. See USUS, Ancipitis.

AND. Compare ET.

Construed to mean "or" (and "or" to mean "and") when necessary to give effect to the intention — of parties to contracts, of testators, of law-makers; but not so when the evident intent would thereby be defeated.[14] See further OR, 2.

ANGER. See ASSAULT; MALICE.

ANIMAL. Any irrational being, as distinguished from man.

In a common sense, a quadruped; not, a bird or a fowl.[15]

In discussions in the cases as to what is included by "animals" in the law of property and of larceny, in duty laws, in statutes punishing malicious mischief, and the like, the term is limited by notions of property. . . Steady progress has been made toward the recognition of all sentient life as deserving legal protection, irrespective of the property aspect.[16]

While the use in a particular context or statute may be limited by the general meaning and purpose, the term, in jurisprudence, may include any living creature not human or rational.[1]

In a statute against cruelty to animals includes wild and noxious animals, unless the purpose of the statute or the context indicates a limited meaning.[2]

Animals are distinguished as *domitæ naturæ*, of a tame disposition; and *feræ naturæ*, of a wild disposition — wild by nature.

Animals of a "base" nature are such as are not fit for food, but are kept for pleasure, curiosity or whim.

In such animals as are of a tame nature, a man may have as absolute a property as in any inanimate being; because they continue perpetually in his occupation, and will not stray from his house or person unless by accident or fraudulent enticement, in which cases the owner does not lose his property. The stealing or forcible abduction of such property is also felony: for these are things of intrinsic value, serving for the food of man or for the uses of husbandry. But in animals *feræ naturæ* a man can have no absolute, merely a qualified, property — *per industriam*, by reclaiming and making them tame by art, industry, training, or by so confining them within his own immediate power that they cannot escape and use their natural liberty;—*propter impotentiam* or *rationе impotentiæ*, on account of their own inability, as, in young animals, until they can fly or run away;— *propter privilegium*, by virtue of privilege, as of game within a liberty. While these creatures, reclaimed from the wildness of their nature, thus continue qualified or defeasible property they are as much under the protection of the law as if the owner's absolutely and indefeasibly. It is also as much a felony to steal such of them as are fit for food as to steal tame animals; but not so if they are kept only for pleasure, curiosity or whim, as dogs, bears, cats, parrots, singing-birds: because their value is then not intrinsic, but depends purely upon the caprice of the owner, though the taking is such an invasion of property as may amount to a civil injury and be redressed by a civil action.[3]

At common law larceny may be committed of a collar or chain attached to an animal not itself the subject of property.[4]

A property in dogs (*q. v.*) is now recognized under laws providing for their registration and taxation.[5]

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[1] An'-cil-lā-ry. L. *ancillaris*, *ancilla*, a handmaid.
[2] 3 Bl. Com. 98.
[3] Legal Tender Cases, 12 Wall. 535 (1870).
[4] 1 Pars. Contr. 141.
[5] Dupasseur v. Rochereau, 21 Wall. 136 (1874).
[6] Forbes Street, 70 Pa. 138 (1871).
[7] Christmas v. Russell, 14 Wall. 88 (1871).
[8] Cooper v. Reynolds, 10 Wall. 314 (1870).
[9] Claflin v. McDermott, 13 F. R. 876 (1882).
[10] 1 Story, Eq. § 768.
[11] 1 Story, Eq. § 583.
[12] Wall v. Dovey, 60 Pa. 218 (1869).
[13] 109 U. S. 20; 111 *id.* 592. So also an attachment may be, 48 Ark. 200; and one section in a charter to another section, 31 F. R. 218.
[14] Litchfield v Cudworth, 15 Pick. 27 (1833); 14 *id.* 453; United States v. Fisk, 3 Wall. 447 (1865); Dumont v. United States, 98 U. S. 142 (1878); 55 Vt. 470.
[15] Reiche v. Smythe, 13 Wall. 165 (1871).
[16] [Abbott's Law Dict.

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[1] [Abbott's Law Dict.]
[2] Commonwealth v. Turner, 145 Mass. 300 (Nov. 23, 1887): Pub. Sts. ch. 207, § 58.
[3] 2 Bl. Com. 390-94. See also 2 Kent, 349-50; Buster v. Newkirk, 20 Johns. *75 (1822) — as to a deer wounded by one and captured by another person; State v. Krider, 78 N. C. 482 (1878) — as to fish (in a pond?); Swift v. Gifford, 2 Low. 112-15 (187-), cases,— as to a harpooned whale; Ghen v. Rich, 8 F. R. 159 (1881), cases,— as to a dead whale found floating.
[4] 4 Bl. Com. 235.
[5] See Morewood v. Wakefield, 133 Mass. 341 (1882).

The owner of an animal or the person who has the exclusive control of it is liable for injuries which he negligently suffers it to commit. This liability stands upon the ground of actual or presumed negligence. If the injury is committed while trespassing upon land the owner is responsible for damage directly resulting as a natural consequence. In other cases he may be liable although there is no trespass and the animal is rightfully in its place; as where the injury comes from the vicious disposition or mischievous habits of the animal of which the owner had previous actual notice; or where, without actual notice, the disposition and habits are so universal among the species that notice is presumed, as in the case of wild and savage beasts. The owner or keeper of such animals, without actual or implied notice of their character, is bound at his peril to keep them at all times and in all places properly secured, and is responsible to any one who without fault in himself is injured by them.[1]

Animals *ferœ naturæ*, as a class, are known to be mischievous; and the rule is well settled that whoever undertakes to keep any such animal in a place of public resort is or may be liable for injuries inflicted by it on a party who is without fault. It is not necessary to aver negligence in the keeper, as the burden is upon the defendant to disprove that implied imputation; it is enough to aver ferocity in the animal and knowledge of that fact in the defendant. Certain animals *ferœ naturæ* may doubtless be domesticated to such an extent they may be classed with tame animals; but as they are prone to relapse into their wild habits and to become mischievous, the rule is that if they do so, and the owner becomes notified, they will thereafter be viewed as not having been thoroughly and safely domesticated.[2]

See ACCESSION; AGIST; ALIVE; AT LARGE; BAIT, 2; CATTLE; CRUELTY, 3; DAMAGE, Feasant; DISTRESS; ESTRAY; FENCE; GAME, 1; IMPLEMENTS; LEVANT; MAIM, 2; NUISANCE; OYSTER; PARTUS; POUND, 2; SOUND, 2 (2); STOCK, 1; TEAM; TRESPASS; VICIOUS; WANTON; WARRANTY, 2; WARREN; WORRY; WOUND.

Harrington *v.* Miles, 11 Kan. 483-84 (1873), cases: 15 Am. Rep. 356, cases; State *v.* Doe, 79 Ind. 9 (1881), cases; Jemison *v.* Southwestern R. Co., 75 Ga. 445 (1885).

[1] Lyons *v.* Merrick, 105 Mass. 76 (1870), Colt, J.; Hewes *v.* McNamara, 106 *id.* 281 (1871); Mann *v.* Weiand, 81* Pa. 253-55 (1875), cases; Marble *v.* Ross, 124 Mass. 47-49 (1878), cases; Linnehan *v.* Sampson, 126 *id.* 510-11 (1879), cases; Muller *v.* McKeeson, 73 N. Y. 198-204 (1878), cases; Lynch *v.* McNally, *ib.* 349 (1878); State *v.* Harriman, 75 Me. 562 (1884); 56 Ala. 402; 49 Conn. 113; 69 Ga. 447; 75 Ill. 141; 88 *id.* 182; 35 Ind. 178; 34 Mich. 288; 27 Pa. 331; 15 *id.* 188; 51 Vt. 18; 38 Wis. 307; 2 Alb. L. J. 101; 20 *id.* 6, 104; 46 Am. R. 425.

As to animals trespassing on a railroad track, see Kansas City, &c. R. Co. *v.* Kirksey, 48 Ark. 376 (1886), cases.

[2] Congress & Empire Spring Co. *v.* Edgar, 99 U. S. 651-56 (1878), Clifford, J., citing many cases. The plaintiff below, one Mrs. Edgar, while visiting Congress Spring park, Saratoga, N. Y., was injured by a deer. The jury awarded her $6,500 damages, and the judgment therefor was affirmed by the circuit court for the northern district of New York and by the United States Supreme Court. See also Twigg *v.* Ryland, 62 Md. 385-88 (1884), cases: 24 Am. Law Reg. 191, 196-97, cases: Meracle *v.* Down, 64 Wis. 323 (1885); Laherty *v.* Hogan, 13 Daly, 533 (1886); State *v.* Donahue, N. J. L. (1887), cases: 10 Atl. Rep. 150; 26 Am. Law Reg. 773-78 (1887), cases.

"If an ox gore a man or a woman that they die . . and if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman, the ox shall be stoned, and his owner also shall be put to death." Exodus, xxi, 28, 29.

ANIMUS. L. Mind; disposition; intention, will.

Animo. With, from, or in, mind or intention: as, in *eo animo*, *ex animo*, *malo animo*, *quo animo*, qq. v.

Animus, animum (objective form), mind or intention, **animo**, with intention or design — *cancellandi*, of canceling; *capiendi*, of seizing or taking; *dedicandi*, of dedicating or donating; *defamandi*, of defaming; *donandi*, of giving; *furandi*, of stealing; *lucrandi*, of gaining; *manendi*, of remaining; *morandi*, of staying, remaining; *possidendi*, of possessing, appropriating; *recipiendi*, of receiving; *republicandi*, of republishing; *revertendi*, of returning; *revocandi*, of revoking; *testandi*, of making a will.

ANNEX.[1] To put in permanent connection with; to attach.

As, to annex — a fixture to a freehold; a condition to an estate; a covenant to land; one writing to another, as, an exhibit to a petition or affidavit of claim; one town to another town.[2]

Figuratively, a penalty or punishment is said to be annexed to an act.[3]

Annex incidents. To show what things are customarily treated as incidental and accessorial to the principal thing.[4]

Actual annexation. Such annexation as exists in point of fact; as, that of a fixture to a freehold. **Constructive annexation.** Exists in inference of law; as, that of a deed to land, that of a key to a house.

A fixture is "annexed to the freehold" when fastened to or connected with it. Mere juxtaposition, or the laying of an object, however heavy, on the freehold, does not amount to an annexation.[5]

A deposition taken under a commission is suffi-

[1] F. *annexer:* L. *annectere*, to knit, tie, bind to.

[2] 100 U. S. 530; 74 Me. 180.

[3] 1 Bl. Com. 415.

[4] 1 Greenl. Ev. § 294.

[5] Merritt *v.* Judd, 14 Cal. 64 (1859): 2 Sm. L. C. 296.

cially annexed or connected to the commission by the envelope and official seal.[1]

Will annexed to letters. See ADMINISTER, 4.

ANNI; ANNO. See ANNUS.

ANNOYANCE. See NUISANCE; USUS, Sic utere, etc.; WANTON.

ANNUALLY. Applied to the payment of interest imports, not an undertaking to pay at the end of a year, but at the end of every year during the period of time, fixed or contingent.[2]

A note payable in five years from date "with interest annually" implies that the interest begins to run from the making of the note.[3] See ANNUS; YEAR.

ANNUITY.[4] A yearly sum stipulated to be paid to another in fee or for life or years, and chargeable only on the person of the grantor.[5]

A yearly sum chargeable upon the person of the grantor.[6]

A "rent-charge" is a burden imposed upon lands.[6]

An annuity is a stated sum payable annually, unless otherwise directed. It is neither "income" nor "profits," nor does it vary with them, though a certain fund may be provided out of which the sum is payable.[7] See INDIAN.

Annuitant. One who is entitled to an annuity.

Annuity table. A table exhibiting the probable longevity of a person at any particular age.

Based upon statistics, and of use in matters of life insurance and dower. See further TABLE, 4.

Life annuity. An annuity limited upon another's life — the engagement or the sum of money promised.[8]

An annuity payable to the annuitant and his heirs is a personal fee; neither curtesy nor dower are incidents thereto. It is assignable, and bequeathable; and may be an asset in case of insolvency. Remedies for its non-payment are: debt, covenant, action of annuity at common law.[9] It is also apportionable; and may be paid to a widow in lieu of dower.[10]

Since an annuity may be regarded as a legacy payable by a yearly instalment, the word "legacy," as used in a will, may comprise the word annuity.[1]

ANNUL. See NULL; REPEAL; RESCISSION; VACATE.

ANNUS. L. A year.

Anni nubiles. Marriageable years.

Infra annos nubiles. Within marriageable years — at common law the age of twelve in girls.[2]

Anno Domini. In the year of our Lord. Abbreviated A. D. See ABBREVIATIONS; YEAR.

Annus luctus. The year of mourning.

Infra annum luctus. Within the year of mourning — sometimes called the "widow's year."

Roman and early Saxon law ordained that a widow should not remarry within a year after her husband's death: an inhibition which seems to have had reference to ascertaining the paternity of children.[3]

Supposed to be the origin also of a custom of wearing mourning dress.

Annus utilis. A serviceable year.

Anni utiles. The years during which a right may be asserted; as, the period during which one is not prevented by disability from availing himself of a statute of limitations.

ANONYMOUS. Designates a case reported with the names of the parties omitted. Abbreviated *Anon.*

ANOTHER. One other; any other

Larceny of the "personal goods of the United States" is within the words "personal goods of another" in the act of April 30, 1790.[4]

In the sense of another person, a co-party, is used in the titles of cases: as "A. B. *v.* C. D. and another." Compare ALIUS, Alios.

ANSWER. Response, reply; defense. Compare RESPONDERE.

1. In the sense of a response to a written or oral communication, see LETTER, 3; SILENCE.

2. A statement made in response to a question or interrogation propounded to a suitor, witness, or garnishee, in the course of a judicial inquiry. See further QUESTION, 1.

3. The formal written statement made by a defendant — to charges in a bill in equity, to a libel in admiralty or in divorce.

An answer is the most usual defense made to a bill in equity. It is given in upon oath; but where there are amicable defendants their answer may be taken without oath by consent of the plaintiff. This method

[1] Savage *v.* Birckhead, 20 Pick. 167 (1838); Shaw *v.* McGregory, 105 Mass. 100 (1870).

[2] Sparhawk *v.* Wills, 6 Gray, 164 (1856); Westfield *v.* Westfield, 19 S. C. 89-90 (1882).

[3] Winchell *v.* Coney, 54 Conn. 26, 30 (1886).

[4] L. L. *annuitas;* L. *annus,* a year.

[5] Coke, Litt. 144 *b;* 3 Kent, 460; 24 N. J. E. 358; 28 Barb. 216.

[6] 2 Bl. Com. 40; 10 Watts, 127; 28 Barb. 216.

[7] Booth *v.* Ammerman, 4 Bradf. 133-35 (1856), cases; Pearson *v.* Chace, 10 R. I. 456-57 (1873), cases; Bartlett *v.* Slater, 53 Conn. 107 (1885), cases.

[8] See 2 Bl. Com. 461.

[9] 3 Kent, 460, 471; Coke, Litt. 285; 4 Ves. 763; 5 *id.* 708.

[10] Blight *v.* Blight, 51 Pa. 430 (1866); Rudolph's Appeal, 10 *id.* 34 (1848); Lackawanna Iron, &c. Co.'s Case, 37 N. J. E. 27 (1883).

[1] Rudolph's Appeal, *ante;* *Exp.* M'Comb, 4 Bradf 152 (1856); 12 N. Y. Leg. Obs. 182.

[2] 1 Bl. Com. 436; 2 Kent, 78.

[3] 1 Bl. Com. 457.

[4] United States *v.* Maxon, 5 Blatch. 362 (1866); 1 St. L. 116.

of proceeding was borrowed from the ecclesiastical courts.[1]

The parts of an answer are: the *title*, which tells whose answer it is and to whose bill; a *reservation* of advantages from any defects in the bill; the *substance*, whether the facts be of personal knowledge or rest upon information and belief; and a general *traverse* to the whole bill.

An answer must be responsive to all the material allegations in the bill.[2]

Unless the complainant have two witnesses, or one witness and corroborative circumstances, he will not be entitled to relief. The reason is, by calling upon the respondent to answer his allegations, the complainant admits that the answer will be evidence — equal to the testimony of any other witness; so that he cannot prevail unless the balance of proof is in his favor; to turn the scales, he must at least have circumstances which corroborate such single adverse witness.[3]

The answer must be responsive to the bill, and be sustained by the testimony of two witnesses, or of one witness corroborated by circumstances equivalent in weight to the testimony of another witness.[4]

If the alleged facts are not known to the defendant he should give his belief, if he has any; if none, he should say so and call for proof; otherwise he waives that branch of the controversy. A mere statement that he is without knowledge is not such admission as waives full proof.[5]

The answer of one defendant cannot be received against another, except where one so succeeds the other that his right devolves on the latter, making them privies in estate.[6]

An answer in equity must be signed by counsel. It must also deny or confess the material parts of the bill; it may confess and avoid (*q. v.*) the facts. If one of these things is not done the answer may be excepted to for insufficiency, and the defendant be compelled to put in a sufficient answer. A defendant cannot pray anything but to be dismissed the court; if he has any relief to ask he must do it by a cross-bill. After an answer is put in the plaintiff may amend his bill; and the defendant must then answer afresh. If the plaintiff finds sufficient confessed in the answer upon which to ground a decree he may proceed to a hearing upon the bill and answer; and in that case he takes the answer as true. Otherwise he replies generally, averring his bill to be true, certain, and sufficient, and the answer the reverse, as he is ready to prove; to which the defendant rejoins, averring the like on his side.[7]

See ADMIRALTY; ADMISSION, 2; ALLEGATION; AMENDMENT, 1; EQUITY, Bill; MASTER, 4; PLEA, 2; SHAM.

[1] 3 Bl. Com. 446–47.

[2] Roach *v.* Summers, 20 Wall. 170 (1873).

[3] Tobey *v.* Leonards, 2 Wall. 430 (1864); Moore *v.* Ullman, 80 Va. 310–11 (1885), cases; 9 Cranch, 160; 6 Wheat. 468; 4 Cliff. 266–67, 458–59, cases; 107 U. S. 232; 18 Pa. 70.

[4] Vigel *v.* Hopp, 104 U. S. 441 (1881); Morrison *v.* Durr, 122 *id.* 518 (1887); 109 *id.* 103; 2 Story, Eq. § 1528.

[5] Brown *v.* Pierce, 7 Wall. 211–12 (1868); 1 Johns. Ch. *107; 5 *id.* *248.

[6] Osborn *v.* United States Bank, 9 Wheat. 832 (1824).

[7] 3 Bl. Com. 447–49.

ANTAGONISM. See REPEAL; REPUGNANT.

ANTE. L. Before; hereinbefore.

Older form, *anti*, against. In compound words, *ante*, *anti*, *ant*, *an*. Anglo-Saxon, *and-*. Opposed, *post*. Compare ANTI; SUPRA.

Ante litem. See LIS, Ante, etc.

Ante natus. See NATUS, Ante, etc.

Antea. Formerly.

ANTECEDENT. See SAID; SECURITY.

ANTE-DATE. See DATE.

ANTENUPTIAL. See NUPTIAL.

ANTI. L. Against; in opposition. Compare ANTE.

As used in compounds illustrated by such words as anti-license, anti-liquor, anti-monopoly, anti-oleomargarine, anti-prohibition (-ists), anti-saloon, anti-slavery.

ANTICIPATION.[1] Taking beforehand, or before a time.

1. Use in the present of what is to accrue or to becomes one's own as income or profit; dealing with income before it is due.

More specifically, alienation by a married woman, who has a separate estate by gift, of income not yet accrued.[2] Compare ADVANCEMENT; TRUST, 1.

2. Objection to issuing a patent, or to a patent granted, upon the ground that its subject-matter is identical with what is or was already known, whether patented or not.

Cases of anticipation are distinguished from cases of patentability or ingenuity, and from cases of new use, of substitution, and of combination.[3] See PATENT, 2.

ANTIENT. See ANCIENT, 1.

ANTIQUATED. See STALE.

ANY. Compare A, 4; EITHER.

In the expression, whether the county will construct "any road or bridge," extends to an indefinite number.[4]

May mean every; thus, in a statute of descents, "any father or mother" may embrace as well the case where all of a class have died in the life-time of the intestate as where only some one or more may have died.[5]

"For the foregoing purposes or any of them" means, in effect, "for the foregoing purposes and *every* of them."[6]

"Any railroad" may be taken distributively, in-

[1] L. *ante-capere*, to take beforehand.

[2] See 133 Mass. 174, 175; 3 Gray, 405; 12 Gratt. 425; 9 Ga. 201; 1 Ld. Cas. Eq. 520; 11 Ves. 221; Lewin, Trusts, 123.

[3] Merwin, Pat. Invent. 82.

[4] Dubuque County *v.* Dubuque, &c. R. Co., 4 Iowa, 4 (1853).

[5] McComas *v.* Amos, 27 Md. 141 (1868).

[6] Davidson *v.* Dallas, 8 Cal. 289 (1857).

cluding all railroads taken severally; as, in the expression, "any county may subscribe to the stock of any railroad in this State." [1]

"Any former deceased husband" in § 4162, Rev. St. Ohio, refers to any husband who has died; the expression is not confined to the case where a widow has had two or more husbands.[2]

APART. See ACKNOWLEDGMENT, 2; SEPARATE, 2.

APARTMENT. See BURGLARY; HOUSE.

APEX. See JUS, Apex, etc.; VEIN.

APOSTLE.[3] In English admiralty practice the copy of the record in an appealed case which is sent to the appellate tribunal.

APOTHECARY. See DRUGGIST; MERCHANT.

Any person who keeps a shop or building where medicines are compounded or prepared according to the prescriptions of physicians, or where medicines are sold.[4]

APPARATUS. See APPENDAGE; PROCESS, 2.

APPAREL. In exemption and duties laws "apparel," "wearing apparel," and "necessary wearing apparel" have their popular import.[5]

Cloth actually appropriated thereto may be regarded as apparel.[6]

In September, 1878, William Astor and family arrived home from Europe, bringing with them wearing apparel bought there for their use, to be worn during the season then approaching, and in quantity not excessive for persons of their means, habits, and station in life. A portion of the articles not having been worn duties were exacted on them, and the circuit court confirmed the action of the collector. The Supreme Court, reversing the lower court, held that under § 2505, Rev. St., exempting from duty "wearing apparel in actual use and other personal effects not merchandise," such articles as fulfill the following conditions are not subject to duty, viz.: 1, wearing apparel owned by the passenger and in condition to be worn at once without further manufacture; 2, apparel brought with him as passenger and intended for use by himself or his family who accompany him, not intended for sale, and not imported for other persons or to be given away; 3, apparel suitable for the season of the year immediately approaching at the time of arrival; 4, apparel not exceeding in quantity, quality, or value what the passenger is in the habit ordinarily of providing for himself and family at that time, and keeping on hand for his and their reasonable wants, in view of their means, habits, and station in life, even though such articles have not been actually worn.[1]

See BAGGAGE; EXEMPTION; PARAPHERNALIA; PIN-MONEY.

APPARENT. 1. Readily seen; evident, self-evident; manifest: as, error apparent upon the face of a record. See APPARERE, De non, etc.; CONSTAT, 1; ERROR, 2 (3).

2. Existing in looks or appearance, and, perhaps, oftener not real than true and real; opposed to *actual:* as, apparent — authority, right or title; also opposed to **non-apparent:** as, an apparent or non-apparent easement, *q. v.*

An apparent right of possession is defeated by proof of a better, *i. e.*, an actual, right.[2]

When the owner of property clothes another with the apparent power of disposition a third party who is thereby induced to deal with that other will be protected as against the owner.[3]

A principal is held for the act of his agent clothed with apparent authority.[4]

The holder of mercantile paper is the apparent owner thereof.

Apparent danger. In the law of justifiable homicide such overt, actual demonstration, by conduct and acts, of a design to take life or to do great personal injury as makes killing apparently necessary.[5]

Apparent good order. Shipped "in apparent good order," in a bill of lading, does not change the legal effect of the bill. If a loss occurs the carrier is not precluded from showing that it proceeded from a latent defect in the package.[6]

APPARERE. L. To come into sight: to appear. Compare CONSTAT, 1.

De non apparentibus et non existentibus, eadem est ratio. Concerning things not appearing and things not existing, the rule (reason, conclusion) is the same. **Quod non apparet, non est.** What does not appear does not exist.

A thing which is not made to appear is regarded as if it could not be made to appear and did not therefore exist.

The record of a court of limited or inferior jurisdiction must show jurisdiction rightfully exercised;[7] but

[1] County of Chicot *v.* Lewis, 103 U. S. 167 (1880).

[2] Anderson *v.* Gilchrist, 44 Ohio St. 440 (1886). See also 41 N. J. E. 659; 9 S. C. 117.

[3] Gk. *apostolein'*, to send away.

[4] Revenue Act, 13 July, 1866, § 9: 14 St. L. 119.

[5] Maillard *v.* Lawrence, 16 How. 261 (1853); Greenleaf *v.* Goodrich, 101 U. S. 285 (1879); *Re* Steele, 2 Flip. 325-26 (1879), cases.

[6] Richardson *v.* Buswell, 10 Metc. 507 (1845); 33 Me. 585; 55 Barb. 399.

[1] Astor *v.* Merritt, 111 U. S. 202 (1884), Blatchford, J.

[2] 2 Bl. Com. 196.

[3] 46 N. Y. 325; 101 U. S. 575.

[4] 96 U. S. 86.

[5] [Evans *v.* State, 44 Miss. 773 (1870), Simrall, J.; Weeley *v.* State, 37 *id.* 349 (1859).

[6] The Oriflamme, 1 Saw. 178 (1870).

[7] 2 How. 341; 12 *id.* 253.

in courts of record of general jurisdiction all things are presumed to have been rightly done.[1]

A fact essential to the exercise, by a court of general jurisdiction, of a special power conferred upon it, must appear upon the face of the record.[2] See further PRESUMERE, Omnia, etc.

An affidavit is good for what it shows upon its face.[3]

A deed irregularly transcribed is not a record.[4]

An objection not of record will be disregarded.

The contents of a document in dispute must be proved.[5]

APPEAL.[6] 1. To apply to, as for relief; also, the application or action itself. Whence *appealable;* as, an appealable order.

May denote an application for relief to be obtained by a consideration or review of previous action: as, an appeal from listers to the selectmen of a town upon an alleged grievous assessment.[7]

2. To remove a cause to a higher court for review and retrial; also, the proceeding in itself considered.

Appeals are allowed in suits in equity, proceedings in courts of probate, orphans' or surrogate's courts, and in admiralty; from awards of arbitrators and referees; from municipal and tax assessments; on summary proceedings in criminal matters determined by committing magistrates; and in numerous other matters of code or statutory regulation.

Appeal lies to a final decree or judgment; in a few cases, also, upon an interlocutory order: as, in review of a commitment when authority in the lower court to act is disputed.[8]

Appellant. He who takes an appeal.

Appellee. The defendant in an appealed case.

Appellate. Having cognizance of appealed cases; accessible by appeal; concerning the judicial review of decisions: as, appellate — court, jurisdiction, power.

Appellate jurisdiction, q. v. Power to revise the decisions of the courts only, not the determinations of all inferior officers and boards.[9]

The secretary of the interior and the commissioner of the general land office in revising the acts of subordinate officials exercise "supervisory" rather than appellate power in the sense in which "appellate" is employed in defining the powers of courts of justice.[1]

Appeal (*appellatio* in civil law) is defined *ab inferioris judicis sententia ad superiorem provocare:* the removal of a cause from the sentence of an inferior to a superior judge, or, as Blackstone expresses it, a complaint to a superior court of an injustice done by an inferior court.[2]

The remedy as known in England is in a great measure confined to causes in equity, ecclesiastical, and admiralty jurisdiction: as to each of which no jury intervenes. In courts proceeding according to the civil law an appeal removes the whole of the proceedings and usually, though not invariably, opens the facts as well as the law to re-examination.[3]

A process of civil law origin. Removes a cause entirely, subjecting the fact and the law to review and retrial. A "writ of error," which is of common-law origin, removes nothing for re-examination but the law.[4]

While perhaps in most States an appeal from a court of general jurisdiction is in the nature of a writ of error,— whereby the appellate court passes upon the record as to facts and law, does not hear additional evidence, but confines its adjudication to errors appearing upon the record,— in Ohio the appeal itself vacates without revisal all proceedings, and the case is heard upon the same or other pleadings and upon such testimony as may be offered in that court. The subject is taken up *de novo*, as if the cause had never been tried.[4]

A final decree in chancery is taken to a higher court for review by appeal.[5]

The object of removing a cause from a justice of the peace by an appeal is to obtain a new trial, upon the same issue, in the higher court.[6]

In States which have adopted the name "appeal" for the review allowed of judgments governed by codes of procedure, the proceeding is subject to so much statutory regulation, and in effect is so assimilated to "writ of error," that it seems no longer possible to give a descriptive definition which shall be correct for the various States and distinguish the two modes of review.[7]

If a party to a suit is in no manner affected by what is decided he cannot be said to be a party to the decree, and, therefore, cannot appeal the case.[8]

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[1] 11 Wall. 209-301.

[2] Chesterfield County v. Hall, 80 Va. 394 (1885).

[3] Lord v. Ocean Bank, 20 Pa. 384 (1853).

[4] McNitt v. Turner, 16 Wall. 361 (1873).

[5] See generally Broom, Max. 163, 166; 102 U. S. 202, 631; 104 *id.* 439; 4 Mass. 685; 8 *id.* 401; 55 Pa. 57; 76 Va. 301.

[6] L. *appellare*, to call upon, address.

[7] Leach v. Blakely, 34 Vt. 136 (1861).

[8] *Exp.* Virginia, 100 U. S. 342 (1879).

[9] See Hubbell v. McCourt, 44 Wis. 587 (1878), cases; Auditor v. Atkinson, &c. R. Co., 6 Kan. 505 (1870); Piqua Bank v. Knoup, 6 Ohio St. 391 (1856).

[1] Hestres v. Brennan, 50 Cal. 217 (1875); R. S. §§ 441, 453, 2478.

[2] United States v. Wonson, 1 Gall. 13 (1812), Story, J.

[3] Wiscart v. Dauchy, 3 Dall. 327 (1796), Elsworth, C. J. See also United States v. Goodwin, 7 Cranch, 110 (1812); 22 How. 128; 103 U. S. 611. As to review of facts in actions at law, see 22 Am. Law Rev. 262-68 (1888), cases.

[4] Mason v. Alexander, 44 Ohio St. 328 (1886), Spear, J.

[5] McCollum v. Eager, 2 How. 61 (1844); 21 *id.* 445.

[6] Rawson v. Adams, 17 Johns. *131 (1819).

[7] [Abbott's Law Dict. See 12 Mo. Ap. 186; 30 Minn. 144.

[8] Farmers' Loan, &c. Co. v. Waterman, 106 U. S. 269 (1882); 108 *id.* 168

Appeal bond. An obligation, with sureties, given by an appellant in order to remove a cause by appeal, and conditioned for the payment of damages and costs if he fails to "prosecute the appeal with effect," *q. v.*

If the judgment is affirmed the sureties, *proprio vigore*, become liable to the same extent as the principal for the damages and costs. In an appeal to a still higher court new sureties are required.[1]

An appeal bond, or a bond in error, is a formal instrument required and governed by the law, and, by nearly a century's use, has become a formula in legal proceedings, with a fixed and definite meaning. As the important right of appeal is greatly affected by it, it is not allowable, in practice, by a change in phraseology, *v.* give it an effect contrary to what the statutes intend — as, in Federal practice, the acts of 1789 and 1802: *R. S.* §§ 1000, 1007, 1010, 1012. It would be against the policy of the law to suffer such deviations and irregularities. The rule followed in some States is a sound one, that if the condition of the bond substantially conforms to the requirements of the statutes it is sufficient, though it contain variations of language; and that if further conditions be superadded the bond is not therefore invalid, so far as it is supported by the statute, but only as to the superadded conditions.[2]

Court of appeals. Any court ordained to review the final decrees of another court; in several States the tribunal of last resort.

The highest court in Kentucky, Maryland, and New York. In Virginia and West Virginia it is known as the "supreme court of appeals;" in Delaware and New Jersey, as the "court of errors and appeals." In Texas the court is inferior to the supreme court. In England designates one of the two subdivisions of the supreme court of judicature as constituted by the acts of 1873 and 1875.

See ERROR, 2 (2, 3), Court of, Writ of; FINAL, 3; PAPER, 5; SUPERSEDEAS.

3. In old English law an accusation by a private subject against another of a heinous crime, demanding punishment on account of the particular injury suffered, rather than for the offense against the public.

Appellor: the accuser; **appellee:** the accused.

Originated, probably, when a private pecuniary satisfaction, called *weregild*, was paid to the party injured or to his relatives to expiate enormous crimes.[3]

Abolished in 1819, after the case of *Ashford* v. *Thornton*. See BATTEL.

APPEAR. The right to "appear" before a tribunal engaged in the transaction of particular business implies the right to be heard thereabout, — so far, at least, as the party is interested.[1]

Appearance. 1. Being apparent, *q. v.*

2. Having the form or semblance of. See COLOR, 2; FACIES.

3. Coming into court as a party to a suit; presence in court as a suitor. Used, particularly, of a defendant's presence, in person or by attorney.[2] Opposed, **non-appearance.**

An entry of appearance upon the record of a cause is to be interpreted by the practice of the particular court. Whatever is held to be a submission to its authority in the cause, whether coerced or voluntary, will be deemed an appearance.[3]

Made by entering of record the name of the party or his counsel, and at the request of either; also, by entering bail, answer, demurrer, or by any other act admitting that the defendant is in court, submitting to the jurisdiction. Originally, when pleadings were oral, made by actual presence in court.

An appearance may be *general* or *common*, or *special* or *conditional*, according as it is unqualified or unrestricted, or made for a specific purpose — as, to make a motion, or is coupled with a condition; *de bene esse*, when provisional on an event; *voluntary*, *compulsory*, or *optional*, according as it is entered freely, is compelled by plaintiff's action, or is made by one not obliged to appear, but who applies to do so, to save a right; *in person*, *by attorney*, *by next friend*, *by guardian*, or *by committee*, according as the party himself defends, or employs or is represented by another; *pro hac vice*, when in some special relation; *corporal*, when by defendant in person.

Corporal appearance is generally required in a criminal trial. In modern practice in civil actions appearing may be constructive or figurative.

An appearance is to be *entered* by a certain day, called the *appearance day;* to which day writs are made returnable. It is "general" when it is the stated day ordinarily observed; and "special" when some other day, as, the day appointed in a particular case.

On every return day in the term the person, at common law, had three days of grace beyond the day named in the writ in which to appear, and if he appeared on the fourth day inclusive, *quarto die post*, it

[1] Babbitt *v.* Finn, 101 U. S. 15, 18 (1879); Beall *v.* New Mexico, 16 Wall. 539 (1872).

[2] Kountze *v.* Omaha Hotel Co., 107 U. S. 395–96 (1882), cases; 11 Lea, 72.

[3] 4 Bl. Com. 312–17; 110 U. S. 596.

[1] Dundee Mortgage Trust Invest. Co. *v.* Charlton, 39 F. R. 194 (1887).

[2] See Schroeder *v.* Lahrman, 26 Minn. 88 (1879); Larrabee *v.* Larrabee, 33 Me. 102 (1851).

[3] Cooley *v.* Lawrence, 5 Duer, 610 (1855); Grigg *v.* Gilman, 54 Ala. 430 (1875).

was sufficient. Therefore, usually the court did not sit till the fourth or appearance day.[1]

An appearance is also entered in a book called the *appearance docket*, which exhibits, in a brief abstract, all the proceedings had in a cause.

For failure to appear after legal notice given, in cases, judgment may be taken "in default" of an appearance.

On cause shown, by petition to the court, an attorney may be permitted to "withdraw" his appearance, timely notice having first been given to the client.[2]

An appearance by a person admitted to practice is received as evidence of his authority; otherwise as to an attorney in fact.[3]

A general appearance waives all questions as to the service of process, and is, moreover, equivalent to a personal service. Its effect is not disturbed by the withdrawal of the attorney. The question of jurisdiction alone is saved.[4]

But, under the privilege of a special appearance, a person cannot avail himself of the advantage of a general appearance.[5]

See ABIDE· VENIRE.

APPENDAGE. See APPENDANT; INCIDENT; RAILROAD.

Where the question was whether a stereoscope, with views, was a "necessary appendage" to a schoolhouse, the court said that the words quoted, as used in a statute, referred to things connected with the building or designed to render it suitable for use as a schoolhouse.[6]

Under the same statute charts and maps to be hung upon the walls may be called "appendages" or "apparatus."[7]

Certainly a well would be a necessary appendage;[8] and, also, a fence around the school building.[9]

APPENDANT.[10] Annexed to another and superior thing; belonging to something as the principal thing; also, the thing itself thus attached: as, an incorporeal inheritance to another inheritance, one power to another power.[11]

Said of a thing which belongs to another thing as its principal and passes as an incident to the latter.[1]

Or, of a thing used with, related to, or dependent upon, another thing more worthy, and agreeing in nature and quality with that other.[2] See APPENDAGE; APPURTENANCE.

APPERTAIN. One thing may appertain to another without adjoining or touching it.

Proof that pieces of land adjoin would not be proof that one appertained to the other. As a descriptive word in a deed "appertaining" imports use, occupancy; "adjoining" imports contiguity.[3] See ADJOINING; APPURTENANCE.

APPLICATION. 1. A written request, more or less formal, presented to a private person or to an official for the favorable exercise of his authority or discretion: as, an application for insurance[4] (*q. v.*), for an order of court, for a pardon, for remission of a fine.

2. Devoting, appropriating to an end or demand; also, the use or purpose itself to which a thing or fund has been set apart, distributed, or paid.

Misapplication. Improper or unlawful disposition or application.

It is not sufficient to aver simply that a defendant "willfully misapplied" trust funds: there must be averments to show how the application was made and that it was an unlawful one.[5]

Application of payments. The application of a general payment of money to the discharge of one or more of several demands.

The right must be exercised within a reasonable time after the payment and by an act which indicates an intention to appropriate. Where neither party has exercised the right the law presumes that the debtor intended to pay in the way which, at the time, was most to his advantage. Where, however, the interest of the debtor could not be promoted by any particular appropriation there is no ground for a presumption of any intention on his part, and the law then presumes that the payment was received in the way most advantageous to the creditor.[6]

The rule settled by the Supreme Court of the United States is that the debtor, or the party paying the money, may, if he chooses, direct its appropriation; if he fails so to do the right then devolves upon the cred-

[1] 3 Bl. Com. 278, 290.

[2] United States *v.* Yates, 6 How. 608 (1848).

[3] See Osborn *v.* United States Bank, 9 Wheat. 830 (1824); Hill *v.* Mendenhall, 21 Wall. 454 (1874).

[4] Eldred *v.* Michigan Ins. Bank, 17 Wall. 551 (1873); Creighton *v.* Kerr, 20 *id.* 12 (1873); 6 How. 608; 29 Kan. 683; 29 Minn. 46.

[5] National Furnace Co. *v.* Moline Iron Works, 18 F. R. 863 (1884).

[6] School District *v.* Perkins, 21 Kan. 587 (1879).

[7] School District *v.* Swayze, 29 Kan. 216 (1883).

[8] Hemme *v.* School District, 30 Kan. 381 (1883).

[9] Creager *v.* Wright School District, Sup. Ct. Mich. (1886).

[10] L. *ad-pendere*, to hang to.

[11] [4 Kent, 316, 404; 2 Bl. Com. 33.]

[1] [Meek *v.* Breckenridge, 29 Ohio St. 448 (1876).

[2] Leonard *v.* White, 7 Mass. 8 (1810); Coke, Litt. 121 *b*, 122 *a*; 3 N. H. 192.

[3] Miller *v.* Mann, 55 Vt. 479 (1882), Veazey, J.

[4] See 25 Minn. 539; 133 Mass. 85.

[5] United States *v.* Britton, 107 U. S. 669 (1883); R. S. § 5209.

[6] Harker *v.* Conrad, 12 S. & R. 304 (1824), Gibson, J.; Pierce *v.* Sweet, 33 Pa. 157 (1859).

itor; and if he fails in this respect the law will make the application according to its own notions of justice. Neither party can make it after a controversy upon the subject has arisen between them.[1]

APPOINTMENT. Fixing, establishing: limitation, selection, designation.

1. Selection for the duties of an office or place of trust.

Appointee. The person so designated, until qualified.

A commission, regularly issued, is conclusive evidence of an appointment.[2]

Where a common council voted to ballot for a municipal officer, in pursuance of a power conferred by charter to "appoint" such officer, it was held that the ballot taken was intended to be an election, that is, an appointment.[3]

Appointments to office are intrinsically executive acts, whether made by a court, a municipal council, an executive officer, or other person or body. A particular appointment is complete when the last act required of the appointing power is performed.[4] See OFFICE, 1; RESIGNATION.

2. Exercise of the right to designate the person who is to take the use of realty.[4]

An authority given to another to be exercised over property in a manner and to an extent which he would not otherwise possess.[5]

Also called *power* of appointment.

Appointor. He who executes the power; the *donee*. He who confers the power is the *donor*. **Appointee.** He in whose favor the power is executed.[6]

General appointment. Such appointment as enables the donee to name, as appointee, whom he pleases — even himself. **Special appointment.** Such as restricts the donee to naming one or more appointees from among particular persons.

The latter dates from the creation of the power; the former from its exercise.

Where a person, having a general power of appointment, by deed or by will, executes it, the property is deemed in equity a part of his assets, subject to the demands of his creditors in preference to the claims of voluntary appointees or of legatees.[1]

Illusory appointment. Allotment of a nominal, not of a substantial, interest.[2]

The rule at common law was to require some allotment to each person where several appointees were intended. But the rule in equity requires a real, substantial portion in each appointee — a merely nominal allotment being viewed not only as illusory but as fraudulent.[3]

A devise to a corporation for a charitable use is an appointment rather than a bequest.[4]

The donee must be competent to dispose of an estate of his own in like manner. All donees, or their survivors, must join in executing the power. The donor's intention is to be strictly observed. A partial execution may be upheld. The estate vests in the appointee as if conveyed immediately by the donor.[5] See further POWER, 2; USE, 3.

APPORTIONMENT. A division into shares, portions or proportions; distribution into proportionate parts.

Division of a fund, or property, or other subject-matter, in shares proportioned to different demands, or appropriate to satisfy rival claims.[6] Whence non-apportionable, unapportionable.

Thus, we have the apportionment — of an *annuity* to a part of the year; of a *contract*, not entire, to the part performed; of *dividends*, or money, in stocks;[7] of sums payable toward the support or removal of an *incumbrance;* of *freight* earned previously to a disaster to an abandoned ship;[8] of *loss* and *damage* caused by a collision of vessels, both parties being in fault;[9] of *rent*, where the leasehold or reversion is transferred, partitioned, levied on for debt, or set-off in dower, or where there are several assignees, or the premises become untenantable;[10] of *Representatives*, decennially, according to the increase of population;[11] of corporate *shares*, when more have been subscribed for than the charter allows to be issued.[12]

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[1] Nat. Bank of the Commonwealth *v.* Mechanics' Nat. Bank, 94 U. S. 439 (1876), cases; Nichols *v.* Knowles, 17 F. R. 495–96 (1881), cases; Bank of California *v.* Webb, 94 N. Y. 472 (1884), cases; McCurdy *v.* Middleton, 82 Ala. 137 (1886), cases; Sanborn *v.* Stark, 31 F. R. 18 (1887); 21 Cent. Law J. 473–79 (1885), cases. See also 9 Wheat. 730; 6 Cranch, 8; 1 Mass. 323; 88 Ind. 68–69, cases; 62 Miss. 8, 121, 500; 7 Oreg. 228; 59 Tex. 649; 55 Vt. 464, 543; 22 F. R. 570; 13 Am. Dec. 505, cases; 14 *id.* 694, cases; 1 Story, Eq. § 459 *b;* 2 Para. Contr. 629.

[2] United States *v.* Le Baron, 19 How. 79, 73 (1856); 1 Cranch, 137; 10 Pet. 343; 10 Oreg. 590.

[3] State *ex rel.* Coogan *v.* Barbour, 58 Conn. 83, 85–90 (1885), cases.

[4] [2 Washb. Real Prop. 302.

[5] [Blagge *v.* Miles, 1 Story, 442 (1841), Story, J.

[6] [4 Kent, 316.]

[1] Brandies *v.* Cochrane, 112 U. S. 352 (1884), cases; Sewale *v.* Wilmer, 132 Mass. 134–35 (1882), cases.

[2] See 3 Kent, 343; Ingraham *v.* Meade, 3 Wall. Jr. 40 (1855).

[3] Sugden, Powers, 489; 4 Kent 342.

[4] 2 Bl. Com. 376.

[5] 4 Kent, 324; 2 Story, Eq. §§ 1061–63; 2 Washb. R. P. 317–22, 298, 337.

[6] Abbott's Law Dict.

[7] 3 Kent, 470.

[8] 3 Kent, 333.

[9] 93 U. S. 302; 10 Beued. 658.

[10] 3 Kent, 469–71.

[11] 1 Kent, 230; Act 25 Feb. 1862: 22 St. L. 5.

[12] 1 Johns. Ch. 18; 1 Edw. 308.

At common law periodical payments, due at set times, were not apportionable.[1]

Guilt and negligence are unapportionable. See CONTRIBUTION.

APPRAISE.[2] To value; to estimate at a price, by authority of law.

Appraisement; appraisal; apprizal. The worth of property as estimated by an authorized person; also the act or proceeding by which the estimate is made.

An "apprizal" of property signifies a valuation of it, an estimation of its value, unless some other sense is plainly indicated.[3]

Appraisements are made — of the goods of a deceased; of articles set apart for the share or exemption of a widow; of the assets of an insolvent who has assigned his property for the benefit of creditors or who claims exemption of his statutory amount under proceedings in execution of a judgment; of property taken for public uses; of goods distrained for rent; of the goods of an importer.

Appraiser. One authorized to determine the value of an article or articles of property. See INDIFFERENT, 1.

Mercantile appraiser. An officer whose duty it is to ascertain the amount of business done by persons in the different mercantile pursuits and to regulate the tax or license fees to be paid by them on their business.

Government appraiser. The incumbent of a permanent office, selected by a collector of customs, and charged with the duty of valuing dutiable merchandise.

Merchant appraiser. An appraiser selected by an importer to act with a government appraiser.[4]

Re-appraiser. One chosen to make a second appraisement of dutiable goods.

The importer has a right to be present when re-appraisers view his goods. The re-appraisement is an apprizal on view, and the re-appraisers may ascertain the value of the merchandise by reasonable means, and determine what witnesses, if any, they will examine. The merchant appraiser who may be called in is not an "officer" within the meaning of Art. II of the Constitution; and the exaction of a fee for his compensation is not authorized.[5]

APPREHENSION.[6] Strictly, seizing and taking hold of a man, but may apply to detaining a person already in custody.[1] See ARREST, 2, 3; ATTACH, 2.

APPRENTICE.[2] A learner: a species of servant usually "bound" for a term of years, by indenture, to serve his master and be maintained and instructed by him.[3]

One bound to service for a term of years in order to learn a trade or art.[4] Whence apprenticeship. "Apprentice" is also used in a verbal sense.

"A young person bound by indenture to a tradesman or artificer who, upon certain covenants, is to teach him his mystery or trade." To constitute an apprenticeship something is to be *learned:* this is the characteristic mark of the service to be performed.[5]

Ex vi termini implies service in some specific profession, trade, or employment.[6]

This form of binding is usually done to persons of trade in order to learn their art and mystery; but it may be done to husbandmen and others. The children of poor persons, till twenty-one years of age, may be apprenticed by the overseers of the poor to such as are thought fitting; and these in turn may be compelled to take them.[7]

The "teacher" is called the *master.* The contract is signed by the immediate parties. The period continues till twenty-one in a male and eighteen in a female, or longer by consent. The master takes the place of the parent. He may discharge the apprentice for reasonable cause. Each party is supposed to work for the other's interest. At common law the contract is not assignable.[8]

Apprenticeship had its origin in days when the various trades were encompassed with restrictions as to the persons who might enter them. Modern customs, which have so greatly relaxed the rules governing the exercise of the arts and trades, have correspondingly modified the strict characteristics of apprenticeship.[9]

Local statutes and decisions should be consulted.

APPRIZAL. See APPRAISE.

APPROACH. See BRIDGE.

APPROBARE. L. To approve; literally, to test, try, prove good.

Qui approbat, non reprobat. He who approves cannot reject.

One cannot both accept and reject the same thing. One may not both affirm and deny.

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[1] 3 Kent, 469.

[2] F. *apreiser*, to value: L. *pretium*, price.

[3] Cocheco Manuf. Company *v.* Strafford, 51 N. H. 482 (1871), Doe, J.

[4] Belcher *v.* Linn, 24 How. 523 (1860): R. S. §§ 2609-10, 2946. See also Oelbermann *v.* Merritt, 19 F. R. 409 (1884); Oelbermann *v.* Merritt, 123 U. S. 356 (1887).

[5] Auff Mordt *v.* Hedden, 30 F. R. 360 (1886), Wheeler, J.

[6] L. *ad-prehendere*, to lay hold of.

[1] Regina *v.* Weil, 47 L. T. R. 632 (1883); s. c. 15 Rep. 413.

[2] F. *apprendre*, to learn: L. *apprehendere*, to lay hold of, grasp.

[3] [1 Bl. Com. 426; 3 *id.* 26.

[4] [2 Kent, 261.

[5] Hopewell *v.* Amwell, 3 N. J. L. *425 (1808). See also State *ex rel. v.* Jones, 16 Fla. 316-18 (1878).

[6] *Re* Goodenough, 19 Wis. 277 (1865), Dixon, C. J.

[7] 1 Bl. Com. 426.

[8] 2 Kent, 261; 1 Bl. Com. 460.

[9] Abbott's Law Dict.

APPROBATE. See ALLEGARE, Allegans contraria, etc.

APPROPRIATE.[1] 1, *v.* (1) To take to one's self; to take as one's own — for one's self:[2] as, to appropriate running water; to appropriate the personalty of another is a conversion, an embezzlement, or larceny, *qq. v.* Whence appropriation, appropriator, appropriable. Compare ACQUIRE; OCCUPY.

To appropriate another's goods against his will is to take them from him to one's self with or without violence.[3] See CONVERSION, 3.

(2) To adopt as distinctively one's own: as, to appropriate a design or symbol for a trademark,[4] *q. v.*

(3) To reserve for a distinct purpose; to destine to a particular end: as, to appropriate property to an exclusive use, or a fund to the discharge of special demand.

A space is not appropriated to the use of passengers on board a vessel as long as one person is allowed an individual use of it.[5]

"Appropriated lands," in a pre-emption law: land applied to some specific use or purpose by virtue of law.[6]

In the expression "appropriate property of any individual to public uses," the term embraces every mode by which property may be applied to the use of the public. Whatever exists which public necessity demands may be thus appropriated.[7] See further DOMAIN, 1, Eminent.

A direction to an executor to "appropriate" funds is an implication that he is assumed to hold that which he is directed to appropriate.[8]

"Appropriations" in a will means a designation to a particular exclusive use.[9]

The "appropriation of public money" is the disposition of public moneys from the treasury by law;[10] — an authority from the legislature, given at the proper time and in legal form, to the proper officers, to apply sums of money out of that which may be in the treasury in a given year to specified objects or demands against the State.[10]

While, as referring to funds, "appropriate" and "apply" are often interchanged, "appropriate" may mean rather to decide that a certain fund shall be devoted to a specific purpose, and "apply" to make the expenditure in fact. See further APPLICATION, 3.

[1] L. *appropriare*, to make one's own — *proprius*.
[2] See 8 Oreg. 102; 9 *id.* 231.
[3] [Waters *v.* United States, 4 Ct. Cl. 393 (1868).
[4] 100 U. S. 95; 101 *id.* 53.
[5] United States *v.* Nicholson, 8 Saw. 164 (1882); R. S. § 4252.
[6] McConnell *v.* Wilcox, 2 Ill. 360, 359 (1837).
[7] Boston, &c. R. Corporation *v.* Salem, &c. R. Company, 2 Gray, 25 (1854), Shaw, C. J.
[8] Blake *v.* Dexter, 12 Cush. 568 (1853), Shaw, C. J.
[9] Whitehead *v.* Gibbons, 10 N. J. E. 237 (1854).
[10] Ristine *v.* State, 20 Ind. 338 (1863), Perkins, J

APPROPRIATE. 2, *adj.* Adapted to the purpose: proper, fit, suitable, *q. v.*: as, the appropriate departments of the government;[1] appropriate legislation;[2] an appropriate remedy[3] or decree.[4]

APPROVE. 1. To accept as good or sufficient for the purpose intended. Opposed, *disapprove*. See APPROBARE.

Public sales are made on "approved, indorsed notes" when the purchaser gives his promissory note for the amount of a purchase, indorsed by another and approved by the seller. The approval of the note ratifies the sale.[5]

See SALE, On approval; RATIFICATION.

2. To deem of sufficient security: as, to approve a bond.

"Approved" indorsed on a bond by the judge of a court does not necessarily import more than that the bond is deemed a sufficient security to be accepted. It does not include a direction that the bond is to stand in lieu of another bond and that the other is discharged.[6]

3. To affirm as lawful and proper; to give judicial sanction to: as, to approve the report of an auditor, a master, or trustee. See CONFIRMATION, 3.

4. To concur in the propriety or expediency, the legality or constitutionality of; to give executive sanction to: as, to approve an ordinance proposed by the councils of a city, to approve an act of an Assembly or of Congress. See ACT, 2; PASS, 2; VETO.

5. To confess a felony or treason and accuse another as accomplice in order to obtain a pardon.

Approvement. The confession made in such case, and the act of making it.

Approver. He who makes such a confession.

The accused is the "appellee."

When a person indicted for treason or felony was arraigned he might confess the charge before plea pleaded and appeal or accuse some other as his accomplice, in order to obtain a pardon. This, allowed in capital cases only, was equivalent to an indictment, as the appellee was required to answer the charge. If proven guilty the judgment was against the appellee; and the approver was entitled to a pardon *ex debito justitiæ;* but if the appellee was acquitted the judgment was that the approver be condemned.[7] See ACCOMPLICE.

[1] 101 U. S. 770.
[2] 100 U. S. 345.
[3] 100 U. S. 311.
[4] 101 U. S. 338.
[5] Mills *v.* Hunt, 20 Wend. 435 (1838); Guier *v.* Page, 4 S. & R. 1 (1818).
[6] United States *v.* Haynes, 9 Bened. 25 (1877).
[7] 4 Bl. Com. 330; Rex *v.* Rudd, 1 Cowp. 335 (1775).

APPURTENANCE.[1] A right connected with the enjoyment or use of another thing as principal; also, the thing itself out of which the right grows as an incident.

Appurtenant. Connected with or pertaining to a thing of superior nature.

In strict legal sense land can never be appurtenant to land. A thing to be appurtenant to another thing must be of a different and congruous nature; such as an easement or servitude, or some collateral incident belonging to and for the benefit of the land. In Coke, Litt. 121 *b*, it is said that nothing can be appurtenant unless the thing agrees in quality and nature to the thing whereunto it appurtaineth; as a thing corporeal properly cannot be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. There are many other authorities to the same effect. In a case, therefore, where the words of a grant pass land "with its appurtenances" the law, in the absence of controlling words, will deem "appurtenances" to be used in its technical sense; and that construction will not be displaced until it is made manifest from other parts of the grant that some other thing was actually intended.[2]

Something appertaining to another thing as principal, and passing as an incident to such principal.[3]

A right not connected with the enjoyment or use of a parcel of land cannot be annexed as an incident to that land so as to become appurtenant to it.[4]

The expression "appurtenances of a ship" is not to be construed with reference to the abstract naked idea of a ship. The relation which the equipment bears to the actual service is to be looked at. "Appurtenances" is a word of wider extent than "furniture" (*q. v.*) and may be applied to many things which could not be so described with propriety in a contract of insurance. The tackle, apparel, and furniture form a part of every ship, but that is not a part which is only appurtenant as necessary for a special voyage.[5]

Compare APPENDANT; INCIDENT.

AQUA. L. Water.

Aqua cedit solo. Water passes with land: a grant of land conveys water rights.

One cannot bring an action to recover possession of a piece of water by the name of water only, by calculating its capacity, by superficial measurement, or by a general description, as for a pond, a water-course, etc. His action must be for so much land covered with water.[1]

Aqua currit, et debet currere, ut currere solebat. Water runs and should run as it has been used to run: a running stream is to be let flow in its channel as nature has provided.

Running water must be used according to the order of nature. Thus, rain-water and drainage are to follow nature's channel — the course in which the water, peaceably and openly, has long been permitted to run.[2]

By the common law all riparian owners on the same stream have an equality of right to the use of the water as it naturally flows, in quality and without diminution in quantity except as created by a reasonable use for proper purposes. Hence, one may not throw back, nor divert, nor unreasonably detain, nor deteriorate or poison the water. But exclusive use for twenty years may constitute a conclusive presumption of right.[3]

A riparian owner on a stream must so use his right as not to injure the concomitant right of another owner, and subject to statutory regulations. Where he owns land on one side his use extends to the middle thread of the stream. The right includes a right to erect mill dams and rights of fishery — both which have their source in the ownership of the soil.[4]

A land owner has no better right to stop the flow of a water-course which has its origin on his land than if it arose elsewhere.[5]

No action can be maintained for changing the course or obstructing the flow of mere surface-water by erections on adjoining land. A party cannot by his own act alone convert a flow of surface-water into a stream with the legal incidents of a natural water-course, but the right may be acquired by adverse user for the proper period.[6]

The courts will enjoin as a public and a private nuisance hydraulic mining which becomes injurious to navigation and destructive to the farms of riparian owners.[7]

A person operating a coal mine in the ordinary and usual manner may, upon his own land, drain or pump the water which percolates into the mine into a stream

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Whiskey Cases (United States *v.* Ford), 99 U. S. 599 (1878); Oliver *v.* Commonwealth, 77 Va. 592 (1883).

[1] F. *apartenir*, to belong to: L. *ad-per-tinere*, to extend through to.

[2] United States *v.* Harris, 1 Sumn. 37–38 (1830), Story, J. See also Whitney *v.* Olney, 3 Mas. 281–83 (1823), Story, J.; 39 Ark. 135; 15 Cal. 186; 57 *id.* 14; 8 Allen, 291, 295; 28 Minn. 262; 58 N. H. 508; 15 Johns. 447; 93 N. Y. 549; 29 Ohio St. 648; 9 Oreg. 398; 10 S. & R. 63; 13 Pa. 495; 58 *id.* 253; 13 Am. Dec. 657–60, cases; 4 Kent, 467.

[3] [Harris *v.* Elliott, 10 Pet. *54 (1836), Thompson, J.

[4] Linthicum *v.* Ray, 9 Wall. 241 (1869), Field, J.

[5] Swift *v.* Brownell, 1 Holmes, 473–74 (1875), cases, Shepley, J.; The Witch Queen, 3 Saw. 202–3 (1874), cases; 2 Low. 40.

[1] 2 Bl. Com. 18.

[2] Kauffman *v.* Griesemer, 26 Pa. 412–16 (1856); Blanchard *v.* Baker, 8 Me. *265 (1832); 2 Bl. Com. 395.

[3] Atchison *v.* Peterson, 20 Wall. 511 (1874), cases; Tyler *v.* Wilkinson, 4 Mas. 400–2 (1827), cases, Story, J.; Silver Spring Bleaching, &c. Co. *v.* Wanskuck Co., 13 R. I. 615 (1882); 3 Kent, 439.

[4] Holyoke Company *v.* Lyman, 15 Wall. 506 (1872), Clifford, J.

[5] Howe *v.* Norman, 13 R. I. 488 (1882).

[6] Dickinson *v.* Worcester, 7 Allen, 22 (1863), cases. Stanchfield *v.* Newton, 142 Mass. 110 (1886).

[7] Woodruff *v.* North Bloomfield Gravel Mining Co., 18 F. R. 753 (1884); 16 *id.* 25. See also 6 Col. 447, 530; 92 N. Y. 490.

which forms the natural drainage of the basin, although the quantity of water may thereby be increased and its quality rendered unfit for domestic purposes by lower riparian owners. The use of the stream by such owners must *ex necessitate* give way to the interests of the community, in order to permit the development of the natural resources of the country and make possible the prosecution of the business of mining coal.[1]

On the mineral lands of the public domain in the Pacific States and Territories the doctrines of the common law are inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection; there, prior appropriation gives the better right to running waters to the extent in quantity and quality necessary for the uses to which the water is applied. What diminution of quantity or deterioration in quality will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case; and in controversies between him and parties subsequently claiming the water the question for determination is whether his use of the water to the extent of the original appropriation has been impaired by the acts of the other parties. Whether a court of equity will interfere to restrain acts of invasion upon the rights of the first appropriator will depend upon the character and extent of the injury alleged, whether it be irremedial in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations ordinarily governing a court of equity in the exercise of its preventive process of injunction.[2]

The civil law acts upon the maxim that water is descendible by nature, that its usual flow should not be interfered with, and that its burden should be borne by the land through or over which it naturally flows, rather than by land through which it can be made to flow only by artificial means. The common law does not recognize this principle as to surface-water, but permits one to protect his premises against it, not regarding as injury any resulting inconvenience. The maxim of the civil law, *aqua currit*, etc., applies generally, in both systems, to running water, subject to such reasonable qualifications as the interests of agriculture require and the enjoyment of private property will permit. As an owner has the right to protect his lands from the violence of the current, or to improve the same by erecting embankments, and as this cannot be done without increasing the flow upon the opposite side, it follows that this must be permitted to some degree by all persons owning lands upon the stream, else the right cannot be exercised by any one of them.[3]

See ALLUVION; ICE; MILL, 1; RIPARIAN; SPRING; THREAD; WATER; WATER-COURSE.

[1] Pennsylvania Coal Co. *v.* Sanderson, 113 Pa. 126, 162-63 (1886), cases.

[2] Atchison *v.* Peterson, 20 Wall. 507, 511-16 (1874), cases, Field, J.; Bosey *v.* Gallagher, *ib.* 681-85 (1874), cases; Tartar *v.* Spring Creek Water & Mining Co., 5 Cal. 397 (1855); Sanford *v.* Felt, 71 *id.* 250 (1886), cases.

[3] Crawford *v.* Rambo, 44 Ohio St. 284, 292-97 (1886), cases, Minshall, J. See also Barkley *v.* Wilcox, 86 N. Y. 143-48 (1881), cases.

Aquarium. See ENTERTAINMENT.

AQUATIC. See AQUA; RIPARIAN.

ARBITRARY.[1] Not governed by fixed rules; not defined by statute; discretionary: as, arbitrary punishment. See DISCRETION; JUDGE.

Without cause or reason shown; as, an arbitrary challenge.[2]

Arbitrarily. In a covenant not "arbitrarily" to withhold assent to an assignment of a lease means, without fair, solid, and substantial cause, and without reason given. A refusal grounded upon advice was held not arbitrary.[3] Compare SATISFACTORY.

ARBITRATION.[4] When the parties injuring and injured submit all matters in dispute, concerning any personal chattel or personal wrong, to the judgment of two or more arbitrators who are to decide the controversy.[5]

A like submission of *any* matter in dispute.

Although some jealousy is felt in allowing references of questions regarding realty, yet references have been had in cases of partition, disputed boundaries, waste by tenant, title of devisees, and generally upon titles. But crimes and misdemeanors are not subjects.[6]

Arbitrator. A private extraordinary judge chosen by the parties who have a matter in dispute, and invested with power to decide the same.[7]

Compulsory arbitration. When assent in one party is enforced by law, under a rule to refer. **Voluntary arbitration.** A reference freely consented to by both parties.

At common law, was *in pais* — by agreement out of court, with no compulsory power over witnesses. In pursuance of 9 and 10 Will. III (1698), c. 15, is *by rule of court* — by order of a court directing that a submission upon a matter not yet in court shall be made a rule of the court.

The statute enacts that all merchants and others who desire to end any controversy, suit, or quarrel (for which there is no remedy but by personal action or suit in equity) may agree that their submission of the suit to arbitration or umpirage shall be made a

[1] L. *arbitrarius*, capricious.

[2] 4 Bl. Com. 353.

[3] Treloar *v.* Bigge, L. R., 9 Ex. 154 (1874).

[4] L. *arbitrare*, to act as umpire: *arbiter*, a witness, a judge.

[5] 3 Bl. Com. 16.

[6] Brown's Law Dict.

[7] [Gordon *v.* United States, 7 Wall. 194 (1868), Grier, J.: Bouvier; 17 How. 394; 53 Barb. 595.

rule of the king's courts of record, and may insert such agreement in their submission or promise, or as the condition of the arbitration-bond; which agreement being proved upon oath by a witness thereto, the court shall make a rule that such submission and award shall be conclusive.[1]

A bond to abide the decision may be required. The arbitrators are the judges of both the law and the facts. They are not bound to disclose the grounds of their finding. They cannot modify or go beyond the precise question submitted; nor can they do general equity.[2]

Irregularities in appointing arbitrators, or in their proceedings, when apparent on the record, may be corrected by a writ of error; but those which are made so by extrinsic proof can be corrected only by the court below. Every presumption is made in favor of the award, unless flagrant error appears on the record. While the proceedings remain in court (that is, until the arbitrators are appointed), it must appear by the record that everything is regular, but after they are appointed the proceedings are out of court and need not be reduced to writing.[3]

The powers and duties of arbitrators are regulated by statute, and explanatory decisions, in each State.

Arbitrations are regarded favorably. If they settle the rights of the parties, and their award can be rendered certain by reference to documentary evidence, they will be sustained. An award which leaves nothing to be done to dispose of the matter except a ministerial act is sufficient.[4]

See further ABIDE; AWARD, 2; REFER, 1; UMPIRE.

Arbitration of exchange. See EXCHANGE, 3.

ARCHITECT. See LABORER.

Every person whose business it is to plan, design, or superintend the construction of buildings, ships, roads, bridges, canals, or railroads, shall be regarded as an architect and civil engineer: *Provided*, That this shall not include a practical carpenter who labors on a building.[5] See SPECIFICATION.

ARGUENDO. See ARGUMENTUM.

ARGUMENT. Proof or the means of proving, or inducing belief; a course or process of reasoning; an address to a jury, or a court. See ARGUMENTUM.

When a controverted question of fact is to be submitted to a jury for its determination either party has an absolute right to be heard in argument thereon. The power of the court is limited to imposing reasonable restrictions as to the time to be occupied.[6] See ATTORNEY.

[1] 3 Bl. Com. 17.

[2] 7 Morse, Arb. & Award, 181–83, cases.

[3] Wilcox *v.* Payne, 88 Pa. 157 (1878); Tobey *v.* County of Bristol, 3 Story, 800, 822 (1845); Corbin *v.* Adams, 76 Va. 61 (1881); Gaylord *v.* Norton, 130 Mass. 74 (1881).

[4] Cochran *v.* Bartle, 91 Mo. 646 (1887), cases.

[5] [Revenue Act, 13 July, 1866: 14 St. L. 121.

[6] Douglass *v.* Hill, 29 Kan. 529 (1883), cases; Foster *v.* Magill, 119 Ill. 82 (1886); 18 Cent. Law J. 363–68 (1884), cases.

Argument list. A calendar of causes for discussion and determination before a court in banc, upon questions of law. See BRIEF, 2.

Argumentative. By way of reasoning: as, that a plea must not be argumentative.[1]

Re-argument. A second or additional argument.

Sometimes ordered by a court of review when the court wishes to hear counsel upon a material question of law either not fully discussed in the first argument or passed by unnoticed and developed later in the deliberations of the court.

ARGUMENTUM. L. Argument: literally, that which makes clear or proves. *Arguere*, to argue.

Arguendo. In reasoning, arguing. Abbreviated *arg.*

Applied to an observation made by a judge in rendering an opinion, incidental to the point under discussion and, therefore, not authoritative.

Argumentum a simile. Argument from a like case — from analogy.

Argumentum a simile valet in lege. An argument from an analogous case has weight in law. See SIMILIS.

Argumentum ab inconvenienti. Argument from a hardship, *q. v.*

ARISE. See JUDICIAL, Power.

ARIZONA. See TERRITORY, 2.

ARM OF THE LAW. See INJUNCTION.

ARM OF THE SEA. See SEA.

ARMA. L. Weapons; war, warfare. See ARMS, 2; LEX, Silent leges, etc.; VIS, Vi, etc.

ARMED REBELLION. See WAR.

ARMS. Weapons, offensive or defensive. See ARMA.

1. **Aggressive weapons; instruments of attack.**

At common law one may carry arms for defense. But going armed with dangerous or unusual weapons by terrifying the people, is a crime against the peace.[1] See DEFENSE, 1.

Playfully or wantonly pointing fire-arms at another, which was an assault at common law, has been made a statutory offense with increased punishment.

Discharging fire-arms within the limits of incorporated towns and cities is generally prohibited.

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[2]

[1] 3 Bl. Com. 308.

[2] 1 Bl. Com. 143; 4 *id.* 149.

[3] Constitution, Amd. Art. II. Ratified Dec. 15, 1791

This right is preserved, also, by the Bill of Rights of each State, and the exercise regulated by statute.

The right to bear arms is not a right granted by the Constitution; nor is it dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed — by Congress.[1] See AMENDMENT, 2; POLICE, 2.

While it is true that that Amendment is a limitation upon the powers of Congress only, nevertheless, since all citizens capable of bearing arms constitute the reserved military force of the National government, a State cannot prohibit the people from keeping and carrying arms so as to deprive the United States of their rightful resource for maintaining the public safety.[2]

The right to bear arms for the common defense does not mean the right to bear them ordinarily or commonly, for individual defense, but refers to the right to bear them for the defense of the community against invasion or oppression. In order that he may be trained and efficient in their use, the citizen has the right to keep the arms of modern warfare and to use them in such manner as they may be capable of being used, without annoyance and hurt to others.[3]

By arms, in such connection, is meant such as are usually employed in civilized warfare and constitute the ordinary military equipment.[4] See TREASON; WAR; WEAPON.

2. Anything that may be used for defense or attack: as, staves, sticks, or other missiles, as well as fire-arms. Whence "force and arms." See FORCE, 2; VIOLENCE.

ARMY. See ENLISTMENT; MARTIAL LAW; NATURALIZAITON (R. S. § 2166); REINSTATE; STATION, 1; WAR.

ARPEN; ARPENT. A measure of land in use in this country, in the early French and Spanish times, nearly corresponding to the English acre.[5]

ARRAIGN.[6] To call upon to account or answer.[7]

To call a prisoner to the bar of the court to answer the matter charged upon him in the indictment.[8]

Arraignment. The act or proceeding of arraigning.

At common law the arraignment of a prisoner consists in calling him to the bar; in his holding up his hand — for identification; in reading the indictment to him — that he may understand the charge; in demanding whether he is guilty or not guilty; and in inquiring how he will be tried — the common answer being "By God and my country."[1]

Constitutes no part of the trial, but is a preliminary proceeding. Until the party has pleaded, it cannot be known whether there will be any trial or not.[2]

In a State in which the constitution provides that the trial of crimes shall be by jury and the prisoner pleads "not guilty," it is mere mockery to ask him how he will be tried, for the constitution has already declared how that shall be. As soon as it judicially appears of record that the party has pleaded not guilty there is an issue which the court is bound to direct to be tried by a jury.[3]

Though a formal arraignment may be proper it is not essential to the power of the court to convict, when expressly waived by the accused; especially so since there are no longer the same reasons for the formalities of an arraignment that there were in ancient practice when proceedings were in Latin, and the accused could not appear with counsel, and, after a plea of not guilty, he was required to elect between trial by jury and ordeal or wager of battel.[4] See BATTEL.

The ancient formality is disused. The statutory requirement of furnishing the prisoner with a copy of the indictment takes the place of reading the indictment to him. The record should show that what took place amounted to an arraignment — as, the mention of the prisoner's presence in court, and that he was called upon to plead to the indictment.[5]

ARRAY.[6] Order; arrangement.

The whole body of jurors as arranged upon the panel. Whence challenge to the array.[7] See CHALLENGE, 4.

ARREAR.[8] Back, remaining back: unpaid, though due.

Arrears. Money unpaid after it is due; as, of interest, dividends, rent, taxes, wages, pensions, alimony, dower.

"In arrear" — overdue and unpaid.[9]

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[1] United States v. Cruikshank, 92 U. S. 553 (1875), Waite, C. J.

[2] Presser v. Illinois, 116 U. S. 265 (1886), Woods, J.

[3] Andrews v. State, 3 Heisk. 177–89 (Ky., 1871), Freeman, J.

[4] Andrews v. State, 3 Heisk. 184, *supra;* 2 Humph. 158–59. See also State v. Reid, 1 Ala. 614–22 (1840), Collier, C. J.; Wright v. Commonwealth, 77 Pa. 470 (1875); 3 Phila. 610; 2 Litt., Ky., 90; 1 Kelly, Ga., 247–51; 2 Story, Const. §§ 1890–90; 8 Am. Rep. 22; 14 *id.* 380.

[5] See 12 How. 426; 6 Pet. 709; 4 Hall, L. J. 518.

[6] L. *ad rationem ponere*, to call to account, — 2 Hale, P. C. 216. F. *aranier*, to speak to, cite: *raison*, reason.

[7] State v. Weber, 22 Mo. 325 (1855).

[8] 4 Bl. Com. 322.

[1] 4 Bl. Com. 322–24. See 1 Steph. Hist. C. L. Eng. 227.

[2] United States v. Curtis, 4 Mas. 236 (1826), Story, J.

[3] United States v. Gilbert, 2 Sumn. 69 (1834), Story, J.; State v. Weber, 22 Mo. 325–27 (1855).

[4] Goodwin v. State, 16 Ohio St. 346 (1865), Day, J

[5] Fitzpatrick v. People, 98 Ill. 260 (1881), Sheldon, J. See also Lynch v. Commonwealth, 88 Pa. 198 (1878); Ray v. People, 6 Col. 231 (1882).

[6] F. *arrai*, preparation, order.

[7] 3 Bl. Com. 359; 4 *id.* 352.

[8] Old Eng. *arere, rere*, in the rear: F. *riere;* L. *retro*, backward.

[9] Hollingsworth v. Willis, 64 Miss. 157 (1886).

Said of money unpaid at the time it is due, that is, past due.[1]

"Arrear" implies that no part has been paid; "arrears" and "arrearage," that some part has been paid.[2] See RIEN.

ARREST.[3] 1, *v.* To delay, detain, stay, stop, withhold.

Arrest of judgment. If, while an issue of fact is regularly decided, it appears that the complaint was either not actionable or was not made with sufficient precision, the defeated party may supersede it by arresting or staying the judgment.[4]

Arrests of judgment arise from intrinsic causes appearing upon the face of the record. As, where the declaration varies totally from the original writ; where the verdict materially varies from the pleadings and issue thereon; or, when the case laid in the declaration is not sufficient in law upon which to found an action.[5]

An invariable rule is that whatever matter of law is alleged in arrest of judgment must be such matter as, upon demurrer, would have been sufficient to overthrow the action or plea.[6]

A defendant in a criminal prosecution, at any time before sentence, may offer exceptions to the indictment in arrest or stay of judgment; as, for want of sufficient certainty in setting forth either the person, the time, the place, or the offense.[6]

The motion should be predicated upon some defect which appears upon the face of the record.[7]

2, *n.* Taking a thing or a person into the custody of the law.

(1) In admiralty practice the technical term for an actual seizure of property.[8]

After an order of discharge from arrest the marshal is to restore the party to formal possession.[9] See ATTACH, 2; RES, 2; SEIZURE.

(2) In civil practice apprehension of a person by virtue of lawful authority to answer the demand against him in a civil action.[10]

Restraint of the person — restriction of the right of locomotion.[1]

The causes are mainly torts — as, frauds upon creditors, breaches of promise to marry, non payment of taxes, non-compliance with the order of a court, professional or official misconduct.

May be made upon original, mesne, or final process.

(3) In criminal practice apprehending or detaining one's person in order to be forthcoming to answer an alleged or suspected crime.[2]

"Apprehension" (*q. v.*) is sometimes used distinctively for this species of arrest.

Taking, seizing, or detaining the person of another, touching or putting hands upon him in the execution of process, or any act indicating an intention to arrest, constitutes an arrest.[3] Usually effected by means of a —

Warrant of arrest. A written judicial order for the arrest of a person accused or suspected of having committed a crime.

This must be in writing, under the hand and seal of the magistrate, and state the cause of commitment, that it may be examined into, if necessary, upon a writ of *habeas corpus*.[4]

All processes for the arrest of a party are not included in the word "warrant" as used in the constitutional provision that no warrant shall issue for the arrest of a person but upon probable cause supported by oath or affirmation. A *capias*, or writ of arrest in a civil action, is not a warrant in the sense intended, and it is issued, at common law, as a matter of course, without oath. The warrant meant is an authority for the arrest of a person upon a criminal charge with a view to his commitment and trial. The arrest of a person upon a charge of insanity, for the purpose of his confinement, partakes more of the nature of a criminal than of a civil proceeding.[5]

Double arrest. Twice holding a defendant to bail for the same cause of action.

Not allowed except under very special circumstances. There cannot be an arrest in two places for the same cause of action.[6]

False arrest. Any restraint upon the liberty of a person without lawful cause; false imprisonment.

Malicious arrest. An arrest made without probable cause.

The malice necessary to sustain an action is not express malice or the specific desire to vex or injure

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[1] Wiggin *v.* Knights of Pythias, 31 F. R. 125 (1887), Hammond, J.

[2] Webster's Dict.

[3] F. *arester*, to stay: L. *re-stare*, to stand back, to remain.

[4] [3 Bl. Com. 387.

[5] 3 Bl. Com. 393–94.

[6] 4 Bl. Com. 375. See also Delaware Canal Co. *v.* Commonwealth, 60 Pa. 371 (1869).

[7] Rountree *v.* Lathrop, 69 Ga. 589 (1882); People *v.* Kelly, 94 N. Y. 526 (1884).

[8] Pelham *v.* Rose, 9 Wall. 107 (1869), Field, J.; The Lottawanna, 20 *id.* 221–22 (1873).

[9] The Maryâ, 10 Bened. 561–62 (1879).

[10] [Gentry *v.* Griffith, 27 Tex. 462 (1864), Moore, J.

[1] [Hart *v.* Flynn, 8 Dana, 192 (Ky., 1839), Ewing, J.

[2] [4 Bl. Com. 289; Montgomery County *v.* Robinson, 85 Ill. 176 (1877).

[3] United States *v.* Benner, Bald. 239 (1830), Baldwin, J.

[4] 1 Bl. Com. 137; 4 *id.* 290–91; 71 N. Y. 376; 92 *id.* 490; 4 Cr. L. M. 193–99.

[5] Sprigg *v.* Stump, 7 Saw. 289 (1881), Deady, J.

[6] See Hernandez *v.* Canobell, 4 Duer, 642 (1855); 14 Johns. *347; 4 Yeates, 206.

another, but the willful doing of an unlawful act to the prejudice or injury of another.[1]

All persons within the jurisdiction of the court are liable to arrest on *civil process*, except — an ambassador and his servant; an attorney, suitor, or subpœnaed witness as such attending a lawful tribunal; a clergyman at divine service; an elector at a public election; a married woman on her contract; a lawmaker in attendance upon the legislative body; a soldier on military duty; sovereigns, governors of the States; and other persons, as provided in local statutes.

In the case of persons attending a tribunal or a legislature the privilege protects them not only during attendance, but also during the reasonable period required for going and returning, — *eundo, morando, et redeundo*, going, remaining, and returning.[2]

All persons in the public service are exempt, as a matter of public policy, from arrest upon *civil* process while thus engaged. The rule is different when the process is issued upon a charge of felony.[3]

May not be made in the presence of a court; nor on Sunday; nor, generally, at night.

When made upon final process merely giving bail does not authorize a discharge.

An unauthorized arrest renders the officer liable to trespass. This occurs when the process is materially irregular or informal, or issued from a court which has no jurisdiction, or when the wrong person is taken under legal process.[4]

All persons are liable to arrest on *criminal process* — except ambassadors and their servants. It may be made: 1. Under a warrant issued by a justice of the peace when he has jurisdiction; in a case of suspicion he is the sole judge of the probability. 2. By an officer without a warrant — when the peace is broken in his presence; and whenever he has probable cause to suspect that a felony has been committed and that the person he arrests is guilty; also, by watchmen, who keep watch and ward in towns, of all offenders, particularly night-walkers. 3. By a private person without a warrant — when the peace is broken in his presence; and whenever a felony has actually been committed and he has probable cause to know that the person he arrests was the perpetrator. 4. By hue and cry,[5] *q. v.*

May be made at night, and, for an indictable offense, on Sunday. Must be made within the jurisdiction of the court or at least of the State. The officer may use necessary force; but he may not kill one charged with a misdemeanor, in the act of escaping, and, rarely, one charged with a felony.[1]

One who is not a peace officer, *de jure* or *de facto*, by assuming to exercise the duties of such officer does not acquire more authority to make an arrest than any other private individual. In resisting arrest by such a person one may use only force enough to protect himself from the assault, — unless it is necessary to save his own life, or his person from great harm, in which case he may take life.[2]

See further BAIL, 1 (2); CAPERE; DURESS; ESCAPE, 2; HOUSE, 1; IMPRISON; OBSTRUCT, 3; PROSECUTION, Malicious; RESIST; REWARD, 1; SANCTUARY; SUSPICION; WARRANT, 2.

ARRIVAL.[3] Under a law imposing a forfeiture there may be an arrival of a vessel at a port without an actual entry or an attempt to enter the port.[4]

Perhaps an arrival "within" a port cannot be without an entry into the port.[6]

In navigation and revenue laws is sometimes used in the common sense of coming into port, and sometimes in the sense of coming into a port of entry or destination for a particular object connected with the voyage.[5]

Sometimes refers to a coming into a port for any cause or purpose. This may be the literal and general meaning with the lexicographers, but, in several cases, the term denotes a coming in for certain special objects of business and remaining there long enough to render an entry of the vessel proper, and a deposit of her papers with a consul prudent and useful. Thus it is when the vessel enters a port or harbor to close an outward or inward voyage. It is usually a coming to the place of the vessel's destination for her business and waiting to transact it.[6]

A vessel arrives at a port of discharge when she comes or is brought to the place where it is intended to discharge her and where the customary place of discharge is.[7]

As to arrival at destination of goods bailed to a common carrier, see CARRIER.

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[1] Johnson *v.* Ebberts, 11 F. R. 129 (1880), cases.

[2] See Bridges *v.* Sheldon, 18 Blatch. 516 (1880), cases; Atchison *v.* Morris, 11 F. R. 582 (1882), cases; Larned *v.* Griffin, 12 *id.* 590 (1882), cases: s. c. 14 Rep. 258; Nichols *v.* Horton, 14 F. R. 397, 829 (1882), cases; Jones *v.* Knauss, 31 N. J. E. 211–16 (1879), cases; Greer *v.* Young, Sup. Ct. Ill. (1887), cases: 26 Am. Law Reg. 372 (1887); *ib.* 377–82, cases; 11 N. E. Rep. 167; Palmer *v.* Rowan, Sup. Ct. Neb. (1888): 22 Am. Law Rev. 278–80 (1888), cases; 1 Greenl. Ev. §§ 316–17; 1 Whart. Ev. §§ 389–90.

[3] United States *v.* Kirby, 7 Wall. 486 (1868).

[4] 3 Bl. Com. 288–89; 1 Bouv. 183, cases.

[5] 4 Bl. Com. 289–94; Mitchell *v.* Lemon, 34 Md. 181 (1870), cases; Fleetwood *v.* Commonwealth, 80 Ky. 5 (1882); Neal *v.* Joyner, 89 N. C. 283–90 (1883), cases; Staples *v.* State, 14 Tex. Ap. 139–41 (1883), cases; Morley *v.* Chase, 143 Mass. 396 (1887), cases; Cooley, Torts, 174–75, cases.

[1] 4 Bl. Com. 293; United States *v.* Rice, 1 Hughes, 562–66 (1875), cases; Reneau *v.* State, 2 Lea, 720 (1879). On federal arrests of State prisoners, see 18 Cent. Law J. 163–65 (1884), cases.

[2] Creighton *v.* Commonwealth, 83 Ky. 142 (1885).

[3] F. *arriver:* L. L. *ad-ripare*, to land, come to shore.

[4] [United States *v.* Open Boat, 5 Mas. 132 (1828), Story, J.; United States *v.* Shackford, *ib.* 447 (1828).

[5] Parsons *v.* Hunter, 2 Sumn. 422–23 (1836), Story, J.

[6] Harrison *v.* Vose, 9 How. 379–81 (1850), statutes, Woodbury, J.

[7] Simpson *v.* Pacific Mut. Ins. Co., 1 Holmes, 137–43 (1872), cases, Shepley, J. See also Gronstadt *v.* Witthoff, 15 F. R. 269, 271 (1883).

ARS. L. Skill in fitting or joining: skill, trade, calling, art.

Cuique, or cuilibet, in sua arte perito, credendum est. To one practiced in his art, confidence should be given.

The opinion of a person versed in a calling is to be received as evidence. Every one, also, is presumed to possess the skill ordinarily requisite to the due discharge of the demands or duties of his vocation.[1] See further EXPERT.

ARSENAL. See LAND, Public.

ARSON.[2] The malicious and willful burning of the house or out-house of another.[3]

The malicious burning of another's house.[4]

Burning any building so situated as to endanger a dwelling-house was felonious arson at common law.[5]

In some States statutes divide the offense into degrees, punishing most severely burnings which involve the greater danger to life. Statutes also impose punishments for the malicious burning of structures not the subject of arson at common law, without extending that name to include them.

At common law an offense against the right of habitation. Actual destruction of some integral part of the wood-work, not personalty, is necessary. The burning is "willful and malicious" when not accidental nor for the public welfare. By "house" is meant a dwelling-house or any out-building within the curtilage, *q. v.* Brief absence from the house is not regarded. If homicide results the act is also murder.

The offense may be committed by willfully setting fire to one's own house and thereby burning a neighbor's house.[6]

Burning one's own house to defraud insurers has been made indictable.[7] See BELONG; BURN.

ART. 1. A principle put into practice by means of some art, machine, manufacture, or composition of matter. See ARS.

"The Congress shall have Power . . To promote the Progress of Science and Useful Arts, by securing to . . Inventors the exclusive Right to their . . Discoveries."[8]

In speaking of patenting an "art" the reference is not to an art in the abstract, without a specification of the manner in which it is to operate as a manufacture or otherwise, but to the art thus explained in the specification, and illustrated, when of a character so to be, by a machine or model or by drawings. It is the art so represented or exemplified, like the principle so embodied, which the patent laws protect. In the English patent acts the word "art" is not used at all. And in ours, as well as in the Constitution, the word refers to a "useful art," or to a manufacture which is beneficial, and which, by the same law, is required to be described with exactness as to its mode of operation.[1]

"Useful art" is the general term used in the patent laws. An art may require one or more processes or machines to produce a certain result or manufacture. The arts of tanning, dyeing, making water-proof cloth, vulcanizing India-rubber, smelting ores, and numerous others, are usually carried on by processes, as distinguished from machines.[9]

Without attempting to define the term "art" with logical accuracy we take as examples of it something which, in their concrete form, exhibit what all concede to come within a correct definition, such as the art of printing, that of telegraphy, or that of photography. The art of tanning leather might also come within the category because it requires various processes and manipulations.[2]

Centuries ago discoveries were made in certain arts the fruits of which have come down to us, but the means by which the work was accomplished are at this day unknown. It would hardly be doubted, if one discovered an art thus lost, and it was a useful improvement, that he would be entitled to a patent. He would not literally be the original inventor; but he would be the first to confer on the public the benefit of the invention.[4] See DESIGN, 2; PATENT, 2; PROCESS, 2.

2. A description of the art of book-keeping, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself.

The object of the one is explanation; of the other use. The former may be secured by copyright; the latter, if at all, by letters-patent.[5]

A copyright may be secured for models or designs intended to be perfected as works of the *fine arts* — painting and sculpture.[6] See COPYRIGHT.

American works of fine arts are importable free of duty.[7] See FURNITURE.

3. Trade; business; calling.

Words of art are understood as in the art or science; other words, in their popular or received import.[8]

When parties who are engaged in a particular business use terms which have acquired a well-defined meaning in that business, the supposition is that they intended the terms to have their ordinary technical meaning.[9]

A vessel was chartered to carry a cargo of oranges,

[1] 1 Bl. Com. 75; 2 Kent, 566; 21 How. 101; 9 Mass. 227.

[2] F. *arson*, incendiarism: L. *ardere*, to burn.

[3] 4 Bl. Com. 220; 40 Ala. 664; 20 Conn. *246.

[4] 2 Bishop, Cr. L. § 8.

[5] Hill *v.* Commonwealth, 98 Pa. 195 (1881); State *v.* McGowan, 20 Conn. *246–47 (1850).

[6] 4 Bl. Com. 220–23.

[7] 1 Whart. Cr. L. § 843; 32 Cal. 160; 51 N. H. 176; 19 N. Y. 537.

[8] Constitution, Art. 1, sec. 8, cl. 8.

[1] [Smith *v.* Downing, 1 Fish. P. C. 70–71 (1850), Woodbury, J.; French *v.* Rogers, *ib.* 142 (1850).

[2] Corning *v.* Burden, 15 How. 267 (1853), Grier, J.

[3] Jacobs *v.* Baker, 7 Wall. 397 (1868), Grier, J.

[4] Gayler *v.* Wilder, 10 How. 497 (1850), Taney, C. J.

[5] Baker *v.* Selden, 101 U. S. 105 (1879), Bradley, J.

[6] R. S. § 4952.

[7] Act 22 March, 1883: 22 St. L. 521.

[8] Maillard *v.* Lawrence, 16 How. 261 (1853); Moran *v.* Prather, 23 Wall. 499 (1874); Greenleaf *v.* Goodrich, 101 U. S. 284 (1879).

[9] South Bend Iron Works *v.* Cottrell, 31 F. R. 256 (1887).

the captain engaging to "take the northern passage." The cargo becoming damaged, the charterer libeled the vessel for the loss. The court below found that "northern passage" appeared to be a term of art, unintelligible without the aid of testimony, that the evidence concerning it was conflicting, but that it was immaterial to decide what it meant as the claimant was entitled to the least strict definition and the actual course of the vessel came within that definition. *Held*, that if the term was a term of art it should have been found by the court; and that if there was no passage known as the "northern," the vessel was bound to take the one which would carry it in a northerly direction through the coolest waters, and the court should have ascertained from the proof what passages vessels were accustomed to take and which passage the contract permitted.[1]

See ABBREVIATIONS; EXPERT; SCIENCE; TECHNICAL; TERM, 1.

ARTICLE.[2] 1. "A distinct portion or part, a joint or a part of a member, one of various things."

A word of separation to individualize and distinguish some particular thing from the general thing or whole of which it forms a part: as, an article in a newspaper, an article of merchandise.[3]

The radical word in the Greek means to join or to fit to as a part. It is only recently that it has been applied to goods or physical property, and then only in the sense of something that is separate and individual in itself, as salt is a necessary article, or a hammer is a useful article.[3]

When a carrier stipulates that he will not be liable in the carriage of baggage for an amount exceeding fifty dollars "upon any article," the reference is to any article coming under the denomination of baggage. The limitation would apply to the articles in a trunk, but not to the trunk as one article. "The article forwarded," in a similar special contract, may cover each of several articles so strapped together as to form one package.[3]

2. In the sense of a distinct portion, one of separate yet co-related parts, a clause in a contract, compact, or other formal document, is used in the expressions:

An article or articles — of agreement, of amendment, of association, of confederation, of impeachment, of partnership, of peace, of war, of separation, of shipping, *qq. v.*

In popular parlance "to article"[4] means to make and become bound by an article of agreement, *q. v.*

[1] The John H. Pearson, 121 U. S. 469, 472 (1887), Waite, C. J. Appeal from the Cir. Ct. for Mass.

[2] *F. article:* L. *articulus*, a small joint, a joint: Gk. *areiv'*, to fit to as part.

[3] Wetzell *v.* Dinsmore, 4 Daly, 195 (1871), Daly, C. J. See also 6 Blatch. 68; 8 *id.* 257.

[4] See 1 Story, Eq. § 790.

Articled clerk. In England a person bound by indenture to a solicitor, that he may acquire the knowledge pertaining to the business of a solicitor.

Articulately. By separate or distinct propositions: as, to articulately propound in a libel in admiralty. See LIBEL, 2.

3. Precise point of time; the exact moment: as, to be in the article of death — *in articulo mortis.*

ARTIFICE. See COMMUNICATION, Privileged, 1; DECEIT; FRAUD.

ARTIFICIAL. 1. Pertaining to an art, trade, or profession; technical. See ART, 2, 3.

Artificially. A will is said to be "artificially" or "inartificially" drawn, according as it employs or does not employ technical or legal words and phrases and a lawyer-like arrangement of the matter. See CONSTRUCTION.

2. Made or devised by human law; opposed to *natural* — formed by the laws of God: as, an artificial body or person, *q. v.*; an artificial day, *q. v.*

3. Established by agreement between men, conventional; opposed to *natural* — made by nature: as, an artificial boundary, *q. v.*

ARTS. See ART.

AS. Compare SUCH.

While the omission of this word is not conclusive when the body of a complaint discloses a representative capacity in the defendant as the ground of action, where the scope and averments of the complaint harmonize with the omission the action may be considered against the defendant as an individual.[1]

As near as may be. See PROCEDURE.

As soon as. See IMMEDIATELY; POSSIBLE; SOON; WHENEVER.

As to. Compare QUOAD.

Recurring at the commencement of several devises does not necessarily indicate the commencement of a complete devise, independent of other limitations.[2]

ASCERTAIN. 1. To render definite or fixed: as, to ascertain the relief due.[3]

"The use in pleading of an averment is to ascertain that to the court which is generally or doubtfully expressed."[4]

[1] Bennett *v.* Whitney, 94 N. Y. 305 (1884). See also Cook *v.* Gray, 133 Mass. 110 (1882); 3 Cranch, C. C. 459.

[2] Gordon *v.* Gordon, 5 L. R., H. L. 254 (1871).

[3] See 2 Bl. Com. 65, 465. Swift wrote "A Proposal for correcting and ascertaining the English Tongue," and South (Sermons, V, 286) says that "success is intended for the wicked man, to ascertain his destruction."

[4] Van Vechten *v.* Hopkins, 5 Johns. 219 (1809).

To make sure or certain; to establish, determine, settle.[1]

This would seem to demand the observance of the usual mode of investigation, to determine the matter in question. Hence, where rent is to be "ascertained" by persons selected by the parties, notice of the time and place of hearing, with an opportunity for offering proofs, should first be given to the parties interested.[2]

2. To acquire information as to a fact; to become possessed of knowledge respecting an event or transaction; to learn the truth as to a matter capable of proof. See INQUIRY, 1; KNOWLEDGE, 1.

ASIDE. See SET ASIDE; STAND ASIDE.

ASPECT. A bill in equity may be framed with a "double aspect," embracing alternative averments, provided that each aspect entitles the complainant to substantially the same relief, and that the same defenses are applicable to each.[3] See RELIEF, 2.

ASPORTARE. L. To carry away.

Cepit et asportavit. He took and carried away. Words formerly used to charge an unlawful removal of personalty.

De bonis asportatis. For goods carried off. The name of an action of trespass for personalty unlawfully removed, withheld or converted. See ASPORTATION.

ASPORTATION. Carrying away or removing a thing — a chattel.

In larceny there must not only be a taking, but a carrying away. *Cepit et asportavit* was the old law-Latin expression. A bare removal from the place in which the goods are found is a sufficient asportation.[4] See ASPORTARE.

ASS. See CATTLE; HORSE.

ASSAULT.[5] An attempt or offer to beat another, without touching him.[6]

If one lifts up his cane or his fist, in a threatening manner at another, or strikes at but misses him — this is an assault, *insultus*, which Finch describes to be "an unlawful setting upon one's person."[6]

It is also inchoate violence, which is considerably higher than bare threats; and, therefore, though no actual suffering is proved, the party injured may have redress by action of trespass *vi et armis*, wherein he recovers damages as compensation for the injury.[6]

An offer or attempt by force to do corporal injury to another.[1]

As if one person strike at another with his hand or a stick, and miss him. If the other be stricken, it is a battery. Or if he shake his fist at another, or present a gun, or other weapon, within such a distance that a hurt might be given; or draw a sword and brandish it in a menacing manner. An intent to do some corporal injury must be coupled with the act.[1]

Any attempt or offer with force or violence to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote at the time an intention to do it, coupled with a present ability to carry the intention into effect.[2]

An unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another.[3]

Assailant and *the assailed* designate, respectively, the person injuring and the person injured.

Abusive words cannot constitute the offense; nor can an act in defense of one's self, wife, child, servant, or property; nor an act in obedience to legal process. Unlawful imprisonment, undue liberty taken by an employer, teacher, physician, dentist, car conductor, or other person in a like position, is, or includes, an assault.

An assault with intent to commit a felony is a higher offense than simple assault.[4]

Remedies: indictment for breach of the peace; action for damages.

Son assault demesne. F. His own assault; his assault in the first instance.

"If one strikes me first, I may strike in my own defense; and, if sued for it, may plead *son assault demesne:* that it was the plaintiff's own original assault that occasioned it."[5] Compare MANUS, Molliter.

See further BATTERY; DEFENSE, 1; INDECENT; PROVOCATION.

ASSAYER. See COIN.

Any person or persons or corporation whose business or occupation it is to separate gold and silver from other metals or mineral substances with which such gold or silver, or both, are alloyed, combined, or united, or to ascertain or determine the quantity of gold or silver in an alloy or combination with other metals, shall be deemed an assayer.[6]

ASSEMBLY. An intentional meeting, gathering, or concourse of people: of three or

[1] Worcester's Dict.

[2] Brown *v.* Luddy, 11 Hun, 456 (1877).

[3] Adams *v.* Sayre, 70 Ala. 325 (1881); Fields *v.* Helmes, *ib.* 460 (1881); 17 How. 130.

[4] 4 Bl. Com. 232; Croom *v.* State, 71 Ala. 14 (1881).

[5] L. *ad-saltus*, a leap at: *salire*, to leap, spring.

[6] 3 Bl. Com. 120; 9 Ala. 82; 39 Miss. 524; 30 Hun, 427.

[1] United States *v.* Hand, 2 Wash. 437 (1810), Washington, J.; United States *v.* Ortega, 4 *id.* 534 (1825); Drew *v.* Comstock, 57 Mich. 181 (1885).

[2] Traver *v.* State, 43 Ala. 356 (1869), Peck, C. J.; Hays *v.* People, 1 Hill, 352-53 (N. Y., 1841).

[3] Cal. Penal Code, § 240; People *v.* Gordon, 70 Cal 468 (1886).

[4] People *v.* Devine, 59 Cal. 630 (1881).

[5] 3 Bl. Com. 120-21; 4 Blackf. 546; 4 Denio, 448.

[6] Revenue Act, 13 July, 1866, § 9: 14 St. L. 121.

more persons in one body; — of any number of persons in one place.

Assemblage. May be composed of things as well as persons.[1] — respects things only.[2]

Lawful assembly. Any congregating of people or citizens directed or permitted by the law of the place.

Civil assembly. A meeting of persons for purposes of trade, amusement, worship, or the like.

Political assembly. Any meeting of persons required by the constitution and laws of the place: as, that of law-makers — whence "Assembly" and "General Assembly" — also, that of the Federal electors, and that of voters at "primary assemblies."

Assemblyman. A member of the legislature of a State — possibly, by restriction, of the lower house. See LEGISLATURE.

Popular assembly. Any meeting of the people to deliberate over their rights and duties with respect to government; also, the House of Representatives in Congress, and the more numerous body in the legislature of a State.

"Congress shall make no law" prohibiting or abridging "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[3]

The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution. It is and always has been one of the attributes of citizenship under a free government. It was not therefore a right granted to the people by the Constitution. The government of the United States, when established, found it in existence with an obligation on the part of the States to afford it protection. The First Amendment operates upon the National government alone.[4] See PETITION, Right of.

In every meeting assembled for a lawful purpose there must necessarily exist an inherent power to preserve order and to remove by force any person who creates a disturbance. If it were not so, the guaranty of the constitution would be idle mockery. Religious meetings, for example, would lose their solemnity and usefulness if they could be turned into halls of disputation at the will of any individual.[5] See WORSHIP.

Unlawful assembly. When three or more do assemble themselves together to do an unlawful act, . . and part without doing it or making any motion toward it.[1] See MOB; RIOT; ROUT.

ASSENT.[2] Agreement; approval; compliance; consent; willingness declared. Opposed, *dissent.*

Implies more than mere acceptance, — is an act of the understanding; while "consent" is an act of the feelings and will.[3] "Assent" respects matters of judgment; "consent" matters of conduct.[4]

Acceptance, approval, consent, ratification, and assent, are often interchanged.[5]

Express assent. Assent openly declared, in words spoken or written. **Implied assent.** Assent inferred from conduct.

Mutual assent. Assent given by all the parties to an act or contract; the meeting of the minds of the parties to any transaction.

Unless dissent is shown acceptance of a thing done for a person's benefit will be presumed; as in the case of a conveyance or a devise of land.

Assent must be *ad idem* — to the same thing, and in the same sense.[6]

"Mutual assent," which is the meeting of the minds of both of the parties to a contract, is vital to the existence of the contract. The obligation must be correlative: if there is none on one side there can be none on the other. Moreover, this requisite assent must be the work of the parties themselves: the law cannot supply it.[7]

Mutual assent of the parties to a modification is as indispensable as to the original making of a contract. Where there is a misunderstanding as to anything material the requisite mutuality of assent is wanting, the supposed contract does not exist, and neither party is bound. In the view of the law in such case there has been merely a negotiation resulting in a failure to agree. What has occurred is as if it were not.[8]

See KNOWLEDGE, 1; INQUIRY, 1; PERMIT; PROTEST, 2; RATIFICATION; SATISFY, 1; SILENCE; UNDERSTANDING.

ASSERTORY OATH. See OATH, Official.

ASSESS.[9] 1. To rate or fix the proportion which each person is to pay of a tax; to

[1] Webster's Dict.

[2] Crabbe's Syn.

[3] Constitution, Amd. I. Ratified Dec. 15, 1791.

[4] United States *v.* Cruikshank, 92 U. S. 551-52 (1875), Waite, C. J.

[5] Wall *v.* Lee, 36 N. Y. 142-46 (1865), cases. See also 21 Wend. 149; 1 Gray, 188; 62 Pa. 474; 20 Alb. L. J. 124 (1879), cases.

[1] 4 Bl. Com. 146: 3 Coke, Inst. 176.

[2] L. *assentire*, to agree to.

[3] Webster's Dict.

[4] Crabbe's Syn.

[5] See Welch *v.* Sackett, 12 Wis. *267 (1860), Dixon, C. J.

[6] See 4 Wheat. 225; 1 Sumn. 218; 12 Mass. 461; 11 N. Y. 441; 1 Pars. Contr. 400; 2 Washb. R. P. 579.

[7] Mutual Life Ins. Co. *v.* Young, 23 Wall. 107 (1874), Swayne, J.

[8] Utley *v.* Donaldson, 94 U. S. 47-49 (1876), cases, Swayne, J.; First Nat. Bank of Quincy *v.* Hall, 101 *id.* 49-50 (1879); 109 *id.* 97.

[9] From L. *assessor*, an adjuster of taxes; originally a judge's assistant, one who sat by him: *assidere*, to sit near to. Compare ASSIZE.

tax. To adjust the shares of a contribution by several persons toward a common object according to the benefit received. To fix the value or the amount of a thing.[1]

To determine by rules of law a sum to be paid; to rate the proportional contribution due to a fund; to fix the amount payable by a person or persons in satisfaction of an established demand.[2]

Assessor. (1) An adviser to a court; an expert.

Nautical assessor. A person, possessing special knowledge in matters of navigation and of maritime affairs, who assists a court of admiralty.[3] Compare ALDERMAN.

(2) One who makes assessments for purposes of taxation or contribution.

A person charged by law with the duty of ascertaining and determining the value of property as the foundation of a public tax.[4]

Assessment. The act or proceeding by which a sum due or payable is determined; also, the sum itself as a payment or obligation.

As, an assessment — of the damages suffered by a plaintiff; of the value of property taken for public use; of money as the equivalent of a benefit or burden caused by a municipal improvement; of losses in insurance; of installments payable upon stock subscriptions; of a sum to be raised by taxation, and of the portions due from individuals.

Strictly speaking, an assessment of taxes is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within a district. As more commonly employed, consists in listing the persons, property, etc., to be taxed, and in estimating the sums which are to be the guide in an apportionment of the tax between them; — valuation is a part of it.[5]

In a broad sense taxes undoubtedly include assessments, and the right to impose assessments has its foundation in the taxing power of the government; but there is also a broad distinction between them. "Taxes" are public burdens imposed generally upon the inhabitants of the whole State, or upon some civil division thereof, for governmental purposes without reference to peculiar benefits to particular individuals or property. "Assessments" have reference to impositions for improvements which are specially beneficial to individuals or property and which are imposed in proportion to the particular benefits supposed to be conferred. They are justified when the improvements confer special benefits and are equitable only when divided in proportion to such benefits.[1] See INSTALLMENT; JUST, 2; TAX, 2; VALUE.

Used of a business corporation, a rating or fixing, by the board of directors, of the proportion of his subscription which every subscriber is to pay, when notified of it and called upon.[2] See CALL, 2 (1).

Political assessment. See OFFICER.

2. To decide the degree of; to determine the extent of: as, to assess a punishment.

A statute providing that issues of fact in criminal cases shall be tried by a jury, "who shall assess the punishment in their verdict," refers to offenses as to which the limits of punishment are fixed by law and within which a discretion may be exercised.[3]

ASSETS.[4] Property sufficient to answer a demand — made by a creditor or a legatee upon an executor or administrator, or by a creditor upon an insolvent or a bankrupt.

Also, all the property of the estate of a decedent or of an insolvent.

"All the assets" of an insolvent company, of which a receiver takes possession in New York, means all the property, real and personal, of the company.[5]

The property of a deceased person appropriable to the payment of his debts; also, the entire property of a mercantile firm or trading corporation.[6]

Whatever is recovered that is of a salable nature and may be converted into ready money is called "assets" in the hands of the executor or administrator; that is "sufficient" or "enough" (French *assez*) to make him chargeable to a creditor or legatee, as far as such goods and chattels extend.[7]

Originally, that which is sufficient or

[1] [Bouvier's Law Dict.

[2] [Abbott's Law Dict.

[3] See The Clement, 2 Curt. 369 (1855); The Empire, 19 F. R. 559 (1884), cases.

[4] Savings, &c. Society *v.* Austin, 46 Cal. 509 (1873), Wallace, C. J.

[5] [People *v.* Weaver, 100 U. S. 545–46 (1879), Miller, J.: Cooley, Tax. 258; Bur. Tax. 198, § 94.

[1] Roosevelt Hospital *v.* Mayor of New York, 84 N. Y. 112–13 (1881), cases, Earle, J.; Palmer *v.* Stumph, 29 Ind. 333–36 (1868), cases; Chamberlain *v.* Cleveland, 34 Ohio St. 561–65 (1878), cases; Stephani *v.* Bishop of Chicago, 2 Bradw. 252–53 (1878); 1 Handy, 473; 3 Col. 462; 6 *id.* 113; 1 Wash. T. 576; Cooley, Tax. 147.

[2] [Spangler *v.* Indiana, &c. R. Co., 21 Ill. 278 (1859), Breese, J.

[3] Territory *v.* Romine, 2 N. M. 128 (1881); *ib.* 457.

[4] F. *assez*, sufficient: L. *ad*, to, for; *satis*, enough.

[5] Attorney-General *v.* Atlantic Mut. Life Ins. Co., 100 N. Y. 282 (1885).

[6] Vaiden *v.* Hawkins, 59 Miss. 419 (1882), Chalmers, C. J.

[7] 2 Bl. Com. 510, 244.

enough in the hands of the executor or administrator to make him chargeable to the creditors, legatees, and distributees of the deceased, so far as the personal property of the deceased, which comes to the hands of the executor or administrator, extends for purposes of administration. In an accurate legal sense, all the personal property of the deceased which is of a salable nature and may be converted into money is deemed assets. But the word is not confined to such property; for all other property of the deceased which is chargeable with, and applicable to, his debts or legacies is, in a large sense, assets.[1]

Though generally used to denote things which come to the representatives of a deceased person, the word includes anything, whether belonging to the estate of a deceased person or not, which can be made available for the payment of debts. Hence we speak of the assets of a money corporation, of an insolvent debtor, of an individual, of a private partnership. The word is likewise used for the "means" which a party has as compared with his liabilities.[2]

In the bankrupt law "assets" included all property chargeable with the debts of the bankrupt that came into the hands or under the control of the assignee.[3]

Legal assets. That portion of the assets of a deceased party which by law is directly liable in the hands of his executor or administrator to the payment of debts and legacies. Generally speaking they are such as can be reached by a suit at law against the executor or administrator, either by a common judgment or by a judgment upon a *devastavit*. More accurately speaking they are such as come into the hands and power of an executor or administrator, or such as, *virtute officii*, he is intrusted with by law to dispose of in the course of administration,— whatever he takes as executor or administrator, or in respect to his office. **Equitable assets.** All assets, chargeable with the payment of debts or legacies in equity, and which do not fall under the description of legal assets.[4]

Termed "equitable" because (1) to obtain payment out of them they can be reached only through the instrumentality of a court of equity, and (2) the rules of distribution by which they are governed differ from the rules for the distribution of legal assets. In general they are either created such by the intent of the party or result from the nature of the estate made chargeable.[4]

[1] [1 Story, Eq. § 531.

[2] [Stanton *v.* Lewis, 26 Conn. 449 (1857); Hall *v.* Martin, 46 N. H. 342 (1865).

[3] *Re* Taggert, 16 Bankr. Reg. 358 (1877).

[4] [1 Story, Eq. §§ 551-52.

The property of a decedent available at common law for satisfying creditors is called "legal assets," and will be applied, at common law and in equity, in the ordinary course of administration, which gives debts of a certain nature priority over others. Where, however, the assets are available only in a court of equity they are termed "equitable assets," and, according to the maxim, that equality is equity, will, after satisfying those who have liens upon any specific property, be distributed among the creditors of all grades *pari passu*, without regard to legal priority.[1]

"Equitable assets" are such as the debtor has made subject to his debts generally, which would not be thus subjected without his act, and which can be reached only by a court of equity. They are divisible among the creditors in ratable proportions.[2]

Personal assets. Assets to which the executor or administrator is entitled; personalty. **Real assets.** Such assets as go to the heir by descent; assets by descent;[3] also, landed property.

"Personal assets" are chattels, money, and evidences of debt available for paying the debts of a bankrupt, insolvent, or decedent.

"Real assets" are such portion of the property of any such individual as consists of realty.

Assets are also *immediate* and *future*.[4]

At common law (originally for feudal reasons) lands in the hands of the debtor himself were not assets for the payment of debts; creditors could reach only the personalty and the profits of realty. Upon the death of the debtor, in case of intestacy, the land descended to the heir and the personalty to the executor. A creditor by a simple contract debt for satisfaction could look only to the personalty in the hands of the executor; while a creditor by a specialty in which the heir was named could reach the land itself in such heir's possession — his *assets by descent*. By will, however, the debtor might charge land with the prior payment of a debt.[5]

For the purpose of founding administration all simple contract debts are assets at the domicil of the debtor. A note given is merely evidence of the debt.[6]

See Accidere, Quando: Account, 1; Administer, 4; Bankruptcy; Bona; Conformity; Creditor's Bill; Insolvency; Legacy; Marshal, 2.

ASSIGN.[7] To point out, specify, signify which of several things; to select, appoint, fix. Whence assignable, assignment.

As, to assign — the particular in which a

[1] [Silk *v.* Prime, 2 L. Cas. Eq., 4 Am. ed., 358, 358, cases.

[2] Catlin *v.* Eagle Bank, 6 Conn. 243 (1826), Hosmer, C. J. See also Freedman's Sav. & Trust Co. *v.* Earle, 110 U. S. 712-20 (1884); 2 Johns. Ch. 577.

[3] [2 Bl. Com. 244, 340, 510.]

[4] 4 Kent, 354.

[5] Hall *v.* Martin, 46 N. H. 341 (1865).

[6] Wayman *v.* Halstead, 109 U. S. 656 (1884), cases.

[7] F. *assigner:* L. *assignare*, to mark out to.

contract has been broken, that is, "the breach;" the matter in which alleged error was committed by an auditor, master, referee, court; dower, or the third of the deceased husband's realty; counsel for a prisoner on trial; a day for a hearing, trial, argument.

Assignment of errors. A pleading filed in an appellate court by a party who complains of errors committed by the court below.[1] See ERROR, 2 (3).

New or novel assignment. When a plaintiff in his replication, after an evasive plea, reduces a general wrong, as laid in his declaration, to a more particular certainty by assigning the injury afresh, with all its specific circumstances, in such manner as clearly to ascertain and identify it consistently with his general complaint.[2]

Not an admission of the facts alleged in the plea; merely an assertion that the plaintiff will not investigate the subject-matter.[3]

2. To set over something to another person; to transfer, convey.

Generally implies a writing. It is of all the right one has in any particular piece or pieces of property.[4] Compare LEASE.

The meanings vary with the subject-matter, but the general one is to set over or to transfer. As applied to movables, satisfied by a delivery.[5]

Assignable. Subject to lawful transfer; also, so transferable as to vest a right of action.[6] Opposed, *non-assignable*.

Assignor. He who transfers property to another person.

Assignee. He to whom property is transferred; more particularly he to whom an insolvent or a bankrupt makes over his whole estate for the benefit of his creditors.

In patent law one who has transferred to him in writing the whole interest of the original patent or any undivided part of such whole interest, in every portion of the United States. Compare GRANTEE 2; LICENSEE, 2.

In strict legal parlance does not designate an "indorsee" of paper.[7]

Assignee in fact. A person made an assignee by the act of another.

Assignee in law. A person made an assignee by the act of the law; as, an executor, an administrator, a trustee for creditors.[1]

An executor, as taking by operation of law, may be deemed the assignee in law of the testator. But a legatee or devisee occupies no such position.[2]

Provisional assignee. One to whom the estate of a bankrupt is conveyed until the permanent assignee can be appointed.

Assigns. Assignees — persons to whom a grantee may potentially convey; as, in the phrase in deeds "heirs, executors, administrators, and assigns."[3]

Comprehends a line or succession of persons.[4]

Those to whom rights have been transmitted by a particular title, as by sale, gift, legacy, or other transfer or cession. Technically, designated the grantees of real estate in fee-simple; for convenience, came to embrace in its spirit all who succeeded to the title by any other means than by descent.[5]

Comprehends all those who take, immediately or remotely, from or under an assignor, whether by conveyance, devise, descent, or act of the law.[6]

In the phrase "lawful assigns or legal representatives," is used in a cognate sense with "legal representatives." Thus construed it means not assignees in fact, but assignees in law — those upon whom the right is devolved and vested by law, as, assignees in bankruptcy.[7]

Neither the word "assigns" nor the words "assigns forever" have any popular or technical meaning that could qualify a devise to a man and his "heirs."[8]

Includes a mortgagee.[9] See REPRESENTATIVE (1).

Not necessary in a deed as a word of limitation indicating the quantity of the estate granted or to empower the grantee to dispose of the estate.[10]

Assignment. A transfer of property to another for himself or creditors; also, the writing containing the evidence thereof.

The idea is essentially that of a transfer

[1] [Associates of the Jersey Company v. Davison, 29 N. J. L. 418 (1860).

[2] 3 Bl. Com. 311. See also 20 Johns. 43; Steph. Pl. 241.

[3] Norman v. Wescombe, 2 M. & W. 360 (1837).

[4] 2 Bl. Com. 327; 21 N. J. L. 389.

[5] Watkinson v. Inglesby, 5 Johns. *591 (1810).

[6] [Thacker v. Henderson, 63 Barb. 279 (1862).

[7] Palmer v. Call, 2 McCrary, 530 (1881).

[1] See 3 Pars. Contr. 480.

[2] Hight v. Sackett, 34 N. Y. 451 (1866); 3 Hun, 419; 46 Ill. 31; 23 Wis. 295.

[3] See Baily v. De Crespigny, L. R., 4 Q. B. *186 (1869); Grant v. Carpenter, 8 R. I. 38 (1864); 34 Ala. 349; 28 Miss. 246; 19 N. Y. 344; 1 Curtis, 193.

[4] Ogden v. Price, 9 N. J. L. 169 (1827).

[5] [Watson v. Donnelly, 28 Barb. 658 (1859).

[6] Baily v. De Crespigny, L. R., 4 Q. B. *186 (1869), Hannen, J.; Brown v. Crookston Agricul. Association, 34 Minn. 547 (1886).

[7] South Pass of Mississippi, 16 Op. Att.-Gen. 157 (1878). Compare United States v. Gillis, 95 U. S. 407 (1877).

[8] Lawrence v. Lawrence, 105 Pa. 340 (1884).

[9] Brown v. Crookston Agr. Assoc., 34 Minn. 546 (1886).

[10] Salem Capital Flour Mills Co. v. Stayton Water Ditch & Canal Co., 33 F. R. 154 (1887), Deady, J.

by one party to another of some species of property or valuable interest.[1]

When commercial paper, payable to bearer, is transferred by delivery, both the right of property and the right to sue pass thereby to the transferee; and this is frequently called an "assignment" of such chose in action. But such use of the term, which has grown up under the usages of commerce, is scarcely correct. Assignment proper is a transfer by writing.[2] See BEARER.

Domestic assignment. An assignment for the benefit of creditors, made by a debtor at the place of his domicil. *Foreign assignment.* Such assignment made in another State or county.[3]

Legal assignment. An assignment of an interest or of property, particularly of personal property, cognizable or enforceable in a court of law. *Equitable assignment.* A like transfer, and in a special sense referring to a chose in action or a thing not *in esse*, cognizable by a court of equity.

An "equitable assignment" is an agreement in the nature of a declaration of trust which a chancellor, though deaf to the prayer of a volunteer, never hesitates to execute when it has been made on a valuable or even good consideration.[4]

To make an assignment valid at law the subject must have actual or potential existence at the time of the grant or assignment. But courts of equity will support assignments not only of choses in action and of contingent interests and expectancies, but of things which, having no present actual or potential existence, rest in mere possibility; not indeed as a present positive transfer operative *in præsenti*, for that can only be of a thing *in esse*, but as a present contract to take effect and attach as soon as the thing comes *in esse;* as, an assignment of the oil to be obtained in a whaling voyage now in progress.[5]

To constitute an assignment in equity of a debt or other chose in action no particular form is necessary. Any order, writing, or act which makes an appropriation of a fund amounts to an equitable assignment of the fund. The reason is, the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity. As the assignee is generally entitled to all the remedies of the assignor, so he is subject to all equities between the assignor and his debtor. But, in order to perfect his title against the debtor, it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee or the debt be discharged by a payment to the assignee before such notice.[1]

An agreement to pay out of a particular fund, however clear in terms, is not an equitable assignment: a covenant in the most solemn form has no greater effect. Such intent and its execution are indispensable. The assignor must not retain control over the fund — an authority to collect, or power of revocation. The transfer must be of such a character that the fundholder can safely pay, and is compellable to pay, though forbidden by the assignor. Then the fundholder is bound from the time of notice. A bill of exchange or a check is not an equitable assignment *pro tanto*. But an order to pay out of a specified fund has always been held to be a valid assignment in equity and to fulfill all the requirements of the law.[2]

May be of part of a debt, without the consent of the debtor.[3] See DEPOSIT, 2; GIFT, 1.

Preferential assignment. An assignment with preferences: made to a trustee in favor of the claim of a particular creditor or creditors; as, that one or more creditors shall be paid in full before others receive anything.[4]

In the nature of a *special*, rather than of a *general*, assignment. But the latter is also opposed to a *particular* assignment or a transfer of part of the debtor's property.

In the absence of prohibitory legislation preferential assignments are valid.[6]

Voluntary assignment. Made of a debtor's own free will, for the benefit of creditors. *Compulsory assignment.* Made in pursuance of the mandate of law.[6]

A "voluntary assignment" means, presumably, an assignment of all of the debtor's property in trust to pay debts; as contradistinguished from a sale to a creditor in payment of his claim, and from a pledge

[1] [Hight *v.* Sackett, 34 N. Y. 451 (1866).

[2] Enloe *v.* Reike, 56 Ala. 504 (1876), Stone, J. See also Andrews *v.* Carr, 26 Miss. 578 (1853).

[3] As to effect of, see generally 26 Am. Law Reg. 509-12 (1887), cases; May *v.* First Nat. Bank of Attleboro, Sup. Ct. Ill. (1887), cases: 13 N. E. Rep. 806.

[4] Nesmith *v.* Drum, 8 W. & S. 10 (1844); Guthrie's Appeal, 92 Pa. 272 (1879); 2 Story, Eq. § 1040.

[5] 2 Story, Eq. §§ 1039-40; Mitchell *v.* Winslow, 2 Story, R. 638-44 (1843); Butt *v.* Ellett, 19 Wall. 544 (1873); Traer *v.* Clews, 115 U. S. 540 (1885), cases; Holroyd *v.* Marshall, 10 H. L. 209-20 (1862); 2 Bl. Com. 442.

[1] Spain *v.* Hamilton, 1 Wall. 624 (1863), Wayne, J.; Laclede Bank *v.* Schuler, 120 U. S. 516, 514 (1887), cases; 2 Story, Eq. § 1047, cases.

[2] Christmas *v.* Russell, 14 Wall. 84 (1871), Swayne, J. See also Wright *v.* Ellison, 1 *id.* 16 (1863); Trist *v.* Child, 21 *id.* 447 (1874), cases; Ketchum *v.* St. Louis, 101 U. S. 316-17 (1879), cases; Basket *v.* Hassell, 107 *id.* 614 (1882); Florence Mining Co. *v.* Brown, 124 *id.* 391 (1888); Lewis *v.* Traders' Bank, 30 Minn. 134 (1883), cases; Goodsell *v.* Benson, 13 R. I. 230 (1881), cases.

[3] James *v.* Newton, 142 Mass. 370-73 (1886), cases.

[4] See 2 Kent, 532.

[5] 1 Story, Eq. § 370; 2 *id.* § 1036.

[6] See 2 Kent, 397, 532.

or hypothecation as a security in the nature of a mortgage.[1]

A voluntary assignment for the benefit of creditors is a contract — a transfer in trust for a nominal consideration and the further consideration of a distribution of the proceeds of the assigned property among all the creditors.[2]

An assignment by a defendant, *pendente lite*, does not necessarily defeat the suit, but his assignee is bound by what is done against him. The assignee may come in by appropriate application and make himself a party, or he may act in the name of his assignor. Such assignment carries with it an implied license to use the assignor's name to protect the right assigned.[3]

Every demand connected with a right of property, real or personal, is assignable. But not — an officer's pay; a judge's salary; a soldier's pension; an action for fraud, negligence, or tort; a personal service or trust; a naked power; a right of entry for a condition broken; nor, without notice to the insurer, a policy of insurance; nor, at common law, a chose in action, or any right *pendente lite*.[4]

Where there is no restriction in any statute, in the articles of association or the by-laws, as to the disposition of property, the directors of a corporation may make an assignment for the benefit of its creditors.[5]

The assignee is bound by a covenant that runs with the land. See COVENANT.

An assignee for the benefit of creditors is a trustee for the creditors mainly, but, in some respects, for all parties.[6]

He is but the hand of the assignor in the distribution of his estate among his creditors. He enjoys the rights of the assignor only; he is bound where the assignor would be bound. He is not the representative of the creditors, and is not therefore clothed with their powers; nor is he a *bona fide* purchaser for value, but a mere volunteer only.[7]

After the trust has been executed the assignor's former interest revests in him, as if it had never been out of him.[8]

The title which vests in an assignee in bankruptcy by the assignment relates back to the date of filing the petition.[9] Such assignee represents the general or unsecured creditors, and his duties relate chiefly to their interests. As to every thing, except fraudulent conveyances and preferences, he takes as a purchaser from the bankrupt with notice of all outstanding rights and equities. Whatever the bankrupt could do to make the assigned property available for the general creditors he may do, and he may recover property conveyed in fraud of the rights of creditors and set aside fraudulent conveyances.[1]

To place parties on equal terms, an assignor of a chose in action cannot be a witness against his assignee unless both are living and the latter's testimony can be obtained. Where there is entirety of interest, declarations of the assignor, made previous to the transfer, bind the assignee; but, otherwise, he cannot disparage the title of an innocent assignee or vendee.[2]

Compare CONVEYANCE, 2; TRANSFER. See CHOSE; BANKRUPTCY; DAMNOSA, Hæreditas; LIS, Pendens: NOVATION; PERISHABLE; PREFER, 2; TRUST, 1; WITNESS.

ASSISE. See ASSIZE.

ASSISTANCE. Help, aid; furtherance.[3]

Writ of assistance. A process issued from a court of equity to enforce a decree; as, to place in possession a purchaser of mortgaged premises sold for a mortgage debt, after he has received a deed.

Power to issue the writ results from the principle that jurisdiction to enforce a decree is co-extensive with jurisdiction to hear and determine the rights of the parties — that the court does complete justice by declaring the right and affording a remedy for its enjoyment. But, as the execution cannot exceed the decree, the writ can issue only against a party bound by the decree.[4]

A purchaser under a decree for the foreclosure of a mortgage has a right to the writ to obtain possession, as against parties and persons made tenants or transferees after the suit was begun.[5]

ASSIZE.[6] Originally, an assembly met for the purpose of ascertaining something judicially: a jury, or court; a session or sitting; then the place where, as also the time when, the session was held, the writ under which it convened, the finding or resolution, and the proceedings as a whole. Hence — a regulation, an ordinance, a statute, — something determined and established; a tax or tribute of a definite amount; also, the reducing a thing to certainty — in number, quantity, quality, weight, measure, time, place.

At first, the jury who tried a cause, "sitting together" for that purpose. Then, by a figure, the

[1] [Dias *v.* Bouchand, 10 Paige, Ch. 461 (1843), Walworth, Ch.

[2] Blackburne's Appeal, 39 Pa. 165 (1861), Thompson, J.

[3] *Exp.* South & North Alabama R. Co., 95 U. S. 226 (1877), Waite, C. J.

[4] 1 Pars. Contr. 223; 3 *id.* 480.

[5] Hutchinson *v.* Green, 91 Mo. 375–76 (1886), cases.

[6] 2 Bl. Com. 480; 3 Pars. Contr. 465, 489.

[7] *Re* Fulton's Estate, 51 Pa. 211–13 (1865), Agnew, J.; Mellon's Appeal, 3 *id.* 129 (1858), Strong, J.

[8] Jacoby *v.* Guier, 6 S. & R. 451 (1821). As to the effect of assignor's fraud upon the assignment, see 21 Am. Law Rev. 901–35 (1887), cases; as to conflict of laws respecting assignments for creditors, 1 Harv. Law Rev. 259–64 (1888).

[9] Conner *v.* Long, 104 U. S. 230–44 (1881), cases; International Bank *v.* Sherman, 101 *id.* 406 (1879).

[1] Dudley *v.* Easton, 104 U. S. 103 (1881), Waite, C. J.

[2] 1 Greenl. Ev. §§ 190, 172.

[3] L. *assistere*, to approach: *ad-stare*, to stand by.

[4] Terrell *v.* Allison, 21 Wall. 291 (1874), cases, Field, J.; Howard *v.* Milwaukee, &c. R. Co., 101 U. S. 849 (1879); Boyd *v.* United States, 116 *id.* 625 (1886).

[5] 2 Jones, Mort. § 1663; Watkins *v.* Jerman, 36 Kan. 467 (1887), cases.

[6] F. *assise*, assembly — of judges; decree; impost: O. F. *asseoir*, to sit near, assist a judge: L. *assidere*, to sit near or together.

court or jurisdiction which summoned the jury by a commission of assize. Hence, the judicial assemblage held by the king's commission in the various counties were (and still are) termed, in common speech, "the assizes." By still another figure, an action for recovering possession of lands — because the sheriff summons a jury or assize.[1]

Designates the court, the place, or the time where the judges of the superior courts of Westminster try questions of fact, issuing out of those courts, ready for trial by jury. "The assizes" are the sittings of the judges at the various places they visit on their circuits, four times a year in vacation. "Assize" also sometimes denotes a jury, and sometimes a writ.[2]

"Assizes" is the word most in use in modern books. It often signifies a single court.

ASSOCIATE.[3] A person united with another in business, office, enterprise, or other interest.

Associates are persons united, or acting together by mutual consent or compact, in the promotion of some common object.[4]

Associate attorney or **counsel.** A lawyer who assists another in a cause; co-counsel; a colleague.

Associate in crime. A confederate in the commission of a criminal offense; an accomplice, *q. v.*

Associate judge or **justice.** A judge who serves with another on the same bench, in distinction from the "chief" justice, the "president" or "presiding" judge, *q. v.*

Association. 1. The act or state of being joined in common interest.

2. An organization of persons without a charter, for business, humanity, charity, culture, or other purpose; any unincorporated society or body.

3. A body of persons invested with some, yet not full, corporate rights and powers: as, a joint-stock association; a building and loan association.

When improvement of the members is the predominant idea, "society" seems to be the preferred word; and "company" or "partnership," when the idea is the making of profits.

"Association" *ex vi termini* implies agreement, compact, union of minds, purpose, and action. May apply to those who are already associated with persons named or those who may come in afterward: as, in acts of incorporation.[1]

Articles of association. The instrument which creates the union between the members of an incorporation, specifies the object and form of organization, the amount and shares of capital, the place of business, the corporators, etc.; and is distinguishable from the charter and the by-laws.

Where individuals voluntarily associate together and adopt a name or description intended to embrace all of its members, and under which its contracts are made and its business carried on, such company can neither sue nor be sued by the name adopted, but in the individual names as partners.[2]

To constitute a "partnership" there must be a community of interests for business purposes. Hence, *voluntary associations* or "clubs," for social and benevolent purposes and the like, are not proper partnerships, nor have their members the powers and responsibilities of partners. Thus, for example, while the members of a Masonic lodge may not be held as partners for a debt incurred by the lodge, each member who assented to or advised the outlay may be held liable as an individual.[3]

Associations for mutual benevolence among their own members are not associations for purely "charitable uses."[4]

The members of a committee, authorized to effect the incorporation of a voluntary association, who neglect to perfect the re-organization, may be held as partners as between themselves, and non-participating members of the association be relieved from liability.[5]

See BANK, 2 (2); BUILDING; BY-LAWS; CHARTER, 2; CHURCH; CLUBS; COMPANY, 2; CORPORATION; PARTNERSHIP; STOCK, 3 (2).

4. Association of words, see NOSCITUR.

[1] 3 Bl. Com. 185, 57, 60; 4 *id.* 269, 424; 3 *id.* 221; 1 *id.* 148, 411.

[2] 3 Bl. Com. 58-59.

[3] L. *associatus*, joined to: *ad*, to; *socius*, a follower, companion.

[4] [Lechmere Bank v. Boynton, 11 Cush. 382, 379 (1853), Shaw, C. J.

[1] [Lechmere Bank v. Boynton, 11 Cush. 380, *ante*.

[2] Covington Drawbridge Co. v. Shepherd, 20 How. 228 (1857), Taney, C. J.; Beatty v. Kurtz, 2 Pet. *585 (1829), Story, J.; 27 Alb. Law J. 326-29 (1883), cases.

[3] See Thomas v. Ellmaker, 1 Pars. Sel. Eq. Cas. 98, 104, 111-12 (1844), cases; Laford v. Deems, 81 N. Y. 514 (1880); Ash v. Guie, 97 Pa. 499 (1881), cases; *Re* St. James's Club, 18 Eng. L. & Eq. 589 (1852); 3 Kent, 23; cases *infra*.

[4] Babb v. Reed, 5 Rawle, 150 (1835); Gorman v. Russell, 14 Cal. *535-38 (1860), cases. But some cases hold that Masonic lodges are "charities," — Duke v. Fuller, 9 N. H. 536 (1838); Burdine v. Grand Lodge, 37 Ala. 478 (1861); Indianapolis v. Grand Master, 25 Ind. 518 (1865); Savannah v. Solomon's Lodge, 53 Ga. 93 (1874). *Contra*, Bangor v. Rising Virtue Lodge, 73 Me. 428, 434 (1882) — the funds of a "public charity" are derived from gifts and devises, and it is open to the whole public,— Appleton, C. J.

[5] See Ward v. Brigham, 127 Mass. 24 (1879); Volger v. Ray, 131 *id.* 429 (1881); Ferris v. Thaw, 72 Mo. 446 (1880). As to unincorporated associations, see generally 17 Cent. Law J. 342-45 (1883), cases.

ASSUME. To take to or upon one's self. See ASSUMPSIT.

A person who "assumes a lease" takes to himself or accepts the obligations and the benefits of the lessor under the contract.[1]

"Assumed" may be used in the sense of claimed; as, in saying that assumed facts must be proved before the main fact can be inferred.[2] Compare PRESUME.

ASSUMPSIT.[3] He engaged or agreed to do a thing.

Describes a contract, not under seal, made with another for his benefit; also, the common-law form of an action of trespass upon the case for damages or failure to perform such contract.[4]

"Debt" lies for an ascertained sum. "*Assumpsit*" originally lay for an unascertained sum, but may now be brought for a fixed sum.

Express assumpsit. An engagement in positive terms to do some particular thing; as, an obligation to pay a promissory note.

Implied assumpsit. An engagement which the law will infer from circumstances; such obligation as reason and justice dictate, and as the law presumes a man has contracted to perform; as, to pay a judgment, a forfeiture, or a penalty.[5]

The presumption in such case is that every man engages to do what duty or justice requires him to do.[6]

Indebitatus assumpsit. He, being indebted, undertook. The species of the action which charges a promise to pay from the mere fact that an indebtedness exists.

Rests upon an implied promise to pay what in good conscience ought to be paid.[6]

Called also *common* or *general assumpsit*.

The promise, the consideration (the facts out of which the obligation grows), and the breach, should be averred.[6]

Special assumpsit. The agreement, and the form of action therefor, which rests upon an express undertaking.

In declaring upon a special *assumpsit*, the undertaking should be set out in the precise terms used.

The action of *assumpsit* lies for — the worth of work done; the value of goods bought and delivered; money received which should not be retained; money spent for another at his request; a balance due on an account; damages for injury from want of integrity or of care or skill assumed to be possessed or exerted.[1] See COUNT, 4 (1), Common.

Indebitatus assumpsit is founded on what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. . . . The law never implies a promise to pay unless some duty creates the obligation; and never a promise to do an act contrary to duty or to law.[2]

Nunquam indebitatus, he never undertook, is the name of the general issue in the *indebitatus* species; but has been used, like *nil debet*, in debt on simple contract.

Non assumpsit. He has not undertaken, or did not undertake. The name of the general denial in the foregoing actions.

Non assumpsit infra sex annos. He did not undertake within six years. The plea of the statute of limitations in these actions.[3] Compare ACTIO, Non accrevit, etc.

See further ACTION, 2; CASE, 3; CONTRACT; COVENANT; DEBET; DEBT; PROMISE.

ASSURANCE.[4] Certainty; warranty; indemnity.

1. Legal evidence of the transfer of title, whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are prevented or removed.[5]

The *common assurances* of the realm are by matter *in pais*, by matter of record, by special custom, and by devise.[6]

Collateral assurance. An assurance in addition to, or over and above, some other assurance; as, a bond, to the covenants in a mortgage.

Future assurance. Such transfer in the future as will cure a defect in a title, — as, by removing an incumbrance, by procuring a quitclaim deed. Whence "covenant for future assurance."[6]

2. Insurance; in England, life-insurance. Whence assurer, the assured, re-assurance. See further INSURANCE.

ASTERISK. Indicates the words at which the pages of the first edition of a text-book or volume of reports began; enlarged

[1] Cincinnati, &c. R. Co. *v.* Indiana, &c. R. Co., 44 Ohio St. 314 (1886).

[2] Jenkins *v.* State, 62 Wis. 63 (1885).

[3] L. *assumpsit*, he has undertaken, he undertook: *assumere*, to take upon one's self.

[4] See 3 Bl. Com. 158-67; Carrol *v.* Green, 92 U. S. 513 (1875); Hendrick *v.* Lindsay, 93 *id.* 143 (1876); Boston, &c. Smelting Co. *v.* Smith, 13 R. I. 35 (1880), cases.

[5] 3 Bl. Com. 158, 159, 162; Lloyd *v.* Hough, 1 How. 159 (1843); Wallis *v.* Shelly, 30 F. R. 748 (1887).

[6] 3 Bl. Com. 155, 158.

[1] 3 Bl. Com. 162; Dermott *v.* Jones, 2 Wall. 9 (1864); Nash *v.* Towne, 5 *id.* 702 (1866); Gaines *v.* Miller, 111 U. S. 397 (1884); National Trust Co. *v.* Gleason, 77 N. Y. 400 (1877).

[2] Bailey *v.* N. Y. Central R. Co., 22 Wall. 628-30 (1874), cases, Clifford, J.

[3] See 3 Bl. Com. 305, 308.

[4] F. *assëurer*, to make secure: L. *ad-sine-cura*.

[5] 2 Bl. Com. 294.

[6] [4 Kent, 468.

or annotated editions being printed as explained under A, 1, par. 8.

AS'TUTE. When it is said that the courts are "not astute" to do a thing (as, to infer fraud from negligence), the meaning is that they are disinclined, not disposed, to do the particular thing.

Thus, they are not only not predisposed but are reluctant or averse to accepting a conclusion involving intended wrong.

ASYLUM.[1] Retreat, refuge; protection, immunity.

1. A place of refuge and protection for criminals, and debtors.

"Asylum" includes not only place, but shelter, security, protection. Thus, within the meaning of the extradition treaty of 1868 (15 St. L. 629), a fugitive from justice in Italy "seeks asylum" in this country when he claims the use of a Territory as an asylum.[2] See EXTRADITION.

2. Immunity from law; as, the status of a public minister.

3. An institution for the unfortunate. See SECTARIAN.

AT. 1. The prefix *at-*, the Latin *ad*, q. v.

2. The English preposition, expressing the relation of presence, nearness in place or time, direction toward.[3]

The word is somewhat indefinite; it may mean "in," "within," or "near." Its primary idea is nearness, and it is less definite than *in* or *on*.[4]

"At the terminus" of a road may mean *near* the terminus.[5]

In ordinary speech, "at" more generally means "within" than "without." Thus, *at* a town or *at* a county means at some place within the town or county, rather than at a place without or even at the outermost verge of, but not in, such town or county. In indictments, where the utmost precision is necessary, the fact is generally stated to have been done at the place; and, if it were not done in the place, the venue would be wrong. "At," like "from," has not then, generally speaking, an exclusive signification: as, in the expression that a canal shall begin "at the District of Columbia."[6]

That "at a place" may not be equivalent to *in* the place, see IN, 1 (1).

Authority to construct a railroad from A to B, or beginning at A and running to B, confers authority to commence the road at some point within A, and to end it at some point within B. "At," like "from" and "to," is to be taken exclusively, according to the subject-matter.[1]

The description of a survey as beginning "at" a tree does not necessarily fix the point at the center of the tree. The deed may be interpreted in conformity with the practical effect given it by the parties, as by actual occupancy to a line beginning at the surface of the tree.[2]

Compare BY; IN, 1; INTO; NEAR; ON; TO; UPON, 1; WITHIN.

At interest. See INTEREST, 3.

At large. 1. In the full extent; in full; at length; *in extenso:* as, for a court to state at large that a thing should not be done; or for proceedings to be recorded at large, instead of by memoranda.[3]

2. Representing a State or district in its whole extent: as, a delegate, elector, or Congressman at large.

3. Applicable to all of a State, all the States, or the whole territory of the United States; general: as, statutes at large, the United States Statutes at Large.

4. In general; general, as opposed to special, particular, preferred, secured: as, the bearer at large, creditors at large.[4]

5. Unconfined; unrestrained; in the free exercise of natural freedom or propensities: as, an animal suffered to run at large.

"Running at large" means strolling about without restraint or confinement, as, wandering, roving, or rambling at will, unrestrained. The restraint need not be entirely physical; it may depend much upon the training, habits, and instincts of the animal. The sufficiency of the restraint is to be determined more from its effect, its controlling and restraining influence, than from the nature or kind of animal.[5]

Whether, in a given case, physical or moral power over the animal is necessary, depends upon its nature, age, character, habits, discipline, use, and other circumstances.[6]

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[1] L. *asylum*, a place of refuge: Gk. *a'sylos*, undespoiled, unharmed.

[2] *Re* De Giacomo, 12 Blatch. 395 (1874), Blatchford, J.

[3] Webster's Dict.

[4] State (West Jersey R. Co.) *v.* Receiver of Taxes, 38 N. J. L. 302 (1876), Dixon, J.; State *v.* Ray, 50 Ala. 173 (1873), Peters, C. J.

[5] Chesapeake & Ohio Canal Co. *v.* Key, 3 Cranch, C. C. 606, 604 (1829), Cranch, C. J.; The Mohawk Bridge Co. *v.* Utica, &c. R. Co., 6 Paige, 562 (1837); Mason *v.* Brooklyn, &c. R. Co., 35 Barb. 377 (1861); Homer *v.* Homer, L. R., 8 C. D. 764 (1878); 28 Alb. L. J. 44.

[1] Union Pacific R. Co. *v.* Hall, 91 U. S. 343 (1875), cases, Strong, J.; Mason *v.* Brooklyn City, &c. R. Co., 35 N. Y. 377-78 (1861).

[2] Stewart *v.* Patrick, 68 N. Y. 454 (1877).

[3] See 3 Bl. Com. 392; 95 U. S. 420.

[4] See 2 Bl. Com. 467.

[5] Russell *v.* Cone, 46 Vt. 604 (1874), Peck, J.; Bertwhistle *v.* Goodrich, 53 Mich. 459 (1884).

[6] Jennings *v.* Wayne, 63 Me. 470 (1874), Dickerson, J. See also 52 Cal. 653; 49 Conn. 113; 53 Iowa, 632; 70 id. 462; 26 Kan. 268; 10 Metc. 382; 10 Allen, 151; 26 Minn. 157; 21 Hun, 249; 50 Vt. 180.

At law. 1. According to the course of the common law; in law, as opposed to "in equity" or according to the principles and procedure in courts of equity or chancery.

2. For the practice of law: as, an attorney or counselor-at-law. See ATTORNEY.

At least. Compare MORE OR LESS.

A publication sixteen months before a certain day was held valid under a statute directing that the publication should be made "at least six months" prior to that day.[1]

When a city charter requires that a resolution ordering work on a street shall lie over "at least four weeks after its introduction," a resolution introduced on a Monday may be acted upon on the fourth Monday thereafter.[2]

At length. See *At Large*, 1; ENTRY, II, 6.

At maturity. See MATURITY, 2.

At once. At one and the same time.[3]

At par. Of nominal value; worth the face value. See PAR, 2.

At sea. On the voyage. See SEA.

At sight. On view; on presentation. See SIGHT.

ATHEIST. One who disbelieves in the existence of a God who is the rewarder of truth and the avenger of falsehood.[4] See INFIDEL; OATH; RELIGION.

ATLANTIC. See CABLE, Submarine.

The Gulf of Mexico is not the "Atlantic coast."[5]

ATMOSPHERE. See AIR.

ATS. At suit of; equivalent to *ads—ad sectam.*

ATTACH.[6] 1. To tie to, fasten to, affix, annex, *q. v.*

2. To lay hold upon by legal authority; to seize, take, arrest. To take or touch,—a precise expression of the thing actually done.[7]

When used without qualification in a statute refers to the taking and holding of the person or property on mesne process, subject to the further order of the court or to the final judgment in the case.[8]

Attachment of the person. A writ in the nature of a *capias*, directed to the sheriff, and commanding him to attach or take up the defendant, and bring him into court;[1] also, the summary proceeding itself.

Employed to compel the appearance of a defendant; to enforce the attendance of a juror or a witness;[2] to bring before the court one charged with contempt.[3]

The officer makes caption of the person named in the same manner as upon an ordinary process for arrest. Instead, however, of holding him to bail he brings him corporally before the court, that he may do the thing required or show cause why he has not or should not do it. Fines for disobedience are often imposed. See CONTEMPT.

Attachment of property. An actual seizure of goods, that they may be held to satisfy the judgment which the plaintiff may recover.[4]

The object is to take out of the defendant's possession and transfer into the custody of the law, acting through its legal officer, the goods attached, that, if necessary, they may be seized in execution and be disposed of and delivered to the purchaser. Hence, in this sense, to attach is to take actual possession of the property.[5]

Originally, a writ issued out of the court of common pleas, grounded upon the non-appearance of the defendant at the return of the original writ. The sheriff was then commanded to attach him by taking gage, that is, certain of his property, which the defendant forfeited if he did not appear; or by making him find safe pledges or sureties for his appearance.[6]

Also the first and immediate process, without previous summons, upon actions of trespass *vi et armis* or for other injuries—trespasses against the peace, as deceit and conspiracy, where the violence of the wrong requires a speedy remedy.[6]

Upon execution of a bond to discharge the attachment the latter becomes discharged, the grounds thereof are no longer in controversy, and the obligors become bound absolutely to pay such judgment as may be recovered.[7]

Attachment of vessel. Allowed after libel filed for work done, materials or supplies

[1] Hoffman *v.* Clark County, 61 Wis. 7 (1884); Ward *v.* Walters, 63 *id.* 45 (1885); *ib.* 314.

[2] Wright *v.* Forrestal, 65 Wis. 348 (1886).

[3] Platter *v.* Green, 26 Kan. 268 (1881).

[4] Commonwealth *v.* Hills, 10 Cush. 533 (1853), Dewey, J.

[5] New Haven Saw Mill Co. *v.* Security Ins. Co., 7 F. R. 847 (1881).

[6] F. *attacher*, to fasten, tack to: L. *attingere*, to touch,—8 Conn. 334.

[7] Hollister *v.* Goodale, 8 Conn. 334 (1831), Hosmer, C. J.; Pennsylvania R. Co. *v.* Pennock, 51 Pa. 253 (1865).

[8] [Beardsley *v.* Beecher, 47 Conn. 414 (1879), Loomis, J.

[1] 3 Bl. Com. 443.

[2] 3 Bl. Com. 369.

[3] 4 Bl. Com. 283.

[4] Dunklee *v.* Fales, 5 N. H. 528 (1831), Richardson C. J.; Bryant *v.* Warren, 51 *id.* 215 (1871).

[5] Hollister *v.* Goodale, 8 Conn. 334 (1831), Hosmer, C. J. See also Adler *v.* Roth, 2 McCrary, 447 (1881), cases; 5 Mass. 163; 12 *id.* 497; 3 Minn. 406; 51 Pa. 253; 55 Vt. 422; 76 Va. 318; 21 W. Va. 211.

[6] 3 Bl. Com. 280; Bond *v.* Ward, 7 Mass. *123 (1810).

[7] Ferguson *v.* Glidewell, 48 Ark. 201-4 (1886), cases *pro* and *con*.

furnished, wharfage due, etc., and is upon the interest of the owner or part-owner.

Domestic attachment. Issues against a resident of the State who is charged with fraud in contracting a debt or with remaining absent or absconding to defraud his creditors. **Foreign attachment.** Issues against a non-resident who evades service of process — in the view that a levy and sale of his property will serve the purpose of an appearance by him and meet the ends of justice.

A "foreign attachment" is a suit against a personal defendant by name; and, because of inability to serve process on him on account of non-residence, or for other reason mentioned in a statute, the suit is commenced by a writ directing the proper officer to attach sufficient property of the defendant to answer any judgment that may be rendered against him. It is like an admiralty proceeding *in rem*.[1]

The foundation of the proceeding is that the defendant is beyond, while his property is within, the reach of process.[2]

Attachment of property was introduced at an early date in London, chiefly to operate upon debtors who could not be arrested because not subject to jurisdiction. As these persons were "foreigners" the process was called *foreign* attachment or attachment of foreigners' goods.[3]

Execution-attachment. An attachment in execution of a judgment. A proceeding in satisfaction of a judgment — by seizing property, rights, or credits in the hands of a debtor or bailee of the defendant.

The proceeding of attachment of property was derived from the customary law of foreign attachment in London, legislatures having modified the use of it, from time to time, as seemed proper. At first it was merely ancillary to other proceedings — in the nature of a proceeding in equity intended to enjoin a person from parting with the property of an absent debtor in order to compel the debtor's appearance, and being, in default of an appearance, an adjudication of the property toward the liquidation of the demand.[4]

Proceedings by attachment are not purely *in rem;* they are rather proceedings against the interest of the defendant and those claiming under him.[5]

In New England attachment of a defendant's property, rights, and credits is an incident to a summons in all actions based upon contract. Elsewhere, the writ seems to issue only upon cause shown by affidavit, accompanied by a bond designed to secure the defendant in such damage as he may sustain on account of the proceeding. The ground upon which the writ may be obtained and the details of practice vary in the different States. Speaking generally, the remedy is allowed for an ascertainable amount due; the plaintiff acquires such rights as the defendant had at the time of the levy: the levy itself constitutes a lien; and attachments levied simultaneously share *pro rata*. In many States the defendant may substitute a bond with sureties and thereupon resume possession of the property. An attachment is "dissolved" by final judgment entered for the defendant, or, on motion, for a substantial defect apparent upon the face of the proceedings.[1]

See GARNISH; ORDER, 2, Charging; RECEIPTOR; RES, 2; SEIZURE.

ATTACK. See ASSAULT; COLLATERALLY.

ATTAINDER.[2] Staining; corrupting: pollution of blood; extinguishment of inheritable quality of blood.

When sentence of death is pronounced the immediate, inseparable consequence at common law is attainder: the condemned is without the protection of the law, his estates are forfeited, his blood corrupted.[3]

The word is derived from *attincta:* the stain or corruption of a criminal capitally condemned. The party attainted lost all inheritable quality — he could neither receive nor transmit property or other rights of inheritance.[4]

Bill of attainder. A legislative act which inflicts punishment without a judicial trial.[5]

If the punishment be less than death, the act is termed a *bill of pains and penalties.*[5]

Bills of attainder (or acts of attainder as they were called when passed into statutes) were laws which declared certain persons attainted — their blood corrupted so that it lost heritable equality.[6]

"No Bill of Attainder . . shall be passed."[6] "No Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."[7] "No State shall . . pass any Bill of Attainder."[8]

Within the meaning of the Constitution bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and offices of a judge: it assumes judicial magistracy; it pronounces upon

[1] The Hine v. Trevor, 4 Wall. 571 (1866), Miller, J.

[2] Pennsylvania R. Co. v. Pennock, 51 Pa. 250 (1865); Fitch v. Ross, 4 S. & R. *564 (1818).

[3] See Brandon, For. Att. 4.

[4] See Brandon, For. Att. 4; Drake, Att. §§ 4–5; Waples, Att. §§ 2–4.

[5] Magee v. Beirne, 39 Pa. 63 (1861); Doe v. Oliver, 2 Sm. L. C., 7 Am. ed., 809, cases.

[1] See Brandon; Drake; 1 Bouvier, 202–3. On attaching debts, see 18 Cent. Law J. 468 (1884), cases.

[2] F. *ateindre*, to convict,— Skeat. F. *attaindre*, to stain, accuse: L. *ad-tingere*, to reach to, touch,— Webster. L. *attinctus*, stained, blackened,— 4 Bl. Com. 380; 39 N. Y. 430; 4 Wall. 387.

[3] 4 Bl. Com. 380–89; 2 *id.* 251–56.

[4] [*Exp.* Garland, 4 Wall. 387 (1866), Miller, J.

[5] Cummings v. Missouri, 4 Wall. 323 (1866), Field, J.

[6] Constitution, Art. I, sec. 9, cl. 3.

[7] *Ibid.*, Art. III, sec. 3, cl. 2.

[8] *Ibid.*, Art. I, sec. 10.

the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense. Such bills are generally directed against individuals by name, but they may be against a whole class; and they may inflict punishment absolutely or conditionally.[1]

In England attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted to the disinherison of those who would otherwise be his heirs. Thereby innocent children were made to suffer because of the offense of their ancestor. When the Constitution was framed this was felt to be a hardship — rank injustice. The provision was intended for the benefit of the children and heirs alone,— a declaration that the children should not bear the iniquity of the fathers. In this light is to be construed the Confiscation Act of 1862.[2]

Courts of justice were employed only to register the edict of Parliament and to carry the sentence into execution.[3]

In England bills of this sort have been usually passed in times of rebellion, of gross subserviency to the crown, or of violent political excitements.[4]

Shortly after the Revolution, acts of attainder were passed in several of the States. In England, by 33 and 34 Vict. (1870), attainder upon conviction is abolished. See TEST. Oath.

ATTEMPT. 1, *v.* To perform an act toward accomplishing a purpose; to do anything by physical exertion tending to produce an unlawful result.

To make an effort to effect an object; to make a trial or experiment; to endeavor; to use exertion to a purpose.[5]

2, *n.* In its largest signification, a trial or physical effort to do a particular thing.[6]

Can only be made by an actual ineffectual deed done in pursuance and in furtherance of the design.[7]

Consists of an act of endeavor to commit a particular offense, and an intent by that act alone, or in conjunction with other necessary acts, to commit it.[8]

Both these elements must be specifically charged.[9]

It is impossible to comprehend all cases in a definition that does not necessarily run into a mere enumeration of instances. There must be a combination of intent and act — an intent to commit a crime and an act, done in pursuance thereof, which falls short of the thing intended. While preliminary preparations,— conditions not causes,— may co-exist with a guilty intent, they may not advance the conduct of the party beyond the sphere of mere intent.[1]

While "attempt" conveys the idea of physical effort to do an act, or to accomplish an end, "intent" expresses the quality of mind with which the act is done.[2]

An "intent" implies purpose only; an "attempt" both purpose and actual effort to carry the intent into execution.[3]

"Intent" indicates the purpose existing in the mind; "attempt" the act to be committed.[4]

A statutory punishment for an attempt to poison is not incurred by an unexecuted determination to poison, though preparation is made for the purpose; nor by the actual administration of a substance not poisonous, though believed to be so.[5]

Merely delivering poison to a person and soliciting him to place it in a spring is not "an attempt to administer poison" — the act not approximating sufficiently near to the commission of murder to establish an attempt to commit it, within the Pennsylvania act of March 31, 1860, § 82, which is a copy of 1 Vict. (1837), c. 85, sec. 3.[6]

When the attempt to commit the principal or ultimate offense is made, the distinct offense of attempting is complete.[7]

Every attempt to commit a felony not murder is a misdemeanor; and, generally, an attempt to commit a misdemeanor is a misdemeanor of the same nature. But merely "soliciting" another to do an act is not an attempt to do that act.[8]

It cannot be maintained as a universal principle that an attempt to commit a misdemeanor is, by the common law, a misdemeanor. The law has declared many acts to be misdemeanors where the purpose of the offender was not consummated, although, if consummated, it would have been an offense only of this grade. In such cases there must be an unlawful purpose and an act committed which would carry it into immediate execution, unless prevented by some counteracting force or circumstance.[9] See ADMINISTER, 1.

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[1] Cummings *v.* Missouri, 4 Wall. 323 (1866), Field, J.

[2] Wallach *v.* Van Riswick, 92 U. S. 210 (1875), Strong, J. See also 2 Bl. Com. 256.

[3] Drehman *v.* Stifle, 8 Wall. 601 (1869).

[4] 2 Story, Const. § 1344.

[5] Commonwealth *v.* McDonald, 5 Cush. 367 (1850), Fletcher, J.

[6] Lewis *v.* State, 35 Ala. 387-88 (1860), cases, Stone, J.

[7] Uhl *v.* Commonwealth, 6 Gratt. 709 (1849).

[8] State *v.* Wells, 31 Conn. 212 (1862), Butler, J.; Gray *v.* State, 63 Ala. 73 (1879).

[1] United States *v.* Stephens, 12 F. R. 55 (1882), Deady, D. J.; 14 Cal. 160; 60 *id.* 71; 62 *id.* 297; 1 Whart. Cr. L. §§ 178, 181; 1 Bish. Cr. L. § 668.

[2] [State *v.* Marshall, 14 Ala. 414-15 (1848).

[3] Prince *v.* State, 35 Ala. 369 (1860); 14 Ga. 59.

[4] Stabler *v.* Commonwealth, 95 Pa. 321 (1880).

[5] State *v.* Clarissa, 11 Ala. 60 (1847).

[6] Stabler's Case, *supra*. See also Regina *v.* Williams, 47 E. C. L. 589 (1844); Regina *v.* Lewis, 38 *id.* 207 (1840); Regina *v.* St. George, *ib.* 193 (1840). Compare People *v.* Bush, 4 Hill, 133 (1843). See 2 Steph. Hist. Cr. L. Eng. 221-25.

[7] State *v.* Decker, 36 Kan. 720 (1887); Kan. Crim. Code, §§ 283, 121.

[8] 4 Bl. Com. 221, 241; Stabler's Case, *supra*; Smith *v.* Commonwealth, 54 Pa. 211-13 (1867), cases; Kelly *v.* Commonwealth, 1 Grant, 484 (1858); Rex *v.* Butler, 25 E. C. L. 441 (1834).

[9] Lamb *v.* State, Sup. Ct. Md. (1887), Bryan, J., deciding that the solicitation of a woman to take drugs to pre-

ATTEST.[1] To bear witness to: to signify, by subscription of his name, that the person has witnessed the execution of the particular instrument. Compare SIGN; SUBSCRIBE, 1.

In its strict sense to witness or bear witness to. The principal object in requiring that an instrument shall be executed in the presence of witnesses is that they may see that the same is properly and fairly executed. But the ordinary use of the word, as applied to the execution of deeds, requires that the witnesses should attest in writing: the principal end of which seems to be to preserve evidence that the instrument was executed in the presence of the required witnesses.[2]

To "attest" the publication of a paper as a last will, and to "subscribe" to that paper the names of the witnesses, are different things. Attestation is the act of the senses; subscription, the act of the hand: the one is mental, the other mechanical. To "attest" a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication; but to "subscribe" a paper published as a will is only to write on the same paper the names of the witnesses for the purpose of identification. There may be a perfect attestation in fact without subscription.[3]

An "attesting" witness, under the Statute of Wills, is one who at the time of attestation would be competent to testify in court to the matter.[4]

The last requisite to the validity of a deed is the attestation or execution of it in the presence of witnesses; necessary rather for preserving the evidence than for constituting the essence of the deed.[5]

The number of witnesses necessary to a valid will, and whether there shall be any at all to a deed, and the particular facts to which they must certify, vary in the different States.[6]

See further DEED, 2; PRESENCE; WILL, 2; WITNESS.

2. To certify to the verity of a copy of a public document.

Referring to judicial writings or copies thereof, as the copy of the record of a judicial process, seems to intend an authentication by the clerk of the court so as to make them receivable as evidence.[1]

ATTORN.[2] To turn over: to transfer service to a new lord; to recognize as landlord the transferee of a leasehold.

Attornment. The consent of a tenant to the grant of his landlord.[3]

The acknowledgment by a tenant of a new landlord, and an agreement to become tenant to the purchaser.[4]

As the feudal obligation between lord and vassal was reciprocal, the lord could not alien his seigniory without the consent of the vassal. This consent was expressed by what was called "attorning" — professing to become the tenant of the new lord: a doctrine afterward extended to all leases for life or years. By 4 and 5 Anne (1706), c. 16, no longer necessary to complete a grant or conveyance.[5]

ATTORNEY.[6] One who is put in the place, stead, or "turn" of another to manage his affairs of law.[7] An attorney-at-law; a lawyer.

A person employed by another to act in his behalf; an agent.

Formerly, one who in any manner acted in behalf of another.[8]

Attorney-at-law. A person whose profession is to represent litigants in the management of their causes before the courts.

Attorney-in-fact. One who serves another as agent in the doing of a particular thing; an agent for the transaction of an act specified in a sealed instrument called a "letter" or "power" of attorney.

An attorney-at-law may act as an attorney-in-fact. Any one who may serve another as agent may be made an attorney-in-fact. Persons are often appointed attorneys-in-fact to transfer certificates of stock, to acknowledge satisfaction of mortgages, to transfer realty, to collect rents,— to attend to all one's business generally in a particular place or country. See DELEGATUS.

Persons acting professionally in legal formalities, negotiations, or proceedings by

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cure an abortion is not within the act of 1868 of that State,— that the common-law rule was not altered by the act. Same case, 26 Am. Law Reg. 641 (1887); *ib.* 645–54, cases. See generally 17 Cent. Law J. 26–28, 45–50 (1883) — Irish Law Times (1882).

[1] L. *attestari*, to be a witness to. See TESTIS.

[2] Wright *v.* Wakefield, 4 Taunt. *223 (1812), Mansfield, C. J.

[3] [Swift *v.* Wiley, 1 B. Mon. 117 (Ky., 1840), Robertson, C. J. See also *Re* Downie's Will, 42 Wis. 76 (1877); 49 Conn. 249: Webster.

[4] [Jenkins *v.* Dawes, 115 Mass. 601 (1874), Gray, C. J.; 9 Pick. 350.

[5] 2 Bl. Com. 307. See also Ladd *v.* Ladd, 8 How. 31–39 (1850), cases.

[6] See Lord *v.* Lord, 58 N. H. 7 (1876); Dyer *v.* Dyer, 97 Ind. 17 (1883).

[1] Gass, &c. Manuf. Co. *v.* People, 4 Bradw. 515 (1879), cases, McAllister, J.

[2] At-tŭrn'. F. *atorner*, to prepare, direct, dispose.

[3] Souders *v.* Vansickle, 8 N. J. L. 317 (1826).

[4] Lindley *v.* Dakin, 13 Ind. 389 (1859). See also Willis *v.* Moore, 59 Tex. 636 (1883); Lyon *v.* Washburn, 3 Col. 204–5 (1877); 1 Washb. R. P. 98.

[5] 2 Bl. Com. 288–89, 72.

[6] F. *attorner*, to attorn, *q. v.*

[7] 3 Bl. Com. 25.

[8] "Our only High Bishop, only attorney, mediator,"— A Short Catechism (1553). "Attornies are denied me, and therefore personally I lay my claim,"— Shakespeare, Rich. II (1595), Act ii, s. 3. "Baptism by an attorney, by a proxy,"— Donne, Sermons (1640), p. 794.

warrant or authority of their clients, may be regarded as "attorneys-at-law" within the meaning of that designation in this country.[1]

An attorney may be an "attorney-in-fact" or "private attorney," or an "attorney-at-law" or "public attorney." The former is one who is given authority by his principal to do a particular act not of a legal character. The latter is employed to appear for the parties to actions, or other judicial proceedings, and is an officer of the courts.[2]

The word "attorney" alone does not necessarily import that the person is an officer of a court;[3] but, standing unqualified, ordinarily it refers to an attorney-at-law.[4]

In this country the distinction between "attorney" or "solicitor" and "counsel" is practically abolished. The lawyer in charge of a case acts both as solicitor and counsel. His services in the one capacity and in the other cannot be distinguished.[4]

In practice when a member of the bar signs a common-law pleading it is as "attorney;" when he signs an equity pleading it is as "solicitor." The distinction arises merely from the two modes of proceeding. He is counsel and attorney of the court in either case.[5] In courts of admiralty his title is "proctor."

February 5, 1790, the Supreme Court "ordered that counsellors shall not practice as attornies nor attornies as counsellors in this court." August 12, 1801, it was "ordered that counsellors may be admitted as attornies" on taking the usual oath.[6]

Compare ADVOCATE; BARRISTER; COUNSEL; LAWYER; PROCTOR; SERGEANT.

In Federal courts a party may manage his cause personally, as prescribed by the rules of court.[7] So, also, in the courts of the States.

The form of oath taken and subscribed by a person applying for admission to practice before the Supreme Court is as follows: "I, ——, do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly and according to law, and that I will support the Constitution of the United States."

The order admitting an attorney to practice is a judgment of the court that a party possesses the requisite qualifications and is entitled to appear and to conduct causes. By virtue of this order he becomes an officer of the court, holding office during good behavior.[1]

He is an agent to conduct a suit to judgment and execution. The utmost good faith is exacted of him toward the court and his client. The authority in the court to remove him is intended to secure the exercise of this degree of fidelity.[2]

He is liable in damages for the want of such skill and care as members of the profession commonly possess and exercise in like matters.[3]

He is not answerable for anything said relative to the cause in hand, although it should reflect upon the reputation of another and even prove groundless; but otherwise if he goes out of the way of legitimate comment and willfully asperses character.[4] See SLANDER.

Without consent he cannot buy, except as trustee, an adverse interest touching the thing to which his employment relates.[5]

He has a lien on papers or on a fund in his hands, as well as a right of action, for the worth of his services.[6]

His fee cannot be included in damages sustained. The reasons are: there is no standard by which fees are measured, some attorneys charging more, and some clients being willing to pay more, than others; more counsel are sometimes employed than are necessary; and, if the rule were otherwise, the amount charged by attorneys and allowed by successful clients would be abused.[7]

He is answerable to the court for any misconduct calculated to bring discredit on the court and reproach upon the administration of justice.[8]

The power in a court to remove an attorney is included in the power to admit him to practice. This power will be exercised where his continuance in

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[1] Savings Bank *v.* Ward, 100 U. S. 199 (1879), Clifford, J.

[2] [Hall *v.* Sawyer, 47 Barb. 119 (1866), Potter, J.

[3] Ingram *v.* Richardson, 2 La. An. 840 (1847); Clark *v.* Morse, 16 La. *576 (1841); 6 La. An. 706; People *v.* May, 3 Mich. 605 (1855).

[4] *Re* Paschal, 10 Wall. 493 (1870), Bradley, J. See 19 Am. Law Rev. 677 (1885) — as to relation in England; also The Nation, No. 964, p. 508.

[5] Stinson *v.* Hildrup, 8 Biss. 378 (1878), Drummond, J. See 3 Bl. Com. 25–29.

[6] Rules and Orders of the Supreme Court, 1 Cranch, xv, xvii.

[7] R. S. § 747.

[1] *Exp.* Garland, 4 Wall. 378 (1866), Field, J.

[2] Rogers *v.* The Marshal, 1 Wall. 651 (1863), cases; Randall *v.* Brigham, 7 *id.* 540 (1868), cases; *Re* Paschal, 10 *id.* 491, 496 (1870), cases.

[3] Savings Bank *v.* Ward, 100 U. S. 198, 195 (1879); Dundee Mortgage Co. *v.* Hughes, 20 F. R. 89 (1884): 24 Am. Law Reg. 197, 202–7 (1885), cases; Shattuck *v.* Bill, 142 Mass. 63–64 (1886), cases; 21 Am. Law Rev. 238–57 (1887), cases; 22 Cent. Law J. 60 (1886),— from Law Times (Eng.).

[4] 3 Bl. Com. 29; Munster *v.* Lamb, 49 L. T. R. 253 (1883): 28 Alb. Law J. 445; Stewart *v.* Hall, 83 Ky. 380–81, 383 (1885), cases; Weeks, Att'ys, § 110, cases; Cooley, Const. Lim. 443.

[5] Baker *v.* Humphrey, 101 U. S. 501 (1879), cases, Swayne, J.; Rodgers *v.* Marshall, 3 McCrary, 76, 89–95 (1881), cases.

[6] *Re* Paschal, 10 Wall. 483 (1870), cases; McPherson *v.* Cox, 96 U. S. 417 (1877); 2 Kent, 640. As to his lien for services, see generally 18 Abb. New Cases, 23–40 (1886), cases; as to his general or retaining lien, 20 Am. Law Rev. 727–40 (1886), cases; as to his special lien on judgments, *ib.* 821–47 (1886), cases; 21 *id.* 70–88 (1887), cases; acting for married women, 20 Cent. Law J. 365–368 (1885), cases.

[7] Oelrichs *v.* Spain, 15 Wall. 231 (1873), Swayne, J.

[8] *Re* Paschal, 10 Wall. 491 (1870), cases.

practice is incompatible with a proper respect of the court for itself, and of regard for the dignity of the profession, and where reprimand, suspension, or fine will not accomplish the end. Generally, opportunity to explain his conduct will be afforded him: the proceedings being *quasi* criminal; but for an act done in the presence of the court no formal allegation is necessary.[1]

It is laid down in all the books that a court has power to exercise summary jurisdiction over its attorneys to compel them to act honestly toward their clients, to punish them by fine and imprisonment for misconduct and contempts, and, in cases of gross misconduct, to strike their names from the roll. If regularly convicted of a felony, an attorney's name will be struck off the roll as of course; because he is rendered infamous. If convicted of a misdemeanor which imports fraud or dishonesty, the same course will be taken; as also for gross malpractice or dishonesty in his profession, or for conduct gravely affecting his character. Although it is not strictly regular not to grant a rule to show cause why he should not be struck off, without an affidavit making charges against him, yet, under the circumstances of a particular case, the want of an affidavit may not render disbarment proceedings void as *coram non judice*. Where an attorney commits an indictable offense, not in his character of attorney, and does not admit the charge, the rule is not inflexible that the court will not strike his name from the roll until he has been regularly indicted and convicted: there may be cases in which it is proper for the court to proceed without such previous conviction,—as where an attorney who had participated in "lynching" a prisoner made an evasive denial of the charge and failed to offer counter testimony to the evidence of his guilt, in itself clear. The proceeding is intended to protect the court from the official ministration of persons unfit to practice as attorneys therein. It is not a criminal proceeding and does not therefore violate the right of trial by jury. The proceeding, furthermore, when instituted in proper cases, is "due process of law." Special proceedings are provided for by statute in some of the States, requiring a formal information under oath to be filed, with regular proceedings and a trial by a jury. In the Federal courts the circumstances of each case must determine whether and when it is proper to dispense with a preliminary conviction.[2]

See further ADMISSION, 2; AGENT; CARE; CHAMPERTY; COMMUNICATION, Privileged, 1; COMPENSATION, 1; COMPROMISE; FEE, 2; CONTEMPT, 1; KNOWLEDGE, 1; MAINTENANCE; PETTIFOGGER; STIPULATION, 2; TRUSTEE; WOMAN.

[1] Bradley *v.* Fisher, 13 Wall. 354 (1871); *Re* Paschal, 10 *id.* 491 (1870); Randall *v.* Brigham, 7 *id.* 540 (1868); *Exp.* Garland, 4 *id.* 378 (1866); *Exp.* Steinman, 95 Pa. 220-39 (1880), cases, Sharswood, C. J.

[2] *Exp.* Wall, 107 U. S. 265, 273, 280, 287 (1882), cases, Bradley, J.; s. c. 13 F. R. 814, 820-23, cases. See also People *v.* Appleton, 105 Ill. 474 (1883); Farlin *v.* Sook, 30 Kan. 409 (1883). See generally, Weeks, Attorneys; Forsyth. Hist. Lawyers.

Attorney-general. 1. King's counsel.[1] 2. The head of the department of justice in the government of the United States.

The chief law-officer in the government of each State.

The former has a deputy in each judicial district, known as the "United States district attorney;" and the latter has a deputy in each county, known as the "district" or "county attorney," the attorney for the people, Commonwealth, State, or government. The attorney representing the United States is also often referred to as the attorney or counsel for the government. In the capacity of accusing and trying alleged violators of the criminal law, they are severally spoken of as the "prosecuting attorney"[2] or attorney for the prosecution.

The attorney-general of either government may appear by a special deputy attorney-general; and their subordinates, in districts and counties, by assistant district attorneys.

The attorney-general of the United States is not authorized, by the law creating and defining his office, to give legal opinions at the call of Congress. His duty to render such opinions is limited to calls from the President and the heads of departments,[3] *q. v.*

He manages government suits before the Supreme Court. His opinions are preserved in a series of reports known as the Opinions of the Attorneys-General, which include decisions rendered from 1791 to date.

The attorney-general of a State advises the governor, and exhibits informations in the name of the State.

Attorney, letter of, or power of. The instrument by which the authority of an attorney-in-fact is set forth.

This is *general*, when the authority is to act generally in the premises; and *special*, when limited to a particular act or acts. The former may be, in addition, *limited* or *unlimited*.

A power of attorney which authorizes the agent to vote is called a "proxy," *q. v.*

The authorization may be by parol or under seal: the latter is the method when an act under seal is to be done. The expression "letter" or "power" imports a sealed instrument.

All powers are strictly construed; general terms, in subordination to the particular subject-matter.[4]

The intention of the parties, not the letter, should control. The instrument should be construed to effectuate the object, if it can be ascertained.[5] See SEAL, 1.

[1] 3 Bl. Com. 27, 261; 4 *id.* 308; 1 Steph. Hist. Cr. L. Eng. 499.

[2] People *v.* Hallett, 1 Col. 359 (1871).

[3] Duty of Attorney-General, 15 Op. Att.-Gen. 478 (1878), cases; 1 Kent, 306; R. S. § 58.

[4] See Story, Agency, §§ 462, 500; 2 Kent, 642-46; 1 Pars. Contr. 94; 8 Pick. 498.

[5] Commonwealth *v.* Hawkins, 82 Ky. 251 (1885).

Attorney, warrant of. An instrument authorizing an attorney-at-law to appear in an action on behalf of the maker, or to confess a judgment against him.

The universal rule is to permit gentlemen of the bar to appear in causes without first procuring a warrant of attorney to appear.[1]

Frequently authorizes any attorney of a court of record to confess a judgment against the maker, in favor of a person named. It is generally under seal; and it must be for a sum certain. A common use is as a security in the hands of a creditor; it is then in some places popularly called a "judgment-note." May recite an accompanying bond, stating the terms upon which that was given; and be available only upon a breach of the condition in the bond — as, upon a default in paying money, in which event the creditor may procure a judgment at once without the delay of a suit, and, after that, have execution, etc. The form in general use also provides for the payment of costs and an attorney's commission out of the maker's property; releases the right to claim advantage from errors made in the proceedings; and waives stay of execution and exemption of property from levy and sale. The entry of one judgment exhausts the authority; after that the warrant is merged into the judgment — a higher species of security.[2] See COGNOVIT; CONFESSION, 1, Judgment.

AUCTION.[3] A public sale of property to the most favorable bidder.

A sale by consecutive bidding, intended to realize the highest price by competition for the article.[4]

When the law requires a sale of property to be made at public auction after due notice, it is for the purpose of inviting competition among bidders, that the highest price may be obtained.[5]

Auctioneer. A person who conducts an auction.

May refer to one who sells his own goods, as well as one who sells the goods of another, at public auction.[6]

Every person shall be deemed to be an auctioneer whose business it is to offer property at public sale to the highest and best bidder — excepting judicial or executive officers and executors, administrators, and guardians, acting in their official capacity.[7]

An "auction" sale is a public competitive sale. The person who conducts it is an "auctioneer." It is part of his engagement to invite and excite competition, and to dispose of the property to the highest bidder. The practice originated with the Romans, who gave it the descriptive name of *auctio*, an increase, because the property was sold to him who offered the most for it. Military spoils were thus disposed of, the sales being conducted *sub hasta*, under a spear — stuck in the ground. (A modern popular phrase is "under the hammer.") Later came into use sale "by the candle" — while a candle burned one inch; and still later "Dutch auction" — an offer at a price above its value with a gradual lowering until some person purchased the article. In each method competition has been a necessary element.[1]

There may be a sale to the *lowest* bidder, as when land is sold for non-payment of taxes to any one who will take it for the shortest term.

A price may be set under which no sale will be permitted, provided public notice thereof be given beforehand.

Parties may unite to purchase in good faith.[2]

The conditions of sale should state whether or not the sale is "without reserve" and whether a right to bid is also reserved. A material error in the description of realty makes the sale voidable, *q. v.* A defaulting purchaser may be made to pay a deficiency on a resale, subject to the former conditions.[3] The auctioneer may not bid for himself nor by an agent, even though he offer a fair price: the reason being, the law will not permit a test to be made between interest and duty. Till a sale has been made he acts for the vendor; after the sale, for some purposes, as, to take the case out of the Statute of Frauds, he is agent for the buyer.[4] To exempt a sale of realty from the operation of that statute he must write the buyer's name in the memorandum of sale.[5] He has a special property in goods, and a lien for costs and commissions. If the vendor is undisclosed, he is liable as vendor. He is also liable for the want of due care and skill.[6]

He has all the liabilities of an ordinary agent. If he sells goods "as auctioneer," without naming the principal, he is liable as if selling for himself; and if the title proves defective, independently of the doctrine of implied warranty, he may be sued by the purchaser, as for money had and received, on the ground that the consideration has failed.[7]

See further BID; COMMERCE; CONCERN, For whom; JOBBER; SALE, Public; VENDUE.

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[1] Osborn *v.* United States Bank, 9 Wheat. 830 (1824).

[2] See 3 Bl. Com. 397.

[3] L. *auctio*, increase: *augeré*, to increase.

[4] [Hibler *v.* Hoag, 1 W. & S. 553 (1841); Campbell *v.* Swan, 48 Barb. 113 (1865).

[5] Porter *v.* Graves, 104 U. S. 174 (1881), Miller, J.

[6] City of Goshen *v.* Kern, 63 Ind. 473 (1878), Howk, C. J.

[7] Revenue Act, 13 July, 1866: 14 St. L. 119.

[1] Crandall *v.* State, 28 Ohio St. 481–82 (1876), Ashburn, J.

[2] See Smull *v.* Jones, 1 W. & S. 136 (1841); Platt *v.* Oliver, 1 McLean, 301 (1837); Kearney *v.* Taylor, 15 How. 519 (1853); Smith *v.* Ullman, 58 Md. 189 (1882), cases.

[3] Weast *v.* Derrick, 100 Pa. 509 (1882).

[4] Veazie *v.* Williams, 8 How. 151–56 (1850), cases. As to that statute, see 19 Cent. Law J. 247–49 (1884), cases.

[5] Doty *v.* Wilder, 15 Ill. 410 (1854), cases; 2 Kent, 540; 13 Am. Dec. 398–400, cases.

[6] 3 Pars. Contr. 12.

[7] Seemuller *v.* Fuchs, 64 Md. 217 (1885), cases; Edgerton *v.* Michels, 66 Wis. 129 (1886), cases. Same cases, 24 Am. Law Reg. 250, 260; *ib.* 263–66, cases.

AUDIRE. L. To hear. Compare OYER.

Audi alteram partem. Hear the other side — the accused, the defendant.

No man is to be condemned unheard.[1] See NOTICE, 1, Judicial.

Audita querela. The complaint having been heard.

An *audita querela* lies where a defendant, against whom a judgment is recovered and who is therefore in danger of execution, may be relieved upon good matter of discharge which has happened since the judgment: as if the plaintiff has given him a general release, or if the defendant has paid the debt without procuring satisfaction to be entered on the record. In these and like cases, wherein the defendant has good matter to plead, but has had no opportunity of pleading it, an *audita querela* lies, in the nature of a bill in equity, for relief against the oppression. The writ is directed to the court below; states that the complaint of the defendant has been heard (*audita querela defendentis*); and, after setting out the matter of the complaint, directs the court to call the parties before it, and, having heard their allegations and proofs, to cause justice to be done between them.[2]

The writ was invented lest in any case there should be an oppressive defect of justice, where a party who has a good defense can not make it in the ordinary forms of law. But the indulgence shown in granting summary relief upon motion has rendered the writ almost useless.[3]

It is a judicial writ, founded upon a record, and directed to the court in which that record remains. It has the usual incidents of a regular suit. It is not a means for obtaining relief from negligence. The same end is now very generally secured by a motion.[3] See MOTION, 2.

AUDIT. Literally, he hears; a hearing. See AUDIRE.

1, *v.* To hear: to examine and adjust or certify.

2, *n.* The act or proceeding of officially examining and allowing or certifying, or of rejecting, a charge or account.

Auditor. One who hears: one who officially examines and allows as proper and lawful, or rejects as unlawful, the items of an account or accounts.

An officer of government whose duties are, chiefly, to examine, verify, and approve or reject, the accounts of those who have disbursed public moneys or furnished supplies.[1]

Termed *auditor-general*, *State auditor*, *county auditor*, *first auditor*, etc. Corresponding in duties is the comptroller (*q. v.*) of cities, States, and of the United States treasury.[2]

The office of public auditor belongs to the administrative department of government. Even where he is empowered to act upon his official judgment his functions are only *quasi* judicial.[3]

"To audit" an account is to hear, examine, adjust, pass upon and settle an account, and then to allow it.[4]

"To audit" is to examine and adjust an account or accounts. An "auditor" is a person authorized to examine an account or accounts, compare the charges with the vouchers, examine parties and witnesses, allow or reject charges, and state a balance.[5]

Such is the meaning when it is directed that a board of supervisors shall "audit and allow" the costs and expenses of a hearing to remove a county officer.[6]

In a statute providing that charges for making an examination of an insurance company shall be presented in an itemized bill, which shall be audited by the comptroller, "audit" means hear and examine, pass upon and adjust. In such case also the word plainly refers to a judicial investigation and decision as to the merits of a claim.[6]

An "auditor" is an agent or officer of the court who examines and digests an account for the decision of the court. He prepares the materials on which a decree may be made.[7]

He is an officer, either at law or in equity, assigned to state the items of debt and credit between parties and exhibit the balance.[8]

The term often designates an officer whose duties are properly those of a master.[9]

Originally, an auditor was an officer of the king, whose duty it was, at stated periods, to

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[1] 1 Cush. 243; 46 N. Y. 119; 41 N. J. E. 659; 16 C. B. 416.

[2] 3 Bl. Com. 405-6.

[3] See Avery *v.* United States, 12 Wall. 307 (1870); 18 Ala. 778; 59 Cal. 139; 24 Me. 304; 20 Md. 320; 10 Mass. 101; 12 *id.* 270; 144 *id.* 13; 9 Johns. 221; 17 *id.* 484; 21 Barb. 435; 34 *id.* 515; 2 Hill, S. C., 298; 12 Vt. 56; 23 *id.* 324; 25 *id.* 168; 42 *id.* 165; 18 Wis. 571; 15 Am. Dec. 695.

[1] See R. S. § 276.

[2] See R. S. §§ 268-73.

[3] State *v.* Brown, 10 Oreg. 222 (1882).

[4] Morris *v.* People, 3 Denio, 391 (1846); 68 Ga. 53.

[5] People *ex rel.* Benedict *v.* Supervisors, 31 N. Y. Supr. 419 (1881), Talcott, P. J.; Laws of 1874, ch. 323.

[6] Matter of Murphy, 31 N. Y. Supr. 594 (1881), Learned, P. J.

[7] Field *v.* Holland, 6 Cranch, 21 (1810), Marshall, C. J.

[8] Whitwell *v.* Willard, 1 Metc. 218 (1840), Shaw, C. J.

[9] Blain *v.* Patterson, 48 N. H. 152 (1868), Bellows, J.

examine the accounts of inferior officers and certify to their correctness. Later, the term designated an officer of the court of exchequer whose duty it was to take the accounts of the receivers of the king's revenue and "audit and perfect" them, without, however, putting in any charges; his office being merely to audit the accounts, that is, to ascertain their correctness. . . "To audit" is to examine, settle and adjust accounts — to verify the accuracy of the statements or items submitted.[1]

Where the items are numerous, the testimony questionable, and the accounts complicated, a court may make a general reference, with direction to state specifically such matters as either party may require or as the auditor may deem necessary.[2] See at end of ACCOUNT, 1.

Auditors are called in by the courts to hear matters of detail which a court has not time to hear, and to inform the conscience of the court as to facts which are essential to be known before a particular decree or judgment can be pronounced.[3]

They are appointed to audit the accounts of assignees in insolvency, of trustees to sell realty, of executors, of administrators, of guardians,— when excepted to, or where distribution is to be made of a balance among rival claimants; also, to report upon the expediency of selling or mortgaging the realty of decedents; as to incumbrances affecting the interests of partitioners; sometimes, to report the facts, where a petition has been taken *pro confesso* but an account showing a balance against the respondent is essential; to examine the accounts of public officers; also, as to the satisfaction of judgments, as to the distribution of the proceeds of forfeited recognizances, of the proceeds of sales, etc. Or, a court may itself sit as a "court of audit," as, an orphans' or surrogate's court, in which at regular intervals large numbers of accounts are presented for approval.

Where the claimants to a fund are numerous the auditor is required to give public notice of the time and place of holding hearings. His specific duties may be defined in the order of his appointment; but statutes provide for his issuing subpœnas, for administering oaths and affirmations, and for procuring the attachment of contumacious witnesses. He reports the facts, not the testimony, and a schedule by which the fund may be distributed according to law. His rulings and recommendations are reviewable by the court upon exception filed by any aggrieved party. He is called upon to admit or reject items of costs, wages, rents, commissions, secured and unsecured claims, etc. In every case the statutes, decisions, rules and practice of the particular jurisdiction should be consulted. Compare MASTER, 4.

AUDITA. See AUDIRE, Audita, etc.

[1] People *v.* Green, 5 Daly, 200 (1874), Daly, C. J. See 4 Coke, Inst. 107.

[2] Field *v.* Holland, *supra*.

[3] Miller's Appeal, 30 Pa. 490 (1858), Woodward, J.

AULA. L. A hall, or palace.

Aula regia or regis. The royal hall, or the king's hall.

A court established by the Conqueror, to advise the king in matters of great moment. It was composed of the king's great officers resident in his palace: the lords high constable, steward, treasurer, the lord chancellor, and others. These were assisted by persons learned in the laws — the king's justiciars or justices, and by the greater barons of parliament. Over all whom presided the chief justiciar.

Here will be noted the change in the meaning of the word "court" from royal household to tribunal of justice.

The court followed the king's household in all his expeditions. That being burdensome to litigants it was ordained by Magna Charta that the court should be held in some certain place — Westminster Hall.

In the reign of Edward I the court was subdivided into four distinct tribunals: chancery, king's bench, exchequer, and common pleas — the last being in a special sense the successor of the original *aula regis*.[1] See CHANCELLOR, 1.

AUNT. See ANCESTOR; CONSANGUINITY.

AUTER. See AUTRE.

AUTHENTIC.[2] In legal parlance, duly vested with all formalities and legally attested.[3]

Authentication. Official, legal attestation to a thing done: as, of a copy made of an act of legislation, or of the record in a court or other public office.

There does not appear to be any necessary or inherent meaning in the word "authenticated" as used in the act of June 19, 1876, amending Rev. St., § 5271, which relates to extraditions and requires the authentication to be in writing. Authentication in regard to original papers may be made by oral proof. A witness may swear to the verity and identity of the original, and that it would be received in the tribunals of the foreign country as evidence of the criminality of the accused. But when *copies* are offered they must be authenticated according to the law of the foreign country — for which the certificate of the principal officer of the United States is absolute proof.[4] See FAITH, Full, etc.; LAW, Foreign.

AUTHOR.[5] Within the meaning of the copyright law one who, by his own intellectual labor applied to the materials of his com-

[1] 3 Bl. Com. 37–40; 3 Steph. Com. 397–400.

[2] L. *authenticus*, written with one's own hand; original.

[3] [Downing *v.* Brown, 3 Col. 590 (1877): Webster.

[4] *Re* Fowler, 18 Blatch. 436 (1880), Blatchford, J., s. c. 4 F. R. 311. See 1 Greenl. Ev. § 484; 1 Whart. Ev. § 700.

[5] L. *auctor*, an originator: *augere*, to increase.

position, produces an arrangement or compilation new in itself.[1]

See generally COPYRIGHT; HISTORY; LETTER, 3; LITERARY; MANUSCRIPT; PHOTOGRAPH; REVIEW, 3; SCIENCE.

AUTHORITY. 1. Power — delegated to an agent or exercised by virtue of an office, trust, or privilege.

Executive authority. Power vested in the President of the United States, or in the governor of a State; also, either of those officials himself considered in his political capacity, as opposed to the judicial and legislative branches of government.[2] **Judicial authority.** Official power in a court or judge. **Legislative authority.** Power conferred upon a legislative body.

Express authority. Power stated in terms more or less explicit. **Implied authority.** Such authority as is or is to be inferred from circumstances.

General authority. Power extending to all acts of a certain nature. **Special authority.** Authority confined to a single act or transaction.

Limited authority. Power restricted by instructions more or less precise. **Unlimited authority.** Authority not defined by words or instructions.

Naked authority. Power exercised by an agent solely for the benefit of the principal. **Authority coupled with an interest.** Power given for value to the agent, or as part of a security.

See further AGENT; DELEGATUS; INTEREST, 2; Coupled, etc.; PARTNER; also, APPARENT; CORPORATE; LAWFUL; POWER, 1; RATIFICATION.

2. The binding force of a constitution, treaty, statute, or ordinance.

Constituted authorities. Officers of government appointed under a constitution. **Constituting authorities.** The persons who appoint the former as their servants or agents.

3. Whatever is relied upon as declaring the law: (1) a constitution, treaty, statute, adjudication; (2) a text-book or treatise explanatory of organic, statute, or case law. Compare OPINION, 3; PRECEDENT.

AUTHORIZE. To confer power upon; to invest with lawful authority, *q. v.*

A government contract to be "authorized by law" must be made in pursuance of express authority given by statute or of authority necessarily inferable from some duty imposed upon, or from some power given to, the person assuming the contract.[1]

AUTRE. F. Another. Also spelled *auter*.

Autre action pendant. Another action pending. See PEND.

Autre droit. Another's right. See further DROIT.

Autre vie. Another's life. See VIE.

AUTREFOIS. F. Another time; formerly.

Autrefois acquit. Formerly acquitted. **Autrefois convict.** Formerly convicted.

Pleas in bar of a second indictment for an offense of which the accused has already been acquitted or convicted. See further ACQUITTAL; CONVICTION, Former.

AUXILIARY. See ANCILLARY; EQUITY.

AVAIL.[2] To be of use or advantage; to answer the purpose; to have strength, force, or efficacy sufficient to the end:[3] as, in saying that a defense, a plea, or evidence will or will not avail the party.

Available. Suitable to the purpose: as, an available defense or plea; also, admitting of early conversion into ready money.

"Available means" are anything which can readily be converted into money; all that class of securities known in the mercantile world as representatives of value easily convertible into money; not necessarily, nor primarily, money itself.[4]

Avails. Profits, proceeds, funds.[5]

AVER. See AVERMENT.

AVERAGE.[6] Proportional payment: contribution to a loss or expense incurred at sea for the general benefit of several persons or several interests.

In its simple generic sense a loss, injury, or deduction not amounting to a total loss.[7]

General or gross average. That contribution to a loss or expense voluntarily incurred for the preservation of the whole, in

[1] [Atwill v. Ferrett, 2 Blatch. 46 (1846), Betts, J. See also 2 Kent, 373-74, 388; R. S. § 4952, cases.

[2] See Commonwealth v. Hall, 9 Gray, 267-68 (1857), Bigelow, C. J.

[1] Fifteen Per Cent. Contracts, 15 Op. A.-G. 236 (1877).

[2] F. *avaloir*, to be of use: L. *valere*, to be strong.

[3] [Webster's Dict.

[4] Brigham v. Tillinghast, 13 N. Y. 218-19 (1855).

[5] See 100 Mass. 233; 12 F. R. 871; 2 Bl. Com. 60.

[6] L. *averagium: averia*, cattle. Service a tenant owes his lord by horse, ox, or carriage therewith.— Blount's Law Dict. (1691). It meant use of horses, carriage, payment for carriage; hence, payment proportional — *to* horses employed, goods lost at sea, etc.,— Skeat.

[7] [Bargett v. Orient Ins. Co., 3 Bosw. 395 (1858).

which all who are concerned in the ship, freight, and cargo are to bear an equal part proportionable to their respective interests.[1]

Particular average. The damage or loss, short of total, falling directly upon particular articles of property.[1]

The liability or claim upon such articles from loss or damage to something else is "general" average.[2]

The rule as to general average is derived from the Rhodian law as adopted in the Roman jurisprudence. The Digest states the rule thus: If goods are thrown overboard to lighten a ship, the loss incurred for the sake of all shall be made good by the contribution of all. The case of jettison was used to illustrate the general principle. Now, as then, ship and cargo must have been placed in a common imminent peril; there must have been a voluntary sacrifice of property to avert that peril; and, by the sacrifice, the safety of the other property must have been successfully attained.[3]

The principle is that "what is given for the general benefit of all shall be made good by the contribution of all." General average is that contribution which is made by all who are parties to the same adventure toward a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, by some of them for the common benefit of ship and cargo. The loss must be of an extraordinary nature, advisedly incurred, under circumstances of imminent danger, for the common benefit of ship and cargo; and it must have aided in the accomplishment of that purpose.[4]

Where the interests are temporarily separated, as by unloading the cargo to repair the vessel, and the expectation of resuming the voyage, from unforeseen circumstances, is not realized, as, for example, inability to make the vessel seaworthy, all the expense of protecting the different interests meanwhile is chargeable to general average.[5]

Passengers' baggage in daily use does not contribute to general average.[6]

AVERMENT.[7] A positive statement of the truth of a fact; a formal allegation in pleading.

Aver. To assert for the truth; to state in positive terms; to allege formally.

Averments are spoken of as "affirmative" and "negative," as "general" and "particular" or "specific," as "material" and "immaterial," as "unnecessary," "impertinent," etc., with substantially the same meaning as are "allegations." See ALLEGATION.

An averment in a declaration is a direct and positive allegation of fact, made in a manner capable of being traversed. It includes the idea of an affirmation to be made out by inference and induction.[1]

"The use in pleading of an averment is to ascertain that to the court which is generally or doubtfully expressed; so that the court may not be perplexed of whom, or of what, it ought to be understood; and to add matter to the plea to make doubtful things clear"—as, an averment in an action of slander.[2]

There is no particular form of words in use. The important matter is that each substantial fact be so averred as to be susceptible of a simple admission or denial. See VERIFY.

AVOCATION. See BUSINESS; EMPLOYMENT; TRADE.

AVOID.[3] 1. To cause to be or become empty: to render useless or void; to make inoperative or of no effect; to nullify. Opposed, *affirm*, *confirm*.

Avoidance. Setting aside; nullifying; rendering of no effect.[4] Compare VOID.

Some authorities assert that an infant's deed cannot be avoided except by an act equally solemn with the deed itself; some that it cannot be done by anything short of an entry; others that it may be done simply by another deed delivered to a different grantee. All agree, however, that acts which would be insufficient to avoid such a deed may amount to an affirmance,[5] *q. v.*

2. In pleading, to repel the consequence or inference which would logically follow a failure to deny the truth of an averment. More fully, to "confess and avoid."

Matter of avoidance. New matter which admits the declaration to be true, but shows, either that the defendant was never liable to the recovery claimed against him or that he has never been discharged from his original liability by something supervenient.[6] See further CONFESSION, 1.

AVOIRDUPOIS. See TON.

AVOW.[7] 1. To declare openly: to acknowledge and justify an act; opposed to *disavow*.

2. To make an avowry.

Avowant. He who makes an avowry.

Avowry. Upon an action of replevin being brought and a declaration delivered, the

[1] Padelford *v.* Boardman, 4 Mass. 549 (1808).

[2] Bargett *v.* Orient Ins. Co., *ante*.

[3] Columbian Ins. Co. *v.* Ashby, 13 Pet. 337-38 (1839), Story, J.

[4] McAndrews *v.* Thatcher, 3 Wall. 370, 376 (1865), Clifford, J. See also 3 Kent, 235.

[5] The Joseph Farwell, 31 F. R. 844 (1887), Toulmin, J.

[6] Heye *v.* North German Lloyd, 33 F. R. 65 (1887), cases, Brown, J.

[7] F. *averer*, to affirm as true: L. *ad*, to; *verum*, truth.

[1] Laughlin *v.* Flood, 3 Munf. 262 (1811).

[2] Van Vechten *v.* Hopkins, 5 Johns. 219 (1809).

[3] M. Eng. *avoiden*, to make empty, put out of the way.

[4] See 2 Bl. Com. 308.

[5] Irvine *v.* Irvine, 9 Wall. 627-28 (1869), Strong, J.

[6] Gould, Plead. 34, 13; 31 Conn. 177.

[7] L. *ad-vovere*, to vow to: *ad-vocare*.

distrainor, as defendant, makes "avowry," that is, he avows taking the distress in his own right or in the right of his wife, and sets forth the reason for it, as for rent-arrear, damage done, or other cause.[1]

If he justifies in another's right as his bailiff or servant, he is said to make "cognizance."[1] See COGNIZANCE, 1.

AVULSION.[2] Alluvion or dereliction of land which is sudden and considerable.

As, where the course of a river is changed by a violent flood and thereby a man loses his ground; in which case he has, as his recompense, what the river has left in another place.[2] See further ALLUVION.

AWARD.[4] 1, *v.* (1) To allow by judicial determination: as, for a court to award a writ of *habeas corpus* or other process.

(2) To adjudge as due; to allow; to find: as, for a jury or viewers to award damages, for arbitrators to award a claim.

2, *n.* The decision of a board of arbitrators; the finding of a referee; also, the writing which embodies such determination.

An award is the judgment of the arbitrator upon the matters submitted.[5]

No award. A plea to an action on an arbitration bond, that no legal award was made.

A valid award is equivalent to a judgment on a verdict. Feudal law did not permit a right in realty to pass by a mere award — lest an alienation should be made collusively without the consent of the superior. . . A party who disobeys an award is punishable as for contempt of court, unless the award be set aside for corruption or other misbehavior in the arbitrators.[6]

An award is an act of the parties performed through their agents, and assented to in advance.[7]

It can be impeached only for corruption, partiality, or gross misbehavior in the arbitrators, or for some palpable mistake as to the law or the facts. If so uncertain that it cannot be enforced, it is void.[8]

At common law it must be not only certain but final, disposing wholly of the controversy which properly forms the subject of the reference; otherwise it cannot be enforced.[9]

Before a court of review every presumption will be made in favor of the validity of an award, unless flagrant error appears upon the face of the record itself.[1]

See further ABIDE; ARBITRATION.

AWAY. See ABSENT; CARRY, 1.

Away-going. See CROP.

B.

B. Referring to a page or note, see A, 1.

In colonial times was imprinted with indelible ink upon the cheek of a person convicted of burglary.[2]

As an abbreviation, usually denotes bachelor, bail, bankruptcy, baron, bench, bill, bond, book:

B. B. Bail bond. See C. C. *et* B. B.

B. C. Bail court; bankruptcy cases.

B. E. Baron of the court of exchequer. See BARON, 3.

B. F. *Bonum factum*, a proper thing.

Formerly was indorsed upon the paper containing a decree, signifying that it was "approved."

B. R. *Bancus regis*, king's bench; bankruptcy reports; Bill of Rights.

B. S. *Bancus superior*, upper bench.

BABY ACT. A term of reproach originally applied to the disability of infancy when pleaded by an adult in bar of recovery upon a contract made while he was under age, but extended to any plea of the statute of limitations.

BACHELOR OF LAWS. See DEGREE.

BACK. To indorse, sign: as, to back a process or writ.

The warrant of a justice of the peace in one county must be backed, that is, signed, by a justice in another county, before it can be executed there. This practice prevailed for a long period prior to authorization by statute.[3]

Under extradition treaties, an officer of government, usually the secretary of state, may indorse or back a warrant of arrest.

BACK-GAMMON. See GAME, 2.

BACK-WATER. See MILL, 1; TAKE, 8.

BAD. 1. When applied to "character," the jury must say whether want of chastity or of honesty was imputed.[4]

The charge of incontinency involved in the words "she is a bad, a loose, character," may be sufficiently averred by an *innuendo* without a *colloquium*. Such words of themselves impute incontinency. Whether

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[1] 3 Bl. Com. 150; 21 N. J. L. 49.

[2] L. *avulsio: avellere*, to tear away.

[3] 2 Bl. Com. 262; 3 Washb. R. P. 452.

[4] Mid. Eng. *awarden:* F. *eswardir*, to examine, judge: *warder*, to take heed, keep. A thing for the parties to observe,— Skeat; Spel. Gloss.

[5] Halnon *v.* Halnon, 55 Vt. 322 (1883), Royce, C. J.

[6] 3 Bl. Com. 16–18.

[7] Babb *v.* Stromberg, 14 Pa. 399 (1850), Gibson, C. J.

[8] Herrick *v.* Blair, 1 Johns. Ch. 101 (1814), Kent, J.; 2 id. 551; Fairchild *v.* Adams, 11 Cush. 550 (1853); Perkins *v.* Giles, 53 Barb. 346 (1869); Russell *v.* Smith, 57 Ind. 406, 408 (1882).

[9] Connor *v.* Simpson, 104 Pa. 443 (1883); Morse, Arb., &c. 466.

[1] Wilcox *v.* Payne, 88 Pa. 157 (1878).

[2] Jones *v.* Robbins, 8 Gray, 348 (1857), Shaw, C. J.

[3] 4 Bl. Com. 291.

[4] Riddell *v.* Thayer, 127 Mass. 490 (1879); Kedroff-vansky *v.* Niebaum, 70 Cal. 218–19 (1886), cases.

or not the charge is true the jury must decide.[1] See CHARACTER; SLANDER.

2. In pleading — materially defective; ill; not good: as, a bad plea, bad pleading, a bad count. Compare ILL, 2; WELL, 2.

When evidence has not been given on a bad count, a general verdict will be entered on such of the good counts as are supported by proof.[2] See USUS, Utile per inutile, etc.

3. False, faulty: as, bad grammar, *q. v.*

Bad faith. See FAITH. Compare MALUS.

BADGE. 1. A mark or device worn by an officer of the peace for purposes of identification and perhaps of notification.

On demand, is ordinarily to be shown as evidence of authority to make an arrest.

2. Evidence of character.

A badge of fraud is a fact tending to throw suspicion upon a transaction, and calling for explanation;[3] as, possession of personalty by the alleged vendor.[4] See POSSESSION, Fraudulent.

"The provisions in the deed of assignment are at most but badges of fraud, susceptible of explanation, like all *indicia*, and may or may not be evidence of fraudulent intent."[5]

BADGER. To pester or worry; as, to badger a witness.[6] Compare BROWBEAT.

Originally, to follow up or pursue with eagerness, as the badger is hunted. See EXAMINATION, 9.

BAG. The sack, satchel, reticule or other like receptacle in which lawyers carry briefs and papers for use during the preparation, trial, hearing, or argument of cases, was formerly called, from the prevailing color of the material, the "green bag."

In the theatrical performances of Queen Caroline's time the lawyer is represented with a *green bag* in his hand; and such is the reference in the literature of Queen Anne's time; and, until a recent date, green bags were commonly carried by the majority of legal practitioners. The king's counselors, queen's counselors, the chancery lawyers, and the leaders of the common bar, were honored with the privilege of carrying red, purple, or blue bags. Indeed, the green bag was so uniformly associated with the profession in the reign of Anne that "to say that a man intended to carry a green bag was the same as saying that he meant to adopt the law as a profession."[7]

In the time of Charles II angry clients were accustomed to revile lawyers as "green-bag carriers."[8]

As to petty bag office, see HANAPER; PETIT.

[1] Vanderlip *v.* Roe, 23 Pa. 84 (1854).

[2] Haldeman *v.* Martin, 10 Pa. 372 (1849); Chaffey *v.* United States, 116 U. S. 442 (1886); *ib.* 497.

[3] Bump, Fraud. Convey. 81.

[4] 101 U. S. 229; 1 Pars. Contr. 522.

[5] Burr *v.* Clement, 9 Col. 11 (1885).

[6] [Webster's Dict.

[7] 5 Alb. Law J. 225 (1872).

[8] Wycherly, Plain Dealer.

BAGATELLE. See GAME, 2.

BAGGAGE. 1. Whatever a passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey.[1]

A contract to carry a person implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, the quantity depending upon the station of the party, the object and length of the journey, and other circumstances.[2]

To the extent that the articles carried by a passenger for his personal use exceed in quantity and value such as are usually carried by passengers of like station, pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer. In cases of abuse by the passenger of the privilege which the law gives him, the carrier secures such exemption from responsibility, not, however, because the passenger, uninquired of, failed to disclose the character and value of the articles carried, but because the articles themselves, in excess of the amount usually or ordinarily carried, under like circumstances, would not constitute baggage within the meaning of the law.

In the case (Fraloff's, *infra*) in which the doctrine foregoing was enunciated, 275 yards of laces, alleged to be of the value of $75,000, and found by a jury to be worth $10,000, were held to constitute part of the wearing apparel of the defendant in error — a wealthy Russian. They were adapted to and exclusively designed for personal use, according to her convenience, comfort, or tastes, during an extended journey, upon which she had entered. They were not merchandise, and there was no evidence that they were intended for sale or for purposes of business. It was further decided that whether the laces were such articles in quantity or value as passengers of like station and under like circumstances ordinarily carry for their personal use, and to subserve their convenience, gratification, or comfort while traveling, was not a question for the jury, under instruction from the court, but for the court itself as a matter of law.[3]

The liability of the carrier attaches when the property, as baggage, passes into his hands with his con-

[1] Macrow *v.* Great Western Ry. Co., L. R., 6 Q. B. 622 (1871), Cockburn, C. J. See also Jordan *v.* Railway Co., 5 Cush. 72 (1849); Connolly *v.* Warren, 106 Mass. 148 (1870); 6 Hill, 586.

[2] Hannibal, &c. R. Co. *v.* Swift, 12 Wall. 274, 278 (1870), Field, J.

[3] N. Y. Central, &c. R. Co. *v.* Fraloff, 100 U. S. 29–30 (1879), Harlan, J.; Waite, C. J., Clifford, Hunt, Swayne, and Bradley, JJ., concurring; Field, Miller, and Strong, JJ., dissenting. See also Haines *v.* Chicago, &c. R. Co., 29 Minn. 161 (1882); Isaacson *v.* N. Y. Central, &c. R. Co., 94 N. Y. 283 (1884).

sent. He may refuse to receive property not properly baggage, but if he receives it knowingly, and no deception has been practiced upon him, he must carry it safely.[1]

The fare paid by a passenger includes the transportation of his baggage. The carrier has a lien therefor, and may detain the baggage until payment is made.[2]

The term has been held to include — a watch,[3] jewelry,[4] an opera glass,[5] surgical instruments,[6] a gun, a pistol,[7] a mechanic's tools,[8] manuscript,[9] books;[10] but not, samples of merchandise,[11] except when the carrier, being made aware of the contents of packages, takes them as baggage;[12] nor gold ornaments for presents;[13] nor money, except as to such limited amount as may be necessary for personal use.[14]

The possession of a baggage check by a passenger is evidence of the receipt of his baggage.[15]

Baggage is to be removed within a reasonable time after arrival, else the carrier may store the articles, charge reasonable rates for such service, and, in case of theft, loss, or destruction, be liable only as a warehouseman,[16] *q. v.* See also CARRIER.

2. As to the baggage of guests in hotels, see INNKEEPER.

BAIL.[17] 1, *v.* To deliver personalty to another as a bailment, *q. v.*

2, *v.* To deliver a defendant to sureties who give security for his appearance in court at the return of the writ.[18]

n. One or more of such sureties themselves.

A delivery or bailment of a person to his sureties, upon their giving (together with himself as principal) sufficient security for his appearance; he being supposed to continue in their friendly custody, instead of going to jail.[1]

The sureties undertake to surrender the defendant when he is called upon to answer the charge.[2]

Bailable. Admitting of bail; allowing or providing for release upon bail: as, a bailable — offense, action, process.

Bail-bond. The obligation entered into by the surety.

Takes the place of the body of the defendant, and is forfeited by his non-appearance according to the stipulation. It is not receivable under final process. The sheriff, constable, or marshal, as the case may be, is the obligee; in which respect the obligation differs from a recognizance, *q. v.* The plaintiff sues on the instrument as assignee of the officer to whom it was originally given, and, perhaps, by a writ of *scire facias*.[3] See C. C. ET B. B.

Bail-piece. A certificate from the record in a case that one or more persons named became bail in a certain sum of money.

Not in the nature of process; merely a record or memorial of the delivery of the principal to his bail, on security given.[4]

Originally written on a small *piece* of parchment.[5]

A surety may use this certificate as a warrant of arrest, and, by virtue thereof, deliver the principal over to an officer for confinement. See ONUS, EXONERETUR.

Following are the common species of bail:

Bail above, or bail to the action. Sureties who jointly and severally undertake that if their principal, the defendant in an action, is "condemned," he will either pay the judgment or give himself up for imprisonment, or else that they will satisfy the judgment.

Bail below, or appearance bail. Sureties who stipulate that a defendant will appear in court on the day named in the writ.[6]

Bail absolute. A person or persons who obligate themselves, usually to the State or Commonwealth, to pay a specified sum of money, in the event of another person (the principal) failing to account, in due form of law, for money entrusted to him as administrator, guardian, assignee, or other trustee.

Common or straw bail. One or more fictitious sureties whose names are entered as bail for matter of form, and who stipulate

[1] Hannibal, &c. R. Co. *v.* Swift, *ante;* Strouse *v.* Wabash, &c. R. Co., 17 F. R. 209 (1883). Left with railway porter, Bunch *v.* Great Western Ry. Co., L. R. 17 Q. B. D. 215 (1886): 2 Law Quart. Rev. 469–79 (1886), cases. See generally 18 Cent. Law J. 421–24 (1884), cases.

[2] Roberts *v.* Koehler, 30 F. R. 96 (1887), cases. Cases *contra*, 26 Am. Law Reg. 296–98 (1887).

[3] Jones *v.* Voorhees, 10 Ohio, 145 (1840); Clark *v.* Burns, 118 Mass. 377 (1875), cases.

[4] McGill *v.* Rowan, 3 Pa. 453 (1846).

[5] Toledo, &c. R. Co. *v.* Hammond, 33 Ind. 379 (1870).

[6] Hannibal, &c. R. Co. *v.* Swift, 12 Wall. 270 (1870).

[7] Chicago, &c. R. Co. *v.* Collins, 56 Ill. 217 (1870).

[8] Porter *v.* Hildebrand, 13 Pa. 133 (1850).

[9] Hopkins *v.* Westcott, 6 Blatch. 69 (1868).

[10] Doyle *v.* Kiser, 6 Ind. 242 (1855).

[11] Stimson *v.* Conn. Riv. R. Co., 98 Mass. 84 (1867), cases.

[12] Hoeger *v.* Chicago, &c. R. Co., 63 Wis. 100 (1885).

[13] The Ionic, 5 Blatch. 538 (1867); 4 Bosw. 225.

[14] Pfister *v.* Central Pacific R. Co., 70 Cal. 173 (1886); 31 Conn. 281; 25 Ga. 61; 22 Ill. 278; 33 *id.* 219; 56 *id.* 293; 5 Cush. 69; 98 Mass. 375; 41 Miss. 671; 44 N. H. 325; 9 Wend. 85; 25 *id.* 459; 6 Hill, 596; 30 N. Y. 594; 16 Pa. 67.

[15] 6 Col. 337; Redf. Car. 71, 73.

[16] See generally McCaffrey *v.* Canadian Pacific R. Co., 24 Am. Law Reg. 175–90 (1885), cases.

[17] *F. bailler*, to deliver, free from.

[18] 3 Bl. Com. 290

[1] 4 Bl. Com. 297; 20 N. H. 161.

[2] Ramey *v.* Commonwealth, 83 Ky. 583 (1886).

[3] See 3 Bl. Com. 290.

[4] Nicolls *v.* Ingersoll, 7 Johns. 154 (1810).

[5] 3 Bl Com. 291.

[6] 3 Bl. Com. 291.

that a defendant will appear. **Special bail.** Real, substantial bondsmen.

"Common" or "straw" bail are universal sureties — John Doe and Richard Roe, or other imaginary persons returned by the sheriff — standing pledges, for the purpose intended. They originally answered for the plaintiff in case he was amerced (*q. v.*) for making a false accusation.[1] See further DOE; STRAW.

"Special" bail may be required, by order of court in such cases as are particularly grievous, or when it is necessary that a defendant should be kept within the jurisdiction. Originally introduced to mitigate the hardships incident to imprisonment.[2]

"All persons shall be Bailable by sufficient Sureties, unless for Capital Offenses, where the proof is evident or the presumption great." This provision, quoted from the Great Law[3] of the Province of Pennsylvania, enacted in 1682, is also found in the constitutions of all the States. See EVIDENT.

Bail is taken by committing magistrates, by judges and commissioners of the courts, by clerks of some courts, and by other persons, as provided by statutes; but not, generally speaking, by justices of the peace on charges of homicide and certain other of the more heinous felonies, nor in charges of contempt of a court or of contempt of a legislature by a member thereof.[4]

"Excessive bail shall not be required."[5] What is "excessive" is for the court alone to determine. See EXCESSIVE.

Bail is not required of a municipal corporation; nor, as a rule, of persons in a fiduciary relation, sued as such.

A surety must generally be a freeholder to some amount, subject to process, and able to make a contract and to pay the amount of the bond. Ordinarily, common bail suffices from a defendant who is a freeholder. A non-resident plaintiff may have to furnish bail for the probable costs in his action.

The principal is regarded as delivered to his sureties as jailers of his own choosing. Their dominion is a continuance of the original imprisonment. Whenever they choose they may seize and deliver him up, in their own discharge; and, until this can be effected, they may imprison him. In this action they may be represented by an agent. They may pursue him into another State; they may arrest him on the Sabbath; and, if necessary, they may break and enter his house to arrest him. Being like a re-arrest by a sheriff of an escaping prisoner, they need no process. Their rights are alike in civil and criminal cases.

With the sureties there is an implied engagement by the principal that he will not leave the jurisdiction; and by the plaintiff, that he will do nothing to increase their risk or to affect their remedy.[6] See JUMP.

See also BIND; COMMISSIONER; DEPOSIT, In lieu, etc.; FIDEJUSSOR; JUSTIFICATION, 2; MAINPERNOR; PENALTY; PERFECT; SURETY.

[1] [3 Bl. Com. 274, 287, 290, 291, 295.]

[2] See 3 Bl. Com. 292, 287.

[3] Chapter LII: Linn, 120. See Wash. Law Rev., Oct. 25, Nov. 1, 15, 1882.

[4] See generally 20 Cent. Law J. 464-66 (1885), cases.

[5] Constitution, Amd. Art. VIII. 4 Bl. Com. 296-99.

[6] See Taylor *v.* Taintor, 16 Wall. 371 (1872), Swayne, J.; Reese *v.* United States, 9 *id.* 21 (1869), Field, J.; 3 Bl. Com. 290-92. As to rights of sureties generally, see 1 Kans. Law J. 211-14 (1885), cases.

BAILEE. See BAILMENT.

BAILIFF.[1] Originally, one put in charge of something.

An officer concerned in the administration of justice in a certain province.[2]

1. A servant, in a superior, ministerial capacity.[3]

A private person who has the custody and care of another's property.

He is liable to an action of account-render.[4]

2. An attendant who preserves order in and about the room where court is being held; a tipstaff, *q. v.*

3. A sheriff's officer or deputy.

Also called a bound or special bailiff.

The due execution of his duties is secured by an obligation with sureties.[5]

BAILIWICK.[6] A word, introduced by the Normans, and equivalent to "county." The liberty, province, or jurisdiction of a sheriff.[7] Compare PRECINCT.

BAILMENT.[8] A delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee.[9]

A delivery of goods in trust upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee as soon as the purpose of the bailment shall be answered.[10]

A delivery of a thing in trust for some special object or purpose, and upon a contract, expressed or implied, to conform to the object or purpose of the trust.[11]

When the identical thing delivered, though in an altered form, is to be restored, the contract is a "bailment," and the title to the property is not changed. But when there is no obligation to restore the specific article, and the receiver is at liberty to return another

[1] The *-iff* is from the A. S. *reeve*, officer, steward.— 1 Bl. Com. 116. O. F. *bailler*, to keep in custody.— Skeat. See BAIL, 2; REEVE.

[2] Coke, Litt. 168 *b*.

[3] 1 Bl. Com. 427.

[4] See Coke, Litt. 172 *a*; 4 Watts, 422; 28 Ga. 161; 44 Barb. 458; 1 Story, Eq. § 446.

[5] 1 Bl. Com. 345.

[6] F. *baillie*, government; *bailler*, to have custody of. A. S. *wic*, dwelling, station, jurisdiction.

[7] 1 Bl. Com. 344; 2 *id.* 37.

[8] F. *bailler*, to deliver.

[9] 2 Bl. Com. 451, 395.

[10] 2 Kent, 559.

[11] Story, Bailm. § 2; Watson *v.* State, 70 Ala. 14 (1881).

thing of equal value, the title to the property being changed, the contract is a "sale,"[1] *q. v.*

Bail, *v.* To deliver a thing to a person upon his engaging to do something to or with it, and then either to return or to account for it.

Bailee. He who thus receives a thing bailed. **Bailor.** He who thus delivers a thing as bailed.

The purpose of the law of bailments is to ascertain, whenever the loss of or injury to a thing occurs, to what degree of care the bailee was bound and of what degree of negligence he has been guilty.[2]

Three kinds of bailments are recognized: That in which the trust is for the benefit — of the bailor, of the bailee, or of both bailor and bailee. In cases of the first kind, at least slight care is required; in cases of the second kind, great care; in cases of the third kind, ordinary care. The absence of the required degree of care constitutes negligence, for which the bailee is responsible.[3]

Sir William Jones, following the civil law, proposed, in 1790, this division: *Depositum*, gratuitous custody; deposit, *q. v.* *Mandatum*, gratuitous feasance; mandate, *q. v.* *Accommodatum* (q. v.), or *commodatum*, loan for use without pay; accommodation. *Pignus*, pledge, *q. v.* *Locatio*, or *locatum*, hiring,[4] *q. v.* See also LOAN, 1.

Each party has a qualified property (*q. v.*) in the subject of the bailment and may maintain an action with respect to it.[5]

Presumably, the bailor is entitled to the thing. The bailee is to do what the principal directed — restore the article or account to him for it. He "accounts" when he yields to the paramount right of immediate possession in a third person who is found to be the true owner.[6]

See also CARE; CARRIER; INNKEEPER; LARCENY; RES, Perit, etc.

BAIT. 1. To feed: to allure a dumb animal, by scented food, from the premises of its owner or from the highway.

The owner of an animal injured in this way may maintain an action upon the case for damages.

2. To attack with violence; to harass: as, to bait a bull with dogs.[7]

Pursuing rabbits with dogs is not baiting them. The term applies where the baited animal is tied to a stake or confined so that it cannot escape.[1]

BALANCE.[2] 1. Excess on one side of an account.

The conclusion or result of the debit and credit sides of an account.[3]

Implies mutual dealings, and the extension of debit and credit.[3]

2. Residue or remainder; as, the balance of an estate.[4]

General balance. Such sum of money as is due for services rendered by a person to whom two or more articles have been bailed for purposes of transportation, for the bestowal of work and labor, or on account of which money has been expended. See LIEN, Particular.

Net balance. Applied to the proceeds of a sale of stock, means, in commercial usage, the balance of the proceeds after deducting the expenses incident to the sale.[5]

In some States a balance found to be due from an executor, administrator, or guardian, may be entered of record as a judgment.

In suits arising out of mutual accounts the jury may find a balance due to the defendant which, by certificate of the court, becomes a judgment against the plaintiff.

Partial balance. A balance found upon a partial settlement of accounts, as between partners. **Final balance.** The balance at final settlement of a portion of the items of an account, or of all the items, and for a limited period of time or for the whole period covered by dealings or transactions.

An express promise by a partner to pay a partial balance is the most satisfactory evidence of an intention to separate the items included in the settlement from the rest of the joint affairs.

To constitute such an *agreed* final balance as will support an action by one partner against his copartner, the balance must have received the assent of both partners, binding them to an admission of its correctness.[6] See ACCOUNT, 1.

BALLET. See THEATER.

BALLOT.[7] *n.* A ball or a ticket used in voting; a paper embodying a vote; also, the whole number of votes cast. *v.* To decide by voting.

[1] Mallory *v.* Willis, 4 N. Y. 85 (1850), cases, Bronson, C. J.; Foster *v.* Pettibone, 7 *id.* 435 (1852), Ruggles, C. J.; Hyde *v.* Cookson, 21 Barb. 108 (1855); Marsh *v.* Titus, 3 Hun, 550 (1875); Story, Bailm. § 288; 2 Kent, 589. Grain in an elevator is "sold," 19 Cent. Law J. 268–69 (1884), cases.

[2] 2 Pars. Contr. 87.

[3] Story, Bailm. § 4.

[4] Jones, Bailm. 86.

[5] Bl. Com. 395, 452.

[6] The Idaho, 93 U. S. 579–80 (1876), cases, Strong, J.; Robinson *v.* Memphis, &c. R. Co., 16 F. R. 57 (1883), cases. See generally Coggs *v.* Bernard, 2 Ld. Ray. 909 (1704); 1 Sm. L. Cas. 369–454, cases. German Law, 2 Law Quar. Rev. 188–212 (1886).

[7] Pitts *v.* Millar, L. R., 9 Q. B. 382 (1874).

[1] Pitts *v.* Millar, *ante*.

[2] L. *bilanx*, having two scales.

[3] McWilliams *v.* Allen, 45 Mo. 574 (1870).

[4] Lopez *v.* Lopez, 23 S. C. 269 (1885); Skinner *v.* Lamp, 3 Ired. L. 155 (1842).

[5] Evans *v.* Waln, 71 Pa. 74 (1872).

[6] 2 Bates, Partn. § 861, cases.

[7] F. *ballotte*, a little ball for voting.

May refer to the decision of a juror or jurors, or to the preferences of persons qualified to elect the officers of a corporation or of a government.

In French dictionaries, defined as "the act of voting by balls or tickets by putting the same into a box or urn;" also as, "secret voting by means of a ball or ticket." The word did not change its meaning when adopted into the English language.[1]

As applied to elections of public officers, voting by ballot signifies a mode of designating an elector's choice of a person for an office by the deposit of a ticket, bearing the name of such person, in a receptacle provided for the purpose, in such a way as to secure to the elector the privilege of complete and inviolable secrecy in regard to the person voted for.[2]

This privilege of secrecy is the distinguishing feature of ballot voting. The object in view is the independence of the voter.[3]

Voting by ballot is a constitutional method of voting which cannot be changed by a statute. Its perpetuation is meant to secure the right to vote without having the voter's opinion of men or measures inquired into.[3] See TEST, Acts.

The natural import of "balloting at a national, State, or municipal election" is, balloting in and for the election of national, State, or municipal officers. The expression will not apply to ballots casts for or against a regulation like that of granting licenses for the sale of intoxicating liquors.[4]

Ballot-box. A receptacle for ballots; more precisely, such receptacle as is authorized by law.

"To stuff a ballot-box" means unlawfully, fraudulently, and clandestinely to place in a ballot-box, at a lawful election, ballots which have not been voted, with intent to affect the result of the election.[5] See ELECTION, 1; VOTE.

BAN; BANN.[6] Public proclamation or notice.

Banns of matrimony. Publication, by oral announcement, of an intended marriage, in a church or public chapel.

Affords opportunity to interpose legal objection to the marriage.[1]

BANC.[2] The seat occupied by the judges of a court; more particularly, a full bench, when all, or at least a majority, of the judges are present for the decision of questions of law, as distinguished from the practice of one or more members of the court sitting, with a jury, for the determination of questions of fact. Whence "banc days," and "sitting in banc." Compare BANK, 2 (1); BENCH.

BANK. 1. The earth bordering a watercourse, *q. v.*

The banks of a river are the earth which contains it in its ordinary state of high water.[3] See ALONG; BED, 2; RIPARIAN.

2. A bench.

(1) A judge's seat; also, a court sitting for the decision of matters of law — but for this "banc" is the word more generally used. See BANC; BENCH.

(2) An institution for the deposit, discount, or circulation of money.

May refer to the association, the office or place of business, or the managing officers as a body.[4]

The sense in which "bank" or "banks" is intended to be used is determined by their connection with what is said. An act to be done by a bank means an act to be done by those who have the authority to do it. If it be an act within the franchise for banking, or within the ordinary power of the bank, and it is done by the president and directors, or by their agents, we say the bank did it. If, however, an act is to be done relative to the institution, by which its charter is to be changed, the stockholders must do it, unless another mode has been provided by the charter. In one sense, after it has been done, we may say that the bank did it, but only so because what the stockholders have done becomes a part of the institution.[5]

Banks, in the commercial sense, are banks of deposit, of discount, or of circulation. Speaking strictly, the term "bank" implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally, the business of banking consisted only in receiving deposits of bullion, plate, and the like, for safe-keeping. In time, bankers assumed to discount bills and notes, and to loan money

[1] State *v.* Shaw, 9 S. C. 133 (1877); Williams *v.* Stein, 38 Ind. 92 (1871).

[2] Brisbin *v.* Cleary, 26 Minn. 108 (1879), cases, Berry, J. See also Temple *v.* Mead, 4 Vt. 541 (1832); People *v.* Pease, 27 N. Y. 45, 57 (1863); Williams *v.* Stein, 38 Ind. 92, 95 (1871).

[3] Attorney-General *v.* Detroit Common Council, 58 Mich. 217 (1885).

[4] Commonwealth *v.* Howe, 144 Mass. 145 (1887),— upon an indictment for casting more than one ballot, contrary to Pub. Sts. *c.* 7, § 57.

[5] See R. S. § 5515; *Exp.* Siebold, 100 U. S. 379 (1879).

[6] A. S. *gebann:* L. L. *bandum, bannum,* a proclamation. Compare ABANDON; CONTRABAND.

[1] 1 Bl. Com. 439.

[2] F. *banc:* L. *bancus,* a bench.

[3] Pulley *v.* Municipality No. 2, 18 La. 537 (1841); Stone *v.* City of Augusta, 46 Me. 127 (1858); Howard *v.* Ingersoll, 13 How. 415-16 (1851); Houghton *v.* Chicago, &c. R. Co., 47 Iowa, 372 (1877); Halsey *v.* McCormick, 13 N. Y. 296 (1855).

[4] See Rominger *v.* Keyes, 73 Ind. 377 (1881).

[5] Gordon *v.* Appeal Tax Court, 3 How. 147-48 (1845). Wayne, J.

upon mortgage, pawn, or other security, and, at a still later period, to issue notes of their own intended as a circulating currency and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two or even all three of these functions; but it is still true that an institution prohibited from exercising more than one of them is a bank, in the strictest commercial sense.[1]

Bank; banker; banking. A banker is one who makes merchandise of money.[2]

"Banking," in its largest sense, includes the business of receiving deposits, loaning money, dealing in coin, bills of exchange, etc., and issuing paper money.[3]

In statutes "bank" usually designates an incorporated institution, and "banker" an unincorporated association exercising "banking privileges."[3]

The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, State and national, and municipal and other corporations.[4]

In Massachusetts "bank" applies to institutions incorporated for banking purposes, not to offices kept by individuals or copartnerships doing such banking business as they have been authorized to do.[5]

The term "banker" includes all the business of a money-changer.[6]

Having a place of business where deposits are received and paid out on checks and where money is loaned upon security is the substance of the business of a banker.[7] See MERCHANT.

The terms bank and banker include any person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency subject to be paid or remitted upon draft, check, or order; or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes; or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale.[1]

At common law the right of banking belongs to individuals, and is exercisable at pleasure.[2]

Bankable. Receivable as the equivalent of cash at a bank; receivable for discount by a bank: as, a bankable or non-bankable bill, or other paper.

Bank for savings; savings bank. A bank of deposit for the accumulation of small savings belonging to the industrious and thrifty.[3]

A bank for the receipt of small sums deposited by the poorer class of persons for accumulation at interest.[4]

An institution formed for the purpose of receiving deposits of money for the benefit of the depositors investing the same, accumulating the profit or interest thereof, paying such profit or interest to the depositor, or retaining the same for his greater security, and, further, of retaining the deposit itself.[5]

The primary relation of a depositor is that of a creditor and beneficiary of a trust. In case of insolvency, depositors stand as other creditors, with equal rights to be paid ratably out of the estate.[6]

National bank; national banking association. An institution, created under United States law, for banking purposes, as distinguished from a bank organized under the law of a State[7] — a *State bank*.

An association may be formed by any number of persons not less than five. They sign "articles of association," and acknowledge an "organization certificate" which states the name assumed, the place where operations are to be carried on, the amount of capital stock and the number of shares thereof, the names and residences of the shareholders, and the shares held by each. Upon filing in the office of the comptroller of the currency these documents, the

[1] Oulton v. German Savings, &c. Institution, 17 Wall. 118-19 (1872), cases, Clifford, J.; Bank for Savings v. The Collector, 3 *id.* 513-14 (1865). See Rominger v. Keyes, 73 Ind. 377 (1881).

[2] 2 Bl. Com. 475.

[3] Exchange Bank v. Hines, 3 Ohio St. 31-32 (1853), Bartley, C. J.; 16 How. 416; 14 Bankr. Reg. 90; 39 La. An. 581.

[4] Mercantile Bank v. New York, 121 U. S. 156 (1887), Matthews, J.

[5] May v. Butterworth, 106 Mass. 76 (1870); 106 *id.* 513.

[6] Hinckley v. Belleville, 43 Ill. 168 (1867).

[7] Warren v. Shook, 91 U. S. 710 (1875), Hunt, J. Act 3 March, 1865: 13 St. L. 209, 472.

[1] Revenue Act, 13 July, 1866, § 9: 14 St. L. 115: R. S. § 3407; Selden v. Equitable Trust Co., 94 U. S. 490-92 (1876).

[2] Bank of Augusta v. Earle, 13 Pet. 595 (1839). As to responsibility for correspondents and notaries, see 20 Am. Law Rev. 889-901 (1886), cases.

[3] Mercantile Bank v. New York, 121 U. S. 161 (1887), Matthews, J.

[4] [Bank for Savings v. The Collector, 3 Wall. 513 (1865): McCollough's Com. Dict. 146. See also Johnson v. Ward, 2 Bradw. 274 (1878).

[5] Commonwealth v. Reading Savings Bank, 133 Mass. 19, 21-23 (1882), Devens, J.

[6] See People v. Mechanics' Sav. Inst., 92 N. Y. 9 (1883).

[7] See National Bank Act, 3 June, 1864; R. S. Tit. LXII, §§ 5133-5243.

association becomes, as from the date of the execution of its certificate of organization, a body corporate, empowered to used a corporate seal, have succession for twenty years, make contracts, sue and be sued, elect directors and appoint other officers; to prescribe, by the board of directors, by-laws, not inconsistent with law, for the conduct of general business, and the exercise of its privileges; "to exercise . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes." [1]

The name to be adopted is subject to approval by the comptroller.[2] No other bank or banker, except a savings bank authorized by Congress, may use the word "national" as a portion of its title.[3]

Any old association may become a national association by the name prescribed in its organization certificate — the articles of association and the organization certificate being executed by a majority of the directors, the certificate declaring that the owners of two-thirds of the capital stock have authorized the directors to make such certificate and to convert the institution into a national association. The shares may continue for the same amount; and the former directors may be continued in office, with full power to perfect the re-organization, until others are elected.[4] The certificate of the comptroller is conclusive as to the completeness of the organization.[5]

The re-organization of a State bank does not relieve it from its former liabilities: it remains substantially the same institution under another name.[6]

National banking associations constitute no part of the Government. Designating a bank as a depositary of public moneys does not change the character of its organization, or convert its managers into public officers, or render the Government liable for its acts.[7]

An association may exist with or without power to issue circulation.[8] To obtain circulating notes an association must deposit with the comptroller United States bonds, as security for the redemption of such notes as it may issue; whereupon, within limits, notes of various denominations may be furnished by the comptroller. Associations may be authorized to issue notes payable in gold.[9]

One hundred thousand dollars is the minimum capital allowed, except in places not exceeding 6,000 inhabitants, when, by consent of the comptroller, the capital may be $50,000. Where the population exceeds 50,000, the capital must be at least $200,000. This capital is divided into shares of $100 each, which are personalty. Fifty per centum must be paid before organization, and the rest in monthly installments of ten per centum each.[1]

The act of May 1, 1886 (24 St. L. 18), empowers an association to increase its capital stock, in accordance with existing laws, to any sum approved by the comptroller, by a vote of the holders of two-thirds of the stock, notwithstanding the limit fixed in the original articles of association. By a like vote an association may change its name and location, the latter not to be more than thirty miles distant from the former location, after the comptroller has certified his approval.

Title to a share of stock passes when the owner delivers his certificate to the purchaser with authority to transfer the share on the books of the bank.[2] See further STOCK, 3 (2).

A national bank may hold such realty as is necessary for its immediate accommodation in the transaction of business; such as shall be mortgaged to it in good faith by way of security for debts previously contracted; such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; such as it shall purchase at sales under judgments, decrees, or mortgages held by it, or shall purchase to secure debts due to it — title in the last case not to be held longer than five years.[3]

The circuit courts of the United States have jurisdiction of all suits by or against national banks established in the district for which the court is held,[4] irrespective of the amount in controversy or the citizenship of the parties.[5] State courts of its locality have jurisdiction of suits brought by it.[6] It may be sued in a place in a State other than where it is established.[7]

A national bank may not loan or discount on the security of its own stock, except to prevent loss.[8]

A national bank may go into liquidation and be closed by a vote of the holders of two-thirds of its stock.[9] In case of failure to pay its notes, the comptroller may appoint a receiver to wind it up.[10]

The Government has no priority of demand against an insolvent bank.[11]

National banks being designed to aid the Government in the administration of an important branch of the public service, the States can exercise only such control over them as Congress may permit.[12]

[1] R. S. §§ 5133–36.
[2] R. S. § 5134.
[3] R. S. § 5243.
[4] R. S. §§ 5154–55.
[5] Casey *v.* Galli, 94 U. S. 679 (1876).
[6] Coffey *v.* Nat. Bank of Missouri, 46 Mo. 148 (1870).
[7] R. S. § 5133; Branch *v.* United States, 12 Ct. Cl. 281 (1876).
[8] National Currency Acts, 11 Op. Att.-Gen. 334 (1865).
[9] R. S. § 5185.

[1] See Bailey *v.* Clark, 21 Wall. 284 (1874).
[2] Johnston *v.* Laflin, 103 U. S. 800, 804 (1880).
[3] R. S. § 5137; 2 Dill. 371.
[4] R. S. § 629, par. 10; 3 Dill. 298; 8 Wall. 506.
[5] 19 Alb. Law J. 182.
[6] Bank of Bethel *v.* Pahquioque Bank, 14 Wall. 383 (1871); Claflin *v.* Houseman, 93 U. S. 130 (1876); 101 Mass. 240.
[7] Casey *v.* Adams, 102 U. S. 66 (1880).
[8] R. S. § 5136.
[9] R. S. § 5220; 5 Biss. 499.
[10] R. S. § 5234, cases; Richmond *v.* Irons, 121 U. S. 47–50 (1887).
[11] Cook County Nat. Bank *v.* United States, 107 U. S. 445 (1882).
[12] Farmers', &c. Nat. Bank *v.* Dearing, 91 U. S. 33–34 (1875). See Veazie Bank *v.* Fenno, 8 Wall. 533 (1869).

Bank-bill; bank-note. A promissory note, issued by a bank under authority of law, payable on demand to the bearer.

Bank-notes differ from ordinary promissory notes only in the recognition of them by general consent, and by the law to an extent, as a substitute and equivalent for legal money. In other respects they are governed by the rules applicable to promissory notes payable to bearer.[1] See CURRENT, 2.

Bank cashier. See CASHIER.

Bank check. See CHECK; EXCHANGE, 2.

Bank director. See DIRECTORS.

Bank president. See ABSTRACT, 1; APPLICATION, 2; DIRECTORS.

Has no power by virtue of his office to bind the bank in an unusual manner, or in any undertaking outside of its customary routine of business. While the directors, or usage, may confer upon him special power, the authority inherent in his position is very slight.[2]

See generally ACCOUNT, 1; ADVANCES; CHARTER, 2; CIRCULATION; COLLECTION; DEPOSIT, 2 (2); DISCOUNT, 2; FUNDS; MONEYED; RESERVE, 7; TAX, 2; USURY.

BANKRUPT.[3] A trader who secretes himself, or does certain other acts tending to defraud his creditors.[4] See TRADER.

A person found, by the proper court, to be entitled or subject to have his property taken for distribution among his creditors, and he to be discharged from the legal obligation of past claims. In a loose sense, a person as to whose status such an adjudication may or would be made.

Bankrupt law. A law intended to secure the application of a debtor's effects to the payment of his debts, and to relieve him from the burden of them.[5]

Bankrupt system. The law, and the practice thereunder, respecting the division of a bankrupt's property among his creditors.

Bankruptcy. The status or condition of being a bankrupt; also, that branch of the law under which the assets of the estate of a bankrupt may be distributed among his creditors and he be discharged from the indebtedness.

Bankruptcy is a proceeding of an equitable nature — a sequestration of a debtor's property that the creditors may resort to, instead of to an ordinary suit at law or in equity.[1]

The object is equality of distribution of the assets among creditors not legally secured.[2] Another purpose, only second in importance to that, is speedy distribution of assets. Our statutes have been filled with provisions designed to secure the early discharge of the debtor and the speedy settlement of his estate.[3]

Bankrupt laws are for the benefit of the honest trader, his honest creditors, and public commerce.[4]

"The Congress shall have Power . . To establish . . uniform Laws on the subject of Bankruptcies throughout the United States." [5] See UNIFORM.

The English word "bankrupt" had its origin in incidents of trade. Whatever secondary or figurative meaning the word may have acquired, its primary and only legal meaning is that which confines it to *traders*. . . As a state of "insolvency" usually precedes "bankruptcy," it is not surprising that the two words should sometimes be confounded. Insolvency is the generic term, comprehending bankruptcy as a species. A man may be insolvent without becoming a bankrupt, or having capacity to become such; and a bankrupt may prove to be entirely solvent. Mere insolvency never makes one a bankrupt without the concurrence of some act tending to the injury of his creditors.[6]

The line of partition between bankrupt and insolvent laws is not so distinctly marked as to enable a person to say with precision what belongs exclusively to the one and not to the other class of laws. It is said that laws which merely liberate the person are insolvent laws, and those which discharge the contract are bankrupt laws. Another distinction, more uniformly observed, is, insolvent laws operate at the instance of an imprisoned debtor, bankrupt laws at the instance of a creditor.[7]

Still another feature of insolvent laws is, the debtor is not discharged from the legal obligation to pay demands in full: he remains subject to suits and executions on account of unoutlawed claims.[8]

Fraudulent bankruptcy. Bankruptcy in which the debtor has practiced, or attempted to practice, some fraud upon creditors; as by not disclosing all of his assets, or by creating an unlawful preference.[9]

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[1] See James *v.* Rogers, 28 Ind. 451, 453 (1864).

[2] Wheat *v.* Bank of Louisville, Sup. Ct. Ky. (1887), cases. Same case, 27 Am. Law Reg. 52 (1888); *id.* 56–60, cases. See also 21 Cent. Law J. 144–46 (1885), cases.

[3] *F. banque*, a table or counter; *route*, trace, track: his "banque" was removed and no trace of it left,— 2 Bl. Com. 272. Ital. *banca rotta*, a broken bench: a money-changer's bench was broken up, on his failing in business,— Skeat. See 3 Story, 453.

[4] 2 Bl. Com. 285, 471.

[5] Const. 269; 2 Bl. Com. 474, 476; 109 U. S. 536.

[1] *Re* Weitzel, 7 Biss. 290 (1876).

[2] International Bank *v.* Sherman, 101 U. S. 406 (1879); Trimble *v.* Woodhead, 102 *id.* 650 (1880).

[3] Bailey *v.* Glover, 21 Wall. 346–47 (1874), Miller, J.; Jenkins *v.* International Bank, 106 U. S. 575–76 (1882); R. S. § 5057.

[4] 2 Bl. Com. 472, 475.

[5] Constitution, Art. I, sec. 8, cl. 4.

[6] Sackett *v.* Andross, 5 Hill, 343–44, 342 (N. Y., 1843), Bronson, J. See also 41 Conn. 505; 2 Bened. 203.

[7] Sturges *v.* Crowninshield, 4 Wheat. 194 (1819), Marshall, C. J.

[8] Martin *v.* Berry, 37 Cal. 222 (1869).

[9] See 4 Bl. Com. 156.

Private bankruptcy. Has been applied to cases of composition with creditors — resort to court for a discharge being thereby obviated.[1]

Voluntary bankruptcy. That in which the debtor avails himself of the law. **Involuntary** or **compulsory bankruptcy.** In which the debtor, by proceedings instituted by one or more creditors, is judicially decided to be bankrupt.

A case of voluntary bankruptcy is in the nature of a suit by the debtor against his creditors.[2]

Act of bankruptcy. An act by a debtor which exposes him to adverse proceedings in bankruptcy.

Under the Act of March 2, 1867, amended by Acts of June 22, 1874, and of July 26, 1876, acts of bankruptcy were certain acts done by a debtor six months before an adjudication was sought: as,— (1) departing from the State to defraud creditors; (2) remaining absent with that intent; (3) concealing himself to avoid service of process; (4) concealing or removing property to prevent its being attached, taken, or sequestered; (5) assigning or giving away property or rights, to delay, defraud, or hinder creditors; (6) being held in custody or imprisoned seven days on account of a claim over one hundred dollars; (7) making, in contemplation of insolvency, a transfer of property, confessing a judgment, procuring or suffering property to be taken on process, with intent to prefer a creditor or to defeat or delay the operation of the bankrupt law; (8) for a bank, banker, broker, merchant, trader, manufacturer, or miner, fraudulently to stop payment of commercial paper, or not to resume payment thereof, for fourteen days; (9) for a bank or banker to fail to pay a depositor within forty days.[3]

A debtor could have a jury trial upon any alleged act of bankruptcy.

Foreigners were exempt from the law; also, a citizen whose provable debts were less than three hundred dollars.

Proceedings were begun in the district court, by petition with annexed schedules of debts and assets. This petition was referred to the "register" — an auxiliary in matters of administration,— who ascertained whether the debts were above two hundred and fifty dollars; if so, the debtor was adjudged a bankrupt and his estate *ipso facto* became vested in the register. There then issued a warrant to the marshal to notify the creditors. In from ten to ninety days the creditors met and nominated an assignee, who, with his sureties, was to be approved by the court; whereupon, the register deeded the estate to the assignee, who proceeded to settle the business.[1]

Upon the commission of an act of bankruptcy the debtor's property becomes a common fund for the payment of his debts, he losing all right of proprietorship over it.[2]

When there exists no purpose to defraud, delay, or prefer, and the value of the estate remains unimpaired, before proceedings are begun the debtor can deal with the property.

Filing a petition is an attachment and an injunction — a *caveat* to all the world. After that, a person deals with the insolvent at his peril.[3]

A transfer designed to prevent equality of distribution, made within four months before petition filed, was held to be a fraud.[4] So was giving a note confessing judgment. But in all such cases the intention of the debtor was made the test.[5]

Property illegally transferred was recoverable by the assignee.[6]

Excepting attachments made within a prescribed period, and fraudulent dispositions, the assignee took title subject to all equities, liens, or incumbrances — in the same plight and condition as when the debtor held it.[6]

Under the acts of Congress a voluntary bankrupt was to pay thirty per centum of the provable claims, unless less was accepted by one-fourth in number and one-third in value of the creditors. A majority in number and three-fourths in value could accept a composition.

A discharge, which was a matter of favor, could be had one year after adjudication, an order having first been issued to such creditors as proved debts, to appear and show cause, if they knew of any, why the discharge should not be granted. And a discharge which had been granted could be annulled, within two years, for fraud undiscovered at the time of the discharge.

A discharge is no bar to an action on a judgment recovered after the discharge, in a suit commenced before the bankruptcy, pending when the discharge was granted, and upon a debt provable in bankruptcy.[7]

A United States law supersedes a State law.[8] But

[1] *Exp.* Vere, 19 Ves. 408 (1812).

[2] Wilson *v.* City Bank of St. Paul, 17 Wall. 481–88 (1873); United States *v.* Fox, 95 U. S. 672 (1877).

[3] R. S. § 5021, cases.

[1] See R. S. Tit. LXI: §§ 4972–5132.

[2] 2 Kent, 389; 2 Bl. Com. 474, 476.

[3] International Bank *v.* Sherman, 101 U. S. 406 (1879).

[4] Dutcher *v.* Wright, 94 U. S. 553 (1876), cases.

[5] Clarion Bank *v.* Jones, 21 Wall. 325 (1874); Clark *v.* Iselin, *ib.* 373 (1874); Watson *v.* Taylor, *ib.* 381 (1874); Little *v.* Alexander, *ib.* 500 (1874).

[6] Yeatman *v.* Savings Institution, 95 U. S. 764 (1877); Stewart *v.* Platt, 101 *id.* 738 (1879); 2 Bl. Com. 485.

[7] Dimock *v.* Revere Copper Co., 117 U. S. 559 (1886). See also Boynton *v.* Ball, 121 *id.* 457 (1887). See generally as to discharge, Laidley *v.* Cummings, 83 Ky. 606 (1886); Fuller *v.* Pease, 144 Mass. 390 (1887).

[8] Sturges *v.* Crowninshield, 4 Wheat. 196 (1819); Ogden *v.* Saunders, 12 *id.* 213 (1827); Baldwin *v.* Hale, 1 Wall. 228–31 (1863).

upon the repeal of a Federal law, a previously enacted State law becomes operative again.[1]

The convention which framed the Constitution had in view the English system.[2]

Bankrupt laws were passed by Congress in 1800, 1841, and 1867, but repealed, in each instance, after a comparatively brief operation. That of 1867, with its amendments, was repealed by act of June 7, 1878, the repeal taking effect September 1, 1878, without effect upon pending cases.[3]

Such laws have been in force in England for more than three centuries. They had their origin in the Roman law.[4]

See further ARS, Alienum; CESSIO; COMPOSITION, 3; CONTEMPLATION; DEATH, Civil; HÆREDITAS, Damnosa; INSOLVENCY; PROCESS, 1, Legal.

BANNS. See BAN.

BAPTISTS, SEVENTH-DAY. See SUNDAY.

BAR. 1. A particular portion of a court room.

Named from the space inclosed by two bars or rails: one of which separated the judge's bench from the rest of the room; the other shut off both the bench and the area for lawyers engaged in trials from the space allotted to suitors, witnesses, and others.

Such persons as appeared as speakers (advocates, or counsel) before the court, were said to be "called to the bar," that is, privileged so to appear, speak and otherwise serve in the presence of the judges as "barristers." The corresponding phrase in the United States is "admitted to the bar."

Proceedings in open court are said to take place "at the bar of the court," or simply "at bar." The particular case being argued is the "case at bar;" and a person on trial for a crime is "the prisoner at the bar."

The figurative expression "before the bar of conscience" is not uncommon.

In still another sense "the bar" denotes the members of the legal profession; as in speaking of the bar of a county, of a State, of the United States. Whence, also, are "bar associations," which consist of lawyers united for the purpose of furthering the interests of their profession.

Barrister. A counselor, learned in the law, who pleads before courts, and undertakes the advocacy or defense of causes generally.

Inner barristers. Queen's counsel, admitted within the bar, in seats specially reserved for them.[1]

Outer or *utter barristers.* Junior counsel, who sit outside the bar. Compare SERGEANT.

Disbar. To expel an attorney from membership in the legal profession. See further ATTORNEY.

2. In a somewhat general way a public bar may be defined as a counter, table, shelf, or other similar device, designed and used for the purpose of facilitating the sale and delivery of liquors there kept to any one who may apply for them, to be then and there drunk, not in connection with meals, lunches or food.[2]

A lunch counter would not be such a bar merely because sales of liquor only are sometimes made there.[3]

3. An impediment; an obstacle. Whence the verbs "bar" and "debar," to prevent, cut off, defeat.

Plea in bar. A plea intended to overthrow an action; a plea which sets up an absolute or peremptory defense, as, payment.

Special plea in bar. New matter avoiding the inference of law on facts previously stated.

Temporary bar. A plea in bar which is effectual for a limited period only: as, "administered fully," until more assets come to hand.[3]

BARBED WIRE. See FENCE.

BARE. Compare NAKED.

BARGAIN.[4] 1, *n.* A mutual contract or agreement between two parties, the one to sell goods or lands, and the other to buy them.[5]

Any mutual undertaking.

"Bargain" more prominently, perhaps, than "agreement," brings into view the mutuality of a contract.[6]

2, *v.* To transfer in pursuance of a bargain; as, "to grant, bargain, and sell."

Bargainer. He who makes a bargain.

Bargainee. He who is to receive property under the contract of a bargain; the grantee in a deed of bargain and sale. See EARNEST; GRANT, 2: OFFER, 1.

[1] Tua *v.* Carriere, 117 U. S. 209 (1886).

[2] Nelson *v.* Carland, 1 How. 272, 277 (1843).

[3] See the Lowell Bill, as to partners, 19 Am. Law Rev. 82 (1885).

[4] Canada South. R. Co. *v.* Gebhard, 109 U. S. 536 (1883).

[1] See 3 Bl. Com. 26; The Nation, Dec. 20, 1883, No. 964.

[2] Commonwealth *v.* Rogers, 135 Mass. 539 (1883), Colburn, J.

[3] See 3 Bl. Com. 305; 1 Flip. 4; 60 Md. 125; 1 Oreg. 48.

[4] F. *bargaigner*, to chaffer: L. L. *barca*, a bark for merchandise.

[5] Hunt *v.* Adams, 5 Mass. *360 (1809), Parsons, C. J.; Packard *v.* Richardson, 17 *id.* *131-32 (1821).

[6] Sage *v.* Wilcox, 6 Conn. 85, 90 (1826).

Bargain and sale. A contract whereby the bargainer, for some pecuniary consideration, bargains and sells, that is, contracts to convey, land to the bargainee.[1]

Also used of transfers of personalty.

A contract to convey, for valuable consideration, by any words sufficient to raise a use in the bargainee.[2]

At common law, land can not pass without livery, *q. v.* In this contract the bargain vests the use, and the Statute of Uses then vests, that is, completes, the possession.[1]

The force of that statute is exhausted in transferring the legal title in fee-simple to the bargainee.[2] See USE, 3.

In a "bargain and sale" of personalty the thing becomes the buyer's the moment the contract is made, whether delivered or not. In an "executory agreement," the thing remains the property of the vendor till the contract is executed.[4]

Catching a bargain. An agreement to purchase an expectant estate at an inadequate price.

Applied to heirs dealing with their expectancies, and to reversioners and remainder-men dealing with property already vested in them, but of which the enjoyment is future, and is, therefore, apt to be underestimated by the giddy, the necessitous, the improvident, and the young.[5]

In most cases have concurred deceit and illusion as to other persons. The father, ancestor, or other relative, from whom was the expectation of the estate, has been kept in the dark. The expectant has been kept from disclosing his circumstances, and resorting to them for advice and relief. This misleads the ancestor, who has been induced to leave his estate, not to his heir or family, but to artful persons who have divided the spoil beforehand.[6]

To maintain parental and *quasi* parental authority, to prevent the waste of family estates, and to protect the heedless and necessitous from the designs of rapacity, relief is afforded in equity. The purchaser must establish not merely that there is no fraud, but "make good the bargain," that is, show that a fair and adequate (*q. v.*) consideration has been paid.[7] Compare *Unconscionable Bargain.*

Strike a bargain. To shake hands in attestation of an agreement; also, to come to an agreement.

From the old custom of shaking hands as necessary to bind a bargain.[8]

[1] 2 Bl. Com. 338; Slifer *v.* Beates, 9 S. & R. *177 (1822).

[2] [4 Kent, 495.

[3] Croxall *v.* Shererd, 5 Wall. 282 (1866), cases.

[4] Benj. Sales, §§ 308, 310; Smith, Contr. 331; Smith *v.* Surman, 9 B. & C. 568 (1829).

[5] 1 Story, Eq. § 337.

[6] Chesterfield *v.* Janssen, 2 Ves. 157, 155 (1750), Hardwicke, Ld. C.

[7] 1 Story, Eq. §§ 335–36.

[8] 2 Bl. Com. 448.

Time bargain. A contract for the sale of stocks, provisions, or other commodity or article of merchandise, at a certain price on a future day, the vendor himself intending to purchase the thing, which is the subject of the proposed sale, before the day for the delivery has arrived. See further WAGER, 2.

Unconscionable bargain. Such bargain as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept, on the other,—being an inequitable and unconscientious bargain.[1]

A bargain of so unconscionable a nature and of such gross inequality as naturally leads to the presumption of fraud, imposition, or undue influence.[2]

A court of equity is not bound to shut its eyes to the evident character of a transaction where its aid has been sought to carry into effect an unconscionable bargain, but it will leave the party to his remedy at law; as, in salvage cases.[3]

BARGE. See SHIP, 2; VESSEL.

BARK. See LITERA, Qui hæret, etc.

BARN. See ARSON; BELONG; CURTILAGE.

Within the meaning of a statute against arson, the building need not be used for storing provender.[4]

The word may include a building mainly used for storing tobacco.[5]

BARON.[6] 1. The man—one able to bear arms; one bound to render service to the king.[7] See CURTILAGE, 1.

2. A member of the nobility in the fifth and lowest degree.[7]

3. A judge of the court of exchequer.

"Barons of the realm" only were formerly appointed to the office;[8] as, "Park, B."

4. A lord; a husband.

Baron and femme. Man and woman; husband and wife.[9]

Covert-baron. One under coverture; a wife.[10] See COVERTURE.

[1] Chesterfield *v.* Janssen, *ante.*

[2] [1 Story, Eq. § 244.

[3] Mississippi, &c. R. Co. *v.* Cromwell, 91 U. S. 643 (1875). See Post *v.* Jones, 19 How. 160 (1856); The Emulous, 1 Sumn. 210 (1832); The Brooks, 17 F. R. 548 (1883); 16 *id.* 144; 4 Del. Ch. 198; 27 Alb. L. J. 4 (1883).

[4] State *v.* Smith, 28 Iowa, 568 (1870).

[5] Ratekin *v.* State, 26 Ohio St. 420 (1875).

[6] L. L. *baro, varo:* L. *vir*, a man,—Webster. Ger. *bar*, a man: *beran*, to carry,—Skeat.

[7] 1 Bl. Com. 398–99.

[8] 3 Bl. Com. 44, 55–56.

[9] 1 Bl. Com. 432.

[10] 1 Bl. Com. 442.

BARRATRY.[1] 1. In maritime law, an act committed by the master or mariners of a ship, for some unlawful or fraudulent purpose, contrary to their duty to the owners, whereby the latter sustain injury.[2]

Consists in willful acts of the master or mariners, done for some unlawful or fraudulent purpose, contrary to their duty to the owners of the vessel.[3]

The act must not be accidental, nor caused by negligence — unless that is so gross as to amount to evidence of fraud. The intention need not be to promote one's own benefit. Any willful act of known criminality, or of malversation, operating to the prejudice of the owner, is barratry.[5]

All definitions agree that fraud is a constituent part of the act.[6]

2. In criminal law, **common barratry** is the offense of frequently exciting and stirring up suits and quarrels, either at law or otherwise.[7]

The proof must show at least three instances of offending.[8]

"A common barrator is a common mover or stirrer up or maintainer of suits, quarrels, or parties, either in courts or in the country; in the country in three manners: in disturbance of the peace; in taking or detaining of the possession of houses, lands, or goods, etc., which are in question or controversy, not only by force, but also by subtlety and deceit, and for the most part in suppression of truth and right; by false invention, and sowing of calumny, rumors, and reports, whereby discord and disquiet arise between neighbors."[9]

We have here strife and contention, and deceit or fraud, growing out of the compound origin and synonymous uses of the word. In the sense of "strife and contention," the word was used in connection with policies of insurance as late as the middle of the last century.[10]

BARREN. See LEVY; RENT; TRUST, 1.

BARRISTER. See BAR, 1.

BARTER.[1] A contract by which goods are exchanged for goods.[2]

The exchange of one commodity or article of property for another.[3]

The consideration, instead of being paid in money, as in the case of a sale, is paid in goods or merchandise susceptible of valuation.[4]

An agent empowered to sell cannot barter; and the principal may recover from an innocent transferee.[5] See EXCHANGE, 1; SALE.

BAS-RELIEF. See DESIGN, 2.

BASE. Inferior; of low degree.

Base animal. An animal which is unfit for food. See ANIMAL.

Base coin. Debased coin.[6]

Base fee. An estate in fee that ends whenever an annexed qualification requires it.[7] See FEE, 1.

Base services. Fit only for a person of servile rank.[8]

Base tenant. One bound to servile service.[9] See FEUD.

BASE BALL. See GAME, 2.

BASTARD.[10] One that is not only begotten, but born, out of lawful matrimony.[11]

Such child as is not born either in lawful wedlock, or within a competent time after its determination.[12]

One begotten and born out of lawful wedlock.[13]

The test is whether the husband of the woman who gives birth to the child is its father.[14]

In Virginia, one born out of wedlock, lawful or unlawful, or not within a competent time after the coverture is determined; or, if born out of wedlock, whose parents do not afterward intermarry, and the father acknowledges the child; or who is born in wedlock when procreation by the husband is for any cause impossible.[15]

Bastardize. To make out to be a bastard, an illegitimate or natural child.

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[1] Sp. *barateria*, deceit, fraud,—3 Pet. *330.

[2] Marcardier v. Chesapeake Ins. Co., 8 Cranch, 49 (1814), Story, J.

[3] Lawton v. Sun Mut. Ins. Co., 2 Cush. 511-12 (1848), Shaw, C. J.; Atkinson v. Great West. Ins. Co., 65 N. Y. 536-40 (1875), cases; 2 Wash. 66.

[4] Patapsco Ins. Co. v. Coulter, 3 Pet. *230 (1830).

[5] 4 Bl. Com. 134.

[6] Commonwealth v. M'Culloch, 15 Mass. *229 (1818); Com. monwealth v. Tubbs, 1 Cush. 8 (1848).

[7] The Case of Barratry, 8 Coke, *72 (1612).

[8] Atkinson v. Great Western Ins. Co., 4 Daly, 16-20 (1871), Daly, C. J.

[1] F. *barat*, traffic.

[2] 2 Bl. Com. 446.

[3] Cooper v. State, 37 Ark. 418 (1881), English, C. J.

[4] Washington County v. Thompson, 12 Bush, 241 (1877), Cofer, J.

[5] Guerreiro v. Peile, 3 B. & Ald. 616 (1820).

[6] 6 Wheat. 333.

[7] [2 Bl. Com. 109.

[8] [2 Bl. Com. 62, 61.

[9] 2 Bl. Com. 148.

[10] F. *bastard: fils de bast*, son of a packsaddle — muleteers made beds of their saddles,— Skeat.

[11] 1 Bl. Com. 454.

[12] 2 Bl. Com. 247.

[13] 2 Kent, 208.

[14] Wilson v. Babb, 18 S. C. 69-70 (1882), Simpson, C. J.

[15] Smith v. Perry, 80 Va. 570 (1885), Lacy, J.

Bastardy. The offense of begetting an illegitimate child; also, the condition of being an illegitimate child — illegitimacy.

Bastardy process. The statutory mode of proceeding against the putative father of an illegitimate child, to secure maintenance for the child.

Bastardy bond. The obligation entered into by such father with the guardians of the poor, conditioned for the payment of the lying-in expenses, maintenance of the child, and, perhaps, such costs as may have been incurred and such fine as has been imposed.[1]

At common law there was no legal liability upon the father to support his bastard child. Now, at the instance of the mother, he can be made support it, by a "bastardy proceeding."[2]

A bastard is a *filius nullius*, son of nobody, or *filius populi*, son of the people. He has no inheritable blood,— has no heir except of his own body. He may, however, take by bequest or devise.[3]

He has a right to maintenance; his settlement is the same as his mother's at his birth; he takes her name, but he may acquire a name by reputation.[4]

Once a marriage is proven, nothing can impugn the legitimacy of issue short of proof of facts showing it to be impossible that the husband could be the father.[5]

By the civil law, and statutes in many States, the subsequent marriage of the parents legitimates children born prior thereto. This seems to be the law in Alabama, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Ohio, Pennsylvania, Vermont, and Virginia.[6]

See ABANDON, 2 (2); ACCESS; ADULTERINE; CONCEAL, 4; FILIATION; MARRIAGE; PREGNANCY.

BATTEL.[7] Trial by combat or duel.

Also called wager of battel, battle, battaile.

In the nature of an appeal to Providence, under an apprehension and hope that Heaven would give the victory to him who had the right.

Introduced by the Conquerer; and used in the court-martial, or court of chivalry and honor, in appeals of felony, and in writs of right — the last and most solemn decision of real property.[8]

Recognized as the law of the land as late as 1818, in the case of *Ashford* v. *Thornton*.[9] Abolished by statute 59 Geo. III (1819), c. 46.[1] Compare ORDEAL: WAGER, 1.

BATTERY.[2] The unlawful beating of another.[3]

Any unlawful touching of the person of another, either by the aggressor or by any person or thing set in motion by him.[4]

The least touching of another's person willfully, or in anger, is a battery. The law cannot draw the line between different degrees of violence, and therefore prohibits the first and lowest stage of it — every man's person being sacred and no other having a right to meddle with it in the slightest manner.[5]

In assessing damages the degree of violence is taken into account. See BEAT.

Every "battery" includes an "assault." The two offenses are joined in indictments, and the assault alone may be proved. Whence "assault and battery," which is — simple, when a mere touching or beating is intended; aggravated, when grievous bodily harm is inflicted, as by breaking a limb or disfiguring the face; felonious, when death is designed, or serious wounding with intent to commit a felony, when the end sought is a felony, at common law or by statute.[6] See ASSAULT.

While "battery" includes "assault," it does not include "an assault with a deadly weapon with intent to commit bodily harm."[7]

A battery may be lawful or justifiable, or unlawful. It is lawful: (1) when committed under authority, as by an officer in order to preserve the peace, or by a parent, master, teacher, or military officer, each of whom may correct moderately; (2) when in self-defense; that is, of self, wife, husband, child, parent, servant; (3) when in defense of one's own goods or possession. It is unlawful: (1) when it originates in malice — is committed in an angry, spiteful, insolent, or rude manner; (2) when it is the result of censurable carelessness.[8]

A trespasser who uses force may be summarily ejected. A person assailed need not wait till a blow has been dealt him. At the same time resistance must not exceed the degree of necessary defense — for it is the law that punishes. Any resistance in the offender to justifiable apprehension becomes a new battery.[9]

Whatever is attached to the person partakes of its inviolability: as, the skirt of the coat or dress, an object in the hand.

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[1] See Gleason *v.* Commissioners, 30 Kan. 493 (1883).

[2] Stowers *v.* Hollis, 83 Ky. 549 (1886).

[3] 1 Bl. Com. 459; 2 *id.* 247-49; Gaines *v.* Hennen, 24 How. 553, 592 (1860); Gaines *v.* New Orleans, 6 Wall. 648 (1867); Smith *v.* Du Bose, Sup. Ct. Ga. (1887): 36 Alb. Law J. 344-48.

[4] 1 Bl. Com. 459.

[5] Patterson *v.* Gaines, 6 How. 589, 598 (1848). See also 18 Cent. Law J. 262-68, 305-7 (1884), cases.

[6] See 2 Kent, 210-14.

[7] L. *batuere*, to strike, beat.

[8] 3 Bl. Com. 337; 4 *id.* 346; Coke, Litt. § 294 b.

[9] 1 Barn. & Ald. 405.

[1] See generally United States *v.* Gibert, 2 Sumn. 68 (1834), Story, J.

[2] L. *batuere*, to beat.

[3] 3 Bl. Com. 120.

[4] 1 Saund. Pl. & Ev. *141; Kirland *v.* State, 43 Ind. 153 (1873); 3 Cooley, Bl. Com. 120, note.

[5] 3 Bl. Com. 120; Johnson *v.* State, 17 Tex. 517 (1856).

[6] See 4 Bl. Com. 216; 13 Allen, 317; 17 F. R. 266.

[7] People *v.* Helbing, 61 Cal. 621 (1882).

[8] See 3 Bl. Com. 120-21.

[9] See 2 Bishop, Cr. L. § 561.

To strike the horse which another person rides or drives is an assault. The owner is liable for a battery when his horse, left near a sidewalk, bites or kicks a passer-by.

The remedy in a civil court is an action of trespass *vi et armis* for damages; in a criminal court, indictment for assault and battery for the public wrong.[1]

While it is no defense to a civil action for an assault and battery that the acts complained of were committed in a fight engaged in by mutual consent, such consent may go in mitigation of the damages.[2]

See ABET; ARREST, 2; DEFENSE, 1; DURESS; FORCE; MAYHEM, Molliter; INJURY; PROVOCATION; WOUND.

BATTURE. "Accretion," which is the imperceptible augmentation of the soil on the shore of a stream, is called "alluvion" and sometimes "batture."[3]

A marine term, denoting a bottom of sand, stone or rock mixed together, and rising toward the surface of the water. From the French *battre*, to beat: beaten by the water. . . An elevation of the bed of a river, under the surface of the water; also, sometimes, the same elevation of the bank, when it has risen above the surface of the water or is as high as the land on the outside of the bank.[4] See ACCRETION.

BAWD.[5] One who procures opportunities for persons of opposite sexes to cohabit in an illicit manner.[6]

Bawdy-house. A house of ill-fame; a house kept for the resort and unlawful convenience of lewd people of both sexes; a house resorted to for purposes of lewdness and prostitution.[7]

The prosecution having shown that the defendant is the keeper of a house alleged to be a common bawdy-house, testimony as to the general reputation of the house, of the persons who frequent it, and of the defendant, is admissible, as tending to show the real character of the house.[7]

Keeping a bawdy-house is indictable as a common nuisance at common law.[8] See HOUSE, 1, Of ill-fame; PROSTITUTE.

BAY-WINDOW. See LIGHTS, Ancient.

A jut or bay-window which is maintained without authority of law, which encroaches on the public highway, and is prejudicial to the interests of the community and of the rights of individual property owners, may be declared a public nuisance and its continuance restrained. As, a window built in the second story of a house, sixteen feet above the sidewalk and projecting three and a half feet beyond the property or building line.[1]

BE IT ENACTED. See ACT, 3.

BEACH. The land, between the lines of high and low water, over which the tide ebbs and flows; synonymous with shore, strand, flat.[2]

A deed of land described as bounded "on the beach" does not convey the shore below high-water mark, unless this boundary is controlled by other parts of the description.

Taking sea-weed from an uninclosed beach, and selling stones therefrom from time to time, may operate to disseize the true owner.[3]

BEACON. See COMMERCE; WRECK.

BEANS. See GRAIN.

BEAR. See DATE; INTEREST, 2 (3).

BEARER. He who bears or carries a thing; he who presents for payment a bill, check, or note, transferable by delivery.

A note payable to "A or bearer" is negotiable without indorsement, and payment may be demanded by any bearer as the person whom the maker promised to pay. The transferrer is not liable except on failure of the consideration. The holder is presumed to be owner for value; but any circumstance of suspicion, as theft of the instrument by a former holder, may require the present holder to prove that he gave value for the paper.[4]

The *bona fide* purchaser of a note payable to bearer, but stolen from the rightful holder, may recover the amount of it from the maker; otherwise, where the note is stolen directly from the maker.[5]

A note payable to bearer is said to be assignable by delivery: but really there is no "assignment" at all. The paper passes by mere delivery, the holder never makes title through any assignment, but claims as bearer. The note is an original promise by the maker to pay any person who shall become bearer; it is, therefore, payable to any and every person who successively holds the note *bona fide*, not by virtue of an assignment of the promise, but by the original, direct promise moving from the maker.[6]

See BLANK, 2; BOND; COUPON; NEGOTIATE, 2.

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[1] 3 Bl. Com. 121; 4 *id.* 216; Kirland *v.* State, 43 Ind. 146-56 (1873), cases; State *v.* Davis, 1 Hill, S. C., 46 (1833).

[2] Barholt *v.* Wright, Sup. Ct. Ohio (1887), cases: 12 N. E. Rep. 185; 36 Alb. Law J. 3 (1887), cases.

[3] [Zeller *v.* Yacht Club, 34 La. An. 888 (1882), Todd, J.; 4 Hall's Law J. 518; 12 F. R. 295; 15 Wall. 650.

[4] Morgan *v.* Livingston, 3 Mart. 111 (1819), Martin, J.; *Ib.* 11. See Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 436 (1841).

[5] F. *baud*, gay, wanton: Ger. *bald*, bold, free.

[6] Dyer *v.* Morris, 4 Mo. 216 (1835).

[7] State *v.* Boardman, 64 Me. 529 (1874); McAlister *v.* Clark, 33 Conn. 92 (1865); State *v.* Hand, 7 Iowa, 411 (1858); Harwood *v.* People, 26 N. Y. 191 (1863); State *v.* Brunell, 29 Wis. 436 (1872), cases.

[8] Martin *v.* Stillwell, 13 Johns. *275 (1816).

[1] Reimer's Appeal, 100 Pa. 182, 190 (1882); Commonwealth *v.* Harris, 10 W. N. C. 10-15 (1881),— Philadelphia cases.

[2] [Doane *v.* Willcutt, 5 Gray, 328 (1855); 41 Conn. 14; 15 Me. 237; 48 *id.* 68.

[3] Litchfield *v.* Ferguson, 141 Mass. 97 (1886).

[4] 2 Bl. Com. 468; 2 Pars. Contr. 942; 14 Wall. 296; 17 Blatch. 2.

[5] Branch *v.* Commissioners, 80 Va. 422-34 (1885), cases.

[6] Bullard *v.* Bell, 1 Mas. 252 (1817), Story, J.; Thompson *v.* Perrine, 106 U. S. 592-98 (1882), cases; Chickering *v.* Carpenter, *ib.* 666 (1882).

BEARING. See DATE; INTEREST, 2 (3).

BEAST. See ANIMAL.

Beasts of the plow. An ancient expression referring to animals employed in the ordinary uses of husbandry, or other actual labor in a lawful and useful industry.[1] See DISTRESS (3); HORSE.

BEAT. In law, not merely to whip, wound, or hurt; includes any unlawful imposition of the hand or arm.[2]

To commit a battery,[3] *q. v.*

BED. 1. The right of connubial intercourse; cohabitation, *q. v.* Whence **bed and board.** See DIVORCE.

2. The **bed of a river** is that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water.[4] Compare BANK, 1.

BEE. See ANIMAL.

BEER. See LIQUOR; PROHIBITION, 2.

BEEVES. See NEAT.

BEFORE. See AFTER; ANTE; CORAM; ON.

Before the twenty-eighth of a month means by the twenty-seventh, at least.[5]

Before a given day excludes that day.[6]

Before the court. When a matter, by regular proceeding, is made to engage or receive the direct attention of a court, for the purpose of decision, it is said to be or to be pending "before the court." See DECISION; DICTUM.

A certificate by a clerk that a complaint was sworn to "before said court" raises a presumption that this was done in court.[7]

Before trial. May mean before pleading to the merits,[8] — implies that a suit has been commenced.[9]

BEGGING. See VAGRANT.

The act of a cripple who stands upon a sidewalk and in silence holds out his hand for money from passers-by is "begging for alms."[10]

BEGIN. See AFFIRM, 1; AT, 2; RUN, 5.

[1] Somers *v.* Emerson, 58 N. H. 49 (1876).

[2] Goodrum *v.* State, 60 Ga. 511 (1878).

[3] State *v.* Beverlin, 30 Kan. 613 (1883).

[4] Howard *v.* Ingersoll, 13 How. 427, 381, 416 (1851), Curtis, J.

[5] Metropolitan Nat. Bank of New York *v.* Morehead, 38 N. J. E. 500 (1884).

[6] Ward *v.* Walters, 62 Wis. 44 (1885).

[7] Tacey *v.* Noyes, 143 Mass. 451 (1887).

[8] Winship *v.* People, 51 Ill. 298 (1869).

[9] Horner *v.* Pilkington, 11 Ind. 449 (1858).

[10] *Re* Haller, 3 Abb. N. Cas. 65 (1877).

BEHALF. See INTEREST, 2 (1).

A witness called by a party testifies "in his behalf" though he testifies against his interest.[1]

BEHAVIOR. Manner of having, holding, or keeping one's self; personal carriage and demeanor; bearing, with respect to propriety, morals, and the requirements of law.

Disorderly behavior. See CONTEMPT; DISORDER, 2; ORDER, 4.

Good behavior. Bearing which conforms to the law.

All persons who are not of good fame may be bound over to good behavior — an expression of so great latitude as to leave much to be determined by the discretion of the magistrate.[2] See SUSPICION, 3.

Security to be of good behavior includes more than security to keep the peace; it is demanded with greater caution, and the recognizance is more easily forfeited.[3] See PEACE, 1.

Misbehavior. Improper, unlawful conduct.

A verdict will be set aside for gross misbehavior in the jury, the prevailing party, or his counsel; and an award will be set aside for misbehavior in the arbitrators or referee.[4]

A judge holds office for a specified term, if he shall "so long behave himself well." See TENURE, Of office.

Each house of Congress may punish its members for disorderly behavior.[5]

BEING. Compare IN, 3 (2), ESSE.

An allegation that liquor was sold to S. and W. M., "being" minors, shows with sufficient certainty that those persons were minors.[6]

BELIEF. Conviction of mind, founded on evidence, that a fact exists — that an act was done, that a statement is true.[6]

The difference between "belief" and "knowledge" consists in the degree of certainty. Things which do not make a deep impression on the memory may be said to leave a "belief." Knowledge is firm belief.[7]

"Between mere belief and knowledge there is a wide difference;" for example, as to whether a lode or vein of gold or silver exists in a claim proposed for a patent.[8]

The distinction between the two words has become important where the contents of a paper are to be verified as true to the knowledge of the affiant, ex-

[1] Richerson *v.* Sternburg, 65 Ill. 279 (1872).

[2] 4 Bl. Com. 256; 1 Binn. 98, *n.*; 2 Yeates, 427.

[3] 3 Bl. Com. 337; 4 *id.* 351.

[4] Constitution, Art. I, sec. 5, cl. 2.

[5] State *v.* Boucher, 59 Wis. 481 (1884).

[6] Giddens *v.* Mirk, 4 Ga. 369 (1848). See also State *v.* Grant, 76 Mo. 246 (1882).

[7] [Hatch *v.* Carpenter, 9 Gray, 274 (1857), Shaw, C. J.; 9 Cal. 62.

[8] Iron Silver Mining Co. *v.* Reynolds, 124 U. S. 373 (1888), Field, J.

cept as to a matter stated on "information and belief," which he must state he believes to be true.[1]

That may be ground for "suspicion" which will not evidence "belief."[2]

While a person may have reason to believe and yet disbelieve, he cannot "verily believe" without having good reason in fact.[3]

The grounds of belief are: credulity, experience, probability, induction. Experience constitutes the basis of belief in human testimony. Aid is derived from the experience of others. Belief in such testimony is a fundamental principle of our moral nature. This is strengthened by corroborating circumstances. Probability is determined by experience and reasoning combined. Induction tests probability.[4]

See ANSWER, 3; CERTAINTY; CREDIT, 2; DECEIT; FRAUD; KNOWLEDGE, 1; SUPPOSE; SUSPICION.

BELLIGERENT. See WAR.

BELL-ROPE. See OBSTRUCT, 1.

BELLS. See NUISANCE.

BELONG. In statutes referring to inhabitancy, the poor, etc., designates the place of a person's legal settlement, not merely his place of residence.[5]

Belonging to. In the Pennsylvania statute defining arson, includes all structures (as, for example, a barn) so near a dwelling-house on the same premises as to endanger the safety of the house in case of fire.[6] See ACCESSORY; INCIDENT.

BELOW. Compare ABOVE; INFRA.

BENCH. The judge's seat in a court.

Also, the judges themselves as a tribunal or a professional class: as, the common or common pleas bench, the supreme bench, a full or partial bench. Compare BAR, 1.

King's or **Queen's bench.** The supreme court of common law in England, now merged into the High Court of Justice.

Abbreviated K. B., and Q. B.

The king in person used to sit in this court: in theory it was always held before the sovereign. During the reign of a queen it is called the "Queen's bench." In the time of Cromwell it was styled the "upper bench." It succeeded the *aula regis*, q. v. Although supposed to follow the person of the sovereign, it was in fact held at Westminster. It consisted formerly of a chief justice and four associate justices — the sovereign conservators of the peace. The jurisdiction of the court, which was originally criminal and included trespasses, in time included all personal common-law actions between subjects, and actions of ejectment. It had also supervisory power over inferior tribunals, magistrates, and corporations.[1]

Bencher. In England, a dignitary of the inns of court.

Each inn is presided over by a certain number of benchers who exercise the right of admitting candidates as members of their society and of ultimately calling them to the bar. They are selected from members who have distinguished themselves in their profession. They also exercise general supervision over the professional conduct of counselors who are members of the inn.[2]

Bench-warrant. Process of arrest issued against a person charged with a crime or a contempt of court.

1. A process issued against a person under indictment to bring him into court to answer the charge.

2. A process issued by a civil court for the apprehension of a person appearing to be guilty, under verified allegations, of an indictable civil injury; as, where a debtor, insolvent and believed to have defrauded or to be intending to defraud his creditors, is disposing of his effects or is about to remove with them from the jurisdiction.

The process may be issued by a judge on the *bench* (whence the name "bench" warrant), or by a judge at chambers.

The proceeding is interlocutory,—like a rule on a defendant to show cause why he should not be held to bail in an action *ex contractu*; and is limited to cases where there appears to be a strong presumption of fraud of some kind on one or more creditors. Hence, fraud is the matter to be alleged, controverted, and substantiated. The remedy is allowed without regard to the place where the fraud was perpetrated, as in actions of tort. The proceeding is not in the nature of a summary conviction, but simply an arrest for debt under the regulated supervision of a judge, instead of the arbitrary and badly controlled discretion of a party. Nor is the proceeding criminal: the fraud is treated as a private injury. The plaintiff files a preliminary affidavit showing, in at least general terms, probable cause to the satisfaction of the court. This affidavit also specifies the nature of the claim, whether a contract or not, and, that the amount of bail may be known, the amount of the claim. A hearing of the proofs is fixed, at which the defendant, who has been previously arrested and imprisoned or bailed, may deny all allegations and demand proof of the alleged facts.[3] See ATTACH, 2.

BENEFICE. A gratuitous donation, as, an estate by feudal tenure; also, an ecclesi-

[1] See Black *v.* Halstead, 39 Pa. 71 (1861); 56 *id.* 33; 67 *id.* 477; 79 *id.* 384; 81 *id.* 180; 82 *id.* 354.

[2] Commonwealth *v.* Lottery Tickets, 5 Cush. 374 (1850).

[3] Russell *v.* Ralph, 58 Wis. 332 (1881), cases.

[4] 1 Greenl. Ev. Ch. III.

[5] Reading *v.* Westport, 19 Conn. 564 (1849), Church, C. J.; 3 *id.* 467; 18 *id.* 425; 8 Vt. 45.

[6] Hill *v.* Commonwealth, 98 Pa. 195 (1881).

[1] See 3 Bl. Com. 41; 4 *id.* 265.

[2] Holthouse's Law Dict.

[3] Gosline *v.* Place, 32 Pa. 520 (1859), Lowrie, C. J.; Act 12 July, 1842.

astical living or church preferment given or held for life.[1]

BENEFICIARY. One who is entitled to the benefit of a contract or of an estate held by another.

The word, though a little remote from the original meaning of the expression "*cestui que trust*," is more appropriate for one who is a trustee or fide-commissary.[2] See TRUST, Cestui, etc.

As a member of a beneficial society, see BENEFIT.

BENEFIT. Good, advantage; fruit, profit, use; aid.

As, in the expressions, assignment for the benefit of creditors, common or mutual benefit, benefit of a doubt, of clergy, of copyright, of a law. See BETTERMENT; USE, 2.

Only he for whose benefit a thing exists can complain of a non-recognition or abuse of his right; and he who retains the benefit of an act must bear the burden.[3] He who has enjoyed the fruit of an act cannot afterward deny the existence or validity of the act — as, that a bond is not valid,[4] that a law is unconstitutional,[5] or an act *ultra vires*. See COMMODUM.

Benefit society. An association incorporated for the purpose of receiving periodical payments from members, to be loaned or given to such members as may need pecuniary relief. Sometimes called *aid*, and *beneficial*, society.

Sick benefits. Aid, usually money, given to a person during the period of his illness or disability, on account of membership or insurance in a benefit or relief society.[6]

The recognition of a person as a member up to a short time before his death, in connection with the presumption that persons follow such regulations as they are under, is sufficient evidence of good standing to maintain an action upon a certificate.[7]

When a benefit certificate takes effect, so far as to vest an absolute right to the benefit money, at the death of the party to whom it issued, the same rule should hold which prevails as to wills and life policies of insurance, viz., that an express designation of the person is conclusive.[8]

A contract of membership must be read in the light afforded by the constitution and by-laws.[1] See ACCIDENT; ASSOCIATION.

Benefits accepted. See AGENT; ASSUMPSIT; CONTRACT, Implied; ESTOPPEL.

Benefits and burdens. Advantages and disadvantages; profits and losses; rights and duties. See BURDEN.

Beneficial. 1. For the assistance of members, as see *Society*, above.

2. Entitled to receive the income or profit, as the beneficial owner of an estate. See BENEFICIARY.

3. Contributing to the end in view; supporting or maintaining rather than restricting or defeating; liberal. See CONSTRUCTION; STATUTE, Remedial; RES, 2, Ut, etc.

BENEVOLENCE; BENEVOLENT. "Benevolent," of itself, without anything in the context of a will to restrict its ordinary meaning, clearly includes not only purposes which are deemed charitable by a court of equity, but also any acts of kindness, good will or disposition to do good, the objects of which have no relation to technical charities.[2]

Hence, a devise to be applied "solely for benevolent purposes," in the discretion of a trustee, is not a charity. . . But "benevolent," when coupled with "charitable" or an equivalent word, or used in such connection or applied to such public institutions or corporations as to manifest an intent to make it synonymous with "charitable," has been given effect according to that intent.[3]

"Benevolence" is wider than "charity," in legal signification, but its meaning may be narrowed by the context.[4]

"Benevolent," applied to objects or purposes, may refer to such as are charitable or not charitable, in the legal sense. Acts of kindness, friendship, forethought, or good will, might properly be described as benevolent. It has therefore been held that gifts to trustees to be applied for "benevolent purposes" at their discretion, or to such "benevolent purposes" as they could agree upon, do not create a public charity. . . Where the word is used in connection with other words explanatory of its meaning, and indicating the intent of the donor to limit it to purposes strictly charitable, it has been held to be equivalent to "charitable."[5]

See ASSOCIATION; CHARITY.

[1] [4 Bl. Com. 107; 3 Kent, 494.

[2] 1 Story, Eq. 12 ed. § 321, note.

[3] Cowell *v.* Colorado Springs Co., 100 U. S. 55 (1879); Jones *v.* Guaranty, &c. Co., 101 *id.* 628 (1879); Peoples' Bank *v.* National Bank, *ib.* 181 (1879).

[4] United States *v.* Hodson, 10 Wall. 395 (1870).

[5] Daniels *v.* Tearney, 102 U. S. 421 (1880); 106 *id.* 481.

[6] See Poultney *v.* Bachman, 31 Hun, 49, 52-55 (1883), cases.

[7] Lazensky *v.* Knights of Honor, 31 F. R. 592 (1887); Knights of Honor *v.* Johnson, 78 Ind. 113 (1881).

[8] Thomas *v.* Leake, 67 Tex. 470 (1887), Willie, C. J. As to beneficiaries generally, see Lamont *v.* Grand Lodge, 31 F. R. 177, 181 (1887), cases. As to designation of beneficiary, see Hotel-Men's Association *v.* Brown, 32 *id.* 11 (1887).

[1] Splawn *v.* Chew, 60 Tex. 534 (1883); 67 *id.* 472. See also, generally, 22 Cent. Law J. 562-64 (1886), cases; *ib.* 277, cases.

[2] Chamberlain *v.* Stearns, 111 Mass. 268-69 (1873), cases, Gray, J.

[3] De Camp *v.* Dobbins, 31 N. J. E. 695 (1879), Beasley, C. J.; Thomson *v.* Norris, 20 *id.* 523 (1869), cases; 6 N. H. 533.

[4] Suter *v.* Hilliard, 132 Mass. 413-14 (1882), cases, En-

BENZINE. See OIL.

BEQUEATH. A gift of personal property by will.

Bequest. A gift of personalty by will; the clause in the instrument making the gift; the thing itself so given.

When the context requires it "bequeath" will be construed "devise"—which is of realty.[1] See DEVISE; LEGACY; WILL, 2.

BEST. See BID; EVIDENCE; KNOWLEDGE.

A testator made a bequest to his son-in-law in trust "to pay the income or such portion as he may consider best and at such time as he sees fit" to testator's granddaughter, an infant, during her life. *Held*, that the intent of the testator was to consider the welfare of the granddaughter; that the word "best" had more reference to withholding income than paying it: that the trustee was to pay only as he thought best to pay.[2] See DISCRETION, 2; IF.

BESTIALITY. See SODOMY.

BET.[3] A wager,—the act or the amount.

"Bet" and "wager" are synonymous terms, applied to the contract of betting and wagering and to the thing or sum bet or wagered. They may be laid upon games and upon things that are not games.[4]

A "bet" or wager is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them on the happening in the future of an event at present uncertain; while the "stake" is the money or other thing thus put upon the chance. Each party gets a chance of gain from others, and takes a risk of loss of his own to them.[5]

"Illegal gaming implies gain and loss between the parties by betting, such as would excite a spirit of cupidity." A "purse," "prize," or "premium" is ordinarily some valuable thing offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered; if he abide by his offer, that he must give it over to some of those contending for it is reasonably certain. "Bet or stakes" and "bet or wager" have substantially the same meaning.[6]

A bet *on* an election means on the result of the election.[1] See GAME, 2; WAGER.

BETTER. See EQUITY.

BETTERMENT. 1. An improvement to realty which is more extensive than ordinary repair, and increases, in a substantial degree, the value of the property; melioration.

Betterment Acts. Statutes which secure to a purchaser of land for valuable consideration, without notice of an infirmity in the title, an interest in the land equal to the value of the improvements or melioration he may have made.

The rule of the common law is that the owner of land shall not pay an intruder or occupant for unauthorized improvements. This induces diligence in the examination of titles, and prevents wrongful appropriations. Chancery, borrowing from the civil law, made the first innovation upon the doctrine; and in time held that when a *bona fide* possessor made meliorations in good faith, under an honest belief of ownership, and the real owner for any reason went into equity, the court, applying the maxim that he who seeks equity must do equity, and adopting the civil law rule of natural equity, compelled the owner to pay for such industrial accessions as were permanently beneficial to the estate.[2]

The occupant must have peaceable possession, under color of title, and honestly believe that he is the owner of the land. Any instrument having a grantor and grantee, containing a description of the land, and apt words for their conveyance, gives color of title. Actual notice of an adverse title is proof of the absence of good faith.[3]

2. The additional value which a piece of property acquires from its proximity to a public improvement.[4] See COMPENSATION, 3.

BETWEEN. Often synonymous with "among," especially when employed to convey the idea of division or separate ownership of property held in common.[5]

It is as appropriate to say that property is to be divided "between" as "among" A, B, and C.[5]

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dicott, J.; Saltonstall *v.* Sanders, 11 Allen, 470 (1865), Gray, J.; Jones *v.* Habersham, 107 U. S. 185 (1882); Adye *v.* Smith, 44 Conn. 60 (1876).

[1] Evans *v.* Price, 118 Ill. 599 (1886); Ladd *v.* Harvey, 31 N. H. 538 (1850); Lasher *v.* Lasher, 13 Barb. 109-10 (1852); Laing *v.* Barbour, 119 Mass. 525 (1876), cases.

[2] Bartlett *v.* Slater, 53 Conn. 110 (1885).

[3] For *abet*, to maintain.

[4] Woodcock *v.* McQueen, 11 Ind. 16 (1858), Perkins, J.

[5] Harris *v.* White, 81 N. Y. 539 (1880), Folger, C. J.; Commonwealth *v.* Wright, 137 Mass. 251 (1884).

[1] Commonwealth *v.* Avery, 14 Bush, 633 (1879).

[2] Parsons *v.* Moses, 16 Iowa, 444-46 (1864), cases, Dillon, J.

[3] Beard *v.* Dansby, 48 Ark. 186-87 (1886), cases. See generally Bright *v.* Boyd, 1 Story, 492-98 (1841): 2 *id.* 607 (1843); Griswold *v.* Bragg, 13 Blatch. 206 (1880); Wheeler *v.* Merriman, 30 Minn. 376 (1883); Effinger *v.* Hall, 81 Va. 109-6 (1885), cases; Green *v.* Biddle, 8 Wheat. 79 (1823); Jackson *v.* Loomis, (N. Y.), 15 Am. Dec. 347, cases; 19 Blatch. 94; 48 Conn. 581; 11 Me. 452; 74 *id.* 515; 13 Ohio, 308; 14 S. C. 338; 17 Vt. 109; 3 Pomeroy, Eq. § 1241, cases; 2 Story, Eq. §§ 799, 1237-38, cases; 1 Wash. R. P. 139, cases.

[4] See Foster *v.* Commissioners, 113 Mass. 335 (1882).

[5] Myres *v.* Myres, 23 How. Pr. 415-16 (1862). See also Ward *v.* Tomkins, 30 N. J. E. 4 (1878); 20 Conn. 123.

When "between" and "among" follow the verb "divide" their general signification is very similar, and in popular use they are synonymous — though "among" denotes a collection and is never followed by two of any sort, while "between" may be followed by any plural number, and seems to refer to the individuals of a class rather than to the class itself.[1]

"Between" persons implies, strictly speaking, between two parties to a division; but the reference may be to more than two persons.[2]

By the language "equally divided between my grandchildren," a testator may intend division between two families.[3]

Between two places excludes the *terminii*.[4]

Between two days excludes both days.[5] See DAY.

"Between eleven o'clock P. M. and five o'clock A. M." covers the period intervening between eleven o'clock at night and five o'clock in the morning of the succeeding day.[6]

BEYOND. See SEA.

BI. The Latin prefix, put for *dui*, twice, or from *bis*, twice, two.

BIAS.[7] Inclination of mind toward a particular object; an influential power which sways the judgment.[8]

In a juror, being under an influence which so sways his mind to one side as to prevent his deciding the cause according to the evidence.[9]

Not synonymous with prejudice.[9]

May show bias in a witness by relationship, sympathy, hostility, or prejudice.[9] See IMPARTIAL, 1; PREJUDICE.

BIBLE. See BLASPHEMY; CHRISTIANITY; HEARSAY, 4.

BICYCLE. Held to be a "carriage," within a statute forbidding fast driving.[10]

Not a "carriage" liable to toll, under the English Turnpike Act of 1888.[11]

A tricycle capable of being propelled by the feet, or by steam as an auxiliary, or alone, was held to be a "locomotive," within the English Highways and Locomotive Act of 1878.[12]

The park commissioners of New York, in their discretion, may prohibit bicycles in the parks of that city. An ordinance to that effect may be a "regulation" intended by the statute creating their office.[13]

An act which forbids the use of bicycles on a certain road, unless permitted by the superintendent of the road, is not unconstitutional.[1]

In the absence of legislative prohibition, riders of bicycles would seem to have the same rights on highways as those using any other vehicle.[2]

BID. In its most comprehensive sense, to make an offer; in its more ordinary acceptation, to make an offer at an auction;[3] the offer itself.

Also, the price at which a contractor will furnish material or do some other particular thing.

Bid off. One is said to bid off a thing when he bids at an auction and the thing is knocked down to him in immediate succession to his bid and as a consequence of it.[3]

Bidder. One who offers to give a designated price for property on sale at an auction.

By-bidding. Fictitious bidding; running up the price of an article, not to save it from sacrifice, but to mislead *bona fide* bidders; puffing.

Upset bid. A more liberal bid on property sold at public sale, offered to the court having jurisdiction in the proceeding, in order that the sale already made may be set aside, or confirmation thereof withheld, and that the new bid may be entertained, perhaps along with other bids. Whence *upset-bidder*, for the person who makes such offer.[4] (Local.)

The article offered for sale is to be delivered to the highest real bidder. If a minimum price is fixed notice thereof must be given. By-bidding, since it deceives and involves falsehood, is a fraud.[5] An agreement not to bid, that is, to prevent competition and possibly to cause a sacrifice of the property, is void, as against public policy. On a breach of a contract to pay a bid the measure of damages is the amount which would have been received if the contract had been kept.[6]

It was formerly the rule in England, in chancery sales, that, until confirmation of the master's report, the bidding would be "opened" upon a mere offer to advance the price ten per centum. But Lord Eldon expressed dissatisfaction with this practice, as tend-

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[1] Senger v. Senger's Executor, 81 Va. 698 (1886), Richardson, J.

[2] Haskell v. Sargent, 113 Mass. 343 (1873).

[3] Stoutenburgh v. Moore, 37 N. J. E. 69 (1883).

[4] Revere v. Leonard, 1 Mass. *93 (1804).

[5] Bunce v. Reed, 16 Barb. 352 (1853); 5 Metc. 540.

[6] Hedderich v. State, 101 Ind. 570 (1884).

[7] *F. biais* a slant, slope: inclination to a side. L. L. *bifacem*, one who looks sideways. — Skeat.

[8] [Willis v. State, 12 Ga. 449-50 (1853).

[9] 1 Whart. Ev. §§ 406, 566.

[10] Taylor v. Goodwin, L. R., 4 Q. B. D. 228 (1879).

[11] Williams v. Ellis, L. R., 5 Q. B. D. 176 (1880).

[12] Parkyns v. Priest, L. R., 7 Q. B. D. 315 (1881).

[13] Matter of Wright, 29 Hun, 358 (1883).

[1] State v. Yopp, 97 N. C. 477 (1887).

[2] Cook, Highways. See 69 Law Times, 26 (1880); 28 Solic. J. & R. 4 (1880) — commenting on Taylor's and Williams' cases, *ante* — notes 10, 11.

[3] Eppes v. Mississippi, &c. R. Co., 35 Ala. 56 (1859), Walker, C. J.

[4] See Yost v. Porter, 80 Va. 855 (1885).

[5] Veazie v. Williams, 8 How. 151-62 (1850), cases; 2 Kent, 538.

[6] Wicker v. Hoppock, 6 Wall. 97-98 (1867), cases; James v. La Crosse, &c. R. Co., *ib.* 752 (1867); 4 Del Ch. 491; 1 Cowp. 395.

ing to impair confidence in sales, to keep bidders from attending, and to diminish the amount realized, and his views were finally adopted in the statute of 30 and 31 Vict. (1867), c. 48, § 7. . . . In this country his views were followed at an early day by the courts, and the rule has become almost universal that a sale will not be set aside for inadequacy of price unless the inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness; being very much the rule that always prevailed in England as to setting aside a sale after a master's report had been confirmed. . . If the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of unfairness, or has taken any undue advantage, or if the owner of the property, or the party interested in it, has been for any other reason misled or surprised, the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud.[1]

See ADEQUATE, 1; AUCTION; RESPONSIBLE; SALE, Judicial.

BIGAMY.[2] The offense of having two husbands or wives at the same time, the one *de jure* and the other *de facto*.[3]

Strictly speaking, *bigamy* means "twice married," as its derivation shows. This was never an offense at common law; it was made an offense by the canonists. *Polygamy* is the proper term; but, by long usage, *bigamy* has come to mean the state of a man who has two wives, or a woman who has two husbands, at the same time.[4]

Whence bigamist (not a legal term), and bigamous.

The penalties of the offense are not incurred where one of a married couple has been absent and unheard of for a long period, as five to seven years, and the other party marries; nor, in some States, where one is sentenced to imprisonment for a long term, as for life; nor where there has been a legal dissolution of the relation for a cause not involving guilt, as for a contract made within the age of consent.[5]

The first wife is not admitted as a witness against her husband, because she is the true wife; but the second wife, so called, may be, for she is not a wife at all; and so, *vice versa*, as to the second husband, so called.[1]

The first marriage may be proved by the admissions of the prisoner.[2]

In a criminal prosecution strict proof of an actual marriage is necessary; but in a civil suit an admission, or reputation and cohabitation, suffices.[3]

The act of Congress of July 1, 1862, provided that every person having a husband or wife living, who married another, whether married or single, in a Territory, or other place over which the United States had exclusive jurisdiction, was guilty of bigamy —

And should be punished by a fine of not more than five hundred dollars, and by imprisonment for a term of not more than five years.[4] That act was amended by act of March 22, 1882, to read as follows:

Section 1. "Every person who has a husband or wife living who, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy, and shall be punished by a fine of not more than five hundred dollars and by imprisonment for a term of not more than five years; but this section [R. S. § 5352, as amended] shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five years, and is not known to such person to be living, and is believed by such person to be dead, not to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract."

Sec. 2. If any male person cohabits with more than one woman, he shall be guilty of a misdemeanor, punishable by a fine of not more than three hundred dollars, and by imprisonment for not more than six months, or by both.

Sec. 5. Cause for challenge of a juror is: living or having lived in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman; or believing in the practice of bigamy, polygamy, etc. . . An answer shall not be given in evidence in any criminal prosecution under the act. Declining to answer as a witness renders the person incompetent.

Sec. 6. The President may grant amnesty for offenses committed before the passage of the act.

Sec. 7. The issue of Mormon marriages, born before January 1, 1888, are legitimated.

[1] Graffam *v.* Burgess, 117 U. S. 191-93 (1886), cases, Bradley, J. See also Vass *v.* Arrington, 89 N. C. 13 (1883) — ten per cent. rule; Hansucker *v.* Walker, 76 Va. 753 (1882); Langyher *v.* Patterson, 77 *id.* 470 (1883); Central Pacific R. Co. *v.* Creed, 70 Cal. 501 (1886); Babcock *v.* Canfield, 36 Kan. 439 (1887).

[2] L. L. *bigamia: bi* for Gk. *di*, double; *gamía*, for Gk. *gámos*, marriage. Gk. *digamía*,— Skeat.

[3] 1 Bishop, Mar. & Div. § 296.

[4] Gise *v.* Commonwealth, 81 Pa. 432, 430 (1876), Paxson, J. See also 4 Bl. Com. 163; 2 Steph. Hist. Cr. L. Eng. 430; 1 Law Quar. Rev. 474-76 (1885).

[5] 2 Kent, 79-80; 4 Bl. Com. 164.

[1] 4 Bl. Com. 164.

[2] Miles *v.* United States, 103 U. S. 304, 311 (1880), cases.

[3] The Gaines Cases, 24 How. 605 (1860); 12 *id.* 472; 6 *id.* 597; State *v.* Johnson, 12 Minn. 476 (1867), cases: 98 Am. Dec. 241, 251-57, cases; 53 Pa. 132; 14 Tex. 468, 471; 2 Utah, 26.

[4] 12 St. L. 50: R. S. § 5352.

Sec. 8. "No polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid . . shall be entitled to vote at any election . . or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States."

Sec. 9. Declares all registration and election offices vacant, and provides for their being filled by a board of five persons, appointed by the President, until provision be made by the legislative assembly of the Territory as further directed by this section.[1]

Any man is a polygamist or bigamist, within the meaning of the last recited act, who having previously married one wife, still living, and having another at the time when he presents himself to claim registration as a voter, still maintains that relation to a plurality of wives, although from March 22, 1882, until the day he offers to register, he may not in fact have cohabited with more than one woman. . . The crime, under the acts of Congress, consists in entering into a bigamous or polygamous marriage, and is complete when the relation begins.[2] See RELIGION.

The offense of cohabiting with more than one woman, created by § 3 of the act of March 22, 1882, is committed by a man who lives in the same house with two women, and eats at their tables one-third of his time, or thereabouts, and holds them out to the world, by his language or conduct, as his wives. It is not necessary that he and the women, or either of them, shall sleep together.[3] See COHABIT, 2.

The uniform current of authority is, that for the purposes of prosecution the offense of bigamy or polygamy can be committed but once prior to the time the prosecution is instituted.[4]

See further Act of March 3, 1888, under POLYGAMY.

[1] 22 St. L. 30-32. See 116 U. S. 56-57; 118 *id.* 350.

[2] Murphy *v.* Ramsey, 114 U. S. 15, 35, 41 (1885), Matthews, J. Approved, 116 *id.* 72, *infra*.

[3] Cannon *v.* United States, 116 U. S. 55 (1885), Blatchford, J. Afterward, May 10, 1886, the court decided that it had no jurisdiction under the writ of error in the case, as see 118 U. S. 354-55.

[4] *Exp.* Snow, 120 U. S. 274, 281-86 (1887), cases, Blatchford, J. Snow was convicted of polygamy upon three indictments, exactly alike except that they covered different periods of time, and three sentences were imposed. He complied with the first sentence — paid a fine of $300, and remained in prison six months; and then demanded his release, claiming that his offense had been a continuing one, and that he could not be punished more than once for it. The Supreme Court held that under the theory of the lower court Snow might have been punished under an indictment entered every week during the continuance of the polygamous relation.

BILATERAL. Designates a contract executory on both sides, as, a sale. **Unilateral.** When one party makes no express agreement, but his obligation is left to implication of law, as, a guaranty. See CONTRACT, Bilateral, etc.

A bilateral record is a record introduced between parties and privies. A unilateral record is a record offered to show a particular fact as a *prima facie* case for or against a stranger.

BILGED. That state of a ship in which water is freely admitted through holes and breaches made in the planks of the bottom, occasioned by injuries, whether the ship's timbers are broken or not.[1]

BILL.[2] A statement of particulars, in writing, and more or less formal in arrangement.

Distinctive qualifying terms are frequently omitted, the relation or context indicating the sense. Thus "bill," standing alone, is often used for bill of exchange, bill in equity, bill of indictment, etc.

I. IN CONSTITUTIONAL LAW. A formal, public, written declaration of popular rights and liberties — restrictive of governmental power. See further RIGHT, 2, Bill of Rights.

II. IN LEGISLATION. The draft or form of an act presented to a legislature but not enacted. As, a bill of attainder, and money bills, *qq. v.*

"Act" is the appropriate term for the document after it has been passed by the legislature: it is then something more than a draft or form.[3]

See ACT, 3; PASS, 2; RIDER; SNAKE; TITLE, 2; VETO; YEAS AND NAYS.

III. IN MERCANTILE LAW. A written statement of the amount or items of a demand, or of the terms of an agreement or undertaking, particularly for the payment of money.[4]

As, a bank-bill; a due-bill; a bill rendered, payable, or receivable; a bill of adventure, of credit, of exchange, of lading, of parcels, of sale, of sight; a bill of health, of mortality; a bill obligatory or penal, or single. As to which see the descriptive or qualifying word.

Bill; bill obligatory; bill penal; bill single. A bond without a condition. An instrument acknowledging indebtedness, in

[1] Peele *v.* Merchants' Ins. Co., 3 Mas. 39 (1822), Story, J.

[2] L. *billa*, a writing: *bulla*, a papal bill; originally a leaden seal,—Skeat.

[3] [Southwark Bank *v.* Commonwealth, 36 Pa. 450 (1856), Lewis, J.; 4 Wall. 367.

[4] Abbott's Law Dict.

a certain sum, to be paid on a day certain.[1]

Differs from a promissory note in having a seal affixed; yet, by the custom of merchants, binds without seal, witness, or delivery. It is subject to defalcation and set-off.[1]

A "bill" is a common engagement for money, given by one man to another. When with a penalty, called a "penal bill;" when without a penalty, a "single bill;" though the latter is most frequently used. By a "bill" is ordinarily understood a single bond without a condition.[2]

"Bill single," or simply "bill," without condition or penalty, was originally the plainest form. A "bill penal" or "penal bill" had a condition and penalty annexed. A "bill obligatory" in form was like either of these and had a seal. Bonds with conditions have superseded bills penal.

Bill payable. Any demand, usually evidenced by a writing, for money, subsisting against a person. **Bill receivable.** Any such demand, with respect to the person who is entitled to the money.

"Bills receivable" are promissory notes, bills of exchange, bonds and other evidences or securities, which a merchant or trader holds, and which are payable to him.[3]

Bill rendered. A creditor's written statement of his claim, itemized.

Not assented to by the debtor, as in an account stated. The creditor may sue for a larger sum.[4] See ACCOUNT, 1.

IV. IN LEGAL PROCEDURE. A formal written statement of complaint to a court of justice.[5] As, the original bill in common-law practice; a bill in chancery or equity; a bill of indictment, of information, *qq. v.*

Also, a written statement or record of proceedings in an action.[1] As, a bill of exceptions, of costs, of particulars, a fee-bill,[5] *qq. v.*

Bill in chancery; bill in equity. A statement, addressed to a chancellor or a court of equity, of the facts which give rise to a complaint, with a petition for relief.

This may be an original bill or a bill not original, a cross-bill, a supplemental bill, a bill for discovery, of conformity, interpleader, peace or *quia timet*, review, revivor, foreclosure, a creditor's bill, *qq. v.*

A bill in equity corresponds to a declaration at law. Its parts are: 1, the address to the court; 2, the names of the parties; 3, the facts of complainant's case — the stating part; 4, a general charge of improper combination — the clause of confederation; 5, the pretenses or excuses respondent may have to offer in defense — the charging part; 6, allegations that the respondent's acts are contrary to equity, and that no adequate remedy is afforded at law — the clause of jurisdiction; 7, a prayer for answers to interrogations — the interrogating part; 8, a prayer for relief; 9, a prayer for process. Parts 4, 5, and 6 are omitted, except where fraud is to be specifically charged as an actual fact. The whole is sworn to by the complainant.

When a person has a cause which is redressible only in equity he commences his suit by preferring to the court a written statement of his case called a "bill in chancery" or a "bill in equity," which is in the nature of a petition to the court, sets forth the material facts, and concludes with a prayer for the appropriate relief or other thing required of the court, and for the usual process against the parties, against whom the relief or other thing is sought, to bring them before the court to make answer in the premises.[1]

The most general division of bills is those which are original and those which are not original. **Original bills** relate to some matter not before litigated in the court, by the same persons standing in the same interests. These bills may again be divided into those which pray, and those which do not pray, relief.[2]

Bills not original are, first, such as are an addition to, or a continuance or a dependency of, an original bill; or, second, such as are brought for the purpose of cross-litigation, or of controverting, suspending, or reversing some decree or order of the court, or of carrying it into execution. The first class of bills not original furnishes the means of supplying the defects of a suit, of continuing it, if abated, and of obtaining the benefit of it. These means are: by a supplemental bill; by an original bill in the nature of a supplemental bill; by a bill of revivor; by an original bill in the nature of a bill of revivor; by a bill of revivor and supplement. The second class includes: a cross-bill; a bill of review; a bill to impeach a decree upon the ground of fraud; a bill to suspend the opera-

[1] Farmers', &c. Bank v. Greiner, 2 S. & R. 115, 117 (1815), Tilghman, C. J.

[2] Tracy v. Talmage, 16 Barb. 462 (1854): Jacob's Law Dict.

[3] State v. Robinson, 57 Md. 501 (1881): Bouvier's Law Dict.

[4] Williams v. Glenny, 16 N. Y. 389 (1857).

[5] Abbott's Law Dict.

[1] Story, Eq. Pl. § 7.

[2] Story, Eq. Pl. §§ 16, 17; 16 F. R. 731.

tion of a decree; a bill to carry a former decree into execution; a bill partaking in some measure of one or more of both of these classes of bills.[1]

A **cross-bill** is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is an auxiliary to the proceedings in the original suit, a dependency upon it — brings the whole dispute before the court for one decree. The two bills constitute one suit.[2]

New and distinct matters, not embraced in the original bill, cannot be introduced by the cross-bill; and new parties must be introduced by amendment of the bill.[3]

A **supplemental bill** is brought as an addition to an original bill to supply some defect in its original frame or structure, not the subject of amendment.[3]

May be filed by either party to his own bill, within a reasonable time — even after decree made, when a necessary party has been omitted, when further discovery is requisite, when some matter overlooked needs development, or when it is essential to bring out other matter in order to give full effect to the decree entered or to be entered on the original bill. The bill is not amendable after the parties are at issue, and witnesses have been examined. An answer to the new matter is prayed for.[3]

After hearing the proofs a bill may be so amended as to put in issue matters in dispute and in proof, but not sufficiently in issue by the original bill.[4] See AMENDMENT, 1.

See also ADEQUATE; ANSWER, 3; DEMURRER; DISMISS; EQUITY, FISHING, 2; IMPERTINENCE; MULTIFARIOUSNESS; PARTY, 2; PREJUDICE, 2; RELIEF, 2; REMEDY.

Original bill. 1. An ancient mode of commencing an action at law, particularly in the court of king's bench; sometimes termed a "plaint," and resembled the modern "declaration." Compare WRIT, Original.

2. In equity, a complaint relating to a dispute not before litigated by the same persons in the same interests. See page 121.

True bill. See IGNORE.

[1] Story, Eq. Pl. § 326.

[2] Story, Eq. Pl. § 389; Shields *v.* Barrow, 17 How. 145 (1854); Ayres *v.* Carver, *ib.* 595 (1854); Cross *v.* De Valle, 1 Wall. 14 (1863); *Exp.* Montgomery, &c. R. Co., 95 U. S. 225 (1877); Ayers *v.* Chicago, 101 *id.* 187 (1879); Nashville, &c. R. Co. *v.* United States, *ib.* 641 (1879); First Nat. Bank *v.* Flour Mills Co., 31 F. R. 584 (1887); 2 McCrary, 177; 50 Conn. 62; 105 Ill. 585; 21 W. Va. 247; 2 Daniel, Ch. 1548.

[3] Story, Eq. Pl. § 332.

[4] Graffam *v.* Burgess, 117 U. S. 195 (1886), cases.

BILLA. L. L. A bill: an original bill at law, or a bill of indictment.

Billa cassetur. That the bill be quashed. A judgment, at common law, for defendant, on a plea in abatement.[1] See QUASH.

Billa vera. A true bill.

BILLIARDS. See GAME, 2.

BIND. To place under a legal obligation, particularly that of a bond or covenant; to affect with a contract or a judgment; to affect with a thing done, or with a common relation; to obligate.

As, to bind, and to be bound or to become bound, by a contract made, by a judgment or decree entered or rendered, by legislation, by the act of a privy, a wife, a partner, or other agent, or by the declaration of an accomplice.

Binding. Establishing an obligation; creating a legal duty or necessity. See INSTRUCT, 2.

Binding out. To obligate as an apprentice, *q. v.*

Binding over. To obligate to appear as a witness, or as a defendant, at the time of trial, or to keep the peace, *q. v.*

Bound. Brought under an obligation, as by a covenant; charged with responsibility, as with a duty; obligated. See APPRENTICE; BOND; HOLD, 4; INDENTURE; OBLIGATE.

BIPARTITE. See PART, 1.

BIRD. See ANIMAL.

BIRTH. See ABANDON, 2 (2); NATUS; VENTER.

BIS. See BI.

BISSEXTILE. See YEAR.

BITTERS. See LIQUOR.

BLACK. See ACRE; CAP; GOWN; RENT.

BLACKLEG. A person who gets his living by frequenting race-courses and places where games of chance are played, getting the best odds and giving the least he can, but not necessarily by cheating.[2]

BLACK-LISTING. See BOYCOTTING.

An act of Wisconsin, approved April 8, 1887 (Laws, ch. 349), provides that: Any two or more employees who shall agree, combine, and confederate together for the purpose of interfering with or preventing any person or persons seeking employment from obtaining such employment, either by threats, promises or by circulating or causing the circulation of a so-called black-list, or by any means whatsoever, or for the purpose of procuring and causing the discharge of any employee or employees by any means whatsoever,

[1] [3 Bl. Com. 306.

[2] Barnett *v.* Allen, 3 H. & N. 379 (1858), Pollock, C. B

shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in the county jail for a period of not more than one month or by a fine not less than fifty dollars, or by both.

BLACK-MAIL.[1] 1. Rent reserved in work, grain, or the baser money. Opposed, *white rent:* rent paid in silver.[2]

A rent in grain, cattle, money, or other thing, anciently paid to men of influence, in the north of England, for protection against robbers.[3]

By statute 43 Eliz. (1601), c. 13, for preventing rapine on the northern borders, to imprison or carry away any subject in order to ransom him . . or to give or take any money or contribution, there called *black-mail*, in order to secure goods from rapine, is felony without benefit of clergy.[4]

2. In common parlance, extortion — the exaction of money for the performance of a duty, the prevention of an injury, or the exercise of an influence.[5]

Imports an unlawful service and an involuntary payment. Not unfrequently, the money is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal or offers to expose the weakness, the folly, or the crime of the victim. There is moral compulsion which neither necessity nor fear nor credulity can resist. The term, as universally regarded, implies an unlawful act; and though, from its indefiniteness and comprehensiveness, the offense is not classified as a distinct crime, it is nevertheless believed to be criminal. Therefore, to charge a man with "black-mailing" is equivalent to charging him with a crime.[6]

Worcester says that "black-mail" originally meant the performance of labor, the payment of copper coin, or the delivery of certain things in kind, as rent; and that the word was contrasted with "white rent," which was paid in silver. Spelman attributes the term "black" to the color of the coin; Jamieson to its illegality. Dean Swift used the term to signify "hush money," "money extorted under the threat of exposure in print for an alleged offense." Bartlett is the first lexicographer who confines its meaning to that sense, and the use of it to this country. . . The meaning is not legally confined to extortion by threats or other morally compulsory measure. The sense intended in any given case should be determined by a jury.[6] See EXTORTION; THREATENING LETTER.

[1] According to most of the authorities, *mail* is from the French *maille*, a small coin. It may come from the German *makl*, tribute, or from the Gaelic, *mal*, a rent.

[2] See 2 Bl. Com. 42-43.

[3] See Termes de la Ley (1721).

[4] 4 Bl. Com. 244. See All the Year, vol. 30, p. 247.

[5] Edsall v. Brooks, 2 Robt. 33-34 (N. Y. Super. Ct. (1864), Monell, J. Same case, 17 Abb. Pr., o. s., 226; 26 How. Pr. 431.

[6] Edsall v. Brooks, 3 Robt. 293-95 (1865), Robertson, C. J. See 122 Mass. 264; 97 N. Y. 313; 12 Tex. Ap. 267.

BLACKS. See CITIZEN; SCHOOL, Separate; WHITE.

BLACKSMITH SHOP. See POLICE, 2.

Is not a nuisance *per se*. The business may be so carried on as not to annoy persons living in the vicinity.[1] See NUISANCE.

BLACKSTONE, SIR WILLIAM.

Born July 10, 1723. In 1736 he entered Pembroke College, Oxford, where he continued till 1741, when he began to study law. In 1746, at the end of the probationary period, he was called to the bar. Down to 1760 he seems to have been engaged in but two cases of importance. He passed much time in Oxford, taking an active interest in the affairs of the university.

About 1750 he began to plan his Lectures on the Laws of England. In 1753 he delivered his first course at Oxford. The next year he published his Analysis of the Laws of England, for the use of his numerous hearers. This analysis is founded on a similar work by Sir Matthew Hale.

A "broadsheet," dated Oxford, June 25, 1753, announcing that the "course of lectures" would begin "in Michaelmas Term next" (November), and was "calculated" for laymen as well as for lawyers, stated that "To this End it is proposed to lay down a general and comprehensive Plan of the Laws of *England;* to deduce their History; to enforce and illustrate their leading Rules and fundamental Principles; and to compare them with the Laws of Nature and of other Nations; without entering into practical Niceties, or the minute Distinctions of particular Cases."[2]

Mr. Viner having bequeathed to the University of Oxford a sum of money and the copyright of his Abridgment of Law, for the purpose of instituting a professorship of common law, Blackstone, on October 20, 1758, was elected first Vinerian professor, and, five days later, delivered his "Introductory Lecture on the Study of Law," afterward prefixed to his Commentaries. His lectures became celebrated throughout the kingdom.

He never acquired celebrity as an advocate. In *Tonson* v. *Collins* (1 W. Bl. 301, 321), he made an exhaustive argument in favor of the common-law right of literary property.

In 1765 appeared the first volume of his commentaries. The other three volumes were published during the next four years.

In 1766 he resigned the Vinerian professorship. In 1770 he was appointed a judge of the King's Bench, receiving then the honor of knighthood; and, a few months later, became a judge of the court of Common Pleas. In *Scott* v. *Shephard* (2 W. Bl. 892), the "squib case," wherein the difference between the actions of trespass and case was discussed, he dissented from the opinion of the majority of the court. See CASE, 3.

He died February 14, 1780. The notes of decisions which he had collected, and prepared for the press, were published in two volumes, in 1781, as directed in his will, by his brother-in-law, James Clitherow, Esq.[3]

[1] Foucher v. Grass, 60 Iowa, 507 (1883).

[2] 2 Law Quar. Rev. 83 (1886) — from a copy of the "broadsheet" found in 1885, in an old book.

[3] See generally Preface to 1 W. Bl. Reports.

American lawyers, with few exceptions, since the Revolution, have drawn their first lessons in jurisprudence from Blackstone's Commentaries. "That work was contemporaneous with our Constitution, and brought the law of England down to that day, and then, as now, was the authoritative text-book on its subject, familiar not only to the profession, but to all men of the general education of the founders of our Constitution."[1]

Blackstone first rescued the law of England from chaos. He did well what Coke tried to do one hundred and fifty years before: he gave an account of the law as a whole, capable of being studied, not only without disgust, but with interest and profit. His arrangement of the subject may be defective; but a better work of the kind has not yet been written, and, with all its defects, the literary skill with which a problem of extraordinary difficulty was dealt with is astonishing. He knew nearly everything, relating to the subject, worth knowing.[2]

"Its institutional value, and especially its historic value as an authentic and faithful mirror of the condition of the English Law as the result of legislation and adjudication, as it then existed, it is difficult to overestimate."[3]

BLAME. See DELICTUM; WRONG.

BLAND'S TABLES. See TABLE, 4.

BLANK.[4] 1, *adj.* (1) Of a white color: lacking something essential to completeness; not filled in or filled up with a word or words — names, amount, time, place, description, conditions, etc.: as, a blank certificate of stock, power of attorney, assignment, warrant.

(2) Unrestricted: indorsee not named: as, an indorsement, in blank or a blank indorsement, *q. v.*

2, *n.* A space left in a written or printed paper, to be filled with words or figures in order to complete the sense.

Blanks. Forms of writs, deeds, leases, powers of attorney, and other instruments, printed with spaces left for writing in names, dates, sums, places, descriptions, conditions, and other matters peculiar to special cases. Often spoken of as *legal* blanks. See WRITING.

Powers of attorney to transfer stock are often executed in blank, the right to fill in the name of an attorney being implied.[1]

The blanks in a warranty of attorney to confess judgment need not be filled up. The idiom of the language admits of many things being understood which are not directly expressed. This is eminently so with the personal pronouns.[2]

The grantor in a deed conveying realty, signed and acknowledged, with a blank for the name of the grantee, may by parol authorize another party to fill up the blank. In such case before the deed is delivered to the grantee his name must be inserted by the party so authorized.[3]

Where a party to a negotiable instrument intrusts it to the custody of another for use, with blanks not filled, as against the rights of innocent third persons such instrument carries on its face implied authority in the receiver as agent to fill any blanks necessary to perfect it as an instrument;[4] but not to vary or alter material terms by erasing what is written or printed as part, nor to pervert the scope or meaning by filling blanks with stipulations repugnant to what was clearly expressed in the instrument before it was so delivered.[5]

A note payable to bearer and indorsed in blank is transferable by mere delivery, and any *bona fide* holder is effectually shielded from the defense of prior equities between the original parties.[6]

As between original parties the act of delivering the paper is authority for filling blanks conformably to their mutual understanding. If there is no express agreement the authority is general; and the burden of proof is on the defendant to show such agreement.[7]

In cases of blank indorsements possession is evidence of title.[8]

When blanks material in nature are filled up after execution, the instrument, as a deed, should be re-executed and re-acknowledged; but failure to do so would hardly defeat a vested interest.[9]

See ALTERATION, 2; BEARER; INDORSEMENT.

BLANKET. See INSURANCE, Policy of.

BLASPHEMY.[10] Denying the being or providence of the Almighty, or contumelious reproaching of Christ; also, profane scoffing at the holy scripture, or exposing it to contempt and ridicule.[11]

[1] Knote *v.* United States, 10 Ct. Cl. 399 (1874), Loring, J.

[2] 2 Steph. Hist. Cr. Law Eng. 214–15.

[3] 26 Am. Law Rev. 35 (1888), J. F. Dillon. See also Cooley's Bl. Com. vol. 1, p. v.

See generally preface to Chitty's edition of the Commentaries; 8 Alb. Law J. 290; 13 *id.* 104; 1 Allibone, Dict. Authors; 1 Am. Jur. 116; 1 Austin, Lect. 71; 104 Eclectic Mag. 708; 15 Law Mag. 292; 14 Leg. Obs. 142; 51 Macm. Mag. 350; 7 Pitts. Leg. J. 106; 5 West. Jur. 529.

[4] F. *blanc*, white.

[1] Denny *v.* Lyon, 38 Pa. 101 (1860); German Building Association *v.* Sendmeyer, 50 *id.* 67 (1865).

[2] Sweesey *v.* Kitchen, 80 Pa. 160 (1876), Agnew, C. J.

[3] Allen *v.* Withrow, 110 U. S. 128–29 (1884), cases.

[4] Bank of Pittsburgh *v.* Neal, 22 How. 108 (1859); Angle *v.* N. W. Mut. Life Ins. Co., 92 U. S. 338–39, 331, 337 (1875), cases.

[5] Goodman *v.* Simonds, 20 How. 360–61 (1857), cases; Michigan Bank *v.* Eldred, 9 Wall. 551–52 (1869), cases; 101 U. S. 572; 46 N. Y. 325.

[6] City of Lexington *v.* Butler, 14 Wall. 295 (1871).

[7] 3 Kent, 89; Davidson *v.* Lanier, 4 Wall. 456 (1866), Chase, C. J.

[8] 3 Kent, 90.

[9] 2 Pars. Contr. 563, 723.

[10] Gk. *blas-phēmein'*, to speak ill or evil of.

[11] [4 Bl. Com. 59.

Maliciously reviling God or religion.[1]

An offense at common law. The reviling is an offense because it tends to corrupt the morals of the people and to destroy good order. Such offenses have always been considered independent of any religious establishment or the rights of the church. They are treated as affecting the essential interests of civil society. . . The people of the State of New York, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but even in respect to the obligations due to society is a gross violation of decency and good order. The free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community is an abuse of that right. Wicked and malicious words, writings and actions which go to vilify those gospels, continue, as at common law, to be an offense against the public peace and safety. They are inconsistent with the reverence due to the administration of an oath, and, among other evil consequences, they tend to lessen, in the public mind, its religious sanction.[1]

A malicious and mischievous intention is the broad boundary between right and wrong. This is to be collected from the offensive levity, scurrilous and opprobrious language, and other circumstances. The species of the offense may be classed as: 1, denying the being and providence of God; 2, contumelious reproaches of Jesus Christ; profane and malevolent scoffing at the scriptures, or exposing any part of them to contempt and ridicule; 3, certain immoralities tending to subvert all religion and morality. It is not necessary to the exercise of liberty of conscience and to freedom of religious worship that a man should have the right publicly to vilify the religion of his neighbors and of his country. It is open, public vilification of the religion of the country that is punished, not to force conscience by punishment, but to preserve the peace by an outward respect to the religion of the country, and not as a restraint upon the liberty of conscience.[2]

Consists in blaspheming the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world.[3]

This may be done by language orally uttered, which would not be a libel, but it is not the less blasphemy if the same thing be done by language written, printed, and published, although when in this form it also constitutes the offense of libel.[3]

Speaking evil of the Deity with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God. Purposely using words concerning God calculated and designed to impair and destroy the reverence, respect, and confidence due to Him, as the intelligent creator, governor and judge of the world. A willful and malicious attempt to lessen men's reverence of God, by denying his existence or his attributes as an intelligent creator, governor and judge of men, and to prevent their having confidence in Him as such.[1]

Blasphemous libel. The publication of writings blaspheming the Supreme Being, or turning the doctrines of the Christian religion into contempt and ridicule.[2]

Does not consist in an honest denial of the truths of the Christian religion, but in "a willful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects."[3]

The fullest inquiry, and the freest discussion, for all honest and fair purposes, one of which is the discovery of truth, is not prohibited. The simple and sincere avowal of a disbelief in the existence and attributes of a supreme, intelligent being, upon proper occasions, is not prevented. It is the design to calumniate and disparage the Supreme Being, and to destroy the veneration due Him, that is intended.[1]

See CHRISTIANITY; PROFANITY; RELIGION.

BLASTING. See NUISANCE.

If a voluntary act, lawful in itself, naturally results in injury to another, the doer must pay all damages which are the proximate consequence of the act, regardless of the degree of care exercised.[4] See NEGLIGENCE.

BLIND. See READING.

A blind man may make a contract or a will.

The handwriting of an attesting witness who has become blind may be proved as if he were dead — he being first produced and examined, if within the juris diction.[5]

Whether it is negligence for a blind man to travel upon a highway on foot, unattended, is a question for a jury.[6]

[1] People v. Ruggles, 8 Johns. 290-98 (1811), Kent, C. J.

[2] Updegraph v. Commonwealth, 11 S. & R. 406, 408 (Pa., 1824), Duncan, J.

[3] Commonwealth v. Kneeland, 20 Pick. 211-12 (Mass., 1838), Shaw, C. J.

[1] Commonwealth v. Kneeland, 20 Pick. 213, 220 (1838), Shaw, C. J.

[2] 3 Greenl. Ev. § 164.

[3] Regina v. Ramsay and Foote, 48 L. T. 734-40 (1883), cases, Coleridge, C. J., quoting Starkie. See Bradlaugh's Case, 4 Cr. Law Mag. 592 (1883); 17 Cent. Law J. 38 (1883) — Law Times (Eng.).

[4] Georgetown, &c. R. Co. v. Eagles, 9 Col. 544 (1886), cases. Eagles recovered damages for direct injury done to the roofs of houses from falling *debris*, and for loss of rents.

[5] 1 Starkie, Ev. § 341; 1 Greenl. Ev. §§ 365-67; 1 Whart. Ev. § 401.

[6] Sleeper v. Sandown, 52 N. H. 244, 250 (1872); 20 Am. Law Reg. 507-16 (1881), cases.

BLOCKADE. The investment of a seaport by a competent naval force, with a view of cutting off all communication of commerce.[1]

Every nation, of common right, as a municipal regulation, may declare what places shall be ports of entry and delivery, and enforce the regulation by such means and with such penalties as it pleases. The term does not apply to an embargo, like that of 1808. That exists only where the forces of one nation encompass the ports of another. A blockade interrupts trade and communication to neutrals.[2]

The President has a right to institute a blockade of ports in possession of persons in armed rebellion against the government, on principles of international law. Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war to use this mode of coercion for the purpose of subduing the enemy.[3]

Simple blockade. Such blockade as may be established by a naval officer acting upon his own discretion or under direction of superiors, without governmental notification. **Public blockade.** Is not only established in fact, but is notified, by the government directing it, to other governments.[4]

In the case of a simple blockade, the captors of prize property are bound to prove its existence at the time of the capture; while in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation. The blockade of the rebel ports was of the latter sort. It is the duty of the belligerent government to give prompt notice of the discontinuance of a public blockade. If it fails to do so, proof of discontinuance may be otherwise made; but, subject to just responsibility to other nations, it must judge for itself when it can dispense with a blockade.[4]

Evidence of intent to violate a blockade may be collected from bills of lading, from letters and other papers found on board the captured vessel, from acts and words of the owners or hirers of the vessel and the shipper of the cargo and their agents, and from the spoliation of papers in apprehension of capture.[4]

No paper or constructive blockade is allowed by international law.[5] Compare EMBARGO.

BLOOD. 1. Relationship; stock; family; consanguinity.

To be "of the blood" of a person means to be descended from him or from the same common stock. All those are of the blood of an ancestor who may, in the absence of other and nearer heirs, take by descent from him.[1]

A person is "of the blood" of another who has any, however small a portion, of the same blood derived from a common ancestor. When it is intended to express any qualification, the word *whole* or *half* blood is used to designate it, or the qualification is implied from the context or from known principles of law. In the common law, "blood" was used in the same sense.[2] See SISTER.

Originally, feuds and estates descended to none not of the "blood of the first purchaser:" because what was given for personal service and merit ought not, it was held, to descend to any but heirs of the person.[3]

See ANCESTOR; ATTAINDER; CONSANGUINITY; DESCENT; PRIVY, 2; PURCHASER; RELATION, 8.

2. Temper of mind; state of the passions; disposition.

Cold blood. Undisturbed use of reason; calm deliberation. See COOLING TIME.

BLOW HOT AND COLD. See ALLEGARE, Allegans contraria, etc.

BOARD. A table.

1. What is served on a table as food; supplies for sustenance.

To board is to receive food as a lodger, or without lodgings, for compensation.[6]

Boarder. If a person comes upon a special contract to board, and to sojourn at an inn, in the sense of the law, he is not a guest, but a boarder.[5]

Where the host is only an innkeeper the presumption is that a temporary sojourner is a guest; but where he also carries on the business of keeping boarders, the question who is a guest and who a boarder is not so easily answered. The duration of the person's stay, the price paid, the extent of the accommodation afforded, the transient or permanent character of his residence or occupation, his knowledge or want of knowledge of any difference of accommodation afforded to or price paid by boarders and guests, are all to be considered.[6]

The keeper of a boarding-house receives only such persons as he chooses; an innkeeper must receive all who come, unless there exists a special reason for refusing entertainment.[7]

[1] 1 Kent, 146–47.

[2] United States *v.* The William Arthur, 3 Ware, 260–61 (1861).

[3] Prize Cases, 2 Black, 665, 635 (1862), Grier, J.

[4] The Circassian, 2 Wall. 150–51, 135 (1864), Chase, C. J.; 21 W. Va. 856.

[5] The Peterhoff, 5 Wall. 50 (1866).

[1] Den *v.* Jones, 8 N. J. L. 346 (1826); 2 Bl. Com. 203, 229, 227.

[2] Gardner *v.* Collins, 2 Pet. *87, *94 (1829), Story, J.

[3] 2 Bl. Com. 220, 56; 2 Pet. *87, *94.

[4] Pollock *v.* Landis, 36 Iowa, 652 (1873).

[5] Story, Bailm. § 477; Berkshire Woolen Co. *v.* Proctor, 7 Cush. 424 (1851); Johnson *v.* Reynolds, 3 Kan. 261 (1865).

[6] Hall *v.* Pike, 100 Mass. 497 (1868), Colt, J. See also 26 Ala. 371; 33 Cal. 597; 25 Iowa, 555; 36 *id.* 651; 53 Me. 163; 35 Wis. 118; 24 How. Pr. 62; 1 Pars. Contr. 628.

[7] Willard *v.* Reinhardt, 2 E. D. Sm. 148 (1853); Cady *v.* McDowell, 1 Lans. 486 (1869), cases.

A keeper of boarders must take at least ordinary care of his patron's property; an innkeeper must exercise the highest degree of care reasonably possible.

A boarder's goods are not now distrainable for rent due by his host.[1]

See further DISTRESS; INN; NECESSARIES; RESIDE. Compare GUEST; LODGER.

2. A table at which a council is held; hence, an authorized assembly. More particularly, a number of persons organized to execute a trust or to perform some other representative or official business.

As, a board — of aldermen,[2] of arbitrators,[3] of directors,[4] of examiners[5] of candidates for admission to the bar, of examiners of patents,[6] of health,[7] of inspectors,[8] of liquidation,[9] of pardons,[10] of property, of public works, of revisers,[11] of supervisors, of trade, of trustees, of viewers,[12] of visitors,[13] poor-board, stock[14] and exchange[15] boards.

BOAT. See VESSEL.

BODY. Compare CORPUS.

1. The physical person. The *natural* body or such as is formed by the laws of God, as distinguished from an *artificial* body or such as is devised by human laws.[1]

In an indictment for murder, the trunk, in distinction from the head and limbs.[2]

See ARREST, 2; MAYHEM; SECURITY, Personal.

Heir or issue of the body. See HEIR; ISSUE, 5; TAIL.

Body-lifting or snatching. See BURIAL.

2. A number of individuals considered collectively, usually organized for a common purpose: as, a legislative body.

An artificial body or that devised by human laws.[3]

An *artificial* body can do only what is authorized by its charter or by law; a *natural* person or body, whatever is not forbidden by law.[4]

Body corporate or corporate body. An artificial body; a corporation, *q. v.*

Body politic. The governmental, sovereign power: a city or a State.

A body to take in succession, framed as to its capacity by policy, and, therefore, called by Littleton a body politic; and it is termed a corporation or body politic, because the persons are made into a body, and are of capacity to take, grant, etc., by a particular name.[1]

"Body corporate and politic" is said, in the older books, to be the most exact expression for a public corporation or corporation having powers of government.

The body politic is the "social compact by which the whole people covenant with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."[2]

While that compact does not confer power upon the whole to control purely private rights, it authorizes laws requiring each to so act as not to injure another — which is the very essence of government.[3] See CORPORATION, Public.

3. The physical part or portion of a thing.

Body of a county or of a State. A county or a State considered in its territorial entirety, as distinguished from a portion of the territory, and from the legal corporation.

Jurisdiction in admiralty extends over a locality within the body of a State connecting with navigable waters although not affected by the ebb and flow of the tide.[4] See COUNTY.

Body of an instrument. The substantial operative part; the essential provisions: as, the body of a contract, note, statute, will. See TITLE, 2.

4. A number of particulars taken together: a systematic collection: as, a body of laws.

BONA. L. 1, *adj.* Good: a feminine form of *bonus*, q. v.

2, *n.* Goods, property: personalty, movables, chattels; assets.

Literally, valuables: the plural of *bonum*, a thing of value. Fr. *biens*.

Bona immobilia. Immovables.

Bona mobilia. Movables.

Bona notabilia. Property of sufficient value to be noted in an account.[5]

Debts evidenced by promissory notes are *bona notabilia* at the domicil of the debtor.[6]

Bona parapherna, or paraphernalia. Goods over and above dower. See PARAPHERNALIA.

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[1] Riddle *v.* Welden, 5 Whart. 9, 14 (1839); Stone *v.* Matthews, 7 Hill, 428 (1844).

[2] Which last word see.

[3] [1 Bl. Com. 467.

[4] Sanchez *v.* People, 22 N. Y. 149 (1860).

[5] 1 Bl. Com. 467.

[6] Paul *v.* Virginia, 8 Wall. 177 (1868); Baltimore, &c. R. Co. *v.* Harris, 12 *id.* 81 (1870).

[1] Lord Coke, quoted in People *v.* Morris, 13 Wend. 334 (1835): Vin. Abr. Corp. (A, 2).

[2] Constitution of Massachusetts.

[3] Munn *v.* Illinois, 94 U. S. 124 (1876), Waite, C. J.; 1 Bl. Com. 467.

[4] Genesee Chief, 12 How. 443 (1851); 1 Black, 560; 7 Wall. 637.

[5] See 2 Bl. Com. 509; 74 Me. 89.

[6] Moore *v.* Jordan, 36 Kan. 275 (1887), cases; Wyman *v.* Halstead, 109 U. S. 654 (1884), cases.

Bona peritura. Perishable property. See PERISHABLE.

Bona vacantia. Unclaimed property.[1]

Bona waviata. Property thrown away. See WAIF.

De bonis. As to goods; concerning property or assets.

De bonis asportatis. See ASPORTARE.

De bonis non. See ADMINISTER, 4.

De bonis propriis. Out of his own property.

Said of a judgment rendered against an executor or administrator, which is to be satisfied out of his property; as, when he has wasted the assets or falsely pleaded "no assets."

De bonis testatoris. Out of the property of the testator.

Describes a judgment rendered against an executor, which is to be satisfied out of the estate of the decedent.

Another form of judgment is *de bonis testatoris cum* (or *quando*) *acciderint:* out of the assets of the testator when they shall have come to hand.

Still another form is *de bonis testatoris si, et non si, de bonis propriis:* out of the assets of the testator if (there are any), and if not, out of his own property.

Even if it happens that the executor has received assets, still the judgment should be against him, in his representative character, to be levied out of the assets in his hands, when no *devastavit* is averred and proved, unless it appears that no such assets can be found; in which event the judgment may, if so ordered, be levied out of his own proper goods.[2]

Nulla bona. No goods; no property.

The return to an execution when no property is found on which to make a levy; also, the plea by a garnishee that he has in his possession nothing belonging to or no money due to the debtor.

BOND. That which binds; any instrument in writing that legally binds a party to do a certain thing. "Bond," "obligation," and "instrument in writing" are sometimes used as convertible terms.[3]

A deed whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed.[1] See OBLIGE.

If that be all, the bond is "single" [or "common"]; but there is generally a condition added that if the obligor does a particular act the obligation shall be void, or else shall remain in full force: as, pay rent, perform a covenant, or repay the principal of a sum borrowed, with interest, which principal is usually one-half of a specified penal sum. In case this condition is not performed the bond becomes forfeited, or "absolute," at law, and charges the obligor, while living, and, after his death, descends upon his heir.[1]

A deed or obligatory instrument, in writing, whereby one binds himself to another to pay a sum of money or to do some other act.[2]

Contains an obligation with a penalty, and a condition which expressly mentions what is to be done and the time within which it must be done.[2]

At common law, and at the present time, imports a sealed instrument.[2]

Bonds are either negotiable or non-negotiable. The former pass ownership by mere delivery; the latter, by written transfer, duly signed, sealed, and, perhaps, attested.

Bond-book. A book in which original, perhaps official, bonds are executed or preserved.

Bondsman. One who by a sealed instrument engages that if another person (the principal) fails to do a specified thing he will pay a certain sum of money; a surety, *q. v.*

Counter-bond. A bond given in a judicial proceeding in opposition to another bond previously furnished by an adversary.

Thus, in replevin, the plaintiff may give a bond for the protection of the officer in taking the property and the defendant execute a counter-bond for holding it.

Forthcoming bond. Security that property levied upon will be produced when wanted. See further FORTHCOMING.

Income bonds. Corporate "income bonds" are bonds payable out of the net income of the corporation by which they are issued.

Such bonds may be negotiable or unnegotiable. They may be payable only out of the net income, or unconditionally. They may bear a fixed rate of interest, or be graduated by the amount of net earnings, or at a certain per centum thereof; and they may or may not have interest-coupons attached.[4]

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[1] See 1 Bl. Com. 298.

[2] Smith *v.* Chapman, 93 U. S. 43 (1876), cases; McLaughlin *v.* Winner, 63 Wis. 128-29 (1885), cases; 29 Minn. 296.

[3] [Courand *v.* Vollmer, 31 Tex. 401 (1868), Morrill, C. J. Compare 108 U. S. 189; 110 *id.* 739.

[1] 2 Bl. Com. 340, 456.

[2] Boyd *v.* Boyd, 2 Nott & McC. *126 (S. C., 1819), Gantt, J.

[3] Koshkonong *v.* Burton, 104 U. S. 673 (1881), Harlan, J.

[4] See 25 Am. Law Reg. 553-61 (1886), cases.

Official bond. An obligation with sureties given by a public officer as security for the faithful discharge of the duties of his office. See OFFICER.

Public bond. The obligation of a nation, State, or public corporation, to pay money at or within a specified time; municipal, State, or government bonds.

Holders of government bonds must be presumed to have knowledge of the laws by authority of which they were created and put into circulation, and of all lawful acts done by government officers under these laws. The obligations of the United States under the five-twenty bonds, consols of 1865, are governed by the law-merchant regulating negotiable securities, modified only, if at all, by the laws authorizing their issue.[1]

Refunding bond. An obligation to pay back money in the event of it appearing that the money should not have been paid.

As, a bond to return the whole or a part of a legacy should the assets of the estate be found insufficient to pay all demands upon it.

Other terms descriptive of bonds are: administration, appeal, arbitration, bail, bottomry, distiller's, duty, estrepement, injunction, joint or joint and several, judgment, *post-obit*, replevin, *respondentia*, railway aid, *qq. v.*

In an action of debt upon a non-negotiable bond, the demand is for the penalty. The condition is no part of the obligation. A judgment for the penalty will be released on performance of the condition.[2]

See OBLIGATION, 3, 4; RECOGNIZANCE; CONDITION; DATE; FACE, 1; FAITHFULLY; HOLDER; MORTGAGE; PARTY, 2; PENALTY; SEAL, 1; SURETY.

School-district, city, county, State, railway aid, and other corporation bonds, payable to bearer, have the qualities of negotiable instruments. Therein depends their value, mainly.[3] They are the representatives of money because issued in negotiable form.[4]

The expectation being that they will be put upon distant markets, the purchaser is assured that conditions precedent to their lawful issue have been complied with. He is bound to know the law which confers the power to issue the bonds on the specified contingency; but that that contingency has happened is a question of fact not for him to decide.[5]

If any essential proceeding, prescribed by law, be dispensed with, the bonds will be invalid in the hands of a person not a *bona fide* purchaser. If a statute is referred to on the face of the bond, a dealer is supposed to know all of its requirements.[1]

When the purchaser has a certificate of a fact he need not inquire whether the fact is as certified.[2]

A recital of circumstances which bring it within the power of the proper authorities to issue the bonds estops denial of the truth of the circumstances.[3] The statute must confer power to issue the bonds, in express terms or by reasonable implication.[4] The holder is chargeable with notice of the statutory provisions and of recitals in the bond.[5]

The corporation acts through its agents, and whenever they have power to decide that a condition precedent has been met (as that the required portion of the voters of a town have petitioned for a subscription in aid of a railroad), their determination of that fact, or their recital of that determination in a series of bonds subsequently issued and held by *bona fide* purchasers, is binding upon the corporation. The recital is a decision of the fact by the appropriate tribunal; and proof that such recital is incorrect is no defense. But where there is no recital the question is open.[6]

The Supreme Court of the United States has uniformly held that where a statute confers power upon a municipal corporation, after the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purpose, and imposes upon certain officers — invested with authority to determine whether such conditions have been performed — the responsibility of issuing them when such conditions have been complied with, recitals by such officers that the bonds have been issued "in pursuance of," or "in conformity with," or "by virtue of," or "by authority of," the statute, import, in favor of *bona fide* purchasers for value, full compliance with the statute, and preclude inquiry as to whether the precedent conditions had been performed before the bonds had issued. But in all such cases the recitals have imported a compliance, in all substantial respects, with the statute giving authority to issue the bonds. Sound public policy forbids enlarging or extending the rule. Where the holder relies for protection upon mere recitals, in order to estop the corporation from showing that the bonds were issued in violation or without authority of law, the recitals should be clear and unambiguous.[7]

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[1] **Morgan** *v.* United States, 113 U. S. 476, 490 (1885), limiting Texas *v.* White, 7 Wall. 700 (1868).

[2] Farni *v.* Tesson, 1 Black, 314 (1861); 2 Bl. Com. 341.

[3] Mercer County *v.* Hacket, 1 Wall. 95 (1863), Grier, J.; Commissioners of Knox County *v.* Aspinwall, 21 How. 539 (1858), Nelson, J.; Pompton *v.* Cooper Union, 101 U. S. 204 (1879); Wadsworth *v.* Supervisors, 102 *id.* 534 (1880); 19 Blatch. 371.

[4] Bailey *v.* N. Y. Central R. Co., 22 Wall. 636 (1874).

[5] Town of Coloma *v.* Eaves, 92 U. S. 487, 490, 486 (1875), cases. Strong, J.; Pana *v.* Bowler, 107 *id.* 539 (1882); North. Bank of Toledo *v.* Porter Township, 110 *id.* 616 (1884); Dixon County *v.* Field, 111 *id.* 93–94 (1883), cases.

[1] McClure *v.* Township of Oxford, 94 U. S. 432 (1876).

[2] Menasha *v.* Hazard, 102 U. S. 95 (1880); Sherman County *v.* Simons, 109 *id.* 735 (1884), cases.

[3] Buchanan *v.* Litchfield, 102 U. S. 290 (1880), cases; Louisiana *v.* Wood, *ib.* 294 (1880); 3 McCrary, 35.

[4] Wells *v.* Supervisors, 102 U. S. 625 (1880).

[5] Walnut *v.* Wade, 103 U. S. 695 (1880), cases.

[6] Commissioners *v.* Aspinwall, Pompton *v.* Cooper Union, *ante;* Bissell *v.* Jeffersonville, 24 How. 287 (1860); St. Joseph Township *v.* Rogers, 16 Wall. 659–66 (1872), cases; Marsh *v.* Fulton County, 10 *id.* 681 (1870).

[7] School District (Iowa) *v.* Stone, 106 U. S. 187 (1882), Harlan, J.; Pana *v.* Bowler, 107 *id.* 539–40 (1882), cases.

A municipal corporation without legislative authority cannot issue bonds in aid of any extraneous object. Every person at his peril must take notice of the terms of the law by which it is claimed the power to issue bonds is conferred. The particular law forms a part of the bonds, as if incorporated in them. The holder is chargeable with notice of all statutory provisions.[1]

Unlike business, the powers of municipal, corporations, unless otherwise directed by express or implied grant, are limited to such as are governmental or administrative, to such as are necessary to conserve the purposes of their organism.[2]

A purchaser takes the risk of the genuineness of an official signature. This includes the official character of him who makes the signature.[3]

A statute which authorizes a town to contract a debt payable in money implies the duty to levy taxes to pay the debt, unless some other source of payment is provided. If there is no power in the legislature to authorize such levy, the statute and forms of contract based thereon are void.[4]

See AID, 1, Municipal; COUPON; STOCK, 3 (2); TAX, 2.

BONE-BLACK. See MANUFACTURE.

BONUS. 1. Lat. Good.

Bona fides. Good faith. See FIDES.

Boni judicis. See JUDEX, 2, Boni, etc.

2. Eng. (1) Not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of that which would ordinarily be given.[5]

A State may exact a bonus for the grant of a franchise, payable in advance or *in futuro* (as, one-fifth of the fare paid by passengers to a railroad company), although it affects the charge which the donee of the franchise will have to exact. Such bonus differs in principle from a tax on transportation between States, which is an interference and regulation of commerce.[6]

(2) A premium paid for the use of money beyond the legal rate of interest.

Although one portion of the sum be called interest and another portion a bonus, the contract is still usurious.[7]

Usury laws cannot be evaded by an understanding which assumes the distinctness of a contract for the payment of additional interest as a bonus.[1]

BOOK. Any literary composition which is printed, or printed and bound into a volume.

1. In copyright law, the form of the publication is not material — the term may include a single sheet.

So held in 1809, under the statute of 8 Anne (1710), § 1;[2] and so held ever since.[3]

Under the copyright act of March 3, 1865, § 4, book includes every volume and part of a volume, together with all maps, prints, or other engravings belonging thereto; with a copy of any subsequent edition published with additions.[4]

A single sheet of music has been held to be a book;[5] so, a diagram of patterns;[2] but not a mere label,[6] nor a prices-current.[6] The test is the subject-matter, not the size, form, or shape.[5, 6]

Although the legal definition of the word may be more extensive than that given by lexicographers, including a sheet as well as a volume, yet it necessarily conveys the idea of thought or conceptions clothed in language or in musical characters, written, printed, or published. Its identity does not consist merely in ideas, knowledge or information communicated, but in the same conceptions clothed in the same words, making it the same composition. A "copy" of a book must, therefore, be a transcript of the language in which the conceptions of the author are clothed; of something printed and embodied in a tangible shape.[7]

See CHART; COPYRIGHT; PRINT.

2. In post-office law, a pamphlet of twenty-four pages, consisting of a sheet and a half secured together by stitching, with a cover of four pages and a title-page, may be described as a book.[8] See MAIL, 2.

Book-account. An account evidenced by one or more books regularly kept in the particular business or calling.

Book of accounts; or account-book. A book in which are entered the transactions of the owner's business; a creditor's book of entries, exhibiting, in detail, the transactions had with a person alleged to be his debtor.

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[1] National Bank of the Republic *v.* City of St. Joseph, 31 F. R. 219 (1887), cases, Wallace, J.

[2] Holmes *v.* City of Shreveport, 31 F. R. 121 (1887), Boarman, J.

[3] Anthony *v.* County of Jasper, 101 U. S. 699 (1879), Waite, C. J.

[4] Loan Association *v.* Topeka, 20 Wall. 658–67 (1874), cases, Miller, J.; Parkersburg *v.* Brown, 106 U. S. 500 (1882). See generally Phelps *v.* Lewiston, 15 Blatch. 151–58 (1878); Smith *v.* Ontario, *ib.* 269 (1878); Stewart *v.* Lansing, *ib.* 287 (1878); Commonwealth *ex rel.* Whelen *v.* Pittsburgh, 88 Pa. 66, 81 (1878); Pierce, Railroads, 97–109, cases; 26 Am. Law Reg. 209–22, 608–20 (1878), cases.

[5] Kenicott *v.* The Supervisors, 16 Wall. 471 (1872), Hunt, J.

[6] Baltimore & Ohio R. Co. *v.* Maryland, 21 Wall. 473, 457 (1874), Bradley, J. See 3 How. 145–46.

[7] Mutual Sav. Bank *v.* Wilcox, 24 Conn. *158 (1855).

[1] 3 Pars. Contr. 113–14; 17 Cent. L. J. 103–5 (1883), cases.

[2] Clementi *v.* Golding, 2 Campb. 32 (1809), Ellenborough, C. J. See 11 East, 244.

[3] Drury *v.* Ewing, 1 Bond, 540, 546 (1862), Leavitt, J.

[4] 13 St. L. 540; Lawrence *v.* Dana, 4 Cliff. 62 (1869), Clifford, J.

[5] Coffeen *v.* Brunton, 4 McLean, 516 (1849).

[6] Clayton *v.* Stone, 2 Paine, 382 (1825?).

[7] Stowe *v.* Thomas, 2 Wall. Jr. 565 (1853), Grier, J.; 2 Bl. Com. 406.

[8] United States *v.* Bennett, 16 Blatch. 351 (1879). See R. S. § 3893.

Action of book-account. A remedy for collecting a balance due upon such dealings as are proper matters of book-account; an action of book-debt.

An account-book, regularly kept, may be received as evidence. And book-accounts are assets.[1] But a tally, a board, a slate, or loose sheets of paper, can hardly be said to constitute a book of accounts.[2] Yet there are not a few decisions to the effect that an account need not be kept in a bound volume.[3]

Book-entries. Particulars of a transaction recorded in a book of accounts.

Book of original entries. A book exhibiting the first or original charges made under a contract concerning merchandise, work and labor done, or services rendered.

To be admissible in evidence, the entries must be contemporaneous with the facts to which they relate; they must be made by a person having personal knowledge of the facts; and they must be corroborated by his testimony, if he is living and accessible, or by proof of his handwriting, if he is dead, insane, or beyond the reach of process. The witness need not remember the facts, if he will testify that he believed the entry to be true as set down.

It is not necessary that the transaction should have been directly between the original creditor and debtor; nor that the entries should have been against the interest of the person making them.[4]

As book-entries are received to prevent a failure of justice, their admissibility is limited by this necessity.[5]

Questions in relation to books of entry as evidence stand upon a new footing since the passage of statutes making parties witnesses. Formerly, the book itself was evidence, and the oath of the party supplementary. Now, the party himself is a competent witness, and may prove his own claim as a stranger would have done before the statutes were passed.[6]

The rule is that books of original entries, properly proved, are evidence of work and labor performed and of goods sold and delivered. To this rule are several exceptions; as, that the invoice book of an agent is not evidence of the sale and delivery of goods nor of goods to be delivered, nor is an entry evidence that is not in the course of the party's business. Books of original entry were formerly received in evidence from necessity. Where the transaction admits of more satisfactory evidence, they should not be received. Now that the parties are witnesses, care is to be taken not to enlarge the rule. In several States the account is not to exceed a sum specified. While there should be some limit to the amount, much more depends upon the nature of the item, and upon the evidence, outside of the book, which naturally exists to prove the item. The charges should be reasonably specific. Lumping charges are not admissible; as, entries like these: "B. Corr, Dr. July 13, 1880. To repairing brick machine, $1,932;" "190 days' work;" "seven gold watches, $308;" "13 dollars for medicine and attendance on one of the general's daughters, in curing the whooping cough."[1]

The books of a corporation are public as to its members, who for a proper purpose may examine them. Inspection of the books of a public office is permitted to any one interested in them, but not, if liable to affect public interests injuriously; of this the head of the department is to judge. *Mandamus* is the remedy by which to obtain an inspection and copies of such books, in which the petitioner has an interest.[2] See PRODUCE, 1.

Books on medicine, agriculture, science, and the like, not being subjects of cross-examination, are not admissible as evidence. But an approved history, being a quasi-public document, is receivable to prove a general fact of ancient date, a general custom, or any like matter.[3] See EXPERT; HISTORY; SCIENTIFIC.

A record in a Bible or other book, by a deceased relative, as to pedigree (*q. v.*) is receivable as a declaration.[4]

The results of an examination of many books may sometimes be proved.[5] See ACCOUNT, 1.

Under statutes in some States, school-books and Bibles are exempted from levy and sale.

The pledgee of a book must use it carefully.[6]

See HORN, LETTER, LOG, MINUTE, PAPER, YEAR, BOOK; BAGGAGE; DOCUMENT; LOST, 2; MAIL, 2; OBSCENE; REFRESH; SUBPŒNA, DUCES, etc.

BORN. See CHILD; NATUS.

BOROUGH. 1. A town, whether corporate or not, that sends burgesses to parliament.[7]

2. A town or city organized for purposes of government.[8]

In the United States, not extensively used with any precise meaning. In Connecticut and Pennsylvania,

[1] 1 Greenl. Ev. §§ 115–18; 55 Vt. 347; 3 Bl. Com. 368.

[2] Richardson *v.* Wingate, 10 West. Law J. 146 (1853), Matthews, J.

[3] Price *v.* The Earl, 1 Sm. L. C. 535–77, cases; 2 Harr., Del., 288; 4 *id.* 532; 12 Bankr. Reg. 390.

[4] Town of Bridgewater *v.* Town of Roxbury, 54 Conn. 217 (1886), cases.

[5] Chaffee *v.* United States, 18 Wall. 541 (1873), cases, Field, J.; Ætna Fire Ins. Co. *v.* Weide, 9 *id.* 680 (1869), cases; Burley *v.* German American Bank, 111 U. S. 216 (1884); 20 Wend. 74–76; 70 Iowa, 376; 132 Mass. 478; 59 Miss. 378; 21 W. Va. 301, 308–11; 1 Greenl. Ev. §§ 115–17, 120, 151–54, cases; 1 Whart. Ev. §§ 678–88, cases.

[6] Nichols *v.* Haynes, 76 Pa. 176 (1875).

[1] Corr *v.* Sellers, 100 Pa. 170–71 (1882), cases, Mercur, J.; Laird *v.* Campbell, *ib.* 159, 165 (1882); Vinal *v.* Gilman, 21 W. Va. 301 (1883).

[2] 1 Greenl. Ev. §§ 474–78, cases; 1 Whart. Ev. §§ 663, 663, cases.

[3] 1 Greenl. Ev. §§ 440, 497, cases; 1 Whart. Ev. §§ 664–70, cases. As to medical books see, especially, Marshall *v.* Brown, 50 Mich. 148 (1883); Boyle *v.* State, 57 Wis. 472, 478 (1883), cases; 60 Cal. 581.

[4] 1 Greenl. Ev. § 104.

[5] Burton *v.* Driggs, 20 Wall. 136 (1873).

[6] 2 Pars. Contr. 111.

[7] [1 Bl. Com. 114; 2 *id.* 82; 41 Mo. 175.

[8] See 1 Steph. Com. 116; 3 *id.* 191.

a part of a township having a charter for municipal purposes.

Borough and village may be duplicate names for the same thing.[1] See TOWN.

Borough English. A custom prevalent in some parts of England (chiefly in old boroughs) by which the youngest son inherited the father's estate.

So called to distinguish it from the Norman rule of primogeniture, *q. v.*

The oldest sons were provided for as they grew up; the younger remained at home and might have been left destitute but for this law.[2]

Burgess. 1. An inhabitant of a borough; also, the representative of a borough in the house of commons.

2. A magistrate of an incorporated town.

3. The chief administrative officer of an incorporated town.[3]

BORROW. While often used in the sense of obtaining a thing to be returned *in specie*, is not limited to that sense. There may be a borrowing where an equivalent is paid annually in the form of interest, though the contract be perpetual and the loan irredeemable.[4]

"Borrowing" imports a promise or understanding that what is borrowed will be repaid or returned, the thing itself or something like it of equal value, with or without compensation for the use of it. To borrow is reciprocal with "to lend."[5] See LOAN.

Under the usury laws of New York the word "borrower" includes any person who is a party to the original contract or in any way liable for the loan.[6]

Power to "borrow money," vested in public authorities, may not include power to issue bonds for the purpose — as, to erect a court-house.[7] See PURPOSE, Public; TENDER, Legal (2).

BOTE.[8] Compensation, recompense; satisfaction, amends.

Synonymous with French *estovers*, q. v. **House-bote:** sufficient wood from another's land to repair, or to be burnt in, one's house; whence *fire-bote*. **Plough-bote, cart-bote:** wood for making and repairing instruments of husbandry. **Hay-bote, hedge-bote:** wood for repairing hay, hedges, or fences.[9]

Theft-bote. Where a person who has been robbed takes his goods back, or receives other amends, upon an agreement not to prosecute the felon.[1]

Bote is supposed to be preserved in the expressions "What boots it," and "to boot."

BOTTLE. See LEAKAGE; SEAL, 5.

A demijohn holding four gallons is not a "bottle" within the meaning of a statute requiring imported liquors to be put up in packages of not less than one dozen bottles each.[2]

An indictment for the larceny of "bottles" of liquor was held not sustained by proof of the larceny of liquor in bottles belonging to the accused, into which he had drawn the liquor.[3]

BOTTOMRY. A contract in the nature of a mortgage on a ship: when the owner borrows money to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship as security for the repayment.[4]

"Bottom" was formerly used for ship or vessel.

Bottomry bond. The instrument which evidences a contract of bottomry.

In the sense of the general maritime law, and independent of the peculiar regulations of the positive codes of different commercial nations, a contract for a loan of money on the bottom of a ship, at an extraordinary rate of interest, upon maritime risks, to be borne by the lender for a voyage, or for a definite period.[5]

Blackstone and others speak of bottomry contracts of the owner only, omitting those of the *master*, which are now the more common, and are strictly for the necessities of the ship.[6]

A contract by which the owner of a ship hypothecates or binds the ship as security for the repayment of money advanced for the use of the ship.[6]

The contract creates a lien on the ship enforceable in admiralty on arrival at the port of destination, but void in the event of loss before arrival. The hazard being extraordinary, the rate of interest is high.[7]

To justify giving the bond, it is essential that there be a necessity, as, for repairs, and a necessity for resorting to the bond to procure the proper funds. There is no such necessity when the master has funds or can get funds on the credit of the owner.[8]

The vital principle is that the case is one of unprovided and real necessity, and that neither master nor owner has funds or credit available.[7]

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[1] Brown *v.* State, 18 Ohio St. 507 (1869).

[2] 1 Bl. Com. 75; 2 *id.* 83.

[3] Wharton's Law Dict.; 1 Bl. Com. 174.

[4] Appeal of Phila. & Reading R. Co., 89 Leg. Int. 96 (Pa., 1882); State *v.* School District, 13 Neb. 88 (1882).

[5] Kent *v.* Quicksilver Mining Co., 78 N. Y. 177 (1879), Folger, J.

[6] National Bank *v.* Lewis, 75 N. Y. 523 (1878), cases.

[7] Lewis *v.* Sherman County, 1 McCrary, 377 (1881).

[8] A. S. *bot*, profit; M. E. *bote, boote*.

[9] [2 Bl. Com. 35; 1 Wash. R. P. 99.

[1] [4 Bl. Com. 133; 16 Mass. 93; 44 N. H. 16.

[2] U. S. *v.* Demijohns of Rum, 8 F. R. 485 (1880).

[3] Commonwealth *v.* Gavin, 121 Mass. 54 (1876).

[4] [2 Bl. Com. 457.

[5] The Draco, 2 Sumn. 186, 173–89 (1835), cases, Story, J.

[6] Braynard *v.* Hoppock, 32 N. Y. 573 (1865), Wright, J.

[7] The Grapeshot, 9 Wall. 135 (1869), Chase, C. J.; 26 Wend. 575; 32 N. Y. 573.

[8] The Fortitude, 3 Sumn. 233–37 (1838), cases, Story, J

Such contracts seem to have been first recognized among the ancient Rhodians. They are allowed for the benefit of commerce. When *bona fide*, they will be upheld by the courts with a strong hand. They cover accruing freight, as well as the ship itself. They are to be liberally construed.[1]

There is no prescribed form for a bond. Any words indicating the amount of the loan, the interest to be paid, the names of the contracting parties, the name of the vessel, the limits of the voyage as to ports and time, the nature of the risks, and the period for repayment, will ordinarily be sufficient.

The lien created takes precedence over other liens, except liens for seaman's wages.

The bonds are usually negotiable instruments.

See HYPOTHECATION; RESPONDENTIA.

BOUGHT. See BUY; NOTE, 1.

BOULEVARD. Originally, a bulwark or rampart; afterward, a public walk or road on the side of a demolished fortification; now, a public drive.

Not, technically, a street, avenue, or highway, though a carriage-way over it is a feature. Refers to an area set apart for purposes of ornament, exercise, and amusement.[2]

BOUND, *v.* See BAILIFF; BIND; BOND.

BOUND, *n.*; BOUNDARY. Bound: a limit; boundary: a visible line designating a limit. The terms are often interchanged.[3]

Bounds. The legal, imaginary line by which different parcels of land are divided.

The "bounds of a river" may refer to the center line of the river.[4]

Artificial boundary. An object erected by man for designating the limit of an ownership in land; as, a post, a fence, or other monument.

Natural boundary. Any natural object remaining where placed by nature; as, a spring, a stream, a tree.

Private boundary and *public* boundary are used.

The most material and most certain calls control those which are less material and less certain. A call for a natural object, as, a river, a stream, a spring, or a marked tree, controls both course and distance.[5]

Courses and distances yield to natural and ascertained objects. Artificial and natural objects called for have the same effect. In a case of doubtful construction the claim of the party in actual possession will be maintained.[6]

Monuments control courses, and specific courses a general course.[1]

On a question of private boundary, declarations of a particular fact, as distinguished from reputation, made by a deceased person, are not admissible unless it is shown that such person had knowledge of that whereof he spoke and was on the land or in possession of it when the declaration was made — as part of the *res gestæ*.[2]

Where a disputed boundary between States is settled, grants previously made by one of lands claimed by it, and over which it exercised political jurisdiction, but which, on the adjustment of the boundary, are found to be within the territory of the other State, are void, unless confirmed by the latter State; but such confirmation cannot affect the titles of the same lands previously granted by the latter State.[3]

See ABUT; AT, 2; CALL, 2 (2); CONFUSION; DESCRIPTION; LINE, 1; MONUMENT, 1; THREAD.

BOUNTY.[4] Money paid or a premium offered [usually by government] to encourage or promote an object, or procure a particular thing to be done. The context may restrict the meaning.[5]

"A premium offered or given to induce men to enlist into the public service." That is a proper and intelligent definition, indicating clearly that the word is only applicable to the payment made to the enlisted man, as the inducement for his service, and not as a premium paid to the man by whose procurement the recruit is mustered.[6]

Bounties have also been established for those who kill dangerous animals or noxious creatures, or who engage in a particular business or industry which it is desired to encourage, as in a fishery, or in the manufacture of salt.

While bounties are usually paid in money, they may be paid in land. Whence bounty lands, and bounty-land warrants.

Land or money, other than current salary or pay, granted by the government to a person entering the military or naval service, has always been called a bounty; and while it is by no means a "gratuity," because the promise to grant it is one of the considerations for which the soldier or sailor enters the service, yet it is clearly distinguishable from "salary" or pay measured by the time of service.[7]

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[1] The Albro, 10 Bened. 671-72 (1879), cases; 1 Pet. *435-37; 3 Kent, 353; 2 Bl. Com. 457.

[2] People *ex rel.* Seaver *v.* Green, 52 How. Pr. 445 (1873), Fancher, J.

[3] See Webster's Dict.

[4] Walton *v.* Tift, 14 Barb. 221 (1852).

[5] Newsom *v.* Pryor, 7 Wheat. 10 (1810), Marshall, C. J.; Brown *v.* Huger, 21 How. 321 (1858).

[6] County of St. Clair *v.* Lovingston, 23 Wall. 62 (1874), cases, Swayne, J.

[1] Grand County *v.* Larimer County, 9 Col. 230 (1886).

[2] Hunnicutt *v.* Peyton, 102 U. S. 364, 363 (1880), cases. See generally 2 Washb. R. P. 630-33, cases; 1 Greenl. Ev. §§ 145, 301, cases; 1 Whart. Ev. §§ 185-91, cases; 28 Am. Law Reg. 546-48 (1880), cases. The highway as a boundary, 36 Alb. Law J. 305-8 (1887), cases.

[3] Coffee *v.* Groover, 123 U. S. 10 (1887), cases, Bradley, J. Boundary between Georgia and Florida.

[4] L. *bonitas*, goodness, gratuity: *bonus*, good.

[5] Fowler *v.* Selectmen of Danvers, 8 Allen, 84 (1864), Bigelow, C. J.

[6] Abbe *v.* Allen, 39 How. Pr. 488 (1870), Bacon, J.

[7] Five Per Cent. Cases, 110 U. S. 479 (1884), Gray, J.

General encouragements, held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether in the shape of bounties or drawbacks, or other advantage, are always under legal control and may be discontinued at any time. Thus a law offering a sum for every bushel of salt manufactured in a State is a general law, regulative of internal economy, dependent for its continuance upon the dictates of public policy, and the voluntary good faith of the legislature. Such law does not belong to the class denominated "contracts," except so far as actually executed and complied with.[1]

BOX. See BALLOT-BOX; JURY-BOX.

BOYCOTTING. A combination between persons to suspend or discontinue dealings or patronage with another person or persons because of refusal to comply with a request made of him or them. The purpose is to constrain acquiescence or to force submission on the part of the individual who, by noncompliance with the demand, has rendered himself obnoxious to the immediate parties, and, perhaps, to their personal and fraternal associates.

The persons directly so confederating have hitherto as a class been employees as against either their own employer or the employer of others in a like business, or else of retail dealers as against a particular manufacturer or wholesale dealer.

The means employed have been the withdrawal of the custom and good-will in business of the immediate parties and of such others as they could influence.

The word may refer to the fact of combining or to the resolution as executed.

The practice takes its name from one Boycott, an agent for Lord Erne on certain estates in the western part of Ireland. Having lost favor with the tenants, from evictions and other harsh treatment, they agreed not to work for him, and the tradesmen of the community not to deal with him.

"The word in itself implies a threat. In popular acceptation it is an organized effort to exclude a person from business relations with others by persuasion, intimidation and other acts which tend to violence, and thereby coerce him, through fear of resulting injury, to submit to dictation in the management of his affairs."[2]

Any such combination is, and ever has been, at common law, a conspiracy, the unlawfulness consisting in the agreement for the concerted action; and aptly illustrates the well-settled principle that two or more persons may not combine to do toward another what one individual of his own accord might not unlawfully do.

"The doctrine to be gathered from the cases seems to be that a conspiracy of this kind ceases to be legal when the means designed . . are characterized by force, threats, intimidation, molestation, improper interference, or compulsion."[1]

It is against the criminal law for a number of men to band together for the purpose, through the power of combination, of injuring the business of another, by parading before his door, by placarding themselves with the word "boycott," by advising passers-by not to patronize the establishment, by distributing circulars filled with accusations and justifying the boycott, and by other devices calculated to induce the public to keep away from the alleged wrong-doer,—provided that the persons so engaged use force, threats, or intimidation. To constitute intimidation it is not necessary that there should be an overt act of violence or any direct threat by word of mouth: it is enough if the attitude of the accused was intimidating; and this may be shown by their numbers, methods, placards, circulars, and other devices. If the attitude and method is such as to deter any of the complainant's customers, even the most timid, from entering his place of business, or to inspire any portion of the general public with a sense of danger in ignoring their appeals, there is intimidation. In New York procuring money from another with his consent obtained by fear, induced by threat to do or to continue an injury to his property, constitutes "extortion;" and every person present when the money, or the agreement under which it was paid, is obtained, and who aids and abets the person to whom it is paid, by personal participation or by silently acquiescing in the threats made by his associates speaking in their joint behalf, is liable as a principal, and he need not be present when the money is actually received.[2]

Associations have no more right to inflict injury upon others than have individuals. All combinations and associations designed to coerce workmen to become members or to interfere with, obstruct, vex or annoy them in working or in obtaining work because they are not members, or to induce them to become members; or designed to prevent employers from making a just discrimination in the wages paid to the skillful and the unskillful, the diligent and the lazy, the efficient and the inefficient; and all associations designed to interfere with the perfect freedom of employers in the proper management of their lawful business, or to dictate the terms upon which their

[1] Salt Company *v.* East Saginaw, 13 Wall. 379 (1871), Bradley, J. See also Commissioners *v.* Woodstock Iron Co., 83 Ky. 153 (1886), cases.

[2] Brace Brothers *v.* Evans *et al.*, C. P. No. 1, Allegheny Co., Pa. (April 21, 1888), Slagle, J.: 35 Pitts. Leg. J. 399, 405. See "England under Gladstone," McCarthy

[1] 10 Va. Law J. 709 (Sept., 1886), Atkins, J., in Crump *v.* Commonwealth. Affirmed, May 24, 1888.

[2] People *v.* Wilzig, 4 N. Y. Cr. R. 403 (O. & T. N. Y. Co., June, July, 1886), Barrett, J. Sometimes called Theiss's Case. N. Y. Penal Code, §§ 552–53. See also People *v.* Lenhardt, *ib.* 317 (June, 1886).

business shall be conducted by means of threats of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of those rights,—are *pro tanto* illegal combinations; and all acts done in furtherance of such intentions by such means and accompanied by damage are actionable.[1]

An act of Wisconsin, approved April 2, 1887 (Laws, ch. 287), provides that: Any two or more persons who shall combine, associate, agree, mutually undertake, or concert together for the purpose of willfully or maliciously injuring another in his reputation, trade, business or profession, by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars.[2]

See further COMBINATION, 2; CONSPIRACY; INJURY, Irreparable; STRIKE, 2. Compare BLACK-LISTING. See also ASSEMBLY, Unlawful; RIOT.

BRAKEMAN. See ADMISSION, 2; NEGLIGENCE.

BRANCH. See RAILROAD.

BRAND. To burn; to mark, stamp.

In common pariance, to mark. What was formerly done by a hot iron in the way of marking packages is now done by the stencil plate. In referring to marks upon packages of merchandise, the use of stencil plates is denominated "branding" quite as often as otherwise. "To brand" has become an equivalent expression with to stamp and to mark.[3] See BURN.

BRAWL. A noisy quarrel; uproar.

"Brawl" and "tumult" are correlative terms. They refer to the same kind of disturbance of the peace, produced by the same class of agents, and well define one and the same offense.[4] See PEACE, 1.

BREACH. Breaking, violation, infraction.

1. A violation of duty or obligation. 2. The part of a declaration which charges the violation of a contract. See DAMAGES.

Breach of close. An unlawful entry upon land. See CLOSE, 3.

Breach of contract or covenant. A failure to observe the conditions of a contract. See CONTRACT; COVENANT.

Breach of pound. The forcible removal of a thing lawfully impounded. Also called *pound-breach*. See POUND, 2.

Breach of prison. Escape from lawful confinement in a prison. Also called *prison-breach*. See ESCAPE, 1 (2).

Breach of privilege. Violation of the privilege of a legislature. See PRIVILEGE, 4.

Breach of promise. Failure to solemnize a contract of marriage, *q. v.*

Breach of the peace. Disturbance of the public order. See PEACE, 1.

Breach of trust. Violation of the duty imposed by an instrument creating a trust; also, willful misappropriation of a thing bailed. See TRUST, 1.

Breach of warranty. Where a contract of warranty is broken in any of its conditions. See WARRANTY.

Continuing breach. Describes acts in violation of one's duty, continuous or repeated at short intervals.

BREAD ACTS. Statutes providing for the sustenance of persons confined in jail for civil causes have been so called.[1]

BREAD AND WATER. To be fed on bread and water was part of the punishment imposed under the Great Law of the province of Pennsylvania (1682) for swearing, profanity, cursing, drunkenness, and offenses of like grade.[2]

This is also sometimes made the diet of persons held in confinement who refuse to obey reasonable prison-rules.

BREAK. 1. To sever by fracture; to part or divide with force or violence; also, to lay open or uncover.

Break bulk. For a bailee to open a box or package intrusted to his custody and fraudulently appropriate the contents.[3] See LARCENY, By bailee.

Break doors. To remove the fastenings of a house with force, so that a person, as, an officer executing process, may enter. See HOUSE.

Break ground. See FREIGHT, Affreightment; SAILING.

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[1] Old Dominion Steamship Co. *v.* McKenna, U. S. Cir. Ct., S. D. N. Y. (Feb. 25, 1887), cases, Brown, J.: 30 F. R. 48, 35 Alb. Law J. 208, 26 Am. Law Reg. 423-32, cases, 18 Abb. N. Cas. 262, 281, cases. See also State *v.* Glidden, 55 Conn. 76 (April, 1887): 35 Alb. Law J. 348, 3 N. E. Rep. 849; 9 Cr. Law Mag. 1-17 (Jan., 1887), cases; 21 Am. Law Rev. 41-69 (Feb., 1887), cases; *ib.* 509-32 (1887), cases; State *v.* Stewart, Sup. Ct. Vt. (May, 1887), cases: 36 Alb. Law J. 9-11 (1887); 35 *id.* 208, 284-26 (1887), cases; 22 Am. Law Rev. 233 (April, 1888), cases; 3 Kans. Law J. 273 (1886).

[2] Compare Penn. Acts 8 May, 1869, 14 June, 1872, 20 April, 1876: Purd. Dig. 1172. Applied, Brace Brothers *v.* Evans *et al.*, *ante*.

[3] Dibble *v.* Hathaway, 11 Hun, 575-76 (1877), Bockes, J.

[4] State *v.* Perkins, 42 N. H. 465 (1861).

[1] See 49 Conn. 87, 89; 91 U. S. 300; 3 Bl. Com. 416; 1 Brightly, T. & H. § 1426.

[2] Laws of Prov. of Penn., Linn, 110-111.

[3] 1 Pick. 375; 4 Mass. 580.

Break jail or prison. To escape from a place of lawful confinement. See ESCAPE, 1.

Break seals. See SEAL, 1, 4.

2. In burglary and house-breaking, to remove any part of the house, or of the fastenings provided to secure it against intrusion, with intent to commit a felony.

Such breaking is *actual* when force is used; and *constructive* when an entry is effected by fraud, conspiracy, or threat.[1] See further BURGLARY.

3. To violate a duty or engagement: as, to break a contract. See BREACH.

4. To establish, in a judicial proceeding, the invalidity of an alleged will. See CONTEST.

BREAST OF THE COURT. This expression, much used by the older writers, seems to mean the sound discretion, the conscience and judgment, of the judge or judges of a court.

During the term the record is in the breast of the court.[2]

In a trial *per testes* the judge is left to form in his own breast his sentence upon the credit of the witnesses examined.[3]

The liberty of considering all questions in an equitable light might leave the decision of every question entirely in the breast of the judge.[4]

BREVE. L. A writ; literally, short, brief, *q. v.* Also, an original writ. Plural, **brevia.**

Brevia were originally in the form of letters. They tersely stated the matter in question — *rem quæ est breviter narrat.* The species came to be known by some important word or phrase in the writ itself, or from the subject-matter; and this word or phrase, in turn, was transferred to the form of action in the prosecution of which the writ (*breve*) was procured.[5]

BREWER. See LIQUOR.

Every person, firm, or corporation who manufactures fermented liquors of any name or description, for sale, from malt, wholly or in part, or from any substitute thereof.[6] Compare DISTILLER.

BRIBERY. 1. In old English, theft, rapine, open violence, official extortion.

The rapacious dignitary was styled the *briber*, and he was said *to bribe* when he boldly grasped his prey; now, the tempter is the briber and the recipient the bribed.[7]

2. When a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behavior in office.[1]

Giving (and perhaps offering) to another anything of value or any valuable service, intended to influence him in the discharge of a legal duty. It does not apply to a mere moral duty.[2]

The later and broader doctrine is that any attempt to influence an officer in his official conduct, whether in the executive, legislative, or judicial department of the government, by the offer of a reward or pecuniary consideration, is an indictable common-law misdemeanor.[3]

A candidate for a judgeship who pledges himself, if elected, to serve at a less salary than that provided by law, virtually bribes the masses to vote for him.[4]

Bribery in a judge of the United States courts, of a member of Congress, or of any officer of the United States, is punishable.[5]

The general election laws of Pennsylvania prohibiting bribery include caucuses as well as elections for State officers; and the constitutional prohibition against violation of any "election law" includes any law intended to purify elections, then or thereafter in force.[6] See CANDIDATE.

One who bribes another cannot maintain an action to recover the money.[7] Compare CORRUPT, 2.

BRIDGE. A structure of wood, iron, brick, or stone, ordinarily erected over a river, brook, or lake, for the more convenient passage of persons and beasts and the transportation of baggage.[8]

A structure, usually of wood, stone, brick, or iron, erected over a river or other watercourse, or over a ravine, railroad, etc., to make a continuous roadway from one bank to another.[9]

Formerly and strictly, the word, unqualified, imported a structure that had a pathway. In this sense

[1] See Timmons *v.* State, 34 Ohio St. 427–31 (1878), cases; 68 N. C. 207; 85 Pa. 54; 2 Chitty, Cr. L. 1092.

[2] 3 Bl. Com. 407; 105 Ill. 668, 669.

[3] 3 Bl. Com. 336.

[4] 1 Bl. Com. 62; 112 U. S. 190.

[5] Coke, Litt. 73 *b*, 54 *b*; Steph. Pl. *27.

[6] Revenue Act, 13 July, 1866: 14 St. L. 117.

[7] Marsh, Lect. Eng. Lang. 249.

[1] 4 Bl. Com. 139; 65 Ill. 65.

[2] Dishon *v.* Smith, 10 Iowa, 221 (1859).

[3] State *v.* Ellis, 33 N. J. L. 103 (1868). See also 62 Cal. 493; 135 Mass. 530.

[4] People *ex rel.* Bush *v.* Thornton, 25 Hun, 465–66 (1881), cases. See also State *v.* Elting, 29 Kan. 399, 402–4 (1883), cases; Hall *v.* Marshall, 80 Ky. 553, 563–66 (1882), cases.

[5] R. S. §§ 5449–51, 5499–5502.

[6] Leonard *v.* Commonwealth, 112 Pa. 607, 626 (1886).

[7] Clark *v.* United States, 102 U. S. 322 (1880). See generally People *v.* Sharp, 10 N. Y. St. R. 522–77 (1887), cases, etc.

[8] Enfield Bridge Co. *v.* Hartford, &c. R. Co., 17 Conn. 56 (1845), Williams, C. J.

[9] Webster's Dict.; Madison County *v.* Brown, 89 Ind.

a railroad bridge, being in the nature of a viaduct, is not a violation of a franchise for an ordinary toll-bridge.[1] See RAILROAD.

The word includes the structure itself and such abutments as are necessary to make the structure accessible and useful; but exactly what constitutes a bridge in a particular case is a question of fact.[2]

The approaches to a bridge, within reasonable limits, are a part of the bridge.[3] See ABUTMENT.

Free bridge. A bridge owned and maintained, usually by the public, free of charge to travelers. **Toll bridge.** A chartered bridge, with the right in its owners to collect toll in reimbursement of the cost of construction, repairs, etc.

Private bridge. A bridge for the use of individuals, generally its owners. **Public bridge.** A bridge which constitutes a part of the public highway, whether free or toll. See TOLL, 2.

A bridge is to be maintained (the repair being equal to the service expected) by its owner, whether a county, a township, a municipality, or a company. But the person or persons, as, a railway company, who makes the structure a necessity, is to make repairs; if he fails in this duty, the public authorities must make them at his expense.[4]

If a bridge is not kept in repair, redress may be had in court by indictment for maintaining a nuisance, by injunction, by *quo warranto*, by *mandamus*, and by suit for special damage suffered by any individual person.

A State may erect a bridge over a river, provided inter-State navigation is not thereby unreasonably obstructed.[5]

What the form and character of bridges over a navigable stream should be, that is, of what height and materials, and whether with or without draws, are matters for regulation by the particular State or States authorizing the construction, subject only to the paramount authority of Congress to prevent unnecessary obstruction to free navigation. Until Congress intervenes in such cases, and exercises its authority, the power of the State is plenary. . . Bridges are merely connecting lines of turnpikes, streets, and railroads; and the commerce over them may be much greater than that on the streams which they cross. A break in the line of railroad communication from the want of a bridge may produce greater inconvenience to the public than the obstruction of navigation caused by a bridge with proper draws. In such cases the local authority can best determine which of the two modes of transportation should be favored.[1]

Congress can empower a private corporation to occupy navigable waters within a State, and appropriate the soil under them, in order to construct a bridge for the purposes of inter-State commerce, against the protest of the State.[2]

The act of Congress of June 16, 1886, authorizing the construction of a railroad bridge across Staten Island Sound, known as "Arthur Kill," and establishing the same as a post-road, is within the power to regulate commerce, to open up commercial communication between the States. Such privilege may be exercised without the consent of the State in which the structure is to be placed. The grant is, in effect, of the use of the soil, not an assumption of exclusive jurisdiction. The right of the State is not property susceptible of pecuniary compensation as "private property" taken for public use.[3]

Speaking generally, a chartered bridge will not be allowed near another bridge, nor near a ferry, having an older franchise.[4]

See COMMERCE; DRAWBRIDGE; FERRY; NAVIGATION.

BRIEF.[5] A concise statement; an epitome; an abridgment.

Sometimes used in a verbal sense, to reduce to the form of a brief, etc. See STATE, 1.

Brief of title. An abstract of the deeds, judicial proceedings, etc., which affect a title to realty. See further ABSTRACT, 2. Compare also SEA-BRIEF.

1. In very old law, a writ. See BREVE.

2. An abridged statement of a party's case, prepared by his counsel, usually for the information of the court on the matters of law involved.[6] See PAPER, 5.

In England the essentials of a case as prepared in writing by the solicitor or attorney for the use of the barrister who is to conduct the case in court is called "the brief" in the case. In America the term designates the memorandum counsel take into court or to a

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88 (1883). See 5 South. Law Rev. 733-35 (1880), cases; 37 Me. 461; 122 Mass. 312; 41 Ohio St. 52; 110 U. S. 566; 6 Iowa, 455; Ang. Highw. § 35.

[1] Proprietors of Bridges *v.* Hoboken Land Co., 1 Wall. 149-51 (1863), cases; s. c., 2 Beasley, 508. See also Smith Bridge Co. *v.* Bowman, 41 Ohio St. 56-58 (1884).

[2] Tollard *v.* Willington, 26 Conn. 582-83 (1857), cases; Bardwell *v.* Jamaica, 15 Vt. 442 (1843).

[3] Rush County *v.* Rushville, &c. R. Co., 97 Ind. 505 (1882); Driftwood Valley Turnpike Co. *v.* Bartholomew County, 72 *id.* 226-38 (1880), cases; Whitcher *v.* Somerville, 136 Mass. 455 (1885).

[4] Penn. R. Co. *v.* Borough of Irwin, 85 Pa. 336 (1877); Shelby County *v.* Deprez, 87 Ind. 510-13 (1882), cases.

[5] Pennsylvania *v.* Wheeling Bridge Co., 13 How. 562 (1851); People *v.* Kelly (East River Bridge), 5 Abb. N. Cas. 382, 420 (1879); 5 McLean, 425.

[1] Hamilton *v.* Vicksburg, &c. R. Co., 119 U. S. 281-82 (1886), Field, J.

[2] Decker *v.* Baltimore & N. Y. R. Co., 30 F. R. 724-28 (1887), cases, Wallace, J.

[3] Stockton, Attorney-General *v.* Baltimore, &c. R. Co., 32 F. R. 9, 16 (1887), cases, Bradley, J. Same case, 36 Alb. Law J. 371.

[4] See 3 Bl. Com. 219; 4 *id.* 167; Enfield Toll Bridge *v.* Hartford, &c. R. Co., 17 Conn. 40, 56 (1845), cases.

[5] F. *bref;* L. *brevis*, short.

[6] Gardner *v.* Stover, 43 Ind. 357, 356 (1873).

hearing before an auditor, master, or other commissioner, to assist in elucidating the law, and, perhaps, the facts in a particular case; also, the statement of the law (statutes, decisions, etc.) supposed to apply to a case pending before a court of review, and filed for the information of the court and of opposing counsel.[1]

Briefless. Without briefs; without business requiring the preparation of briefs; without clients.

Within the meaning of the rules of an appellate court, a "brief" is a statement of a case for the information of the court. It should furnish aid in deciding the case—show why the judgment below should be either reversed or affirmed.[1]

After the trial or argument of a cause, though the counsel of one of the parties gives notice that he will furnish the court a brief of authorities, a decision may be rendered without giving time for the preparation of the brief. The reception of briefs being for the assistance of the court, the judges, who are presumed to know the law, are not bound to receive them.[2]

BRING INTO COURT. See PAYMENT.

BRING SUIT. See BROUGHT; SUIT.

BRISTLES. See HAIR.

BRITISH. See STATUTE.

BROKER.[3] An agent employed to make bargains and contracts between other persons in matters of trade, commerce or navigation, for a compensation commonly called *brokerage*.[4]

Brokerage. The business of a broker; also, his remuneration or commission. Formerly spelled *brokage* and *brocage*.

The term "broker" is no longer limited to a person employed to negotiate contracts for the sale or exchange of goods, but is extended to almost every branch of business — to realty as well as to personalty.[5]

The term is applied, ordinarily, to one acting for others.[6]

A broker is a middleman, an intervenor between the buyer and the seller: a factor or agent who acts for one or the other.[7]

Brokers take their names from the kinds of contracts they negotiate. The more common classes are the following:

Bill and note brokers. These negotiate the purchase and sale of bills of exchange and promissory notes.

They impliedly warrant that the paper is as represented, with respect to the genuineness of signatures, but not as to the solvency of parties.[1]

Their usefulness would be destroyed if a purchaser was to be affected with their knowledge as to the character of the paper they offer in market for discount.[2] See *Exchange Broker*.

Commercial broker. A person who negotiates sales of merchandise, or contracts for freights, for other persons.

Within the meaning of the internal revenue laws a person who negotiates sales or purchases in the names of the parties primarily liable; not, one authorized to sell in his own name or on his own account.[3]

Any person or firm whose business it is, as a broker, to negotiate sales or purchases of goods, wares, or merchandise, or to negotiate freights and other business for the owners of vessels, or for the shippers, or consignors, or consignees of freight carried by vessels, shall be regarded as a commercial broker.[4]

Exchange broker. A broker who negotiates bills of exchange, foreign or domestic.

Every person, firm, or company, whose business it is to negotiate purchases or sales of stocks, bonds, exchange, bullion, coined money, bank-notes, promissory notes, or other securities, for themselves or others, shall be regarded as a broker.[4] Compare *Bill* and *Stock Broker*.

Insurance broker. A person who negotiates contracts of insurance.

He is agent for both parties. An insurance agent is, ordinarily, the employee of the insurer only. See INSURANCE, Broker.

Merchandise broker. A broker who negotiates sales of merchandise without having possession or control of it. See FACTOR.

Pawnbroker. A person, usually licensed, who loans money, in small sums, at usurious interest, on the security of pledges of personalty. See further PAWN.

Produce-broker. A person whose occupation it is to buy and sell agricultural or farm-products.[5]

Not, then, one who sells from his own farm, or goes from house to house to sell his own produce.[6]

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[1] Gardner *v.* Stover, *ante*.

[2] Van Dolsen *v.* Abendroth, N. Y. City, Mar. Ct., 15 Rep. 472 (1883).

[3] In Mid. Eng. an agent, a witness of a transaction. Probably allied to A. S. *bru'can*, to use, employ,—Skeat.

[4] Story, Agency, § 28; 83 N. Y. 381, *infra*.

[5] Little Rock *v.* Barton, 33 Ark. 443, 444-49 (1878), cases, Turner, S. J.

[6] Warren *v.* Shook, 91 U. S. 710 (1875), Hunt, J.

[7] [United States *v.* Simons, 1 Abb. U. S. 472-73 (1870), McCandless, J.

[1] Baxter *v.* Duren, 29 Me. 439-41 (1849), cases; Morrison *v.* Currie, 4 Duer, 82-85 (1854), cases; Aldrich *v.* Jackson, 5 R. I. 219 (1858).

[2] Moorehead *v.* Gilmore, 77 Pa. 122. Agency: Worthington *v.* Cowles, 112 Mass. 30; 1 Dan. N. Inst. § 740 *a*

[3] [Slack *v.* Tucker, 23 Wall. 329 (1874).

[4] [Revenue Act, 13 July, 1866: 14 St. L. 117, 116.

[5] United States *v.* Simons, *ante*.

Real estate broker. A broker who negotiates sales of realty.

He may also negotiate loans on mortgages, let houses, lease lands, collect rents, etc.

Inasmuch as acting for both parties, in an exchange of lands, involves inconsistent duties he can recover remuneration from neither party, notwithstanding an express promise by one of the parties to pay a percentage, unless it clearly appears that each principal had full knowledge of all the circumstances connected with his employment by the other which would naturally affect his action, and had assented to the double employment. When such knowledge and assent are shown, he may recover from either party.[1]

Ship broker. A broker who negotiates sales of ships, freighting of vessels, etc. See *Commercial Broker.*

Stock broker. A broker who buys and sells shares in corporations. See ORDER, Stop, 2; RINGING UP; STOCK, 8, Exchange.

Ordinarily, a broker never buys or sells in his own name, nor has he possession of the goods; wherein he differs from a "factor" or commission merchant. His business is to bring buyer and seller together; but he need not actually negotiate the bargain. Unless there is a special agreement to the contrary, he earns his commission when he procures a party with whom the principal is satisfied, and who actually contracts for the purchase of the property at a price acceptable to the owner. But he must establish his employment and that his agency was the procuring cause of the sale. Pending an authorized negotiation at private sale, the owner cannot take the business out of the broker's hands, complete the sale, and then refuse to pay the commission.[2] The owner must have a good reason for refusing to fulfill his agreement to pay the broker for his services. Usage, in the absence of an express contract, determines the value of the services.[3] When the broker does not disclose his principal he may be held as principal. See REALIZE.

BRONZES. See FURNITURE.

BROOD. See PARTUS.

BROTHEL. See BAWDY-HOUSE.

BROTHER. See BLOOD, 1; CONSANGUINITY; DESCENT, Canons of.

BROTHERHOODS. See COMMUNITY, 3.

BROUGHT. Commenced.

In the legislation of Congress on the subject of limitation of actions, "commenced" and "brought" mean the same thing.[1]

A suit is brought when it is instituted or commenced.[2] See COMMENCE, Action.

BROWBEAT. To depress or bear down with haughty, stern looks, or with arrogant speech and dogmatic assertions; to bear down by impudence: as, to browbeat a witness.[3] Compare BADGER. See EXAMINATION, 9.

BRUTALITY. See CRUELTY; WHIPPING-POST.

BUBBLE ACT. The statute of 6 Geo. I (1720), c. 18 (enacted after the South Sea project had beggared half the nation), made all unwarrantable undertakings by unlawful subscriptions, then known as "bubbles," subjects of *præmunire.*[4]

By 6 Geo. IV (1826), the greater portion of that statute was repealed, and illegal companies left to be dealt with by the common law.[5]

"Bubble Acts" and "bubble companies" are still in use in speaking of persons who have been defrauded in subscribing to the stock of companies organized either without real capital or business, or with capital but for dishonest speculation.

BUCKET-SHOP. See WAGER, 2.

BUGGERY. See SODOMY.

BUGGY. See WAGON.

BUILDING. In its broadest sense, an erection intended for use and occupation as a habitation or for some purpose of trade, manufacture, ornament, or use, constituting a fabric or edifice, such as a house, a store, a church, a shed.[6]

A structure of considerable size, intended to be permanent or at least to endure for a considerable time.[7]

The "commencement" of a building imports some work and labor on the ground, the effect of which is apparent, as, beginning to dig the foundation, or other work of like description, which every one can readily recognize as the commencement of a building,[8]—

[1] Bell v. McConnell, 37 Ohio St. 399-403 (1881), cases.

[2] See McGavock v. Woodlief, 20 How. 227 (1857); Walker v. Osgood, 98 Mass. 348 (1867): 96 Am. Dec. 171-78, cases; Keys v. Johnson, 68 Pa. 42-44 (1871), cases; Sibbald v. Bethlehem Iron Co., 83 N. Y. 381-82 (1881), cases; Vinton v. Baldwin, 88 Ind. 105-6 (1882), cases; Viaux v. Old South Society, 133 Mass. 10 (1882); Armstrong v. Wann, 29 Minn. 127-28 (1882), cases; Barry v. Schmidt, 57 Wis. 172 (1883); Hamlin v. Schulte, Sup. Ct. Minn. (1887): 26 Am. Law Reg. 106 (1887); *ib.* 109-15, 543-68 (1887), cases; 20 Cent. Law J. 466-68 (1885), cases; Chic. Leg. Adv. (1885): 9 Va. Law J. 515, 2 Kans. Law J. 242; 22 Cent. Law J. 126-29 (1886), cases; 21 Am. Law Rev. 705-14 (1887), cases; 26 Cent. Law J. 75-77 (1888), cases.

[3] Koch v. Emmerling, 22 How. 74 (1859).

[1] Goldenberg v. Murphy, 108 U. S. 163 (1883), Waite, C. J.; 119 *id.* 470.

[2] Berger v. Commissioners, 2 McCrary, 486 (1880): Act of Congress, 1875, § 1.

[3] Webster's Dict.

[4] 4 Bl. Com. 117.

[5] 4 Chitty, Bl. Com. 117.

[6] Truesdell v. Gay, 13 Gray, 312 (1859), Bigelow, C. J.

[7] Stevens v. Gourley, 97 E. C. L. 112 (1859), Byles, J.

[8] Brooks v. Lester, 36 Md. 70 (1872).

work being done with the purpose then formed to continue it to the completion of the building.[1]

The idea in all the cases which concern a "new" building is newness of structure in the main mass — the entire change of external appearance, which denotes a different building from that which gave place to it, though into the composition of the new structure some of the old parts may have entered. This newness of construction must be in the exterior, the main plan of the building, not in the interior arrangements.[2]

See ADDITION, 1; ALTER; BURGLARY; ERECT, 1; HOUSE, 1; LOSS, Total; SPECIFICATION, 1; STRUCTURE; SUPPORT, 2.

Building or building and loan associations. Co-operative associations, usually incorporated, for the purpose of accumulating money and loaning it to their members upon the security of their real estate.

Each member makes a monthly payment upon each share of his stock, and such members as borrow from the association pay, in addition, interest upon the sums loaned to them. When the stock, from the payments of the monthly installments upon shares and from the accumulation of interest, reaches its par value, the mortgages given by the borrowers are canceled, and the non-borrowers receive in cash the par of their shares of stock.

Buildings, public. See LAND, Public.

Builder. A person whose business it is to construct buildings, vessels, bridges, canals, or railroads, by contract.[3] See CONTRACTOR.

He who undertakes to build a house impliedly agrees with every person who may have occasion to use it that he will exert, in the construction, such skill, care, and foresight as may be expected of a man of at least ordinary caution.[4]

The occupant of a house likewise agrees not to overload a floor; and, that every part of the premises, in and out of doors, to which the public are admitted, shall be reasonably guarded against accident. See CARE; DUTY, 1; MANSLAUGHTER; NEGLIGENCE; RES, Perit, etc.

As to the expense of changes made in plans and specifications, see *Watson* v. *Jones*, under CONTRACT, Executed, and *Phillips Construction Co.* v. *Seymour*, under COVENANT.

BULK. See BREAK.

BULLDOZE. See BALLOT; CONSPIRACY.

BULLION. Uncoined gold and silver, either smelted, refined, or in the condition in which it is used for coining.

From an early period, has been associated with or employed as a term denoting money.[5] See BANK, 2 (2).

[1] Kelly v. Rosenstock, 45 Md. 392 (1876), cases.

[2] Miller v. Hershey, 59 Pa. 69 (1868), cases.

[3] See Revenue Act, 13 July, 1866: 14 St. L. 121.

[4] 1 Addison, Torts, § 569; People v. Buddensieck, 4 N. Y. Cr. R. 230, 250-72 (1886), cases.

[5] Counsel v. Vulture Mining Co., 5 Daly, 77 (1874).

BUNDLING. See SEDUCTION.

BURDEN. That which is borne: charge, obligation, duty; also, disadvantage. Compare BENEFIT; INCUMBRANCE; ONUS.

Burdensome. Grievous, oppressive: as, a burdensome contract.

Burden of proof. The obligation imposed upon a party who alleges the existence of a fact or thing necessary in the prosecution or defense of an action, to establish it by proof.[1]

Sometimes spoken of simply as "the burden." See further PROOF, Burden of.

BUREAU. See BOARD, 2; DEPARTMENT; HEALTH; LABOR, 1.

BURGESS. See BOROUGH.

BURGLAR.[2] He that by night breaketh and entereth into a mansion-house with intent to commit a felony.[3]

Burglarious. Intending to commit burglary.[4]

Burglary. Originally, the robbery of a dwelling; now, breaking and entering the house of another in the night-time with intent to commit a felony, whether the felony be actually committed or not.[5]

"House-breaking" describes the same offense, the time not being regarded.

Burglary, or nocturnal house-breaking, has always been looked upon as a very heinous offense; not only because of the terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation which every individual might acquire even in a state of nature.[6]

By "night" is meant the period between total disappearance of daylight in the evening and its reappearance the next morning. The disappearance is total when a face can no longer be discerned. See NIGHT.

By "mansion-house" is meant a dwelling-house: any building actually used for human habitation and not permanently abandoned. It includes incidental out-buildings which are parcel of the dwelling-house. By statutes, extended to stores or shops. A single room may be such habitation: the injured owner being he who has the right of possession. See CURTILAGE.

There must be both a "breaking" and an "entering." "Breaking" means the removal of some portion

[1] People v. McCann, 16 N. Y. 66 (1857); Willett v. Rich, 142 Mass. 357 (1886).

[2] F. *burglar*, a burg-thief: a house-breaker: L. *latro*, a robber.

[3] Coke, 3 Inst. 63; 4 Bl. Com. 224; 29 Ind. 80; 34 La. An. 49; 53 Md. 153.

[4] See 14 Tex. Ap. 604.

[5] Anderson v. State, 48 Ala. 666 (1872): 3 Chitty, Crim Law, 1101.

[6] 4 Bl. Com. 223.

of the house intended for security against intrusion. This may be by lifting a latch or a window, or by getting in through artifice or conspiracy; but not by raising a window already open, pushing back a door standing ajar, or by other entrance already made, except as to a chimney, which is as much closed as the nature of things will permit. The breaking may be of an inner or chamber door, or for purposes of egress. The least degree of "entering" with any part of the body, or with an instrument held in the hand, is sufficient; and it may be before, as well as after, the breaking.

The "intent" must be to commit a robbery, a murder, a rape, or other felony, whether the crime be actually perpetrated or not. If such specific intent is absent the act is a mere "trespass."[1]

Where the accused had himself, concealed in a chest, transferred to an express car, intending to rob the messenger, his acts were held to constitute a breaking and entering.[2]

The common-law definition has been modified and different degrees of the offense have been established, in some of the States.

See ACCESSARY; ACCOMPLICE; CRIME; DEFENSE, 1; EXTRADITION, 1; FELONY; INDICTMENT; MANSLAUGHTER.

BURIAL. "Burial ground" and "cemetery" may be used synonymously.[3]

To take up a dead body without lawful authority is a misdemeanor at common law. But there can be no larceny of the body, although there may be of the shroud.[4]

Preventing the burial of a dead body is indictable.

After interment, control over a body is in the next of kin. If they differ as to the disposition to be made of it, a court of equity may not afford assistance to either party.[5]

A stone vault in a cemetery used for the interment of dead bodies, though wholly above ground, is not a "building" or "other erection or inclosure," within the meaning of the penal code of New York.[6]

For sanitary reasons, a State may forbid the exhumation and removal of a corpse, without a permit being first procured.[7] See HEALTH; SEPULCHER.

[1] 4 Bl. Com. 224; Commonwealth v. Glover, 111 Mass. 402 (1873), cases; Walker v. State, 63 Ala. 50 (1879), cases.

[2] Nichols v. State, 68 Wis. 416 (1887), cases.

[3] Jenkins v. Andover, 103 Mass. 104 (1869).

[4] See 28 Alb. Law J. 106-8 (1883), cases; *Re* Wong Yung Quy, 6 Saw. 442, *infra*.

[5] See *Re* Beekman Street, 4 Bradf. Sur. 503 (1856); Bogert v. Indianapolis, 13 Ind. 138 (1859); Wynkoop v. Wynkoop, 42 Pa. 293, 301 (1862); Pierce v. Swan Point Cemetery, 10 R. I. 227, 235 (1872); Craig v. First Presby. Church, 88 Pa. 42, 52 (1878); Weld v. Walker, 130 Mass. 422 (1881), cases; Griffith v. Charlotte, &c. R. Co., 23 S. C. 39-42 (1885), cases; Johnston v. Marinus, 18 Abb. N. Cas. 72-77 (1886), cases; 10 Alb. Law J. 70 (1874), cases; 16 Am. Law Reg. 155 (1877), cases; 24 *id.* 591-600 (1885), cases; 19 Am. Law Rev. 251-70 (1885); Bishop, Contr. § 237.

[6] People v. Richards, N. Y. Ct. Ap. (Jan. 17, 1888); Pen. Code, §§ 498, 404.

[7] *Re* Wong Yung Quy 3 Saw. 442 (1880).

BURNED. See LOST, 2.

BURNING. In the law of arson (*q. v.*), to materially destroy the integrity of some portion of the house of another.[1]

Burning in the hand and left cheek was anciently a mode of punishment.[2] See C, 2; F, 1; T, 2.

Prior to 30 Geo. III (1790), c. 48, the penalty for treason was being burned alive;[3] and so, anciently, as to arson.[4] But victims seem to have been first deprived of sensation, as by strangling.[5]

As a punishment for military offenses, branding has been used to a very limited extent.

See BRAND; PUNISHMENT; WITCHCRAFT.

Burning fluid. See OIL.

BURSTING. In an insurance policy, which excepts a loss from the bursting of a boiler, synonymous with explosion, *q. v.*

BUSINESS. A word of large signification, denoting the employment or occupation in which a person is engaged to procure a living.[6]

"Business" and "employment" are synonymous terms, signifying that which occupies the time, attention, and labor of men for purposes of a livelihood or for profit. A calling for the purpose of a livelihood.[7] See EMPLOYMENT; HAPPINESS.

"Labor" may be business, but it is not necessarily so; and "business" is not always labor. The making of a contract is business, but not labor.[8] See LABOR, 1; TRADE.

"Other business," in the expression "works, mines, manufactory, or other business," is *ejusdem generis* with the species of business described by the preceding words, and imports, in a Wages Act, business of the same general character.[9]

"Ten per cent. on the business" of a partnership may mean ten per centum of the result of the business, that is, of the profits.[10]

Business corporation. In the Bankruptcy Act of 1867, had a broader meaning than "trading" corporation; was held to include a railroad corporation,[11] and an insurance company.[12]

[1] See 40 Ala. 669; 46 Cal. 356; 110 Mass. 403.

[2] 4 Bl. Com. 370.

[3] 4 Bl. Com. 204, 376, 407.

[4] 4 Bl. Com. 222

[5] 4 Bl. Com. 377. See 1 Steph. Hist. Cr. Law Eng. 476-77.

[6] Goddard v. Chaffee, 2 Allen, 395 (1861), Merrick, J.

[7] [Moore v. State, 16 Ala. 413 (1849); 52 *id.* 21; 71 *id.* 62; 28 N. J. L. 545; 23 N. Y. 244.

[8] [Bloom v. Richards, 2 Ohio St. 396-403 (1853), cases.

[9] Pardee's Appeal, 100 Pa. 412 (1882).

[10] Funck v. Haskell, 132 Mass. 582 (1882).

[11] Adams v. Boston, &c. R. Co., 1 Holmes, 30 (1870); Winter v. Iowa, &c. R. Co., 2 Dill. 488 (1873).

[12] *Re* Independent Ins. Co., 1 Holmes, 104 (1872).

While "business" in § 37 of that act had a broader meaning than the word "commercial," used in the same section, such scope was not given it as to supersede "commercial" and "moneyed," or to leave these words without practical signification.[1]

Business hours. The business hours of the community generally.[2]

The hours when business is ordinarily transacted, down to the beginning of the hours of rest in the evening, except as to paper payable at a bank or by a banker.[3]

Business paper. Commercial paper; negotiable instruments. See NEGOTIABLE.

Business usages. See CUSTOM; USAGE.

Course of business. An act done according to the rules or methods which prevail in business generally or in a particular line or branch of business is said to be done in the "due," "ordinary," "regular," or "usual" course of business.

One who takes commercial paper before its maturity, and without notice, actual or otherwise, of any defense thereto, receives the paper in the due course of business and becomes a holder for value.[4]

Under the Bankruptcy Acts sales not made in the usual and ordinary course of the business of the debtor were *prima facie* evidence of fraud on creditors; as, where a retail dealer disposed of his stock at wholesale.[5]

Place of business. The place where one habitually or chiefly transacts his business duties is his usual or principal place of business.

"Usual place of business" means the place where one's business is carried on openly; the place which has public notoriety as one's usual place of business.[6]

The "principal place of business" is no test of residence, either of a natural person or of a corporation.[7]

See BANK, 2 (2); CARRY ON; COMMERCE; CUSTOM; INCOME; LABOR, 1; LICENSE, 3; MERCHANT; PROFIT, 1; RESIDE; SUNDAY; TAX, 2; TRADE.

BUST. See DESIGN, 2.

BUTCHER. See PEDDLER; POLICE, 2; RETAILER.

BUTTAL. See ABUT.

BUTTERINE. See OLEOMARGARINE.

[1] Sweatt *v.* Boston, &c. R. Co., 3 Cliff. 351 (1871).

[2] Derosia *v.* Winona, &c. R. Co., 18 Minn. 154 (1872).

[3] Cayuga County Bank *v.* Hunt, 2 Hill, 635, 638 (N. Y., 1842); Lunt *v.* Adams, 17 Me. 231 (1840); Flint *v.* Rogers, 15 *id.* 69 (1838).

[4] Brooklyn City R. Co. *v.* Nat. Bank of the Republic, 102 U. S. 25-28 (1880), cases.

[5] Act of 1867, § 35; Walbrun *v.* Babbitt, 16 Wall. 581 (1872), cases.

[6] [Bank of Columbia *v.* Lawrence, 1 Pet. *583 (1828); Stevenson *v.* Primrose, 8 Porter, 155 (Ala., 1838): 33 Am. Dec. 287.

[7] Guinn *v.* Iowa Cent. R. Co., 14 F. R. 324 (1882); McCabe *v.* Illinois Cent. R. Co., 13 *id.* 827 (1882).

BUY. To acquire by giving a consideration, usually money; to purchase, *q. v.*

To buy a note, as opposed to discount a note, see DISCOUNT, 2.

Buy in. To cause property to be offered at public sale, and then to become the purchaser thereof. See AUCTION.

Buying titles. See SEISIN, Disseisin.

Buyer. He who becomes the owner of a thing by paying the price asked; he who acquires or purchases; a purchaser.

See CAVEAT, Emptor; REDEEM; SALE; WAGER, 2.

BY. 1. Near, near to; by the side of; beside — all denoting exclusion.

Used descriptively in a grant, not "in immediate contact with," but "near to" the object.[1]

"By land of A" means along the line of A's land.[2]

A grant of land bounded "by" a fresh-water stream, whether navigable or unnavigable, conveys the soil to the middle line of the stream.[3] See ALONG.

A contract for the doing of a thing "by" a certain day means on *or* before that day.[4] See DAY.

Authorized "by" may mean "in" this State.[5]

By-bidding. See BID.

By-road. See WAY, Private.

By-standers. See TALES.

2. With, through, as the means or mode; as, by the book, by the uplifted hand. See OATH. Compare PER.

3. According to; by authority, direction, or allowance of: as, by agent, by writing filed, by the court, by act and operation of law, by statute, *qq. v.* See also ACCORDING; FORCE, 2.

Staying proceedings until an issue is determined by final judgment in another case may mean to stay the proceedings "according to" the judgment.[6]

4. May be used instead of "to;" as in the sentence "a person whose name is not known by the complainant."[7]

BY-LAW.[8] 1. A law affecting a single village or township; a rule governing the inhabitants of a locality.

"The by-law [of a borough] has the same effect within its limits, and with respect to the persons upon

[1] Wilson *v.* Inloes, 6 Gill, 153 (Md., 1847).

[2] Peaslee *v.* Gee, 19 N. H. 277 (1848).

[3] The Magnolia *v.* Marshall, 39 Miss. 110, 117, 134 (1860).

[4] Coonley *v.* Anderson, 1 Hill, 519, 522 (N. Y., 1841); Rankin *v.* Woodworth, 3 P. & W. 48 (Pa., 1831). See Higley *v.* Gilmer, 3 Monta. 437 (1880).

[5] State *v.* Overton, 16 Nev. 149 (1881).

[6] Haubert *v.* Haworth, 78 Pa. 83 (1875).

[7] Commonwealth *v.* Griffin, 105 Mass. 175 (1870).

[8] Scan. *byr*, a town, a village,— Skeat. A. S. *bilage*, a private law,— Webster. "A law made *obiter*, or by the by," Termes de la Ley (1721).

whom it lawfully operates, as an act of Parliament has upon the subjects at large."[1]

2. A rule or law of a corporation for its own government.

An act of legislation; therefore the formalities required by the charter for its passage must be observed. It may be in the form of a "resolution," although that is not necessarily a by-law.[2]

By-laws are the orders and regulations which a corporation, as one of its legal incidents, has power to make, and which is usually exercised to regulate its own action and concerns and the rights and duties of its members among themselves.[3] See CHARTER, 2; ORDINANCE, 1.

C.

C. 1. In connection with references to statutes means chapter. See STATUTE, 2.

2. In Rhode Island, as late as 1785, was branded upon the forehead as part of the punishment for counterfeiting.

3. As an abbreviation, may also denote case, chancellor, chancery, chief, circuit, civil, code, commissioner, common, counsel, court, criminal, crown:

C. A. Chancery appeals; court of appeals.

C. A. V. *Curia advisari vult.* The court wishes to consider the matter. See further CURIA, Advisari, etc.

C. B. Chief baron; common bench.

C. C. *Cepi corpus;* chief commissioner; circuit, city, or county court; chancery, civil, criminal, or crown cases; civil code.

C. C. J. Circuit, city, or county court judge.

C. C. P. Code of civil procedure: court of common pleas.

C. D. Commissioners' (patent) decisions.

C. J. Chief justice; circuit judge.

C. J. B. Chief judge in bankruptcy.

C. L. Civil law; common law.

C. L. P. Common law procedure.

C. O. D. Collect (*q. v.*) on delivery.

C. P. Common pleas (court).

C. q. t. (or *c. q. t.*). *Cestui que trust*, q. v.

C. R. Chancery reports; *curia regis*, the king's court.

C. t. a. (usually, *c. t. a.*). *Cum testamento annexo*, with the will attached. See ADMINISTER, 4.

CABINET. See DEPARTMENT; PRESIDENT.

CABLE. See COMMERCE; TELEGRAPH.

The act of Congress approved February 29, 1888 (25 St. L. 41), entitled an act to carry into effect the International Convention of March 14, 1884, for the protection of submarine cables, provides:

"Section 1. That any person who shall willfully and wrongfully break or injure, or attempt to break or injure, or who shall in any manner procure, counsel, aid, abet, or be accessory to such breaking or injury, or attempt to break or injure, a submarine cable, in such manner as to interrupt or embarrass, in whole or in part, telegraphic communication, shall be guilty of a misdemeanor, and, on conviction thereof, shall be liable to imprisonment for a term not exceeding two years, or to a fine not exceeding five thousand dollars, or to both fine and imprisonment, at the discretion of the court."

"Sec. 2. That any person who by culpable negligence shall break or injure a submarine cable in such manner as to interrupt or embarrass, in whole or in part, telegraphic communication, shall be guilty of a misdemeanor, and, on conviction thereof, shall be liable to imprisonment for a term not exceeding three months, or to a fine not exceeding five hundred dollars, or to both fine and imprisonment, at the discretion of the court."

Sec. 3. The foregoing sections shall not apply to a person who breaks or injures a cable in an effort to save life or limb, or to save his own or any other vessel: *Provided*, that he takes reasonable precautions to avoid such breaking or injury.

"Sec. 4. That the master of any vessel which, while engaged in laying or repairing submarine cables, shall fail to observe the rules concerning signals that have been or shall hereafter be adopted by the parties to the convention with a view to preventing collisions at sea: or the master of any vessel that, perceiving, or being able to perceive the said signals displayed upon a telegraph ship engaged in repairing a cable, shall not withdraw to or keep at a distance of at least one nautical mile; or the master of any vessel that seeing or being able to see buoys intended to mark the position of a cable when being laid or when out of order or broken, shall not keep at a distance of at least a quarter of a nautical mile, shall be guilty of a misdemeanor, and on conviction thereof, shall be liable to imprisonment for a term not exceeding one month, or to a fine of not exceeding five hundred dollars."

Sec. 5. The master of any fishing vessel who shall not keep his implements or nets at a distance of at least one nautical mile from a vessel engaged in laying or repairing a cable, or at a distance of at least a quarter of a nautical mile from a buoy intended to mark the position of a cable when being laid or when out of order or broken, shall be guilty of a misdemeanor, and on conviction be liable to imprisonment for a term not exceeding ten days, or to a fine not exceeding two hundred and fifty dollars, or to both fine

[1] Hopkins v. Mayor of Swansea, 4 M. & W. *640 (1839), Ld. Abinger, C. B.

[2] Drake v. Hudson River R. Co., 7 Barb. 539 (1849). Compare Compton v. Van Volkenburgh, &c. R. Co., 34 N. J. L. 135 (1870).

[3] Commonwealth v. Turner, 1 Cush. 496 (1848), Shaw, C. J.

and imprisonment, at the discretion of the court: *Provided, however*, that fishing vessels, on perceiving or being able to perceive the said signals displayed on a telegraph ship, shall be allowed such time as may be necessary to obey the notice thus given, not exceeding twenty-four hours, during which period no obstacle shall be placed in the way of their operations.

Sec. 6. A person commanding a ship of war of the United States or of any foreign state for the time being bound by the convention, or a ship specially commissioned by such government or state, may exercise and perform the duties vested in and imposed on such officer by the convention.

Sec. 7. Any person having the custody of the papers necessary for the preparation of the statements provided for in article ten of the convention who shall refuse to exhibit them or shall violently resist persons having authority according to said article to draw up statements of facts in the exercise of their functions, shall be guilty of a misdemeanor, and on conviction thereof shall be liable to imprisonment not exceeding two years, or to a fine not exceeding five thousand dollars, or to both fine and imprisonment, at the discretion of the court.

Sec. 8. The penalties provided for the breaking or injury of a cable shall not be a bar to a suit for damages.

Sec. 9. When an offense against this act shall have been committed by means of a vessel, or of any boat belonging to it, the master of such vessel shall, unless some other person is shown to have been in charge, be deemed to have been navigating the same, and be liable to be punished accordingly.

Sec. 10. Unless the context of this act otherwise requires, the term "vessel" shall be taken to mean every description of vessel used in navigation, in whatever way it is propelled; "master" every person having command or charge of a vessel; and "person" to include a body of persons, corporate or incorporate. "Convention" shall mean the International Convention for the Protection of Submarine Cables, made at Paris, May 14, 1884, and proclaimed by the President of the United States May 22, 1885.

Sec. 11. The provisions of the Revised Statutes, from § 4300 to 4305 inclusive, for the summary trial of offenses against the navigation laws, shall extend to offenses against sections four and five of this act.

Sec. 12. This act shall apply only to cables to which the convention for the time being applies.

Sec. 13. The district courts of the United States shall have jurisdiction over all offenses against this act and of all suits of a civil nature arising thereunder, whether the infraction complained of shall have been committed within or outside of the territorial waters of the United States: *Provided*, that in case such infraction is committed outside of said waters the vessel is a vessel of the United States. From decrees and judgments, appeals and writs of error shall be allowed as now provided by law in other cases. Criminal actions and proceedings shall be prosecuted in the district court for the district within which the offense was committed, and when not committed within any judicial district, then in the district court for the district within which the offender may be found; and suits of a civil nature may be commenced in the district court for any district within which the defendant may be found and shall be served with process.

CADET. See GRADUATE.

Naval cadets, by settled usage which has the force of law, are appointed by certificates under the hand and seal of the secretary of war. They are inferior officers who, for purposes of instruction, may be required to serve as officers, non-commissioned officers, or privates.[1]

CADIT. See QUÆSTIO, Cadit.

CÆTERA. See ADMINISTER, 4; ET, Etc.

CALENDAR. 1. The division of time into years, months, weeks, and days, and a register of them.

The *pontifex maximus* on the first of every month proclaimed — Lat. *calare* — the month, with its festivals and the time of the new moon. From *calare* was derived "calendar." The first day of the month in the Roman calendar was called the *calendæ*, the calends.[2]

Calendar month. A solar month, known as January, February, etc.; distinguished from a lunar month of twenty-eight days. See further MONTH.

2. A list of causes arranged for trial or argument; a list; a docket.[3]

The calendar of a criminal court gives the names of offenders and prosecutors, the nature of the charges, from what magistrates certified, numbers and terms of the cases, and like particulars.

The calendar of a civil court contains the names of the parties plaintiff and defendant, the names of counsel, the nature of the demand in each case, the defense or plea, the number and term of the case, and, in courts of review, the name of the lower court from which removed.

CALIFORNIA. See CHINESE; PUEBLO.

CALL. 1, *v.* (1) To require a prisoner to present himself and answer the indictment, in the immediate presence of the court, is to call him to or before the bar.[4] See ARRAIGN.

(2) To admit to the rights and privileges of a practitioner of law is to call a student-at-law to the bar.

In England, "call-day" is the day in each term when those who have been students are admitted to practice law.

Call a case. For a judge to announce that a cause is about to be placed on a particular list, or to proclaim that a cause on

[1] Babbitt *v.* United States, 16 Ct. Cl. 203, 215–17 (1880). See United States *v.* Morton, 112 U. S. 1, 3 (1884). As to cadet-engineers, see also United States *v.* Redgrave, 116 *id.* 474 (1886); United States *v.* Perkins, *ib.* 483 (1886).

[2] Rives *v.* Guthrie, 1 Jones L. 86–87 (N. C., 1853), Nash, C. J.

[3] See Titley *v.* Kaehler, 9 Bradw. 539 (1881).

[4] [4 Bl. Com. 322.]

such list may now be determined by a trial by a jury or by argument before the court.

Call a list or docket. To inquire publicly in open court as to what causes on a list are ready for trial; also, to call for trial or argument certain causes already set or fixed for such determination.[1]

Whence, in the practice of some courts, the "first," the "second," and perhaps the "third" call of a case or list; also "the call."

Call a jury. To draw the names of persons to serve as a jury, out of the names of all of those who have been summoned as jurors.

Call a party. To call aloud his name in open court, and to command him to appear in order to perform some duty.

Call the plaintiff. At common law, when counsel for the plaintiff perceives that his client has not made out a case, the client may withdraw from the court room: whereupon the crier is required to call the plaintiff. If he does not answer the call (made thrice in succession), judgment of nonsuit is entered.[2]

The nonsuit is more eligible for the plaintiff than a verdict against him.[3]

Call a witness. To call his name aloud in, and perhaps about, the room of the court at which he has been subpœnaed to appear, before an attachment issues for disobedience.

Also, to present a witness for examination in a trial or hearing then in progress.

Recalling a witness, who has been once examined and dismissed, is a matter almost wholly within the discretion of the trial court.[4] See PRODUCE, 1.

2, *n.* (1) A notice or demand by the directors of a stock corporation upon a subscriber to pay money on account of his shares.

The word may refer to the resolution, its notification, or the time when it becomes payable.[4]

A court of equity may enforce payment of stock subscriptions though there have been no calls for them by the company. . . . Subscriptions are in the nature of a fund for the payment of debts, and calls may be made whenever funds are needed for such payment. . . . A formal call need not be made before a bill in equity is filed: filing the bill is equivalent to a call.[5] See PUT, 3; STOCK, 3 (2).

(2) A designation of the limit of a boundary.

A "locative call" refers to a physical object rather than to a course or distance. See further BOUNDARY.

CALLING. See BUSINESS.

CAMP-MEETING. See WORSHIP.

The Massachusetts statute of 1867, c. 57, which prohibits a person, during the time a camp or field meeting is being held for religious purposes, and within one mile of the place, from maintaining a building for vending provisions or refreshments without permission of the officers of the meeting, and which provides that a person having a regular and established place of business shall not be required to suspend his business, is constitutional.[1]

The Pennsylvania act of May 8, 1878,[2] prohibits disposing of any kind of merchandise, within one mile of any camp-meeting held for religious worship, under a fine of not more than one hundred dollars or imprisonment of not more than six months, or both; the act not applying to persons having written permit from the managers of the meeting, nor to persons regularly engaged in business, nor to farmers who sell the products of their farms upon the same. And the act of March 23, 1876,[3] provides that a judge of the court of common pleas of the particular county may appoint as policemen such persons as the association may designate; each to possess the powers of a constable; to enforce obedience to all reasonable regulations of the association not inconsistent with the constitution and laws of the State; to detain offenders twelve hours, if need be, exclusive of Sunday, until they can be carried before the nearest justice of the peace; and to wear a metallic shield with "camp police" and the name of the association inscribed thereon, in plain view — except when employed as detectives.

CAMPBELL'S ACT. See ACTIO, Personalis, etc.

CAN. Compare CASE, 4.

CANAL. Applied to an artificial passage for water, includes the banks, and refers to the excavation or channel as a receptacle for the water.[4]

As used in an Internal Improvement Act, a navigable public highway, for the transportation of persons and property. . . . There must be a canal fitted in all respects for navigation and open to public use before benefits can accrue to the owner to overcome his claim for damages.[5]

The title of owners of land abutting on a canal extends to the line of the canal, subject to the use of the bank by the owners of the canal for purposes of commerce.[6]

[1] See Blanchard *v.* Ferdinand, 132 Mass. 391 (1882).
[2] 3 Bl. Com. 376.
[3] Keating *v.* Brown 30 Minn. 10 (1882).
[4] Ambergate, &c. R. Co. *v.* Mitchell, 4 Ex. R. *543 (1849), Parke, B.
[5] Hatch *v.* Dana, 101 U. S. 214-15 (1879), Strong, J.

[1] Commonwealth *v.* Bearse, 132 Mass. 542, 551 (1882).
[2] P. L. 63.
[3] P. L. 9.
[4] Bishop *v.* Seeley, 18 Conn. *394 (1847).
[5] Kennedy *v.* City of Indianapolis, 108 U. S. 604 (1882), Waite, C. J.
[6] Morgan *v.* Bass, 14 F. R. 454 (1882).

A general grant of premises upon the bank of a river, in which is constructed a canal, conveys the grantor's right to the river's center. Where the canal company, as such, has the right only to use the bed and water, at dissolution such right reverts to the proper owners.[1]

Navigable water situated as is the Illinois and Lake Michigan canal,—a highway for commerce between ports and places in different States,—is public water of the United States, within admiralty jurisdiction, although the canal is wholly within the body of the State of Illinois.[2]

See COMMERCE; TOLL, 2.

CANCEL.[3] 1. To draw lines over the face of an instrument, in the form of lattice-work. 2. To obliterate, deface, efface, expunge; to do away with, set aside, strike out of existence. 3. To satisfy, pay.

A deed may be rendered of no effect by delivering it up to be canceled; that is, to have lines drawn over it in the form of lattice-work: though the phrase is now used figuratively for any manner of obliteration or defacing it.[4]

To draw cross-lines over the face of an instrument is a common mode of showing an intention thereby to make an end of it as an instrument in force. In earlier times, when few persons could write, the mass of men could manifest their intention, with pen and ink, only by unlettered marks. . . When the instrument is so marked by the maker as to show clearly that the act was designed to be a canceling, that act becomes effectual as a revocation of a will by canceling.[5]

Cancel is not a technical word. In a statute of wills it is presumed to retain its popular meaning. . . A canceled bond or note has meant exclusively a bond or note over which lattice-work lines have been drawn. . . Revocation of a will by cancellation means by any act done to the paper which, in common understanding, is regarded as cancellation when done to any other instrument.[6]

In a contract, may not be equivalent to rescind; may mean no more than "doing away with" an existing agreement upon the terms, with the consequences, mentioned.[7]

Cancellation will be ordered, by a court of equity, of a writing which was obtained without consideration, or which became a nullity, or which may cause injury to the plaintiff, or be used to vex him after the evidence to impeach it has been lost, or which may throw a cloud over his title.[8]

Cancellation destroys a deed, annulling all covenants, as far as the deed is executory. It will not revest in the grantor an estate once completely transferred to another.[1]

"Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud unless the fraud be made clearly to appear; never for alleged false representations unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."[2] See PATENT, 2.

Compare NULL; RESCISSION; VACATE; VOID.

CANDIDATE. One who seeks or aspires to some office or privilege, or who offers himself for the same.

In a constitutional provision that any person who, while a candidate for office, shall be guilty of bribery, etc., is used in that popular sense: any one who seeks an office, whether nominated or not.[3]

See BRIBERY; LEGAL, Illegal; LIBEL, 3; LIBERTY, 1, Of the press.

CANISTER. See CASE, 4.

CANON.[4] A rule; a law.

Canon law. Ecclesiastical law.

In particular, a body of ecclesiastical laws relative to matters over which the church of Rome had or claims to have had jurisdiction.[5]

Compiled from opinions of the fathers, decrees of councils, and decretal epistles and bulls of the holy see. Received, in England, by immemorial custom, or else by consent of parliament; otherwise, ranked as unwritten law.[6]

Canons of construction. Rules of construction, *q. v.*

Canons of descent or of inheritance. The rules which regulate the descent of inheritances; the rules according to which estates are transmitted from ancestor to heir.[6] See further DESCENT.

CAP. When a person, who has been sentenced to capital punishment by hanging, is about to be executed, it is customary to place over his head and neck a sack or bag, which, from the color of the material, is called the **white cap** or **black cap, and,** generally, the "**death cap.**"

In England and Canada, when a judge formally passes sentence of death upon a prisoner, he usually

[1] Day *v.* Pittsburgh, &c. R. Co., 44 Ohio St. 415 (1886); Pittsburgh, &c. R. Co. *v.* Bruce, 102 Pa. 33 (1882).

[2] *Exp.* Boyer, 109 U. S. 632 (1884).

[3] L. L. *cancellare*, to draw lines across: L. *cancelli*, lattice-work. Compare CHANCERY.

[4] 2 Bl. Com. 309.

[5] Warner *v.* Warner's Estate, 37 Vt. 362-63 (1864).

[6] Evans's Appeal, 58 Pa. 242-44 (1868), Strong, J. See also Ladd's Will, 60 Wis. 189-99 (1884), cases, Cassoday, J.

[7] Winton *v.* Spring, 18 Cal. 455 (1861); Weil *v.* Jones, 28 *id.* 47 (1878).

[8] 1 Story, Eq. §§ 693-711; 17 Blatch. 145.

[1] See 4 Kent, 452; 1 Greenl. Ev. § 265.

[2] Atlantic Delaine Company *v.* James, 94 U. S. 214 (1876), Strong, J. Approved, Union R. Co. *v.* Hull, 124 *id.* 183 (1888), Harlan, J.

[3] Leonard *v.* Commonwealth, 112 Pa. 624 (1886): Webster; Const. Penn. Art. VIII, sec. 9.

[4] Gk. *kanōn'*, a reed, rod, rule.

[5] 1 Bl. Com. 82, 79, 19. See 2 Steph. Hist. Cr. L. Eng. 440; 25 Hen. VIII, c. 19; 1 Eliz. c. 1.

[6] 2 Bl. Com. 208.

wears a "black cap." Some writers trace the practice to the ancient custom by which rulers covered the head on occasions of great solemnity; while other writers find its origin in a prohibition against persons in holy orders (from which class the judges were largely selected) imposing the death penalty — as officials of the church. Since it was obligatory that such sentences should be pronounced, the judges, on such occasions, were supposed to lay aside their ecclesiastical character by "covering the clerical tonsure" with the black cap which all judges in early days wore as a part of their official dress.[1]

CAPACITY. Ability to take, do, act: competency, qualification, fitness, power. See CAPAX.

1. Power or fitness to perform a particular legal act; mental qualification: as, capacity to enter into a contract, disposing or testamentary capacity.

Capacity for guilt: will joined with an act.[2]

The test of capacity to make an agreement or a conveyance is, that a man shall have the ability to understand the nature and effect of the act in which he is engaged.[3] See INFLUENCE.

2. Character or function, relation or office, invested or conferred by law: as, capacity to act as an executor, administrator, guardian, trustee, referee, judge, sheriff, or other officer.

Whence also fiduciary, judicial, ministerial capacity; professional capacity; men in public capacity — see LIBEL, 5; DESCRIPTIO, Personæ.

CAPAX. L. Receiving or containing: able, fit for; having capacity, *q. v.*

Capax doli. Competent to intend wrong, to commit a crime. **Doli incapax:** incapable of committing crime. See further DOLUS.

Capax negotii. Competent to transact business.

CAPERE. L. To take, seize; to arrest.

Capias. That you take. A common-law writ commanding the sheriff to take a defendant into custody.

Named from the emphatic word in the writ when expressed in Latin.

Has come to designate the whole class of writs by which arrests are made by a constable, sheriff, or marshal. The species are:

Capias ad respondendum. That you take for answering: arrest (and imprison) the defendant so that you have him in person before the court on a certain day to answer the plaintiff's complaint.

Serves the purpose of compelling an appearance in court, on the part of a defendant, in actions of tort, in which damages are claimed, as, in actions for slander, libel, false arrest, malicious prosecution, and other trespasses. Being the species of the writ most frequently issued, is often designated as a or the "*capias.*"[1] See PROCESS, 1.

Capias ad satisfaciendum. That you take for satisfying: arrest (and imprison) the defendant so that you may have him in court on a given day, in order that he may then and there pay the plaintiff such debt, damages, and costs as he may recover. Abbreviated *ca. sa.*

At common law, after this writ no other process could be issued against a debtor's property. The early use of the writ has been restricted by statutes abolishing imprisonment for debt or facilitating the discharge of debtors, in cases in which no fraud is shown to have been practiced.[2]

Capias in withernam.[3] That you take in reprisal; that you distrain for a distress.

A writ for seizing property of a distrainor on account of property concealed, eloigned, or otherwise withheld by him so that it could not be replevied.[4] See ELOIGN.

Capias utlagatum. That you arrest the outlaw, *q. v.*

Cepi. I have taken, or arrested. The distinctive word in old Latin forms of returns of service to orders for making arrests.

Cepi corpus. I have taken the body,— arrested the defendant. Abbreviated C. C.

Cepi corpus et bail bond. I have arrested the defendant and discharged him on a bail bond. Abbreviated C. C. et B. B.

Cepi corpus et committitur. I have arrested and imprisoned the defendant. Abbreviated C. C. et C.

Cepi corpus et est custodia. I have arrested the defendant and he is in custody.

Cepi corpus et est languidus. I have arrested the defendant and he is sick. See LANGUIDUS.

Cepi corpus et paratum habeo. I have arrested the defendant and have him in readiness. See ARREST, 2; BAIL, 1 (2).

Cepit. He took. The emphatic word in the Latin writs of trespass for taking personalty, and in declarations in trespass and replevin. Still used as descriptive of the action,

[1] See 22 Am. Law Rev. 121 (1888).

[2] 4 Bl. Com. 20.

[3] Eaton *v.* Eaton, 37 N. J. L. 113 (1874); 2 Bl. Com. 200.

[1] See 3 Bl. Com. 414.

[2] See 4 Bl. Com. 319.

[3] With'-er-nam is A. S. *widher*, against, and *néman*, to seize.

[4] See 3 Bl. Com. 149.

as in replevin for a mere taking — when the action is said to be "in the *cepit*." See Non Cepit.

Cepit et abduxit. He seized or took and led away — a person, or a living chattel.

Cepit et asportavit. He took and carried away — an inanimate thing, goods. See ASPORTARE; CARRY, 1.

Cepit in alio loco. He took in another place — than that declared upon. A plea in replevin justifying the taking and claiming a return.

Non cepit. He did not take. The general issue in replevin: denies taking and detaining.

CAPIAS. See CAPERE, Capias.

CAPITA. See CAPUT, Capita.

CAPITAL.[1] 1, *adj.* For which death is the penalty: as, a capital offense.

Probably from "decapitation," once a common mode of executing the sentence of death.

Those judgments are capital which extend to the life of the offender, and consist, generally, in his being hanged by the neck till dead.[2] See DEATH, Penalty.

2, *n.* Money or property invested in a business enterprise.

The actual estate, whether in money or property, which is owned by an individual or a corporation.[3]

The chief thing, the head, the beginning and basis of an undertaking or enterprise. . . "Capital" and "capital stock," in ordinary parlance, when applied to combinations or associations for transacting business, have the same meaning, the former being an abbreviation of the latter.[4]

Used with respect to the property of a corporation or association, the term "capital" has a settled meaning. It applies only to the property or means contributed by the stockholders as the fund or basis for the business or enterprise for which the corporation or association was formed. . . Referring to the property of individuals in any particular business, the term has substantially the same import. It then means the property taken from other investments or uses and set apart for and invested in the special business, and in the increase, proceeds or earnings of which property, beyond expenditures incurred in its use, consists the profits made in the business.[1]

It does not, any more than when used with respect to corporations, embrace temporary loans in the regular course of business.[1] See MONEYED.

"Capital stock," or "shares of capital stock," signifies the sum upon which calls may be made upon the holders of the stock of a corporation, and upon which dividends are declared.[2] See further STOCK, 3 (2).

CAPITATION. See TAX, 2.

CAPTION. 1. A taking, a seizure, *q. v.*; an arrest; a capture, *q. v.* See also CAPERE.

Recaption. When any one deprives another of his personal property, or wrongfully detains his wife, child, or servant.[3]

The owner of the goods, and the husband, parent, or master, may claim and retake them wherever he finds them, so that it be not attended with a breach of the peace. The owner may have this only opportunity to do himself justice.[3] See DEFENSE, 1.

2. The heading of a legal document, in which is shown the time when, the place where, and the person by whose authority, it was prepared or executed.

This use of the word is not warranted by its derivation — *captio*, a taking, and not *caput*, a head; but it is quite common in law books.

Though usual, is not necessary to an affidavit.[4]

When an inferior court, in obedience to the mandate of the king's bench, transmitted an indictment to the crown office, it was accompanied with its history — naming the court in which, the jurors by whom, and the time and place when and where, it was found. All this was entered of record by the clerk of the superior court immediately before the indictment, and was called the "caption," but was not then and is not now a part of the indictment itself.[5]

See AFFIDAVIT; COMMENCE, Indictment; TITLE, 2.

CAPTURE. A taking, seizure. See CAPERE.

In the law of marine insurance, any unlawful taking by force, including a piratical taking as well as such as is made *jure belli*.[6]

Synonymous with prize (*q. v.*), as used in Europe. The popular use of a taking by force or violence from without, to which a vessel in the course of a maritime adventure might be exposed, corresponds with the use in marine insurance.[6]

A taking by the enemy of a vessel or its cargo as prize, in time of open war, or by

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[1] L. *capitalis*, chief: *caput*, the head.

[2] 4 Bl. Com. 376.

[3] People *v.* Commissioners, 23 N. Y. 219 (1861), Comstock, C. J.

[4] San Francisco *v.* Spring Valley Water Works, 63 Cal. 529 (1883), Thornton, J.; Gas Light Co. *v.* Assessors, 31 La. An. 477 (1879), Manning, C. J.

[1] Bailey *v.* Clark, 21 Wall. 286–87 (1874), Field, J.

[2] Sanger *v.* Upton, 91 U. S. 60, 47 (1875), Swayne, J.

[3] [3 Bl. Com. 4.

[4] Harris *v.* Lester, 80 Ill. 311 (1875).

[5] People *v.* Bennett, 37 N. Y. 122 (1867); *Exp.* Bain, 121 U. S. 7 (1887): Starkie, Cr. Pl. p. 287.

[6] Dole *v.* New England Mut. Mar. Ins. Co., 6 Allen, 386–90 (1863), Bigelow, C. J. See Fifield *v.* Ins. Co. of Penn., 47 Pa. 176–77, 189 (1864), cases.

way of reprisal, with intent to deprive the owner of it.[1]

This was probably the primary idea in instruments of marine insurance. Losses of ships and cargo engaged in commerce, by the public enemy, were the most to be apprehended and provided against. But usage, and the course of decisions by the courts, have very much widened this meaning, and it now may embrace —

The taking of a neutral ship and cargo by a belligerent *jure belli;* also, the taking forcibly by a friendly power, in time of peace, and even by the government itself to which the assured belongs.[1]

Technically, a taking by military power; a seizure, a taking by civil authority.[2]

"Captured property" may mean property seized or taken from hostile possession by the military or naval forces of the United States.[3]

As to **recapture**, see POSTLIMINY. See also RANSOM.

CAPUT. L. A head, the head; an individual.

Æstimatio capitis. The value of a head: the worth of a life.

In Saxon law, a prescribed sum to be paid for an unlawful taking of another man's life. In modern law, the amount of damages recoverable for causing a death.

Capita. Heads: bodies; individual persons.

Per capita. By heads: according to the individuals. Opposed, *per stirpes*, by the ancestor.

In distributing the personalty of an intestate, the persons entitled thereto are said to take *per capita* when they claim in their own rights as in equal degree of kindred, and not in right of another — *per stirpes*. This rule of succession was borrowed from the civil law. The common-law rule was the *per stirpes* rule.[4]

Caput lupinum. A wolf's head: an outlawed felon — who might be knocked on the head like a wolf.[5]

Caput mortuum. A dead head: a matter of no legal validity; a thing void as to all persons and for all purposes.[6]

CAR. See CARRIER, Common; RAILROAD.

Car load. A contract for a certain number of car loads of ice was held not void for uncertainty, that the quantity contemplated could be made certain by averment and proof.[1] See also CARRIAGE, 1.

CARDS. See GAME, 2.

CARE. Attention, caution, circumspection, vigilance, diligence.

Due care. In cases where the gist of the action is negligence, implies not only that a party has not been negligent or careless, but that he has been guilty of no violation of law in relation to the subject-matter or transaction which constitutes the cause of action.[2]

Great care. The degree of attention which a very thoughtful man exercises toward securing his own interests.

Ordinary care. That degree of care which every person of ordinary prudence takes of his own concerns.[3]

In the law of bailment, that degree of care which, under the same circumstances, a person of ordinary prudence would take of the particular thing were it his own.[4]

Ordinary care, skill, and diligence is such a degree of care, skill, and diligence as men of ordinary prudence, under similar circumstances, usually employ.[5]

Ordinary care implies the exercise of reasonable diligence, and reasonable diligence, as between a corporation and its employees, implies such watchfulness, caution, and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise.[6]

The same degree of care which a railroad company should take in providing and maintaining its machinery must be observed in selecting and retaining its employees, including telegraphic operators. Ordinary care on its part implies, as between it and its employees, not simply the degree of diligence which is customary among those intrusted with the management of railroad property, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences that may result from negligence on the part of employees, is fairly commensurate with the perils or dangers likely to be encountered. . . A degree of care ordinarily exercised in such matters may not be due, or reasonable, or proper care, and therefore not ordinary care, within the meaning of the law.[6]

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[1] Mauran *v.* Alliance Ins. Co., 6 Wall. 10 (1867), Nelson, J.

[2] United States *v.* Athens Armory, 2 Abb. C. C. 137 (1868).

[3] United States *v.* Padelford, 9 Wall. 540 (1869).

[4] See 2 Bl. Com. 517, 218; 49 Conn. 222; 143 Mass. 239; 91 N. Y. 445-47.

[5] 4 Bl. Com. 220.

[6] See 96 U. S. 195-96.

[1] Schreiber *v.* Butler, 84 Ind. 576 (1882).

[2] Jones *v.* Inhabitants of Andover, 10 Allen, 20 (1865), Bigelow, C. J.

[3] 2 Pars. Contr. 87, tit. Bailment.

[4] [Heathcock *v.* Pennington, 11 Ired. L. 643 (1850), Ruffin, C. J.

[5] Brown *v.* Lynn, 31 Pa. 512 (1858), Williams, J.

[6] Wabash Ry. Co. *v.* McDaniels, 107 U. S. 460-61 (1882), Harlan, J. See also 25 Ind. 197; 74 Me. 497; 104 Mass. 101; 132 *id.* 426; 58 N. H. 528; 10 Oreg. 254; 41 Eng. C. Law, 425.

Reasonable care. The care and foresight which men of ordinary prudence are accustomed to employ.[1]

Care exercised in proportion to the danger of doing harm to others.[2]

A relative term, with no fixed meaning. The caution which persons of ordinary prudence would exercise in any given case is "reasonable care" in law. That care which under some circumstances would be reasonable care might under other circumstances be gross negligence.[3]

Slight care. The degree of care which every man of common sense, though inattentive to his own affairs, applies to them.[4]

See further CARRIER; CAUTION; DILIGENCE; DUTY, 1; KNOWLEDGE, 1; NEGLIGENCE; PRUDENCE.

CARGO. Goods on board of a vessel.[5]

All the merchandise and effects laden on board a ship, exclusive of persons, rigging, ammunition, provisions, guns, etc. What is laden on board as merchandise.[6]

Generally speaking, the entire load of the ship.[7]

See BOTTOMRY; CHARTER-PARTY; COLLISION, 2; DISPATCH; HYPOTHECATE; SAIL; SALVAGE; SHIP, 2.

CARICATURE. See LIBEL, 5.

CARLISLE TABLES. See TABLE, 4.

CARNAL. See KNOWLEDGE, 2.

CARPENTER. See CONTRACTOR; MANUFACTURER.

CARRIAGE. 1. The act of carrying: transportation, conveyance; also, that which carries or conveys.

To the ordinary mind, does not convey the idea of a railroad or street railway car, nor of a wheeled vehicle for the transportation of merchandise or products used in ordinary business. The idea is a vehicle for the transportation of persons for pleasure or business, drawn by horses or other draught animals over the ordinary streets and highways of the country, and not that of a "car" used upon a railroad or street railway expressly constructed therefor. As yet, in this country, the vehicles used for transporting passengers on railroads and street railways are generally called cars, occasionally coaches; seldom, if ever, carriages. The definition given by the older lexicographers of "carriage" was very general and indefinite, while that given in our own times is more in consonance with the restricted meaning of the word as understood by people in general. In a bill of lading therefore, a "carriage" will not include a street car.[1]

See BICYCLE; CARRIER; FREIGHT; VEHICLE.

2. Manner of carrying one's self, behavior. See BEHAVIOR; LASCIVIOUS.

CARRIER. One who engages to transport persons or property.

Common carrier. One who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place.[2] **Private or special carrier.** One who agrees in a special case, with some private individual, to carry for hire.[3]

A common carrier holds himself out "in common," that is, to all persons who choose to employ him, as ready to carry for them.[3]

If it is his legal duty to carry for all alike, who comply with the terms as to freight, etc., he is a common carrier; if he may carry or not, as he deems best, he is but a private individual, and may make such contracts as suit himself.[4]

A private carrier, like an ordinary bailee for hire, is only liable for the injury or loss of the goods intrusted to him when it results from the failure of himself or his servant to exercise ordinary care. He is not bound to carry for any person unless he enters into a special agreement to do so.[5] He is not an insurer, but must use care and skill.[6] The bailor must prove negligence.

A common carrier is bound to carry for all who offer such goods as he is accustomed to carry, and who tender reasonable compensation for carrying them. If he refuses to perform his obligation in this respect he may be held liable in damages.[6]

Common carriers are classified as carriers of goods or merchandise, and as carriers of passengers. Their office is *quasi* public: the public have an interest in the faithful discharge of the duties. Their property, being devoted to a public use, may be regulated by the legislature.[7]

I. Common Carrier of Goods or Merchandise. To him "common carrier" and "carrier" are applied by way of pre-eminence. His relation, at common law, is that of insurer against all losses except such as result from an act of God or of the public enemy. As against any other cause of loss, the law conclu-

[1] [Johnson *v.* Hudson River R. Co., 6 Duer, 646 (1857).

[2] Dexter *v.* McCready, 54 Conn. 172 (1886), Park, C. J.

[3] Read *v.* Morse, 34 Wis. 318 (1874), Lyon, J. See also 100 U. S. 195; 1 Flip. 18.

[4] [2 Pars. Contr. 87; 20 N. Y. 69.

[5] Seamans *v.* Loring, 1 Mas. 142 (1816), Story, J.

[6] [Thwing *v.* Great West. Ins. Co., 103 Mass. 406-7 (1869), cases, Gray, J.

[7] Macy *v.* Whaling Ins. Co., 9 Metc. 366 (1845); 113 U. S. 49.

[1] [Cream City R. Co. *v.* Chicago, &c. R. Co., 63 Wis. 97 (1885), Taylor, J.

[2] Dwight *v.* Brewster, 1 Pick. 53 (1822), Parker, C. J.

[3] Allen *v.* Sackrider, 37 N. Y. 342 (1867), Parker, J. See also 3 Wend. 161; Story, Contr. § 752, *a*.

[4] Piedmont Manuf. Co. *v.* Columbia, &c. R. Co., 19 S. C. 364 (1883), Simpson, C. J.

[5] Varble *v.* Bigley, 14 Bush, 702-6 (1879), cases.

[6] The Margaret, 94 U. S. 497 (1876), cases. See also 25 Am. Law Reg. 451-61 (1886), cases.

[7] See Munn *v.* Illinois, 94 U. S. 113, 130 (1876). See generally 1 Sm. L. Cas. 406-41, cases.

sively presumes negligence on his part — a rule which proceeds upon the ground of public policy. He and his employer are not on equal terms: the property is within his power, and it would be difficult for the owner to prove misconduct. He may limit the operation of this rule by a special agreement — just and reasonable in itself, not against legal policy, and not exempting him from liability for negligence or misconduct.[1]

Toward avoiding the effects of an overpowering cause, ordinary diligence only is exacted.[2]

He may regulate his business by such rules as are in themselves reasonable, consistent with law and public policy, and distinctly made known to shippers.[3]

For a reasonable cause he may refuse to receive goods.

The common law requires him to charge equal rates for the same service, without discrimination.[4]

He has a right to know both the general nature and the value of packages offered for carriage.[5] But the law does not exact of him knowledge of the contents of a package, nor permit him, in cases free from suspicion, to require information as to the contents, as a condition to transportation.[6]

He has a lien for freight, *q. v.*

On the service of legal process, he may surrender goods into the custody of the law.[7]

The fair result of the cases limits his liability, where no special contract exists, to his own line. But if he undertakes the entire service, he cannot make another carrier the agent of the consignor or consignee.[8]

II. Common Carrier of Passengers. His duty is to carry all persons who apply for transportation, if his accommodations are sufficient and there exists no reasonable objection to the persons.[9]

He may make reasonable regulations for the comfort and safety of the passengers. For non-compliance with a proper regulation, he may expel a passenger. Each passenger is to take at least ordinary care of himself. The carrier is expected to exercise the highest degree of vigilance — he represents that all the means of conveyance are sound, and that his employees will use the utmost of human foresight toward preventing accidents and securing a safe journey.[1]

The engagement of a railroad company is to carry its passengers safely; for an injury arising from a defect in its road, which could have been guarded against by the exercise of proper care, it will be liable in damages. Though a carrier of passengers is not, like a carrier of property, an insurer against all accidents except those caused by an act of God or the public enemy, it is charged with the utmost care and skill in the performance of its duty; which implies not merely the most attention in respect to the movement of cars, but to the condition of the road, and of its ties, rails,— all appliances essential to the safety of the train and passengers. For injuries through negligence, to which the passenger does not contribute by his own act, it is liable.[2]

In guarding passengers from dangers not incident to ordinary railway travel, the rule of liability is less stringent than in the case of the ordinary perils from appliances, servants, and operation of trains; but in no case must the carrier expose the passenger to extra-hazardous dangers that might readily be discovered or anticipated by reasonable and practicable care and foresight.[3]

The standard of duty should be according to the consequences that may ensue from carelessness. The rule has its foundation in public policy. It is approved by experience, and sanctioned by the plainest principles of reason and justice. The courts should not relax it. The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business. . . The rule is beneficial to both parties. It tends to give protection to the traveler, and warns the carrier against the consequences of delinquency.[4]

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[1] See Southern Express Co. *v.* Caldwell, 21 Wall. 267–73 (1874), cases; York Co. *v.* Illinois Central R. Co., 3 *id.* 111–13 (1865), cases; N. Y. Central, &c. R. Co. *v.* Lockwood, 17 *id.* 359–64 (1873), cases; Bank of Kentucky *v.* Adams Express Co., 93 U. S. 181 (1876); Brown *v.* Adams Express Co., 15 W. Va. 816–26 (1879), cases.

[2] Memphis, &c. R. Co. *v.* Reeves, 10 Wall. 189–91 (1869), cases.

[3] New York Central & Hudson River R. Co. *v.* Fraloff, 100 U. S. 27 (1879).

[4] Rothschild *v.* Wabash R. Co., 15 Mo. Ap. 245–46 (1884).

[5] Muser *v.* Holland, 17 Blatch. 414–15 (1880), cases.

[6] Nitro-Glycerine Case, 15 Wall. 535–36 (1872), cases; State *v.* Goss, 59 Vt. 271 (1886), cases.

[7] 2 Pars. Contr. 207.

[8] Michigan Central R. Co. *v.* Manufacturing Co., 16 Wall. 3-4 (1872); Ogdensburg, &c. R. Co. *v.* Pratt, 22 *id.* 129 (1874); Bank of Kentucky *v.* Adams Express Co., 93 U. S. 181 (1876); St. Louis Ins. Co. *v.* Railroad Co., 104 *id.* 157–59 (1881); Myrick *v.* Michigan Central R. Co., 107 *id.* 106–10 (1882), cases; Atchison, &c. R. Co. *v.* Denver, &c. R. Co., 110 *id.* 680 (1884); Keep *v.* Indianapolis, &c. R. Co., 3 McCrary, 208, 214–19 (1881), cases; Aigen *v.* Boston, &c. R. Co., 132 Mass. 425 (1882), cases; Central Trust Co. *v.* Wabash, &c. R. Co., 31 F. R. 248 (1887), cases. On the carriage of freight generally, see 22 Cent. Law J. 79 (1886), cases.

[9] Pearson *v.* Duane, 4 Wall. 615 (1866).

[1] Philadelphia, &c. R. Co. *v.* Derby, 14 How. 486 (1852); Hall *v.* Memphis, &c. R. Co., 15 F. R. 57, 69–97 (1882), cases.

[2] Vicksburg & Meridian R. Co. *v.* O'Brien, 119 U. S. 109 (1886), Field, J.

[3] Chicago, &c. R. Co. *v.* Pillsbury, Ill. Sup. Ct. (Nov. 11, 1887): 26 Cent. Law J. 288; *ib.* 290–92 (1888), cases. The plaintiff took aboard non-union laborers (under police protection) who went into the smoking-car with other passengers, among whom was Pillsbury. The train, while stopping at a crossing (not a station), was boarded by a mob who attacked the laborers, and shot Pillsbury. The company was held liable in damages for his death, on the ground that the attack might have been foreseen and the death of the passenger averted.

[4] Indianapolis, &c. R. Co. *v.* Horst, 93 U. S. 296–97 (1876), cases, Swayne, J. See also 26 Cent. Law J. 50–55 (1888), cases; Hyman *v.* Pennsylvania R. Co., Sup Ct. Pa. (1888).

He is liable for the slightest fault. He cannot by special contract exempt himself from liability for negligence or misconduct. The burden of disproving negligence rests upon him. He must show by affirmative evidence that he exercised the requisite degree of care.[1]

What will be misconduct on the part of servants toward a passenger cannot be defined by a rule applicable to every case, but must depend upon the particular circumstances in which they are required to act. In the enforcement of reasonable regulations established by the carrier for the conduct of its business, the servant may be obliged to use force. But the law will not protect the carrier if the servant uses excessive or unnecessary force.[2]

A passenger upon a railroad, taking a drawing-room car, has a right to assume that the car is there under a contract with the railroad corporation, and that the servants in charge of the car are its servants, for whose acts, in the discharge of their duty, it is liable.[3]

The negligence of a servant of a palace-car company whose car forms part of the carrier's train is negligence in the railroad company, though an additional sum has been paid to the former company.[4] See SLEEPING-CAR.

See further ACCIDENT; ACT, 1, Of God; BAGGAGE; BAILMENT; COMMERCE; DELIVERY, 1; EXPRESS COMPANY; LIEN; NEGLIGENCE; PASSENGER; POLICY, 1; RAILROAD; RIGHT, 2, Civil Rights Acts; STOPPAGE; TORT, 2; TUG-BOAT; WAREHOUSEMAN; WHARFINGER.

CARRY. 1. In the law of larceny, "carry" is not the same as "carry away." "Did take and carry away" is the translation of "*cepit et asportavit*," used in indictments when processes and records were in Latin. "Away" or some other word must be subjoined to "carry" to modify its general signification.[5] See LARCENY.

"Take and haul away" has the same meaning as take and carry away.[6]

2. To bear: as, to "carry a concealed weapon."

Locomotion is not essential.[7] See further WEAPON.

3. When a party becomes entitled to the payment of costs as an incident to a verdict in his favor, the verdict is said to "carry costs." See DAMAGES.

4. That to carry safely is the obligation of a common carrier, see CARRIER.

Carry on. A single act pertaining to a particular business will not constitute one as "carrying on" or engaged in that business.[1]

Making a contract in Colorado to build and to deliver in Ohio certain machinery was held not "carrying on" business in Colorado.[2] See further FIND, 2.

Carry stock. When a broker buys stock and holds it on account of a customer, he is said to "carry stock."[3]

CART. See WAGON.

CARTA. See CHARTA.

CASE. 1. That which happens or comes about; an occurrence; a circumstance to which something applies. Compare CASUS.

In the Revised Statutes, § 5392, limiting perjury to oaths in a case in which the law authorizes an oath to be administered, "case" is not confined to a suit or proceeding in court. The meaning is, the law must authorize the oath under the circumstances existing; as, in justifying bail.[4]

The expression "all cases" often signifies all cases of a particular class only. The generality of the words will be restrained by the context and the general scheme of the instrument.[5]

The words "in case he lives" imply a condition as explicitly as "if," "upon," and the like, and express a contingency.[6] See THEN; UPON, 2.

2. A state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice.[7]

A question contested before a court of justice; an action or suit in law or equity.[8]

An action, suit, or cause, *qq. v.*

In the sense of "a state of facts involving a question for discussion or decision, a cause or suit in court," will include a question pending before a commission authorized to hear and determine matters pertaining to railroads.[9]

The word is applied in New York to at least three abstract ideas: a suit or action at law; the combination of facts upon which each party relies to sustain

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[1] Pennsylvania Co. *v.* Roy, 102 U. S. 456 (1880), cases; Hart *v.* Penn. R. Co., 112 *id.* 333–43 (1884), cases; Waterbury *v.* N. Y. Central, &c. R. Co., 17 F. R. 671, 674–93 (1883), note; 22 Am. Law Rev. 198–202 (1888), cases.

As to contract for non-liability for negligence, see also Griswold *v.* New York, &c. R. Co., 53 Conn. 385–86 (1885), cases, *pro* and *con.*; Lake Shore, &c. R. Co. *v.* Spangler, 44 Ohio St. 476 (1886); Little Rock, &c. R. Co. *v.* Eubanks, 48 Ark. 465 (1886), cases.

[2] New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 646–47 (1887), cases. As to servants, see 28 Cent. Law J. 127 (1888) — Justice of the Peace (Eng.).

[3] Thorpe *v.* N. Y. Central & Hudson River R. Co., 76 N. Y. 402 (1879).

[4] Commonwealth *v.* Adams, 7 Gray, 45 (1856); Commonwealth *v.* Pratt, 132 Mass. 247 (1882).

[5] Spittorff *v.* State, 108 Ind. 172 (1886).

[6] Owen *v.* State, 31 Ala. 389 (1858), Rice, C. J.

[1] Weil *v.* State, 52 Ala. 20–21 (1875); United States *v.* Jackson, 1 Hughes, 532 (1875).

[2] Cooper Manuf. Co. *v.* Ferguson, 113 U. S. 735 (1885).

[3] Peckering *v.* Demerritt, 100 Mass. 421 (1868).

[4] United States *v.* Volz, 14 Blatch. 17 (1876).

[5] Phillips *v.* State, 15 Ga. 521 (1854); 27 Ark. 564. 11 Ohio St. 252; 18 Pa. 388; 118 U. S. 491.

[6] Robert's Appeal, 59 Pa. 72 (1868).

[7] Kundolf *v.* Thalheimer, 12 N. Y. 596 (1855), Gardiner, C. J.

[8] *Exp.* Towles, 48 Tex. 433 (1877), Roberts, C. J.

[9] Smith *v.* City of Waterbury, 54 Conn. 177 (1886).

his side of a controversy; and the aggregation of papers and evidence presented to an appellate court on the argument of an appeal.[1]

Case in judgment. The facts which constitute the case under consideration or already decided.

Case law. That part of the jurisprudence of a country which is deducible from the decisions rendered by the courts; law made by decided cases.

Case reserved. When the jury find a verdict generally for the plaintiff, but subject to the opinion of the court on the special case stated by counsel on both sides with regard to a matter of law.[2]

Case stated. When the parties submit to the court a written statement of the facts in the case as they agree upon them, to obtain a decision upon the question of law arising out of the facts. Also called a "case agreed upon," or "case made."

A case stated is a substitute for a special verdict,[3] *q. v.*

If a question of mere law arises in the course of a cause in chancery, it is referred, for an opinion, to the king's bench or the common pleas, upon a case stated for that purpose, wherein all the material facts are admitted, and the point of law is submitted to their decision.[4]

Cases and controversies. By "cases and controversies," in the judicial article of the Constitution, are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties takes such a form that the judicial power is capable of acting upon it, it becomes a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.[5]

The term "controversies," if distinguishable from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.[6] See CONTROVERSY; JUDICIAL, Power.

See also ADMIRALTY; FICTITIOUS; LEADING; MERITS; OVERRULED; REPORT, 1 (3); TABLE, Of cases.

[1] [15 Alb. Law J. 242 (1877).

[2] [3 Bl. Com. 378.

[3] Whitesides *v.* Russell, 8 W. & S. 47 (1844).

[4] 3 Bl. Com. 453.

[5] *Re* Pacific Railway Commission, 32 F. R. 265 (1887), Field, J.

8. In pleading, a term for "action on the case," "trespass on the case," "special action of trespass on the case"—a common-law form of action.

A generic term, embracing many different species of actions, those of most frequent use being *assumpsit* and trover.[1]

A remedy for all personal wrongs committed without force—where the injury is consequential. Called "case" because the plaintiff's whole cause of complaint is set forth at length.[2]

Where the act done is in itself an immediate injury the remedy is by an action of trespass *vi et armis*. Where there is only a culpable omission, or where the act is not immediately injurious, but only consequentially and collaterally so, the remedy is by an action on the special case for the damages consequent on such act or omission.[3]

Where any special consequential damage arises, which could not be foreseen and provided for in the ordinary course of justice, the party is allowed, by common law and by statute of Westminster 2, c. 24, to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his particular grievance.[4] See CASUS, Consimili casu.

The action of case lies for a tort not committed with force, actual or implied; for a tort committed forcibly where the matter affected was not tangible, as for an injury to a right of way or to a franchise; for an injury to a relative right; for an injury resulting from negligence; for a wrongful act done under legal process regularly issued from a court of competent jurisdiction; for a wrongful act committed by defendant's servant without his order, but for which he is still responsible; for the infringement of a right given by statute; for an injury done to property of which the plaintiff has the reversion only.

Damages not necessarily resulting from the act complained of must be alleged specially. The plea "not guilty" raises the general issue; and under this plea almost any matter of defense, except the statute of limitations, may be given in evidence. In some States the distinction between "trespass" and "case" has been abolished.

See AMENDMENT, 1; DAMAGES, Special; TRESPASS.

4. A chest, box, or package.

By statute 35 and 36 Vict. (1872), c. 77, s. 23, no explosive or inflammable substance shall be taken into a mine "except in a case or canister," etc. *Held*, that "case" means something solid and substantial in the nature of a canister, and that a package like a bag of linen or calico was not contemplated.[5]

[1] [Carrol *v.* Green, 92 U. S. 513 (1875), Swayne, J.

[2] [3 Bl. Com. 122, 154.

[3] 3 Bl. Com. 123; Scott *v.* Shepherd, 2 W. Bl. 892 (1773): 1 Sm. L. C., Part I, *754-69; Cooley, Torts, 70; 36 Conn. 182, 186.

[4] 3 Bl. Com. 122-23, 50-51.

[5] Foster *v.* Diphwys Casson Slate Co., L. R., 18 Q. B. D. 428 (1887).

CASH. In all sales for cash the money must be paid when the property is delivered.[1]

A sale for cash is a sale for the money in hand.[2]

But when a factor is directed to sell grain for cash, evidence may be given of a well-established custom to allow the purchaser to receive the grain, and call for the money in a few days after delivery.[3]

Where goods are sold for cash, but the delivery is unconditional and without fraud or mistake, the title vests in the vendee notwithstanding the cash was not in fact paid.[4]

The idea of a sale on credit is that the vendee is to have the thing sold on his assumption to pay, and before actual payment.[5]

See CREDIT; CURRENT, 2; MONEY; PLACE, 1, Of delivery, payment; SALE; VALUE.

CASHIER. An officer or agent whose business is mainly to take care of the money of an institution, of a private person, or of a firm.

The cashier of a bank is the executive officer through whom the financial operations are conducted. He receives and pays out its moneys, collects and pays its debts, receives and transfers its commercial securities. Tellers and other subordinate officers are under his direction, and are, as it were, the arms by which designated portions of his functions are discharged.[6]

Evidence of powers habitually exercised with the acquiescence of the directors of the bank defines and establishes, as to the public, those powers — provided the charter is not violated.[6]

He is the general financial agent. He acts, or is presumed to act, according to general practice, and the course of business; and this binds the bank in favor of one who possesses no other knowledge.[7]

See AGENT; BANK, 2 (2); CHECK; DEPOSIT, 2.

[1] Bliss *v.* Arnold, 8 Vt. 255 (1836).

[2] Steward *v.* Scudder, 24 N. J. L. 101 (1853).

[3] Foley *v.* Mason, 6 Md. 49 (1854), cases.

[4] Merchants' Nat. Bank of Memphis *v.* Nat. Bank of Commerce, 91 U. S. 95 (1875), Strong, J.

See also 24 Am. Law Reg. 514–19 (1885), cases; 20 Cent. Law J. 304–7 (1885), cases; 1 Cal. 45; 54 *id.* 218; 4 Mass. 245; 103 *id.* 17; 5 Allen, 91; 27 N. Y. 378; 62 *id.* 513; 69 *id.* 148; 9 Johns. 120; 13 *id.* 144; 39 Barb. 283; 1 Ohio, 189; 34 Pa. 311; 28 Gratt. 165.

[5] Merchants' Nat. Bank *v.* State Nat. Bank, 10 Wall. 650 (1870), cases, Swayne, J.

[6] *Ibid.* 604, 641; Moores *v.* Citizens' Nat. Bank of Piqua, 111 U. S. 156, 169 (1884), cases.

[7] Case *v.* Citizens' Bank of Louisiana, 100 U. S. 454 (1879); Martin *v.* Webb, 110 *id.* 14 (1884); Xenia Bank *v.* Stewart, 114 *id.* 224 (1885); Knickerbocker Life Ins. Co. *v.* Pendleton, 115 *id.* 344 (1885); Bostwick *v.* Van Voorhis, 91 N. Y. 353 (1883); Merchants' Bank *v.* Jeffries, 21 W. Va. 504 (1883); 20 Cent. Law J. 126–30 (1885), cases; 133 Mass. 22; Story, Agency, §§ 114–15; Whart. Ag. §§ 684–87; 3 Am. Law Rev. 612–40 (1869), cases; Bank. Mag., July, 1860. As to his signature, see Robinson *v.* Kanawha Valley Bank, 44 Ohio St. 448 (1886).

CASK. See EMPTY.

CASSETUR. See QUASH.

CAST. To transfer, invest with, place upon; as, in saying that the law casts the legal ownership of the property of an intestate upon the administrator,[1] or casts the estate upon the heir.[2]

Cast away. For a vessel to be lost, to be irrecoverable by ordinary means, to perish.[3]

Casting vote. See VOTE.

CASTIGATORY. See SCOLD.

CASTLE. See HOUSE, 1; MANOR.

CASUAL.[4] That which happens by accident or is brought about by an unknown cause. Compare REGULAR.

Casual ejector. A nominal defendant in the action of ejectment at common law.

By a fiction he was supposed to have entered and ejected the lawful possessor.[5]

Casual pauper or poor. A person who is assisted under the poor laws in a district other than that of his lawful settlement. Whence "casuals." See further POOR.

Casualty. An inevitable accident, *q. v.* "Unavoidable casualty," in common use in leases, comprehends only damage or destruction arising from supervening and uncontrollable force or accident. By strict definition, an event or accident which human prudence, foresight, and sagacity cannot prevent.[6] See ACT, 1, Of God; INSURANCE.

CASUS. L. A thing that happens: an occurrence; a combination of circumstances; an event; a case, *q. v.*

Casus fœderis. The case of the treaty: the case contemplated in a compact or contract.[7]

Casus fortuitous. An inevitable occurrence or accident.[8]

Casus major. An unusual accident.[9] See ACCIDENT; ACT, 1, Of God.

Casus omissus. A case not provided for. A combination of circumstances overlooked,

[1] 143 Mass. 392; 52 Pa. 232; 7 Wheat. 107

[2] 36 Cal. 332.

[3] 1 Wash. 372; 3 *id.* 382; 4 Dall. 412.

[4] L. *casualis*, happening by chance.

[5] 3 Bl. Com. 202.

[6] [Welles *v.* Castles, 3 Gray, 325 (1855), Bigelow, J. See also Thompson *v.* Tillotson, 56 Miss. 36 (1878).

[7] See 1 Kent, 49.

[8] See 3 Kent, 217, 300; Whart. Neg. §§ 113, 553.

[9] Story, Bailm. § 240.

or deemed unimportant, in a statute or a contract.

Where the letter of a statute would have been enlarged to include an occurrence, had the legislature foreseen it, the courts will bring the case within the spirit of the statute.[1]

But, under this rule, a court may not go so far as virtually to make a law.[2]

Consimili casu. In like case.

To quicken the diligence of the clerks in chancery, who were much attached to ancient precedents, it was provided by statute of Westm. 2, 13 Edw. I (1285), c. 24, that when "in one case a writ shall be found in the chancery, and *in a like case* falling under the same right and requiring like remedy, no precedent of a writ can be produced, the clerks shall agree in forming a new one; and if they cannot agree, it shall be adjourned to the next parliament." . . This provision might have answered all the purposes of a court of equity.[3]

CATALOGUE. See COPYRIGHT.

CATCHING. See BARGAIN.

CATCHPOLE. Formerly, an officer, as a deputy-sheriff or a constable, who made arrests.

He was supposed to catch the prisoner by the *poll*—the head, or neck. The term now expresses contempt or derision.

CATTLE.[4] Domestic animals generally; animals useful for food or labor.

"Sheep, oxen, swine, and horses, which we in general call cattle, may be estrays."[5]

Not only domesticated horned animals, but also swine, horses, asses, and mules.[6]

In an indictment "steer" may be used for "cattle" or "neat cattle."[7]

Within the meaning of a penal statute, "buffaloes" may not be cattle.[1]

See ANIMAL; DAMAGE-FEASANT; FEED; FENCE; HEIFER; HOG; HORSE; PERISHABLE; PROVISIONS.

CAUCUS. See BRIBERY.

CAUSA. L. That which operates to produce an effect; that on account of which a thing is done; that which supplies a motive, or constitutes a reason.

Causa causans. The originating, efficient cause; the immediate cause. **Causa causæ causantis.** The cause of the cause operating; i. e., the near, not the direct, cause.[2] See CAUSE, 1.

Causa mortis. See DONATIO, Mortis, etc.

Causa proxima, non remota, spectatur. The near cause, not the removed, is considered. See at length CAUSE, 1, Proximate, etc.

Causa sine qua non. A cause without which a thing cannot be or exist: as, a cause without which an injury could not have occurred.[3]

Causa turpis. An unlawful motive or purpose: an immoral or illegal consideration.

Ex turpi causa non oritur actio. Out of an illegal consideration an action cannot arise: no court will aid a party who founds his claim for redress upon an illegal act.[4] See further DELICTUM, In pari, etc.

CAUSE. 1. Eng. (1) That which produces or effects a result; that from which anything proceeds, and without which it would not exist.[5]

Proximate cause. The nearest, the immediate, the direct cause; the efficient cause; the cause that sets another or other causes in operation; the dominant cause. **Remote cause.** The removed, the distant, the indirect, the intermediate cause.

The law concerns itself only with the direct cause of an event — that force or influence which, in the order of causation, is nearest to the effect or result under consideration, and is sufficient of itself to produce the result.

The principle is of frequent application in the law of insurance; and in cases of involuntary negligence, as distinguished from wanton or intentional injuries.

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[1] See 1 Shars. Bl. Com. 61; 2 *id.* 260; 4 *id.* 302.

[2] See United States *v.* Union Pacific R. Co., 91 U. S. 85 (1875); Hobbs *v.* McLean, 117 *id.* 579 (1886).

[3] 3 Bl. Com. 50-51.

[4] L. L. *catalla*, movables. In old English, "cattle" had not that meaning,—Marsh, Eng. Lang. 246. From L. *capitalis*, the head or chief. Compare "pecunia-ry," and "feud." When wealth consisted in heads of cattle (*capita*, *capitalia*), the word which designated them came to include all kinds of property. In the Elizabethan age "quick cattle" meant live stock. In time "chattel" denoted dead, inanimate property; and "cattle" sensate possessions. Wiclif, in 1380, translated Luke viii, 44, "a woman that spendid all hir catel in leechis;" and Chaucer, in 1388, wrote that an avaricious man "hath hope in his catel." See Trench, Glossary, 29.

[5] 1 Bl. Com. 298.

[6] See United States *v.* Mattock, 2 Saw. 149-51 (1872); Decatur Bank *v.* St. Louis Bank, 21 Wall. 299 (1874); Ohio, &c. R. Co. *v.* Brubaker, 47 Ill. 462 (1868); Toledo, &c. R. Co. *v.* Cole, 50 *id.* 186 (1869); Hubotter *v.* State, 33 Tex. 484 (1870); 27 *id.* 726; 45 *id.* 84.

[7] State *v.* Lange, 22 Tex. 591 (1858); State *v.* Abbott, 32 Vt. 537 (1860).

[1] State *v.* Crenshaw, 22 Mo. 458 (1856).

[2] See 12 Wall. 399; 95 U. S. 132; 4 Gray, 398.

[3] 111 U. S. 241.

[4] The Florida, 101 U. S. 43 (1879); 2 Pet. *589; 87 Ind. 273; 45 Iowa, 241.

[5] Webster's Dict.

If we could deduce from the cases the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations. One of the most valuable criteria furnished by the authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.[1]

No difficulty attends the application of the maxim when the causes succeed each other in the order of time. When one of several successive causes is sufficient to produce the effect (for example, to cause a loss), the law will never regard an antecedent cause of that cause, or the *causa causans*, q. v. But when there are two concurrent causes, the predominating efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished. And certainly that cause which set the other in motion, and gave to it its efficiency for harm at the time of the disaster, must rank as predominant.[2]

What is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, as in the oft cited case of the squib thrown in the market-place. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of attending circumstances. . . We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or non-feasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause, *disconnected from the primary fault*, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence in the occupants of the first building, no one would doubt that the destruction of the second building was due to the negligence that caused the destruction of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second building was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events, more or less depending upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.[1]

The question is not what cause was nearest in time or place to the catastrophe. The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. The proximate cause is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss.[3]

The jury must determine whether the facts constitute a continuous succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause — the negligence of the defendant.[3]

When several proximate causes contribute to an accident and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or to any of the causes.[4]

That some agency intervenes between the original wrong and the injury does not necessarily bring the cause within the rule. It is firmly settled that the intervention of a third person, or of other and new

[1] Mutual Ins. Co. *v.* Tweed, 7 Wall. 52 (1868), Miller, J.; Travelers' Ins. Co. *v.* Seaver, 19 *id.* 542 (1873).

[2] Howard Fire Ins. Co. *v.* Transportation Co., 12 Wall. 199 (1870), Strong, J.

[1] Milwaukee, &c. R. Co. *v.* Kellogg, 94 U. S. 474–76 (1876), Strong, J. In this case a mill was destroyed by fire communicated from an elevator, and to the elevator from a boat.

[2] Ætna Fire Ins. Co. *v.* Boon, 95 U. S. 130, 133 (1873), cases, Strong, J. See also Crandall *v.* Goodrich Transp. Co., 16 F. R. 75 (1883).

[3] Pennsylvania R. Co. *v.* Hope, 80 Pa. 377–78 (1876), cases, Agnew, C. J.; Hoag *v.* Lake Shore, &c. R. Co., 85 *id.* 297–98 (1877), cases.

[4] Ring *v.* City of Cohoes, 77 N. Y. 90 (1879), Earl, J., Reiper *v.* Nichols, 31 Hun, 495 (1884), cases

causes, does not preclude a recovery, if the injury was the natural and probable result of the original wrong.[1]

Everything which induces or influences an accident does not necessarily and legally cause it. . . There can be no fixed rule defining a proximate cause. Much must depend upon the circumstances of each case.[2]

Strictly, the law knows no cause but a responsible human will. When such a will negligently sets in motion a natural force that acts upon and with surrounding conditions, the law regards such human action as the cause of resulting injury.[3]

Whether a particular act of negligence is the proximate cause is a question of fact to be determined by the jury under instructions.[3]

The unlawful act of a third person, though directly induced by the original wrong of the defendant, is not to be attributed to the original wrong as a proximate cause of the damage.[4] See ACT, 1, Of God; BLASTING; CONSEQUENCES; DAMAGES.

(2) The occasion for action; that by reason of which a thing is done; reason or ground for action.

The origin or foundation of a thing, as of a suit or action; a ground of action.[5]

Cause of action. The right which a party has to institute and carry through a proceeding.[6]

The act on the part of the defendant which gives the plaintiff his cause of complaint.[7]

Jurists have found it difficult to define a cause of action. It may be said to be composed of the right of the plaintiff and the obligation, duty, or wrong of the defendant.[8]

A wrong committed or threatened.[1]

A plaintiff must show himself entitled to the relief called for by the facts stated in his complaint. The allegations, the evidence, and the findings should correspond in legal intent.[2]

The expression implies not only a right of action, but that there is some person in existence who is qualified to institute process. The right must be capable of being legally enforced; and so there must be a person to be sued.[3]

The elements are: a right possessed by the plaintiff, and an infringement of such right by the defendant.[3]

Where the distinction between "trespass" and "case" is abolished, the plaintiff in his petition may present such facts as show a blending of those common-law forms of action.[3] See LIMITATION, 3, Statute of.

To "show cause of action" is to exhibit the facts upon which a right of action rests. The practice is resorted to in actions of tort to reduce the amount of bail required, as where it will appear that the cause of action is purely technical or is of a very ordinary nature.

See MERITORIOUS; SPLIT.

For cause. See CHALLENGE, 4; REMOVE, 2.

Good cause. Has no certain meaning in a stipulation for canceling a contract.[4]

Probable cause. Within the meaning of the law relating to actions for malicious prosecutions,—a reasonable cause of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged.[5]

Such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty.[6]

The existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person

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[1] Billman v. Indianapolis, &c. R. Co., 76 Ind. 168-71 (1881). See also Louisville, &c. R. Co. v. Krinning, 87 id. 354-55 (1882), cases; 12 Bradw. 153.

[2] Spaulding v. Winslow, 74 Me. 534-35 (1883), cases. See also Jucker v. Chicago, &c. R. Co., 52 Wis. 152-53 (1881), cases; N. Y. Express Co. v. Traders' Ins. Co., 132 Mass. 382-85 (1882); Nelson v. Chicago, &c. R. Co., 30 Minn. 77 (1882); Ransier v. Minneapolis, &c. R. Co., 32 id. 334 (1884), cases; Georgetown, &c. R. Co. v. Eagles, 9 Col. 547 (1886), cases; 14 Pet. 99; 10 Wall. 191; 66 Ga. 750; 4 Gray, 412; 76 Mo. 293; 3 Kent, 374; 4 Am. Law Rev. 201-16 (1870), cases; 4 South. Law Rev. 759-68 (1878), cases; Whart. Neg. § 73.

[3] Adams v. Young, 44 Ohio St. 86-91 (1886), cases, Follett, J. Sparks, negligently thrown from a mill smoke-stack, set fire to a stable one hundred feet away, from which a second building, two hundred feet distant, took fire, and from that the building in suit, sixty feet distant. See same and other cases, 25 Am. Law Reg. 568-70 (1886).

[4] The Young America, 31 F. R. 753 (1887), cases, Wallace, J.

[5] United States v. Rhodes, 1 Abb. C. C. 33 (1866): Burrill.

[6] [Meyer v. Van Collem, 28 Barb. 231 (1858).

[7] Jackson v. Spittall, L. R., 5 C. P. *552, 544 (1870), Brett, J.

[8] Veeder v. Baker, 83 N. Y. 160 (1880), Earl, J. See also Rodgers v. Mutual Endowment Association, 17 S. C. 410 (1881).

[1] Miller v. Hallock, 9 Col. 453 (1886), cases, Beck, C. J.

[2] Fruitt v. Anderson, 12 Bradw. 430 (1883).

[3] Atchison, &c. R. Co. v. Rice, 36 Kan. 600 (1887), Valentine, J.

[4] Cummer v. Butts, 40 Mich. 322 (1879).

[5] Munns v. Dupont, 3 Wash. 37 (1811), Washington, J.; 2 Denio, 617; 97 U. S. 645; 37 Md. 318, 381.

[6] Bacon v. Towne, 4 Cush. 238 (1849), Shaw, C. J. See also Mitchell v. Wall, 111 Mass. 497 (1873); Heyne v. Blair, 62 N. Y. 22 (1875); Stacey v. Emery, 97 U. S. 645 (1878), cases.

charged was guilty of the crime for which he was prosecuted.[1]

When information as to the commission of a crime is believed, and is such, and from such sources, that the generality of business men of ordinary care, prudence, and discretion would prosecute upon it under the same conditions.[2]

The constitutional provision that a warrant of arrest can issue only "upon probable cause, supported by oath or affirmation," contemplates an oath or affirmation by the person who, of his own knowledge, deposes to the facts which constitute the offense; the mere belief of the affiant is insufficient.[3]

"Probable cause for making an information" does not mean actual and positive cause. The complaint may be made upon information and belief.[4]

Prize courts deny damages or costs where there has been probable cause for a seizure. Probable cause exists where there are circumstances sufficient to warrant a reasonable ground of suspicion, even though not sufficient to justify condemnation.[5]

There is no substantial difference between "probable cause" and "reasonable cause" of seizure.[6] See PROSECUTION, Malicious.

Reasonable cause. A fact which would suggest to persons of average intelligence the same inference or action; such facts as would constrain a person of ordinary caution and sagacity to pursue a particular course of conduct; legal cause or excuse; probable cause.

In the law of homicide, reasonable cause or ground to apprehend harm or death. A bare fear, unaccompanied by any overt act indicative of the supposed intention, will not warrant a killing, if there is no actual danger.[7] See further DEFENSE, 1.

The reasonable cause which will justify a husband or wife in abandoning the other is, in Pennsylvania at least, that which would entitle the party so separating himself or herself to a divorce.[8] See ABANDON, 2 (1).

Reasonable cause to believe a debtor insolvent exists when the condition of his affairs is known to be such that prudent business men would conclude that he could not meet his obligations as they mature in the ordinary course of business.[1]

A recital in the certificate of a magistrate that "satisfactory cause" has been shown for issuing a warrant of arrest is not equivalent to a statement that he is satisfied that there is "reasonable cause" to believe that the charge contained in the preliminary affidavit is true.[2]

To avoid, as a fraudulent preference in the Bankrupt Act, a security taken for a debt, the creditor must have had such knowledge of facts as to induce a reasonable belief of his debtor's insolvency. . . Reasonable cause "to believe" and "to suspect" are distinct, in meaning and effect.[3] See PREFER, 2.

(3) An action at law, a suit at law or in equity; a judicial proceeding.

In any legal sense, action, suit, and cause are convertible terms.[4]

"Case" is more limited, importing a collection of facts with the conclusions thereon. A "cause" pends, is postponed, appealed, removed; whereas a "case" is made, vested, argued, decided, etc.[5]

See ACTION, 2; ADMIRALTY; CASE, 2; CHANCERY: JOINDER; SUIT; TITLE, 2.

2. Fr. A case; a trial.

Cause celebre. A celebrated trial; plural, *causes celebres.*

In French law, resembles a "State trial" in English law. Among English and American writers, a trial, or a reported case, famous for the parties and the facts involved.

CAUSEWAY. See BRIDGE.

CAUTELA. L. Caution; providence; care; heed.

Ad majorem cautelam. For the sake of the greater caution. **Ex abundanti cautela.** Out of extreme caution. **Ex majore cautela.** By way of greater vigilance.

Applied to the use of apparently superfluous words and the doing of things seemingly supererogatory, from an apprehension that otherwise some right may be yielded or prejudiced, some power or privilege waived, or an estoppel created: as where formal, technical, and synonymous terms are employed in instruments; where slightly varying averments are made in pleading: where special statutory power to do a thing is conferred, on the supposition that power may not already exist.[6]

CAUTION. Attention to the effect of a thing about to be done; regard to contingencies; forethought; care. See CAUTELA.

[1] Wheeler *v.* Nesbitt, 24 How. 551-52 (1860), Clifford, J.

[2] [Hamilton *v.* Smith, 39 Mich. 226-29 (1878), cases, Graves, J. See also Burton *v.* St. Paul, &c. R. Co., 33 Minn. 191 (1885), cases; 1 Am. Ld. Cas. 213; 23 Ind. 67; 12 Bradw. 635; 52 Me. 505; 76 Mo. 670; 20 Ohio, 129; 28 Iowa, 49; 45 Tex. 544.

[3] United States *v.* Tureaud, 20 F. R. 623-24 (1884), cases, Billings, J. See also Swart *v.* Kimball, 43 Mich. 451 (1880).

[4] State *v.* Davie, 62 Wis. 308 (1885).

[5] [The Thompson, 3 Wall. 162 (1865), cases, Davis, J.

[6] Stacey *v.* Emery, 97 U. S. 646 (1878).

[7] Wiggins *v.* People, 93 U. S. 478-80 (1876), cases, Clifford, J.

[8] Gordon *v.* Gordon, 48 Pa. 234 (1864); Butler *v.* Butler, 1 Pars. Sel. Cas. Eq. 337 (1849).

[1] Merchants' Nat. Bank *v.* Cook, 95 U. S. 346 (1877), cases, Hunt, J.; Dutcher *v.* Wright, 94 *id.* 557 (1876), cases; Stucky *v.* Masonic Bank, 108 *id.* 74 (1883).

[2] May *v.* Hammond, 144 Mass. 152 (1887), cases.

[3] Grant *v.* First Nat. Bank of Monmouth, 97 U. S. 81 (1877), Bradley, J.

[4] *Exp.* Milligan, 4 Wall. 112 (1866), Davis, J.

[5] 18 Conn. App. 10.

[6] 6 Wheat. 108; 2 Saw. 150; 59 Pa. 333.

Cautionary. By way of warning; made or done in anticipation of a change in circumstances; providing for an adverse contingency.

Cautionary judgments may sometimes be entered or confessed to bind lands or to charge special bail.

Cautionary orders are intended to provide for indemnity against loss by reason of an injunction issued.[1]

CAVEAT. L. Let him take heed; let him beware.

A formal notice or warning to an officer or a court not to do a specified act; as, not to probate a will, grant letters of administration, issue letters-patent for an invention or for land,—until the person procuring the order can be heard in opposition to the contemplated act or proceeding.[2]

Caveator. He who interposes a caveat. *Caveatee.* He against whom a caveat is interposed.

Protects the rights of one person against rights which, without it, might arise in favor of another person out of the proposed proceeding. Thus, for example, it secures time to perfect an invention without the risk of a patent being granted to another—allows an opportunity to show priority of invention and title.[3]

Caveat actor. Let the doer beware.

Caveat emptor. Let the buyer beware.

A purchaser of property must examine and judge for himself as to its title and quality, unless dissuaded by representations.

In the absence of fraud or an express warranty, the purchaser of realty has no relief against a defect in the title, or for the unsuitableness of the land for a particular purpose, either of which an examination, which he was free to make, would have revealed. And so as to personalty, in the absence of imposition or of an express assurance, no warranty of title or of quality is implied. The maxim does not apply where a specific article is ordered for a known purpose, nor where merchandise is sold not by sample nor under the inducement of an express warranty, but with opportunity for thorough inspection. In other cases a warranty is implied that the article will reasonably answer the purpose for which it is ordinarily used.

Where there is neither fraud nor warranty, and the buyer receives and retains the goods without objection, he waives his right to object afterward. Where the buyer has no opportunity to inspect, and no warranty is given, the law implies the condition that the thing shall fairly answer the description in the contract.[4]

The fundamental inquiry is whether, under the circumstances of the case, the buyer had the right to rely and necessarily relied upon the judgment of the seller.[1]

The rule applies to a purchaser at a judicial sale: he takes the defendant's interest only.[2]

See COMMENDATIO; DECEIT; DICTUM, Gratis; FRAUD, Actual; SALE, Judicial; SAMPLE; SOUND, 2 (2).

Caveat venditor. Let the seller take heed.

This maxim of the civil law expresses a doctrine contrary to the rule of *caveat emptor* of the common law. An implied warranty of title on the sale of a chattel is common to both systems; but while in the civil law a fair price implies a warranty also of the soundness of the article, by the common law, as seen above, to make the vendor answerable for the quality there must be either an express warranty or fraud on his part. The civil law maxim applies to executory sales, to contracts for goods to be manufactured or produced, and to sales where the buyer has no opportunity to inspect the article purchased.[3]

Caveat viator. Let the traveler take care.

A traveler upon a highway must use reasonable care in detecting and avoiding defects in the road.[4] See SIDEWALK; STREET.

CEASE. See RATIO, Cessante, etc.

Where a lot was to revert if a school-house "ceased" to stand on it for two years, and none was built, *held*, that the lot did not revert. A thing cannot "cease" until after it has begun.[5]

Insurance conditioned to be void if the premises "cease to be operated" as a factory was held not void because of a temporary suspension on account of yellow fever.[6]

CEDE. See CESSION.

CEMETERIES. See BURIAL.

CENSUS. A rating, numbering, valuing, assessing.

"Representatives and direct Taxes shall be apportioned among the several States . . according to their respective numbers. . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."[7]

In connection with the ascertainment of the number of inhabitants, the act of Congress provides for inquiries as to age, birth, marriage, occupation, and

[1] R. S. § 718.

[2] See Slocum v. Grandin, 36 N. J. E. 488 (1884).

[3] R. S. § 4902.

[4] Miller v. Tiffany, 1 Wall. 309 (1863); Barnard v. Kellogg, 10 *id.* 388 (1870); 2 Kent, 478; 1 Story, Eq. § 212; 3 Bl. Com. 165.

[1] Kellogg Bridge Co. v. Hamilton, 110 U. S. 116, 119-15 (1884), cases; Wissler v. Craig, 80 Va. 32 (1885); Burwell v. Fauber, 21 Gratt. 463 (1871), cases.

[2] Oslerberg v. Union Trust Co., 93 U. S. 428 (1876); 105 Ill. 339.

[3] See Wright v. Hart, 18 Wend. 453 (1837), Walworth, Ch.; *ib.* 432; Hargous v. Stone, 5 N. Y. 81-84 (1851), cases.

[4] Cornwell v. Commissioners, 10 Excheq. *774 (1855).

[5] Jordan v. Haskell, 63 Me. 192 (1874).

[6] Pass v. Western Assurance Co., 7 Lea, 707 (1881).

[7] Constitution, Art. I, sec. 2, cl. 3. See R. S. tit. XXXI.

other matters of general interest. For a refusal to answer an inquiry a small penalty is imposed. There is no attempt to inquire into private affairs, nor are the courts called upon to enforce answers to inquiries. Similar inquiries usually accompany the taking of a census of every country, and they are not deemed to encroach upon the rights of the citizen.[1]

CENT. See COIN.

CENTER. See FILUM; ROAD, 1; STREET.

CEPI; CEPIT. See CAPERE, Cepi, Cepit.

CERA. See SEAL, 1.

CERTAIN. Known, established, definite: as, a certain date, a certain instrument. See CERTUM; CUSTOM; DEBT.

Since "uncertain" may include any doubt, whether reasonable or unreasonable, a jury should not be told that if they feel uncertain that a witness is to be believed, they should acquit.[2]

Certainty. 1. Assurance; confident belief: freedom from doubt or failure; also, that which is established beyond question. Compare CONTINGENCY; THEN: WHEN.

The certainty of the law is of the highest consequence. See HARDSHIP.

Moral certainty. A state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it.[3]

The phrase, borrowed from the publicists and metaphysicians, signifies only a very high degree of probability. . . Proof beyond a reasonable doubt is proof to a moral certainty, as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; each has been used by eminent judges to explain the other.[4] See further DOUBT, Reasonable.

2. Distinctness, accuracy, clearness of statement; opposed to uncertainty and ambiguity, *q. v.*

Generally refers to written language.

In pleading, statement of alleged facts so clear and explicit as to be readily understood by the opposite party who is to make answer, by the jury which is to find the truth, and by the court which is to pronounce judgment.[5]

Consists in alleging the facts necessary to be stated, so distinctly as to exclude ambiguity and make the meaning of the averments clearly intelligible.[1]

Three degrees of certainty were formerly recognized: **Certainty to a common intent** — words used in their ordinary sense, but susceptible of a different meaning. This degree was required in defenses and in instruments of an ordinary nature. **Certainty to a certain intent in general** — the meaning ascertainable upon a fair and reasonable construction, without recurrence to possible facts which do not appear. This degree was required in indictments and declarations. **Certainty to a certain intent in particular** — such technical accuracy of statement as precluded all question, inference, or presumption. This was required in estoppels and as to disfavored pleas.[2]

A negotiable instrument must have certainty as to payor, payee, amount, time, fact of payment, and, perhaps, place of payment.[3]

A postal card containing the words "Send us pice of counter screen" was held to present a case of incurable uncertainty; and the judge properly refused to submit to the jury to determine whether "pice" meant "piece" or "price."[4]

CERTIFICATE.[5] A writing giving assurance that a thing has or has not been done, that an act has or has not been performed, that a fact exists or does not exist.

To "certify" is to testify to in writing: to make known or establish as a fact. The word is not essential to a "certificate:" it is enough that the law calls a statement a certificate.[6] See CHECK, Certified.

Certificates are such as are authorized or required by law, and such as are purely voluntary. "Authorized or required by law" are: a certificate of a balance due, of costs, of a divorce, that a married woman has been decreed a *feme sole* trader, that a bankrupt has been discharged, that an alien has been naturalized, that a physician is qualified to practice medicine; a certificate of copyright, or of a trademark registered; a certificate that a document is authentic, or genuine; an officer's return of service of process. "Voluntary" certificates include: certificates of benefits receivable, of check, of deposit, of interest, of loan, of no defense, of search, of stock, of scrip, of transfer, a receiver's certificate, *qq. v.*

Voluntary certificates are not conclusive evidence of the facts they state, except where, otherwise, an innocent party would be the loser. Certificates required by law of officers are conclusive of the facts

[1] *Re* Pacific Railway Commission, 32 F. R. 250 (1887), Field, J.; R. S. § 2171.

[2] State *v.* Ah Lee, 7 Oreg. 258 (1879).

[3] Montana *v.* McAndrews, 3 Monta. 165 (1878), Wade, C. J.: Bur. Circ. Ev. 199.

[4] Commonwealth *v.* Costley, 118 Mass. 23 (1875), Gray, C. J. See also United States *v.* Guiteau, 10 F. R. 164 (1882).

[5] See Andrews *v.* Whitehead, 13 East, 102, 107 (1810).

[1] [Gould, Pleading, IV, sec. 24.

[2] See Coke, Litt. 303 *a*; Gould, Plead. III, sec. 52; Steph. Plead. 380; 3 Cranch, C. C. 56; 5 Conn. 423; 9 Johns. 314.

[3] See 1 Parsons, Notes & Bills, 80, 87; 24 Am. Law Reg. 719-24 (1885), cases; 59 Iowa, 649.

[4] Cheney Bigelow Wire Works *v.* Sorrell, 142 Mass. 442 (1886).

[5] L. *certificatus*, assured, made certain.

[6] State *v.* Schwin, 65 Wis. 213 (1886): Webster

mentioned, but fraudulent procurement may be shown. Certificates authorized by statute are evidence of such facts only as the officer may certify under the statute.[1]

2. A writing made by a court, a judge or an officer thereof, and properly authenticated, to give notice to another court of a thing done in the court *a quo*. See OPINION, 3, Division of.

CERTIORARI. L. To be certified. A writ by which the record of a proceeding in a lower court is removed into a higher court for review.

The emphatic word in the Latin writ, which read: *quia certis de causis certiorari volumus*, for as much as concerning certain causes we wish to be certified. From *certior*, the comparative of *certus*, known, established. See CERTUM.

After indictment found, a writ of *certiorari facias* [that you cause to be certified] may be had to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench.[2]

The writ, at common law, issued out of chancery or the king's bench, directed, in the king's name, to the judges or officers of the inferior courts, commanding them to return, before him, the record of a cause depending before them, that the party may have more sure and speedy justice or such other justice as he shall assign to determine the cause.[3]

The writ has been extended, and the practice under it regulated, by statutes in each State. Speaking generally, it is employed for removing statutory proceedings for completion, when the lower court fails to do so; it serves as an auxiliary process to obtain a full return to other process; it effects a review of the determinations of special tribunals, commissioners, and magistrates; it secures an inspection of the record where a writ of *habeas corpus* has been sued out. Unless a statute directs otherwise, or palpable injustice will be done, it does not lie to review a decision based on a matter of fact, nor as to a matter resting in discretion; nor does it lie for an error in formality, substantial justice being dispensed.

The application for the writ must disclose a proper case upon its face. The plaintiff may have to furnish security for the demand, with interest and costs, before the writ will operate as a *supersedeas*, q. v.

The judgment is that the proceedings be quashed or affirmed, in whole or in part. At common law neither party recovered costs.

At common law, also, the writ was granted to a prosecutor as a matter of right, and to a defendant as a matter in discretion.[1]

Will not, in general, be issued where the party has another remedy, as by appeal.[2]

Bill of certiorari. An original bill, in equity, to remove a cause into a higher court.

States the proceedings in the lower court, the incompetency in the powers of such court to do complete justice, etc. Rarely used in the United States.[3]

CERTUM. L. Perceived, determined: definite, known, certain.

Certum est quod certum reddi potest. That is certain which can be made certain — or reduced to a certainty.

When the law requires certainty, that is accepted for certainty which, by computation or testimony, can be shown to be already certain; as, in questions respecting the sum to be paid on a negotiable instrument, the liquidation of damages for non-performance of a contract, reasonable time, and the like.[4]

CESSANTE. See RATIO, Cessante, etc.

CESSER. A ceasing; formerly, neglect of duty. Also, a yielding up, a cession, *q. v.*: as, the cesser of an interest conferred by a will.[5]

CESSIO. L. A giving up; surrender. See CESSION.

Cessio bonorum. A surrender of goods. In civil law, an assignment for the benefit of creditors.

Discharged the debtor to the extent of the property made over; and exempted him from imprisonment. French, *cession des biens*.[6]

CESSION. A yielding up; transfer. See CESSIO.

Cede: to give up, yield up.[7] Compare ABANDON, 1.

Concession. A grant, as of lands, between sovereignties. **Recession.** A reconveyance by a sovereign.

Thereby public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institu-

[1] See 1 Whart. Ev. §§ 120–36, cases; 10 Oreg. 947.

[2] 4 Bl. Com. 320.

[3] [Dean *v.* State, 63 Ala. 154 (1879); 13 Fla. 393; 15 Blatch. 286; 106 U. S. 31.

[1] See 4 Bl. Com. 321; *Exp.* Hitz, 111 U. S. 766 (1884).

[2] Alabama Great Southern R. Co. *v.* Christian, 89 Ala. 309 (1886), cases.

[3] Story, Eq. Pl. § 308; 2 Hale, Pl. Cr. 215.

[4] See 1 Bl. Com. 78; 2 *id.* 143; 2 Kent, 480; 2 Black, 504; 99 U. S. 489; 101 *id.* 638; 9 Col. 279; 73 Ga. 92; 80 Va. 761; 59 Wis. 500; 61 *id.* 188; 66 *id.* 497; 67 *id.* 434.

[5] 91 U. S. 794.

[6] See 2 Bl. Com. 473; 1 Kent, 492; 15 Wall. 605; 38 F. R. 1.

[7] Somers *v.* Pierson, 16 N. J. L. 184 (1837).

tions, and constitution of the new government are at once displaced.[1] See LAND, Public; PUEBLO.

CESTUI. He: that one; the one. Also spelled *cestuy*. See ADDENDA.

Pronounced cĕst'-wē. A law-French term, corresponding to the classic French *c' est lui* (*celui*): it is for him that, etc. Plural, *cestuis*.

Cestui que trust. He for whom a trust exists, or was created: the beneficiary under a trust.[2]

The *que* is pronounced kē. See further TRUST, Cestui, etc.

Cestui que use. He for whom a use — exists: he for whose benefit land is held by another.[3] See further USE, 3, Cestui, etc.

Cestui que vie. He for whose life — land is held by another:[4] he whose life measures the duration of an estate.[5]

CF. An abbreviation of the Latin *conferre*, compare.

Used in references to analogous cases or subjects.

CH. An abbreviation of chancellor, chapter, chief.

CHAIN. See ABSTRACT; EVIDENCE, Circumstantial; OBLIGATION, 1.

It is incorrect to speak of a body of circumstantial evidence as a "chain," and allude to the different circumstances as the "links." A chain cannot be stronger than its weakest link. The metaphor may perhaps be correctly applied to the ultimate and essential facts necessary to conviction in a criminal case; but it is not true that every minor circumstance introduced to sustain the ultimate facts must be proven with the same degree of certainty.[6]

CHAIRMAN. See DESCRIPTIO, Personæ.

CHALLENGE.[7] 1. A request to fight — to fight a duel.

Whether made by word or letter, is indictable at common law. Tends to a breach of the peace. He who knowingly carries a challenge for another is guilty of the offense.[8] See PRIZE-FIGHT.

2. Objection to the legality of a vote about to be cast. See BALLOT.

3. Objection to a cause being tried before a particular judge on account of alleged bias, prejudice, interest, or other disqualification.

4. Objection to a juror or jurors drawn to try a cause.

Challenge to the array. An exception to the whole panel in which the jury are arrayed or set in order by the sheriff in his return.[1]

The reason which, before awarding the *venire*, would be sufficient to cause it to be directed to the coroner or to elisors, will be sufficient to quash the array when made by an officer of whose partiality there is any fair ground of suspicion; also, if the sheriff arrays the panel under the direction of either party.[1]

Challenge to the polls. An exception to particular jurors.

Lies for any matter showing disqualification. Also known as "principal challenge" and as the "challenge for cause."

Challenge for cause. For which a reason is assigned.— to the array or to the polls.

An objection to a particular juror; and may be "general" — that he is disqualified from serving in any case, or "particular" — that he is disqualified from serving in the action on trial.[2]

Challenge for favor. Of the same nature and effect as a principal challenge "propter affectum."

Peremptory challenge. For which no reason is assigned.

Principal challenge. 1. "Propter defectum" — for disability: as, alienage, infancy, unsound mind, insufficient property. 2. "Propter affectum" — for bias or partiality: as, opinion formed; of kin to a party, or of the same fraternity or corporation; his attorney, servant, or tenant, or entertained by him; promised money for verdict; sued by exceptant in an action involving legal malice; being formerly a juror or an arbitrator in the matter; influenced by scruples against the punishment. 3. "Propter delictum" — for an offense committed: as, convicted of treason, forgery, perjury, or other *crimen falsi*.[3]

A juror unsuccessfully challenged for cause may be challenged peremptorily. In felonies, at common law, thirty-five peremptory challenges were allowed the accused; at present the number is about twenty in capital cases; in civil cases, if allowed at all, only to a very limited extent. The State is allowed peremptory challenges in capital cases, the number varying in the different States.

When a challenge for bias, actual or implied, is disallowed, and the juror is peremptorily challenged and

[1] Chicago & Pacific R. Co. *v.* McGlinn, 114 U. S. 547 (1885), Field, J.

[2] 2 Bl. Com. 328.

[3] 2 Bl. Com. 328; 4 Kent, 201; 1 Washb. R. P. 163.

[4] 2 Bl. Com. 123; *ib.* 461.

[5] [1 Washb. R. P. 88.

[6] Clare *v.* People, 9 Col. 123 (1886), Helm, J.

[7] Mid. E. *chalenge*, a claim: F. *chalonge*, a dispute, accusation.

[8] See 4 Bl. Com. 150; 3 East, 581; 6 Blackf. 20; 1 Dana, 594.

[1] 3 Bl. Com. 359.

[2] Cal. Penal Code, § 1071; 70 Cal. 11.

[3] See 3 Bl. Com. 361-65; 4 *id.* 352; 29 Kan. 690; 17 S. & R. 162.

excused, and a competent juror is obtained in his place, no injury is done the accused, if, until the jury is completed, he has other peremptory challenges which he can use.[1]

Experience has shown that one of the most effective means to free the jury-box from men unfit to be there is the exercise of the peremptory challenge. . . The number of challenges must necessarily depend upon the discretion of the legislature, and may vary according to the condition of different communities, and the difficulties in them of securing intelligent and impartial juries.

Originally, by the common law, the crown could challenge peremptorily without limitation as to number. By an act passed in the time of Edward I, the right was restricted to challenges for cause. But, by rule of court, the crown was not obliged to show cause till the whole panel was called. Those not accepted on the call were directed to stand aside; and if a full jury was not otherwise obtained, the crown was required to show cause against those jurors; if no sufficient cause appeared, the jury was completed from them.

The right to challenge is the right to reject, not to select, a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained.[2]

Challenges are to be made before the jury is sworn. In the Federal courts the justness of a challenge is determined by the judge, without the aid of triors.[3]

See JURY; OPINION, 2; TRIORS; VOIR DIRE.

CHAMBER. A room in a house, used for purposes of a dwelling, of an office, or of a court. See HOUSE, 1; STAR-CHAMBER; SURVEY, Of land.

Chambers. In London, the offices of barristers.

Chambers, or at chambers. A private room or other place where parties may be heard and orders made by a judge, in such matters as the law does not require shall be considered in open court or by a full court. Of such are acts done in a court room while the court is not in session.

Jurisdiction at chambers is incidental to and grows out of the jurisdiction of the court itself. It is the power to hear and determine, out of court, such questions arising between the parties to a controversy as might well be determined by the court itself, but which the legislature has seen fit to intrust to the judgment of a single judge, out of court, without requiring them to be brought before the court in actual session. It follows that the jurisdiction of a judge at chambers cannot go beyond the jurisdiction of the court to which he belongs, or extend to the matters with which his court has nothing to do.[1]

"A judge at chambers" is simply a judge acting out of court.[2] See VACATION.

CHAMPERTY.[3] A bargain with a plaintiff or defendant, *campum partire*, to divide the land or other matter sued for between them, if they prevail: whereupon the champertor is to carry on the party's suit at his own expense. . . The purchasing of a suit or right of suing.[4]

Champart, in the French law, signifies a similar division of profits, being a part of the crop annually due to the landlord by bargain or custom.[4]

Champertor. One who purchases or promotes another's suit; a person chargeable with champerty. **Champertous.** Infected with champerty.

Champerty is the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute, or some profit out of it.[5]

A common example is (or was) the case of a contract by an attorney to collect a claim for a percentage.[6] Also of a champertous character are: purchases of demands involving litigation, of pretended titles, and like claims which cannot be realized upon except by lawsuit.[7]

As between an attorney and his client, it is essential that the attorney prosecute the suit at his own expense.[8]

Where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party, though pledging the avails of the suit as security for payment, the agreement is not champertous.[9]

Some courts have ruled that if the fact that a suit is being prosecuted upon a champertous contract comes to the knowledge of the court in any proper manner, it should refuse longer to entertain the proceeding. Other courts have held, what seems supported by the better reason, that the fact that there is a champertous contract for the prosecution of a cause of action is no ground of defense thereto, and can only be set up by the client against the attorney when the champertous agreement is sought to be enforced. . . The tendency is to relax the common-law doctrine so as to

[1] Spies *v.* Illinois (The Anarchists' Case), 123 U. S. 168 (Nov. 2, 1887), Waite, C. J.; Hopt *v.* Utah, 120 *id.* 436 (1887).

[2] Hayes *v.* Missouri, 120 U. S. 70-71 (1887), cases, Field, J

[3] R. S. § 819; Reynolds *v.* United States, 98 U. S. 157 (1878).

[1] Pittsburg, Ft. W., &c. R. Co. *v.* Hurd, 17 Ohio St. 146-47 (1866).

[2] Whereatt *v.* Ellis, 65 Wis. 644 (1886).

[3] Sham'-perty.

[4] 4 Bl. Com. 153. See 2 Story, Eq. § 1043; 4 Hughes, 563; 10 F. R. 533; 53 Ind. 317; 22 Wend. 405.

[5] Stanley *v.* Jones, 7 Bing. *377 (1831), Tindal, C. J.

[6] See Ackert *v.* Baker, 131 Mass. 437-38 (1881), cases; McPherson *v.* Cox, 96 U. S. 404, 416 (1877); Atchison, &c. R. Co. *v.* Johnson, 29 Kan. 227 (1883), cases.

[7] 2 Story, Eq. §§ 1043-57.

[8] Phillips *v.* South Park Com'rs, 119 Ill. 627 (1887).

[9] Blaisdell *v.* Allen, 144 Mass. 395 (1887), cases.

permit greater liberality of contracting between attorney and client than was formerly allowed, for the reason that the condition of society which gave rise to the doctrine has, in a great measure, passed away. In some States the common-law rule is altogether repudiated.[1]

The English common law and statutes against maintenance and champerty had their origin, if not their necessity, in a different state of society from that which prevails at the present time. When the doctrine was established, lords and other large landholders were accustomed to buy up contested claims against each other, or against commoners with whom they were at variance, in order to harass and oppose those in possession. On the other hand, commoners, by way of self-defense, thinking that they had title to land, would convey part of their interest to some powerful lord, in order, through his influence, to secure their pretended right. The want of sufficient written conveyances, and records of titles, and the feudal relation of villein and liege lord, afforded facilities for the combinations and oppressions which followed this state of things. The power of the nobles became mighty in corrupting the fountains of justice. To remedy these evils, the law against both maintenance and champerty was introduced.[2]

CHANCE. A thing happens by chance to a person which is neither brought about nor pre-estimated by his understanding.[3] See GAME, 2; MEDLEY.

CHANCELLOR.[4] 1. In England, several officers bear this name.

Chancellor of the exchequer. A high officer of the crown, who sometimes sat in court, sometimes in the exchequer chamber, and, with the regular judges of the court, saw that matters were conducted to the king's advantage. His chief duties now concern the management of the royal revenue. Under the Judicature Act of 1873, he is deprived of his judicial functions.[5] See EXCHEQUER.

Lord chancellor. The presiding judge in the court of chancery.

In the courts of the Roman emperors he was a chief scribe or secretary, afterward invested with judicial powers and supervision over other officers. From the empire the name passed to the church: every bishop had a chancellor, the principal judge of his consistory. And when the modern kingdoms were established, almost every state preserved its chancellor, with different jurisdictions and dignities. In all of them he had supervision of such instruments of the crown as were authenticated in the most solemn manner. When seals came into use he had the custody of the king's great seal.[1]

The office is created by delivery of the king's great seal into the custody of the nominee. He becomes a privy counsellor by his office and prolocutor of the house of lords by prescription. He appoints all justices of the peace. Being formerly an ecclesiastic, presiding over the king's chapel, he became keeper of the king's conscience, visitor to all hospitals and colleges of the king's founding, and patron of certain of the king's livings. He is the general guardian of all infants, idiots, and lunatics; he superintends all charitable uses. These powers belong to him apart from the extensive jurisdiction he exercises in his judicial capacity in the court of chancery.[1] See CHANCERY, 1; WOOLSACK.

Vice chancellor. One of a class of equity judges who held court independently of the lord chancellor, but whose decisions were reviewable in his court. They perhaps originally acted in his place.

2. In the United States, the judge of a court of equity.

As a judicial title, in use in Alabama, Delaware, Kentucky, Mississippi, and New Jersey. See CHANCERY, 2.

3. A person sitting as a judge in equity; as in saying that a circumstance in a case would cause a "chancellor" to hesitate to enter a decree in favor of a particular person. See TITLE, Marketable.

CHANCERY.[2] 1. In England, the highest court next to parliament.

Originally consisted of two distinct tribunals: an ordinary court, or court of common law; and an extraordinary court, or court of equity.

The "ordinary court" was the more ancient. It had jurisdiction in proceedings to cancel letters-patent, in cases of traverse of office, and the like, and of personal actions against officers of the court. Whenever any such cause came to an issue of fact, the chancellor, having no power to summon a jury,

[1] Courtright *v.* Burnes, 18 F. R. 317 (1882), cases, McCrary, J.; *ib.* 323-29, cases; s. c. 3 McCrary, 63, 68-75, cases. See generally Fowler *v.* Callam, 102 N. Y. 397 (1886).

[2] Hovey *v.* Hobson, 51 Me. 64 (1863), Dickerson, J. See also 29 Ala. 680; 70 *id.* 118, 179; 17 Ark. 624; 40 Conn. 570; 57 Ga. 264; 73 Ill. 13; 89 *id.* 183; 5 T. B. Mon. 416; 1 Pick. 416; 132 Mass. 388; 4 Mich. 538; 13 Ired. L. 198; 4 Duer, 275; 13 Ohio St. 175; 2 Bart. 457; 29 Wis. 506; 19 Alb. Law J. 468-69 (1879), cases; 19 Cent. Law J. 402-8 (1884), cases; 24 *id.* 198 (1887), cases.

[3] [Goodman *v.* Cody, 1 Wash. T. 335 (1871).

[4] F. *chancelier:* L. L. *cancellarius: a cancellando*, from canceling — illegal letters-patent,— 4 Coke, Inst. 88; 3 Bl. Com. 46. He stood near the screen, *cancellus*, before the judgment seat,— Skeat. See also 1 Campbell's Lives Ld. Ch. 1-2.

[5] 3 Bl. Com. 44, 55.

[1] 3 Bl. Com. 46, 47, 49.

[2] Chancelry: L. L. *cancellaria*, the record-room of a chancellor,— Skeat. L. *cancelli*, bars, lattice — to keep off the people,— 3 Chitty, Bl. Com. 46.

sent the record to the court of king's bench for trial. Out of this ordinary tribunal also issued original writs under the great seal, commissions of charitable uses, of bankruptcy, of lunacy, etc.; for which the court was said to be always open: whence called the *officina justitiæ*.[1]

The "extraordinary court" became the court of greatest consequence. When the courts of law, which followed strictly the directions of the original writs, pronounced a harsh or imperfect judgment, application for redress was at first made to the king in person and his counsel; they, in time, referred the matter to the chancellor and a select committee, or, by degrees, to the chancellor alone,—the referee being empowered to mitigate the severity or to supply the defects of the judgment pronounced in the courts of strict law, upon consideration of all the circumstances in each case.[2] See CHANCELLOR.

The equitable jurisdiction of the court grew out of the exigencies of the times and of judicial administration: as from petitions to the king in council; cases as to which the precedents furnished no form of action for a remedy; cases calling for relief from fraud, accident, mistake, forfeiture; cases involving uses and trusts. The well-defined development of its distinct exercise dates from the time of Edward I (about 1300); but its character was crude until the time of Cardinal Woolsey and Sir Thomas Moore, under Henry VIII (1509-47). Lord Bacon reduced the practice to somewhat of a system. But Sir Heneage Finch (about 1660) so laid the foundation of modern equity jurisprudence as to have been called "the father of equity." Later lord chancellors, notably Hardwicke and Mansfield, extended and improved the system.[3]

Under the Judicature Act of 1873 the court of chancery became the Chancery Division of the High Court of Justice, retaining its former extraordinary jurisdiction; with part of its former ordinary jurisdiction transferred to the Court of Appeal, and the rest to the Courts of Common Law.

A too severe application of common-law rules brought the court of chancery into existence. . . . The body of chancery law is nothing else than a system of exceptions—of principles applicable to cases falling within the letter, but not within the intention, of particular rules.[4]

2. In the United States, "chancery" corresponds to "equity," and a "court of chancery" to a "court of equity," that is, a court exercising equitable powers.

Here equity jurisprudence has grown up chiefly since the close of the last century, the English court of chancery being followed as a model. In some of the States, and in the national tribunals, chancery powers are exercised by the common-law courts.[5] See further EQUITY.

[1] 3 Bl. Com. 47-48.

[2] 3 Bl. Com. 49-50, 50-53.

[3] See 1 Story, Eq. §§ 41-53; 3 Bl. Com. 53-55; 1 Kent, 494.

[4] Peacock v. Hart, 8 S. & R. 377 (1823), Gibson, J.

[5] 1 Story, Eq. §§ 54-58; 1 Pomeroy, Eq. §§ 1-42; 3 Story, Const. §§ 505-7, 644-45.

CHANGE. See ALTER; FUNDAMENTAL; PARTY, 2; VENUE.

'CHANGE. See EXCHANGE, 8.

CHANNEL. The main channel is that bed of a river over which the principal body of water flows.[1] See AQUA, Currit, etc.; NAVIGABLE.

CHAPTER. See STATUTE, 2.

CHARACTER. The qualities impressed by nature or habit on a person, which distinguish him from other persons. These constitute his real character; while the qualities he is supposed to possess constitute his estimated character or reputation. . . . "Reputation" may be evidence of character, but it is not character itself.[2]

That which a person really is, in distinction from that which he may be reputed to be.[3]

Character [reputation] is the slow-spreading influence of opinion, arising from the deportment of a man in society.[4]

In many cases it has been said that the regular mode of examining a witness is to inquire whether he knows the general character of the person whom it is intended to impeach, but in all such cases the word "character" is used as synonymous with "reputation." What is wanted is the common opinion, that in which there is general concurrence; in other words, general reputation or character attributed. That is presumed to be indicative of actual character.[5]

General character. The estimation in which a person is held in the community where he has resided.

Ordinarily, the members of that community are the only proper witnesses to testify to such character. . . . Evidence of character is founded on opinion, and a witness testifying as to the general character of another must have the means of knowing such character.[6]

Good character. Good general reputation for one, several, or many qualities—as, for honesty, chastity, veracity, peaceableness, integrity.

Moral character and conduct may be proven: to afford a presumption that the person is not guilty of a criminal act; to affect the damages where the amount depends upon character and conduct; to impeach or confirm the veracity of a witness.

[1] St. Louis, &c. Packet Co. v. Keokuk Bridge Co., 31 F. R. 757 (1887), Love, J.

[2] [Carpenter v. People, 8 Barb. 608 (1850), Welles, J.

[3] Andre v. State, 5 Iowa, 394 (1857), Woodward, J.

[4] Trial of Hardy, 24 St. Tr. 1079 (1795), Erskine (Ld.), *arguendo*.

[5] Knode v. Williamson, 17 Wall. 586 (1873), Strong, J. See State v. Egan, 59 Iowa, 637 (1883).

[6] Douglass v. Tousey, 2 Wend. 354 (1829).

In civil suits the character of a party is not admissible in evidence unless the nature of the action involves his general character or directly affects it. In the case of a tort, when the defendant is charged with fraud from mere circumstances, evidence of his general character is receivable to repel it. Such evidence will be rejected, whenever the general character is involved by the plea only and not by the nature of the action. Character in regard to a particular trait is not in issue, unless the trait is involved in the matter charged.[1]

The bad character of the plaintiff may be shown in suits for damages for seduction, breach of promise to marry, slander, libel, and malicious prosecution, *qq. v.* The burden of proof is on the assailant.[2]

In homicide, evidence of previous good character may be made the basis on which to form a doubt.[3] But when the evidence is positive and satisfactory, good character cannot overcome the presumption of guilt:[4] against facts strongly proven, good character cannot avail.[5]

The old rule, that evidence of the good character of the defendant is not to be considered unless other evidence leaves the mind in doubt, has been much criticised; the weight of authority is now against it. If evidence of reputation is admissible at all its weight should be left to be determined by the jury in connection with all the other evidence in the case. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.[6]

A witness called to impeach the veracity of another witness may be asked: "Is the character of the witness for truth on a par with that of mankind in general?" In English courts the inquiries are: "Are you acquainted with the character of the witness? What is his general character? Would you believe him under oath?"[7]

Courts differ as to whether the general reputation of a witness for truth and veracity is the true and sole criterion of his credit, or whether the inquiry may not properly be extended to his entire moral character and estimation in society. They also differ as to the right to inquire of the impeaching witness whether he would believe the other on his oath. All agree, however, that the first inquiry must be restricted either to his general reputation for truth and veracity, or to his general character; and that it cannot be extended to particular facts or transactions, for the reason that while every man is supposed to be fully prepared to meet those general inquiries, it is not likely he would be prepared, without notice, to answer as to particular acts.[1]

Unwillingness to believe a man under oath must be based upon two facts: that the witness knows the reputation for veracity among the man's neighbors, and that such reputation is bad.[2]

Proof of a general disposition to do a thing is not proof of that thing. Thus, proof of a habit of gambling when drunk is not proof that the person gambled when drunk on a particular day; nor will proof of a habit of loaning money at a usurious interest prove that a loan was made in a particular instance.[3]

See further BAD, 1; CHASTE; COMMUNICATION, Privileged, 1; REPUTATION; SUSPICION, 3.

CHARGE. 1, *v.* To lay on, to place under or upon, as, a burden, a duty, a trust. Opposed, **discharge**, *q. v.*

(1) To place under a duty or obligation with respect to knowing or doing: as, to charge one with notice of such facts or information as inquiry (*q. v.*) would disclose, or with notice of what the law requires; to charge an acceptor or indorser by presentment.[4]

(2) To impose, upon a person or thing, the duty or obligation of paying money: as, to charge the estate of a decedent with a debt; to charge a legacy upon land devised; to charge a purpart in partition with owelty. See LEGACY; OWELTY.

(3) To enter, in an account, an item of money due. See ACCOUNT, 1.

(4) To place upon one the burden of crime or guilt; to accuse of a wrong or offense; to indict.

The implication is, usually, that the offense has been alleged according to the forms of law — that legal process has issued.[5] See *Charge*, n. (2, b).

(5) For a jury to be charged with the fate of a prisoner,[6] see JEOPARDY.

(6) To instruct in the nature of a duty imposed: as, for a judge or a coroner to charge a jury.

Chargeable. Subject to charge; capable of being or of becoming charged:[7] as, to be

[1] 1 Greenl. Ev. §§ 54–55, cases; 4 Wall. 471; 26 Alb. L. J. 364. As to evidence of, in civil cases, see particularly Simpson *v.* Westenberger, 28 Kan. 757–62 (1882), cases.

[2] 1 Whart. Ev. §§ 47–56, cases.

[3] Kilpatrick *v.* Commonwealth, 81 Pa. 216 (1858).

[4] United States *v.* Freeman, 4 Mas. 510 (1827).

[5] Commonwealth *v.* Webster, 5 Cush. 325 (1850); 59 Cal. 601; 62 *id.* 29; 50 Md. 233.

[6] Commonwealth *v.* Leonard, 140 Mass. 470, 479 (1886), cases, Field, J.; 26 Cent. L. J. 515–19 (1888), cases.

[7] State *v.* Randolph, 24 Conn. 367 (1856); Langhorne *v.* Commonwealth, 76 Va. 108 (1882); State *v.* Rush, 77 Mo. 519 (1883).

[1] Teese *v.* Huntingdon, 23 How. 11–13 (1859), cases, Clifford, J. See, generally, as to evidence, 25 Cent. Law J. 146 (1887), cases.

[2] Spies *et al. v.* People, 122 Ill. 208 (1887).

[3] Thompson *v.* Bowie, 4 Wall. 471 (1866), cases.

[4] 94 U. S. 432; 101 *id.* 697.

[5] Day *v.* Inhabitants of Otis, 8 Allen, 478 (1864), Bigelow, C. J.

[6] State *v.* Connor, 5 Coldw. 313 (1868).

[7] 46 Vt. 625; 107 Mass. 426.

chargeable with a loss;[1] a tax chargeable on land; a pauper chargeable upon a district.

"Chargeable," in its ordinary acceptation as applicable to the imposition of a duty or burden, signifies capable of being charged; subject, liable, proper to be charged.[2]

2, *n.* A burden, duty, obligation, responsibility, or disability — imposed upon a person or attached to a thing. Opposed, **discharge** (which see).

(1) **Charge upon a Thing.** Whatever is in the nature of a lien or incumbrance (*qq. v.*) resting upon an object of property and to be satisfied out of it or out of the proceeds of it: as, a legacy to be paid out of land. Of this nature also are assessments and taxes upon realty,[3] *qq. v.*

Charges. (a) Pecuniary impositions upon property — real estate.

(b) Book-entries of moneys due.

(c) Expenses incurred in settling an estate.[4] See ACCOUNT, 1.

(d) Referring to litigation, something more than costs, *q. v.*

(e) In equity pleading, allegations in denial or avoidance of a defense.

Charge and discharge. Describes the mode formerly pursued in accounting before a master: the complainant exhibited the items of his claim in a form called a charge, while the respondent exhibited contrary items or claims by way of discharge — as, a release.[5]

Charging order. An order of court that stock shall stand pledged to the payment of a judgment. See further ORDER, 2.

Charging part. Allegations, in a bill in equity, intended to anticipate and controvert the answer.[6]

Collateral charge. An obligation in a bond binding the heir, executor, and administrator,— descends upon the heirs and holds assets by descent.[7]

Overcharge. In a statute providing for recovery from a railroad company "for any overcharge," signifies, as ordinarily, a charge of more than is permitted by law.[1]

See also RENT-CHARGE; SURCHARGE.

(2) Charge upon a Person. Anything in the nature of a burden, or of a duty or obligation, resting upon one or more individuals.

While in this substantive sense the word "charge" may have a meaning corresponding to any one of the foregoing verbal senses, it distinctly signifies:

(a) The duty of paying money.

(b) Responsibility for a wrong or an offense, as for negligence or crime, particularly the latter — formal accusation of criminal conduct.

An accusation, made in a legal manner, of illegal conduct.[2]

May imply an original complaint made in the first instance preliminary to a formal trial.[3] See INDICTMENT.

(c) Instruction judicially given by the judge of a court to a jury in regard to their duty as jurors, in particular to a traverse jury as to their duty in finding a verdict.

An authoritative exposition of the law which it is incumbent upon the jury to obey.[4]

Delivered to grand jurors before they proceed to consider indictments and presentments; and to petit or common jurors before they retire to deliberate over the evidence in a particular case.

General charge. Instruction upon a case in its entirety. **Special charge.** Made, at the request of counsel for a party, upon one or more points in the case.

It is clearly error to charge upon a conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but the tendency is to mislead and embarrass them. It may induce them to indulge in conjectures, instead of weighing the testimony.[5]

Where there is an entire absence of testimony, or it is all one way, and its conclusiveness is free from doubt, it is competent for the court to direct the jury to find accordingly.[6]

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[1] 101 U. S. 19.

[2] Walbridge v. Walbridge, 46 Vt. 636 (1874).

[3] See Harris v. Miller, 71 Ala. 34 (1881); 59 id. 317; 69 id. 127; 25 id. 398.

[4] [Goodwin v. Chaffee, 4 Conn. 166 (1822).

[5] See Daniel, Chanc. Pract. 1173.

[6] See Story, Eq. Pl. § 31.

[7] [2 Bl. Com. 340.

[1] Woodhouse v. Rio Grande R. Co., 67 Tex. 418 (1887), Stayton, A. J.

[2] Tompert v. Lithgow, 1 Bush, 180 (1866).

[3] Ryan v. People, 79 N. Y. 598 (1880); 16 Nev. 91.

[4] See Commonwealth v. Porter, 10 Metc. 265-66 (1845).

[5] United States v. Breitling, 20 How. 254 (1857), Taney, C. J.; Goodman v. Simonds, *ib.* 359 (1857); Michigan Bank v. Eldred, 9 Wall. 553 (1869).

[6] Meguire v. Corwine, 101 U. S. 111 (1879); *ib.* 697.

When, after giving a party the benefit of every inference that can fairly be drawn from all the evidence, it is insufficient to authorize a verdict in his favor, it is proper for the court to give the jury a peremptory instruction for the other party.[1]

The court may sum up the facts, and submit them, with the inferences of law, to the judgment of the jury. But care is to be taken to separate the law from the facts, and to leave the latter, in unequivocal terms, to the jury, as their true and peculiar province.[2]

With the charge of the court upon matters of fact, and with its commentaries upon the weight of evidence, the Supreme Court has nothing to do; such observations are understood to be addressed to the jury merely for their consideration as the ultimate judges of matters of fact, and entitled to no more importance than the jury choose to give them.[3]

But, as the jurors are the triors of the facts, an expression of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments.[4]

A general statement will be taken in connection with the facts in the particular case.[5]

In some States the court neither sums up the evidence, nor expresses an opinion upon a question of fact, the charge being strictly confined to questions of law, leaving the evidence to be discussed by counsel, and the facts to be decided by the jury without comment or opinion by the court. But most of the States have adopted the English practice, where the judge always sums up the evidence, and points out the conclusions which in his opinion ought to be drawn from it; submitting them, however, to the judgment of the jury. The judge of a Federal court may express his opinion on the facts.[6]

At a trial by jury in a Federal court the judge may express his opinion upon the facts; the expression, when no rule of law is incorrectly stated and all facts are ultimately submitted to the determination of the jury, cannot be reviewed by writ of error; and the power of the court in this respect is not controlled by a State statute forbidding judges to express an opinion upon the facts.[7] Nor can a State constitution prohibit the judges of the Federal courts from charging juries with regard to matters of fact.[8]

No error is committed in refusing a prayer for instructions consisting of a series of propositions, presented as an entirety, if some of them should not be given to the jury.[9]

It is not error to refuse to give an instruction asked for, even if correct in point of law, provided those given cover the entire case and submit it properly to the jury.[1]

Failure to embrace all the issues in one instruction is not error, if they are included in those given, which, on the whole, are correct, not contradictory, nor calculated to mislead.[2]

Although an instruction, considered by itself, is too general, yet if it is properly limited by others, so that it is not probable that it could have misled the jury, the judgment will not be reversed.[3]

If the court has laid down the law fully and correctly, it is not bound to repeat an instruction in terms varied to suit the wishes of a party.[4]

Where a charge embraces several distinct propositions, a general exception to it will not avail the party if any one of the propositions is correct.[5]

Where any portion of the charge is correct, an exception to the entire charge will not be sustained.[6]

A nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious, and cannot mislead the jury.[7]

Exceptions to a charge are made after the jury retire; and each must cover a distinct point or part only. See further DIRECT, 2; INSTRUCT, 2; JURY, Trial by; NONSUIT; POINT.

CHARGE D'AFFAIRES. See MINISTER, 3.

CHARITY. 1. In its widest sense, all the good affections men ought to bear toward each other; in a restricted and common sense, relief of the poor.[8]

The benevolence which limits itself to giving alms to the poor comes within the restricted definition but falls far short of that true charity which has its origin in the two great sources of all good deeds — the love of God and the love of man.[9]

In considering what is lawful to be done on the Lord's day, "charity" includes everything which proceeds from a sense of moral

[1] Marshall v. Hubbard, 117 U. S. 419 (1886), cases.

[2] M'Lanahan v. Universal Ins. Co., 1 Pet. 183 (1828), Story, J.

[3] Carver v. Jackson, 4 Pet. 80 (1830); Story, J.; Hayes v. United States, 32 F. R. 663 (1887), cases.

[4] Tracy v. Swartwout, 10 Pet. 96 (1836), McLean, J.; Games v. Stiles, 14 *id.* 327 (1840).

[5] Northern Bank v. Porter Township, 110 U. S. 615 (1884), cases; 6 Wheat. 264.

[6] Mitchell v. Harmony, 13 How. 130 (1851), Taney, C. J.

[7] Vicksburg & Meridian R. Co. v. Putnam, 118 U. S. 558 (1886), cases, Gray, J.

[8] St. Louis, &c. R. Co. v. Vickers, 122 U. S. 360 (1887).

[9] Worthington v. Mason, 101 U. S. 149 (1879); Beaver v. Taylor, 93 *id.* 54 (1876), cases.

[1] Laber v. Cooper, 7 Wall. 566 (1868); Indianapolis, &c. R. Co. v. Horst, 93 U. S. 295 (1876); The Schools v Risley, 10 Wall. 115 (1869); Wheeler v. Winn, 53 Pa 127-29 (1866).

[2] Muehlhausen v. St. Louis R. Co., 91 Mo. 346 (1886), Norton, C. J.

[3] Spies *et al.* v. People, 122 Ill. 245-46 (1887), cases.

[4] Northwestern Mut. Life Ins. Co. v. Muskegon Bank, 122 U. S. 510 (1887), cases.

[5] Lincoln v. Claflin, 7 Wall. 132, 139 (1868); Johnston v. Jones, 1 Black, 221 (1861).

[6] Boogher v. N. Y. Life Ins. Co., 103 U. S. 93 (1880), cases.

[7] Rogers v. The Marshal, 1 Wall. 654 (1863).

[8] Morice v. Bishop of Durham, 9 Ves. *405 (1804), Sir William Grant. Approved, Same v. Same, 10 *id.* *540 (1805), Lord Eldon.

[9] Price v. Maxwell, 28 Pa. 36, 35 (1857), Lewis, C. J

duty, or a feeling of kindness and humanity, and is intended wholly for the relief or comfort of another, and not for one's own benefit or pleasure.[1]

Charity is active goodness. It is doing good to our fellow-men. It is fostering those institutions that are established to relieve pain, to prevent suffering, and to do good to mankind in general or to any class or portion of mankind. The term no doubt takes on shades of meaning from the Christian religion.[2] See further SUNDAY.

2. A gift, devise, or trust, intended to promote a charitable use.

In law, charity and charitable use are convertible terms. The latter was originally employed in contradistinction to "superstitious use," and designated such "good and worthy use" as was deemed not within the purview of statute 23 Hen. VIII (1532), c. 10, which abolished certain uses invented by the clergy. But, inasmuch as that statute swept away many meritorious uses, statute 1 Edw. VI (1547), c. 14, was passed to legalize, as recited in the preamble, several "good and godly uses" — such as schools for educating the youth, provision for the poor, etc. This preamble became the germ of the law of "charitable uses." Before 1547, such uses had never been grouped together as a distinct class, and peculiar principles applied to them. . . Since the enactment of statute 43 Eliz. (1601), c. 4, no uses have been regarded as "charitable" except uses within the letter or spirit of that statute, and these are wholly "public" in nature.[3]

What is a charity is rather a matter of description than of definition.[4]

A charity is a gift for a public use; as, a gift in aid of the poor, to learning, to religion, to a humane object.[5]

A precise definition of a legal charity is hardly to be found in the books. The one most commonly used in modern cases, originating in the judgment of Sir William Grant, confirmed by that of Lord Eldon, in *Morice's Case*, 9th and 10th Vesey, *ante* — that those purposes are considered charitable which are enumerated in the statute of 43 Elizabeth, or which by analogy are deemed within its spirit and intendment — leaves something to be desired in point of certainty, and suggests no principle. Mr. Binney, in his argument in the *Girard Will Case*, p. 41 (1844), defined a charitable or pious gift to be "whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense — given for these motives, and to these ends — free from the stain or taint of every consideration that is personal, private and selfish;" and this definition was approved in *Price's Case*, 28th Pa. *ante*. A more concise and practical rule is that of Lord Camden, adopted by Chancellor Kent, by Lord Lyndhurst, and by the Supreme Court of the United States — "A gift to a general public use, which extends to the poor as well as the rich." *Jones* v. *Williams*, Ambl. 652 (1767); *Coggeshall* v. *Pelton*, 7 Johns. Ch. 294 (1823); *Mitford* v. *Reynolds*, 1 Phil. Ch. 191 (1842); *Perin* v. *Carey*, 24 How. 506 (1860).[1]

A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by creating or maintaining public buildings or works, or otherwise lessening the burdens of government.[1]

It is immaterial whether the purpose is called "charitable" in the gift itself, if it is so described as to show that it is charitable in its nature.[1]

A testator must be taken to have used the word "charitable" in its legal sense.[2]

The statute of Elizabeth is the principal source of legal charities, — has become the general rule of charities. The signification of the word is chiefly derived from it, and not from the popular understanding of "good affection" between men, nor of relief of the poor.[3]

That statute names as distinct charities: 1, relief of the aged, impotent, and poor; 2, maintenance of sick and maimed soldiers and mariners; 3, schools of learning; 4, free schools; 5, scholars in the universities; 6, houses of correction; 7, repair of bridges, ports, havens, causeways, churches, sea-banks, highways; 8, the education and preferment of orphans; 9, marriage of poor maids; 10, support and help of young tradesmen, handicraftsmen, and persons decayed; 11, relief and redemption of prisoners or captives; 12, aid of the poor in paying taxes; 13, setting out of soldiers.[4]

These charities are but instances under three general classes: 1, relief and assistance of the poor and needy; 2, promotion of education; 3, maintenance of public buildings and works. The inquiry in each case

[1] Doyle v. Lynn & Boston R. Co., 118 Mass. 197 (1875), cases, Gray, C. J.

[2] Allen v. Duffie, 43 Mich. 7 (1880), Cooley, J.

[3] Owens v. Missionary Society, 14 N. Y. 385, 389, 397, 408 (1856), Selden, J. See also Baptist Association v. Hart, 4 Wheat. 2, 27 (1819); *ib.*, App. 1; 17 How. 151–52, 155; 9 Ves. *405; 30 Kan. 628; 2 Bl. Com. 273; 2 Story, Eq. §§ 1135–49.

[4] Perin v. Carey, 24 How. 494 (1860), Wayne, J.

[5] Kain v. Gibboney, 101 U. S. 365 (1879), Strong, J.

[1] Jackson v. Phillips, 14 Allen, 555–56 (1867), Gray, J. See also Detwiller v. Hartman, 37 N. J. E. 353 (1883); White v. Ditson, 140 Mass. 352 (1885); Humane Society v. Boston, 142 *id.* 27 (1886). Definitions collected, Protestant Episcopal Education Society v. Churchman, 80 Va. 762–63 (1885).

[2] Howe v. Wilson, 91 Mo. 49 (1886).

[3] Town of Hamden v. Rice, 24 Conn. *355 (1856), Ellsworth, J.

[4] Ould v. Washington Hospital, 93 U. S. 309–11 (1877), Swayne, J.

is: Is the purpose of the gift within the principle and reason of the statute, although not expressly named in it.[1]

Gifts for repairing a church, for building an organ gallery, for erecting and maintaining a parsonage, for the worship of God, for the advancement of Christianity, for the benefit of ministers of the gospel, have been held to be valid charities.[2]

The statute of Elizabeth was simply remedial and ancillary to the common law.[3] Courts of equity had, and still have, an original and inherent common-law jurisdiction over charities, except in a few States, as in Maryland, North Carolina, and Virginia.[4]

While the provisions of the statute of Elizabeth have been re-enacted in some States, in others new purposes have been enumerated. In Connecticut, the District of Columbia, Maryland, New York, North Carolina, and Virginia, the statute seems to have been repudiated; in Georgia, Indiana, Iowa, Kentucky, Massachusetts, Rhode Island, Vermont, and in some other States, it is still in force.[5]

A good charitable use is "public," not in the sense that it must be executed openly and in public, but in the sense of being so general and indefinite in its objects as to be deemed of common and public benefit. Each individual benefited may be private, and the charity may be distributed in private and by a private hand. Opposed is a "private charity:" not a public or general charity, in view of the statute of Elizabeth or of a court of chancery, but an association for the mutual benefit of the contributors and of no others. Such a case wants the essential element of indefiniteness in the immediate objects, if not that of gratuity in the contribution.[6]

A charitable use is essentially shifting. When a trust defines the beneficiaries with certainty, it is rather private than public. "Charity begins where uncertainty of the beneficiaries begins."[7]

When private property is appropriated to the support of education for the benefit of the public without any view to profit, it constitutes a charity which is purely public.[1]

Trusts for public charitable purposes must be for the benefit of an indefinite number of persons; for, if all the beneficiaries are personally designated, the trust lacks the element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery.[2]

If the general object of a bequest is pointed out, or if the testator has provided a means of doing so by the appointment of trustees with that power, the gift will be treated as sufficiently definite for judicial cognizance.[3]

When a charitable trust has been fully constituted, and the funds have passed into the hands of the institution or organization intended for its administration, the court of chancery becomes its legal guardian and protector, and will take care that the objects of the trust are duly pursued, and the funds rightfully appropriated. But where contributions to a charity are proposed to be made upon certain express conditions, the rights of the donors stand upon contract; and if the conditions are not performed, their obligation to contribute is discharged.[4]

A devise to a corporation in favor of a charity is valid.[5]

There is no implication, in such case, that the corporation is of a "religious" nature.[6]

Where there is a valid devise to a corporation in trust for charitable purposes, the sovereign may enforce the execution of the trust, by changing the administrator, if the corporation be dissolved, or, if not, by modifying and enlarging its franchises, provided the trust be not perverted, and no wrong be done to the beneficiaries.[7]

Equity will not enforce a trust whose object is the propagation of atheism, infidelity, immorality, or hostility to the existing forms of government.[8]

The essentials to a valid charity are: ability in the donor; capacity in the donee; an instrument or means whereby it is given; a thing to be given;[9] a legal purpose; a gift not absolute, but available through the medium of a trust.[9]

Equity will not administer a foreign charity, unless it be valid under the laws of both States, and the

[1] Jackson *v.* Phillips, 14 Allen, 551 (1867), cases, Gray, J.

[2] Bishop's Residence Co. *v.* Hudson, 91 Mo. 676 (1887), cases.

[3] Ould *v.* Washington Hospital, *ante*.

[4] Kain *v.* Gibboney, Ould *v.* Hospital, *ante;* Vidal *v.* Girard's Executors, 2 How. 155 (1844); Howe *v.* Wilson, 91 Mo. 49 (1886), cases; 80 Va. 773; 107 U. S. 167.

[5] See 1 Bouvier, 304, cases.

[6] Saltonstall *v.* Sanders, 11 Allen, 456, 464 (1865), cases, Gray, J. See also Jones *v.* Habersham, 107 U. S. 174 (1882), cases; s. c. 3 Woods, 443; Beckwith *v.* The Rector, 69 Ga. 569 (1882); De Wolf *v.* Lawson, 61 Wis. 480 (1884); Protestant Epis. Education Society *v.* Churchman, 80 Va. 718 (1885); Kent *v.* Dunham, 142 Mass. 216, 218 (1886).

[7] Dodge *v.* Williams, 46 Wis. 98, 91-103 (1882), cases, Ryan, C. J.; Fontain *v.* Ravenel, 17 How. 384 (1854).

[1] Gerke *v.* Archbishop Purcell, 25 Ohio St. 247, 243 (1874), White, J.

[2] Russell *v.* Allen, 107 U. S. 167 (1883), cases, Gray, J.; American Academy of Arts *v.* Harvard College, 12 Gray, 596 (1882), Shaw, C. J.

[3] Howe *v.* Wilson, 91 Mo. 52 (1886), Black, J. See also Webster *v.* Morris, 66 Wis. 366 (1886).

[4] Printing House *v.* Trustees, 104 U. S. 727 (1881), Bradley, J.

[5] Perin *v.* Carey, Vidal *v.* Girard's Executors, *ante*.

[6] De Wolf *v.* Lawson, 61 Wis. 480 (1884).

[7] Girard's Executors *v.* Philadelphia, 7 Wall. 14-18 (1868); Philadelphia *v.* Fox, 64 Pa. 182 (1870).

[8] Manners *v.* Library Company, 98 Pa. 173 (1880), cases; Jones *v.* Habersham, 107 U. S. 189 (1882), cases

[9] Owens *v.* Missionary Society, 14 N. Y. 385 (1856).

trustee has capacity to receive and carry out the trust.[1]

By the law of England, before the statute of Elizabeth, and by the law of this country at the present day (except where restricted by statute or decision, as in Virginia, Maryland, and New York), trusts for public charitable purposes are upheld under circumstances as to which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration; and the instruments creating them should be so construed as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form and manner pointed out by him cannot be followed.[2]

Board of charities. A board of public charities, in several of the States, is a body of commissioners, appointed by the governor of each State (possibly by and with the consent of one of the houses of the legislature), and charged with the duty of examining into the condition of all charitable, reformatory or correctional institutions in the State; having regard, in particular, to the methods of government and instruction, the official conduct of trustees or officers, the finances, buildings, etc.

See AMERICAN; ASSOCIATION, 3; BENEVOLENCE; CY PRES; INDIGENT; LEGACY; MARSHAL, 2; MASSES; MORTMAIN; PROTESTANT; SUBSCRIBE, 2; VISIT, 2.

CHART. As used in the copyright law, does not include sheets of paper exhibiting tabulated or methodically arranged information.

In the Copyright Act of 1790, where the word was first used, a chart was a marine map, as is shown by all the dictionaries of the time. A definition covering such a sheet of paper was introduced into Worcester's dictionary in 1864, and into Webster's in 1865. The word, in the present act, is separated from the word "book," and kept with the word "map" and other words of artistic import, thus showing an intention to continue its use in the sense of a chart of the class of maps, and other works of art.[3] See COPYRIGHT. Compare MAP.

CHARTA. L. Paper; a writing; a charter. See MAGNA CHARTA; OFFICINA: CHARTARUM.

CHARTER. 1. A deed is sometimes called a charter from its materials.[4] See CHARTA.

Charter-land. Land held by deed under certain rents and free services; book-land. Opposed, *folk-land;* which was held by an assurance in writing.[5] See MANOR.

Charter-party. A contract by which the owner lets his vessel to another for freight.[1]

A contract by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places.[2]

All contracts under seal were anciently called "charters," and divided into two parts, one for each party. Whence *charta-partita:* a writing divided; like an indenture (*q. v.*) at common law.[3]

Charterer. He who hires a vessel under a "charter-party." *Charter-money.* The sum agreed to be paid for the use of the vessel.

Charge of navigating the vessel may be retained by the owner or assumed by the hirer.

The contract is generally effected through a broker acting for the ship-owner.

A ship thus chartered is opposed to a "general ship."

The instrument is not usually under seal. It names the vessel, master, and contract parties; and specifies the tonnage, the times and places for loading and discharge, the charter-money, and the allowance for delay. It is a commercial instrument, subject to the rules applicable to other commercial contracts. It is to be construed liberally, in agreement with the intention of the parties, the usages of trade in general and of the particular trade.[4]

An action *in rem* cannot be maintained for the breach of a charter-party when the voyage was not undertaken, and no part of the cargo delivered on board.[5]

See DEFECT; DISPATCH; FREIGHT; LADING, Bill of; SAIL.

2. The primary meaning — a deed or sealed instrument — is obsolete. Used alone, the word now refers to certain instruments which emanate from government, in the nature of letters-patent.[6]

The king's grants, whether of lands, honors, liberties, franchises, or aught besides, are contained in charters or letters-patent,[7] *q. v.*

Charter of incorporation. The instrument evidencing the act of a legislature, governor, court, or other authorized department or person, by which a corporation is or was created.

The charter of a *private* corporation, duly accepted, is an executed contract. It is construed

[1] Taylor *v.* Trustees of Bryn Mawr College, 34 N. J. E. 101 (1881), cases: 13 Rep. 20.

[2] Russell *v.* Allen, *ante;* 13 Wall. 733. See generally 23 Cent. Law J. 364–68 (1886), cases.

[3] Taylor *v.* Gilman, 24 F. R. 633-34 (1885), cases, Wheeler, J.

[4] 2 Bl. Com. 295.

[5] 2 Bl. Com. 90.

[1] Spring *v.* Gray, 6 Pet. 164 (1832), Marshall, C. J.

[2] Vandewater *v.* Mills, 19 How. 91 (1856), Grier, J.; Ward *v.* Thompson, 22 *id.* 333 (1859).

[3] 2 Kent, 201.

[4] Lowber *v.* Bangs, 2 Wall. 744 (1864); 113 U. S. 40; 115 *id.* 353.

[5] The Missouri, 30 F. R. 884 (1887), cases.

[6] See 1 Story, Const. § 161.

[7] 2 Bl. Com. 346; 1 *id.* 108, 473.

strictly, against the corporation, and in favor of the public. Nothing passes but what is granted in explicit terms. The charter of a *municipal* corporation is not a contract.[1]

The charter of a bank is a franchise, and not taxable if a fair price has been paid for it and accepted in lieu of taxation. No power of sovereignty will be held to be surrendered, unless expressed in terms too plain to be mistaken.[2]

A power reserved by the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter, granted subject to such power, which will not defeat or substantially impair the object of the grant or of any right vested under it, and which the legislature may deem necessary for securing either that object or a public right.[3]

To "create" a charter is to make one which never existed before. To "renew" a charter is to give a new existence to one which has been forfeited, or which has lost its vitality by lapse of time. To "extend" a charter is to give one which now exists greater or longer time in which to operate than that to which it was originally limited.[4]

It is a well settled rule of construction of grants to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.[1]

See CORPORATION; FUNDAMENTAL; IMPAIR; RAILROAD; ULTRA VIRES.

CHASE. See GAME, 1.

CHASTE. Actually pure as to conduct and principle; virtuous.

Chaste character. Personal virtue; moral purity.

Refers not to reputation but to moral qualities — to what a person really is.[2]

Actual personal virtue — actually chaste and pure in conduct and principle.

Applies to one who, having fallen, has subsequently reformed and become chaste.[3]

Although a female, from ignorance or other cause, may have so low a standard of propriety as to commit or permit indelicate acts or familiarities, yet, if she have enough of the sense of virtue that she would not surrender her person, unless seduced to do so under a promise of marriage, she cannot be said to be a woman of "unchaste character" within the meaning of a statute punishing seduction under a promise of marriage.[4]

Chastity. The virtue which prevents unlawful sexual commerce.

Offenses against chastity are: fornication, adultery, incest, seduction, lascivious carriage, keeping or frequenting houses of prostitution, bigamy, marrying the husband or wife of another, obscene libels, sodomy, bestiality.

Solicitation of chastity. Inviting another to commit adultery or fornication.

A solicitation is not an attempt. Until some forbidden overt act is committed, the law will not detect and punish the intent. The contrary rule would be impracticable.[5]

Charges of unchaste conduct are seldom made in direct words; usually by insinuation. However made, they are slanderous when they convey to the mind of the hearers the meaning that the person in question is unchaste.[6]

See ATTEMPT; BAD, 1; PRETIUM, Pudicitiæ.

CHATTEL. Things personal include not only things movable, but something more: the whole of which is comprehended under the general name of "chattels," which Coke says is a French word signifying goods — from the technical Latin *catalla*, which meant, primarily, beasts of husbandry, and,

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[1] Dartmouth College *v.* Woodward, 4 Wheat. 518, 634 (1819), Marshall, C. J.; *ib.* 708, 712, Story, J.

[2] Jefferson Branch Bank *v.* Skelly, 1 Black, 446 (1861); Thomas *v.* West Jersey R. Co., 101 U. S. 82 (1879).

[3] Close *v.* Glenwood Cemetery, 107 U. S. 476 (1883), cases, Gray, J. See also Union Passenger Ry. Co. *v.* Philadelphia, 101 *id.* 539-40 (1879); Spring Valley Water Works *v.* Schottler, 110 *id.* 352-53 (1884); County of Santa Clara *v.* South. Pacific R. Co., 18 F. R. 406-8 (1883). Although an attempt to shake or limit the conclusion reached in the Dartmouth College Case was made in Bank of Toledo *v.* Toledo, 1 Ohio St. 622 (1853), and in other cases at about the same time, the doctrine was re-asserted and even generalized and extended by the Supreme Court in Piqua Branch *v.* Knoop, 16 How. 369 (1853); Dodge *v.* Woolsey, 18 How. 331 (1855), and cases, *ib.* 380, 384. Much space would be needed for expounding the decisions which have applied the doctrine, and for tracing its application to different kinds of charters. To do so is the less necessary because the legislatures have become accustomed to grant charters subject to a general reserved power to alter or repeal them. There are, no doubt, a few corporations chartered before 1819, and some created since, without reservation of such power, which are independent of legislative changes made without their assent; but the great mass of private corporations now active are subject to a right reserved to the legislature to make changes. Addison, Contr. *2, Am. ed., A. & W. (1888), note. See also New Orleans *v.* Great Southern Tel., &c. Co., Sup. Ct. La. (Feb. 23, 1888): 26 Cent. Law J. 223; *ib.* 234-36 (1888), cases.

[4] Moers *v.* Mayor, &c. of Reading, 21 Pa. 201 (1853), Black, C. J.

[1] Minturn *v.* Larue, 23 How. 436 (1859), Nelson, J.; 76 Va. 961; 77 *id.* 219.

[2] [State *v.* Carron, 18 Iowa, 375-76 (1865), cases; State *v.* Prizer, 49 *id.* 532 (1878); 5 *id.* 391; 59 *id.* 636; 70 *id.* 454; 28 Minn. 52.

[3] Carpenter *v.* People, 8 Barb. 608-9 (1850).

[4] State *v.* Brinkhaus, 34 Minn. 285 (1885), Mitchell, J.

[5] Smith *v.* Commonwealth, 54 Pa. 211-14 (1867), cases; 14 *id.* 226; 7 Conn. 270; 1 Bish. Cr. L. § 767.

[6] Kedrolivansky *v.* Niebaum, 70 Cal. 218 (1886).

secondarily, all movables in general. In Normandy, a chattel stood opposed to a fief or feud.[1] See further CATTLE.

Any species of property not real estate or freehold.[2]

Chattel personal. Chattels personal are, strictly, things movable: which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another.[3]

Such are animals, household stuff, money, jewels, grain, garments, and everything else that can be put in motion and transferred from place to place;[3] also, choses in action; and slaves were.

Chattel real. Chattels real, says Coke, are such as concern, or savor of, the realty; as, terms for years of land, estates by a statute-merchant, statute-staple, or the like.

These are called real chattels, as being interests issuing out of, or annexed to, real estate: of which they have one quality, viz., immobility, which denominates them "real;" but want the other, viz., a sufficient, legal, indeterminate duration; and this want it is that constitutes them "chattels." The utmost period for which they can last is fixed and determinate, either for a space of time certain, or till a particular sum of money be raised out of a particular income; so that they are not equal, in law, to the lowest estate of freehold,— a lease for another's life.[4]

See FIXTURE; GOODS; MORTGAGE; PROPERTY; SALE.

CHAUD-MEDLEY. See MEDLEY.

CHEAT.[5] Cheats which are punishable at common law may be described to be deceitful practices in defrauding or endeavoring to defraud another of his known rights by means of some artful device, contrary to the plain rules of common honesty.[6]

Many acts which would be denounced as cheats by the principles of morality are not legally cheats.[7]

To "cheat and defraud" does not necessarily import the commission of an indictable offense. Therefore, in charging a conspiracy to cheat and defraud, the means proposed must be set out, for the information of the court and of the defendant.[8]

A cheat or fraud, indictable at common law, must be such as would affect the public, such as common prudence cannot guard against: as, using false weights and measures (*q. v.*), or false tokens (*q. v.*), or where there is a conspiracy to cheat.[1]

Technically, the offense is "false pretenses." Spoken of one in relation to his vocation, the word is defamatory and actionable.[2]

See COVIN; DECEIT; PRETENSES; SWINDLE.

CHECK.[3] An order on a bank to pay the holder a sum of money at the bank, on presentment of the order and demand of the money.[4]

A draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money to a certain person therein named, or to him or his order, or to the bearer, and payable instantly on demand.[5]

When accepted, it is an appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability on the part of the drawer. The drawer must have an account with the bank, and, perhaps, money on deposit.[6]

The payee of a check, before it is accepted by the drawee, cannot maintain an action upon it against the latter, as there is no privity of contract between them.[7]

A check is not an inland bill of exchange, though like it. Unlike a bill, it is drawn upon a bank or banker and against funds on deposit; acceptance of it stops denial of funds; no grace is allowed on it; it is not due until payment is demanded; the drawer is not discharged by laches in the holder in presenting it for payment, except to the extent of injury done him; and the death of the drawer rescinds authority in the bank to pay the check. In other respects checks are governed by the rules applicable to inland bills of exchange and promissory notes. When drawn outside of the State in which the bank is located, they are like foreign bills of exchange.[8]

A check is to be presented or indorsed over to another holder within such time as is reasonable, taking into view all the circumstances of the case. The holder

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[1] [2 Bl. Com. 385-86; 19 Ill. 584; 18 Johns. *94.

[2] 2 Kent, 342.

[3] 2 Bl. Com. 387.

[4] 2 Bl. Com. 386. See Insurance Co. *v.* Haven, 95 U. S. 251 (1877); Hyatt *v.* Vincennes Nat. Bank, 113 *id.* 415 (1885); Putnam *v.* Westcott, 19 Johns. *76 (1821); 2 Kent, 342.

[5] *F. escheat:* from fraud used by lords of manors to procure escheats.

[6] Hawkins, Pl. Cr., b. 1, c. 23, § 1.

[7] See People *v.* Miller, 14 Johns. *372 (1817).

[8] Commonwealth *v.* Wallace, 16 Gray, 228 (1860), Dewey, J

[1] Rex *v.* Wheatly, 2 Burr. 1127 (1760), Mansfield, C. J.; 3 Bl. Com. 165. See 7 Johns. *204; 12 *id.* *372.

[2] Heard, Lib. & Sl. §§ 16, 28, 46; 6 Cush. 185; 5 Wend. 263; 2 Pa. 187.

[3] Mid. E. *chek*, a stop: F. *eschec*, a "check at chess-play." *Cheque* is from exchequer, and erroneous,— Skeat; Webster.

[4] [Bullard *v.* Randall, 1 Gray, 606 (1854), Shaw, C. J.; 10 Oreg. 35.

[5] 2 Daniel, Neg. Inst. § 1566 (1879): 28 Gratt. 170.

[6] See Merchants' Nat. Bank *v.* State Nat. Bank, 10 Wall. 647-48 (1870), cases; Espy *v.* Bank of Cincinnati, 18 *id.* 604, 619-20 (1873); Gordon *v.* Müchler, 34 La. An. 604 (1882); 12 Rep. 514.

[7] First Nat. Bank of Washington *v.* Whitman, 94 U. S. 343-47 (1876), cases; 100 *id.* 689.

[8] *Re* Brown, 2 Story, 513 (1843); Merchants' Bank *v.* State Bank, Espy *v.* Bank, *supra;* Levy *v.* Laclede Bank, 18 F. R. 198 (1883).

can sue the drawer, if payment is refused; and the drawer, in such case, has *assumpsit* against the bank for breach of contract. The holder cannot sue the bank.[1]

Checks, regular upon their face, pass as money.[2]

A bank is not bound to take notice of memoranda and figures on the margin of a check, which a depositor places there merely for his own convenience, to preserve information for his own benefit; and in such case, the memoranda and figures are not a notice to the bank that the particular check is to be paid only from a particular fund. So, too, a mark on a deposit ticket, if intended to require a particular deposit to be kept separate from other deposits, must be in the shape of a plain direction, else such a duty will not be imposed on the bank.[3]

Certified check. A check marked "good" by the banker.

Implies that there are funds in the bank with which to pay it, that the same are set apart for its satisfaction, and that they will be so applied when the check is presented for payment.[4]

The act of certifying is equivalent to an acceptance of the check. The object is to enable the holder to use the check as money. The bank charges the check to the account of the drawer; credits it in a certified check account; and, when paid, debits that account with the amount. The bank thus becomes the debtor of the holder.[4]

Memorandum check. A check having "Memorandum" or "Mem." written across its face.

A memorandum of indebtedness given by a borrower. In the hands of a third person, for value, has the force of a check without restriction.[5]

The check takes the place of a note, as for a temporary loan. It is not designed to be presented at bank, but is for redemption at the time agreed upon.[6]

Raised check. A check increased in the amount for which it was drawn, by fraudulent alteration, *q. v.*

When money has been been paid upon a raised check by mistake, neither party being in fault, it may be recovered as paid without consideration. If neither party's negligence caused the injury the holder must bear the loss. When a person sends such paper to the bank upon which it is drawn, for information, the bank is presumed to know the drawer's signature and the state of his account. Unless the attention of the bank officer is directed beyond these two matters, his response that the check is good will be limited to them, and will not be extended to the genuineness of the filling-in or of the check as to the payee or the amount.[1]

See BANK, 2; CASHIER; DEPOSIT, 2; DONATIO, Mortis, etc.; NEGOTIABLE; ORDER, 1.

CHEESE. See OLEOMARGARINE; POLICE, 2.

CHEMISTRY. See CORONER; EXPERT; PROCESS, 2.

CHICKEN. See ANIMAL; DAMAGE-FEASANT; CRUELTY, 8; NUISANCE; TRESPASS; WORRY.

CHIEF.[2] The head: principal; leading; above, higher, or preceding another or others. Compare PRIMARY.

Chief Executive. The President of the United States. See PRESIDENT.

Chief justice. The presiding judge of a court of errors and appeals. See further JUDGE.

In chief. A shortened form of the phrase "examination in chief:" the first examination of a witness by the party who calls him; the direct examination of a witness.[3] See EXAMINATION, 9.

Tenant in chief. See FEUD.

CHILD. 1. An infant — in the popular senses. See ABANDON, 2 (2); ABORTION; CURTESY; VENTER.

2. One of tender years; a young person; a youth. See CRUELTY, 2; INFANT; SERVITUDE, 1, Involuntary.

3. A legitimate descendant in the first degree.

4. A legitimate descendant in any degree; but, in this case, "children" is the word used; offspring, issue or descendants generally.

In common parlance, "children" does not include any other than the immediate descendants in the first degree of the ancestor. But it may include others, as where it appears from a will that there are no other persons in existence who will answer the description of children except descendants of a degree remoter than the first; or, where there could not be any of the first degree at the time or in the event contemplated by the testator; or where he has shown by other words that he used the word "children" as synonymous with descendants, or issue, or to designate or

[1] Bank of the Republic *v.* Millard, 10 Wall. 156 (1869). See generally 20 Cent. Law J. 339-42 (1888), cases.

[2] Poorman *v.* Woodward, 21 How. 375 (1858); Downey *v.* Hicks, 14 *id.* 249 (1852).

[3] State Nat. Bank of Springfield *v.* Dodge, 124 U. S. 346 (1888), Blatchford, J.

[4] Merchants' Bank *v.* State Bank, Espy *v.* Bank, Bank *v.* Whitman, *ante;* Bank of British North America, 91 N. Y. 110 (1883).

[5] Story, Prom. Notes, § 499; 16 Pick. 535; 32 N. J. L. 96; 11 Paige, 612.

[6] See Turnbull *v.* Osborne, 12 Abb. Pr. 201-7 (1872).

[1] Espy *v.* Bank of Cincinnati, 18 Wall. 604, 619 (1873).

[2] F. *chef*, head, top.

[3] 1 Greenl. Ev. § 445.

include illegitimate offspring, grandchildren, or step-children. But, ordinarily, the reference is to descendants in the first degree only.[1]

The word is generally a word of purchase; but not so in the case of a grant in the present tense to a man and his children, he having no child, as in *Wild's Case*.[2]

While the word "children" will include a grandchild,[3] the presumption of law is against such construction.[4]

The word itself intends only legitimate children.[5]

Children become emancipated at twenty-one. Their duties to their parents arise out of natural justice, and compensation. At common law they are not bound to support an infirm or indigent parent; but otherwise, now, by statute. They may defend the parent's person, but may not commit crime at his command.[6]

In a contest for the possession of a child, the welfare of the child is the controlling consideration. The father will be given the custody of it, unless he is shown to be unfit or incompetent for that office, or unless the welfare of the child demands a different disposition.[7]

See further ADOPT, 3; AGE; AGENT; BASTARD; DESCENDANT; DIE, Without, etc.; FAMILY; HEIR; INFANT; ISSUE, 5; NAME, 1; NEGLIGENCE; ORPHAN; PARENT; PATER, Partus, etc.; PERPETUITY; RAISE; SHELLEY'S CASE; WITNESS.

CHINA, DECORATED. See PAINTING.

CHINESE. See BURIAL; CITIZEN; COMMERCE; LAUNDRIES; POLICY, 2; QUARANTINE, 2; RIGHT, Civil Rights Act; TREATY; WHITE.

The **Burlingame treaty of July 28, 1868**, declares, Art. 6, that "Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel and residence, as may be enjoyed by the citizens or subjects of the most favored nation," and, reciprocally, as to citizens of the United States in China.

Appeals from the Pacific coast induced the Government to request a modification of the treaty. This resulted in the **supplemental treaty of November 17, 1880**, the first article of which provides that "whenever in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension may be reasonable and shall apply only to Chinese who may go to the United States as laborers . . and immigrants shall not be subject to personal maltreatment or abuse;" and the second article of which provides that "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."[1]

The **act of May 6, 1882**, c. 126 (22 St. L. 58), entitled "An act to execute certain stipulations relating to Chinese," as amended by the **act of July 5, 1884**, c. 220 (23 St. L. 115) — the words in italics being introduced by the act of 1884, while those in brackets were in the act of 1882, but were stricken out by the amendatory act — provides as follows:

Whereas, in the opinion of the government of the United States, the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof, therefore be enacted,—

Section 1. That from and after the [expiration of ninety days next after the] passage of this act, and until the expiration of ten years, the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come *from any foreign port or place*, or, having so come, [after the expiration of said ninety days,] to remain within the United States.

Sec. 2. The master of any vessel who shall knowingly bring within the United States on such vessel and land, *or attempt to land*, or permit to be landed, any Chinese laborer, from any foreign place, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each and every laborer so brought, and may *also be* imprisoned for a term not exceeding one year.

Sec. 3. The foregoing sections shall not apply to Chinese laborers who were in the United States on the 17th of November, 1880, or who shall have come into the same before the expiration of ninety days next after the passage of *the act to which* this act *is amendatory, nor shall said sections apply to laborers*, [and] who shall produce to such master before going on board such vessel, and to the collector of the port at which such vessel shall arrive, the evidence hereinafter required of his being one of the laborers in this section mentioned; nor shall the foregoing sections

[1] See Treaty of 1868, 16 St. L. 739; Treaty of 1880, 22 St. L. 826; Heong *v.* United States, 112 U. S. 536, 542 (1884); Act 1884, *ib.* 543; 124 *id.* 627.

[1] See Mowatt *v.* Carow, 7 Paige, 339 (1838), Walworth, Ch.; Palmer *v.* Horn, 84 N. Y. 520-21 (1881); Ingraham *v.* Meade, 3 Wall. Jr. 42 (1855); Rogers *v.* Weller, 5 Biss. 168 (1870); Feit *v.* Vanatta, 21 N. J. E. 84 (1870); Winsor *v.* Odd Fellows' Association, 13 R. I. 150 (1880); Butler *v.* Ralston, 69 Ga. 489 (1882); Bates *v.* Dewson, 128 Mass. 334 (1880).

[2] 3 Coke, *17 (1599); Cannon *v.* Barry, 59 Miss. 289, 300 (1881), cases; Bannister *v.* Bull, 16 S. C. 227 (1881).

[3] *Re* Paton, 41 Hun, 500 (1886); *Re* Brown, 29 *id.* 417 (1883), cases.

[4] Pugh *v.* Pugh, 105 Ind. 555 (1885); 94 *id.* 407, cases; Smith *v.* Smith, 24 S. C. 214 (1885).

[5] Minot *v.* Harris, 132 Mass. 531 (1882).

[6] See 1 Bl. Com. 453; 4 *id.* 23; 4 Kent, 345; People *v.* Turner, 55 Ill. 282-86 (1870).

[7] *Re* Scarritt, 76 Mo. 565, 564 (1882), cases.

apply to the case of any master whose vessel, being bound to a port not within the United States, shall come within the jurisdiction of the United States by reason of being in distress or in stress of weather, or touching at a port on its voyage to any foreign port or place: provided that all laborers brought on such vessel shall *not be permitted to land except in case of absolute necessity, and must* depart with the vessel on leaving port.

Sec. 4. For the purpose of properly identifying Chinese laborers who were in the United States on the 17th of November, 1880, or who shall have come into the same before the expiration of ninety days next after the passage of *the act to which* this act *is amendatory*, and in order to furnish them with the proper evidence of their right to go from and come to the United States, [of their free will and accord,] as provided by the *said act and the* treaty between the United States and China dated November 17, 1880, the collector of customs of the district from which any such laborer shall depart from the United States shall, in person or by deputy, go on board each vessel having on board any such laborer, and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such laborers, which shall be entered in registry books kept for that purpose, in which shall be stated the *individual, family, and tribal* name *in full, the* age, occupation, *when and where followed*, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each of such laborers, which books shall be safely kept in the custom-house; and every such laborer so departing from the United States shall be entitled to, and shall receive, free of any charge or cost, upon application therefor, from the collector, or his deputy *in the name of said collector, and attested by said collector's seal of office*, at the time such list is taken, a certificate, signed by the collector or his deputy, and attested by his seal of office, in such form as the secretary of the treasury shall prescribe, which certificate shall contain a statement of the *individual, family, and tribal* name *in full*, age, occupation, *when and where followed*, [last place of residence, personal description, and facts of identification,] of the laborer to whom the certificate is issued, corresponding with the said list and registry in all particulars. In case any laborer, after having received such certificate, shall leave such vessel before her departure, he shall deliver his certificate to the master of the vessel, and, if such laborer shall fail to return to such vessel before her departure from port, the certificate shall be delivered by the master to the collector of customs for cancellation. The certificate herein provided for shall entitle the laborer to whom the same is issued to return to and re-enter the United States upon producing and delivering the same to the collector of customs of the district at which such laborer shall seek to re-enter; *and said certificate shall be the only evidence permissible to establish his right of re-entry;* and upon [delivery] *delivering* of such certificate by such laborer to the collector of customs at the time of re-entry, said collector shall cause the same to be filed in the custom-house and duly canceled.

Sec. 5. Any Chinese laborer mentioned in section four being in and desiring to depart from the United States by land, shall have the right to demand and receive, free of charge or cost, a certificate of identification similar to that provided for in section four to be issued to such laborers as may desire to leave the United States by water; and it is hereby made the duty of the collector of customs of the district next adjoining the foreign country to which said laborer desires to go to issue such certificate, free of charge or cost, upon application by such laborer, and to enter the same upon registry books kept as provided for in section four.

Sec. 6. In order to the faithful execution of [articles one and two of the treaty in] *the provisions of* this act, [before mentioned,] every Chinese person other than a laborer, who may be entitled by said treaty [and] *or* this act to come within the United States, and who shall be about to come to the United States, shall *obtain the permission of and* be identified as so entitled by the Chinese government, *or of such other foreign government of which at the time such person shall be a subject*, in each case, [such identity] to be evidenced by a certificate issued [under the authority of said] *by such* government, which certificate shall be in the English language, [or, if not, accompanied by a translation into English, stating such right to come,] *and shall show such permission, with the name of the permitted person in his or her proper signature*, and which certificate shall state the *individual, family, and tribal* name *in full*, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, *when and where and how long pursued*, and place of residence [in China] of the person to whom the certificate is issued, and that such person is entitled [conformably to the treaty in] *by* this act [mentioned] to come within the United States. *If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid; Provided, That nothing in this act, nor in said treaty, shall be construed as embracing within the meaning of the word "merchant" hucksters, peddlers, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired. The certificate provided for in this act, and the identity of the person named therein, shall, before such person goes on board any vessel to proceed to the United States, be visèd by the indorsement of the diplomatic representative of the United States in the foreign country from which said certificate issues, or of the consular representative of the United States at the place from which the person is about to depart; and such representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate, to examine into the truth of the statements set forth in said certificate, and, if he shall find that any of the statements therein contained are untrue, it shall be his duty to refuse*

to indorse the same. Such certificate, *visèd as aforesaid*, shall be prima facie evidence of the fact set forth therein, and shall be produced to the collector of customs [or his deputy] of the port at which the person shall arrive, *and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person producing the same to establish a right of entry; but said certificate may be controverted, and the facts therein stated disproved by the United States authorities.*

Sec. 7. Any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate, or forge any such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in any such certificate, shall be deemed guilty of a misdemeanor; and, upon conviction thereof, shall be fined in a sum not exceeding one thousand dollars, and imprisoned in a penitentiary for a term of not more than five years.

Sec. 8. The master of any vessel arriving from any foreign place shall, at the same time he delivers a manifest of the cargo, and, if there be no cargo, then at the time of making a report of the entry of the vessel pursuant to law, in addition to the other matter required to be reported, and before landing, or permitting to land, any Chinese passengers, deliver and report to the collector of customs of the district in which such vessels shall have arrived a separate list of all Chinese passengers taken on board his vessel at any foreign place, and all such passengers on board the vessel at that time. Such list shall show the names of such passengers, (and if accredited officers of the Chinese *or of any other foreign* government traveling on the business of that government, or their servants, with a note of such facts,) and the names and other particulars, as shown by their respective certificates; and such list shall be sworn to by the master in the manner required by law in relation to the manifest of the cargo. Any [willful] refusal or *willful* neglect of any such master to comply with the provisions of this section shall incur the same penalties and forfeiture as are provided for a refusal or neglect to report and deliver a manifest of cargo.

Sec. 9. Before any Chinese passengers are landed from any such vessel, the collector or his deputy shall proceed to examine such passengers, comparing the certificates with the list, and with the passengers; and no passengers shall be allowed to land from such vessel in violation of law.

Sec. 10. Every vessel whose master shall knowingly violate any provision of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district into which such vessel may enter, or in which she may be found.

Sec. 11. Any person who shall knowingly bring into, or cause to be brought into, the United States by land, or who shall [knowingly] aid or abet the same, or aid or abet the landing from any vessel of any Chinese person not lawfully entitled to enter, shall be deemed guilty of a misdemeanor, and shall, on conviction, be fined in a sum not exceeding one thousand dollars, and imprisoned for a term not exceeding one year.

Sec. 12. No Chinese person shall be permitted to enter by land without producing to the proper officer of customs the certificate required of persons seeking to land from a vessel. And any person found unlawfully here shall be caused to be removed to the country whence he came, [by direction of the President,] and at the cost of the United States, after being brought before some justice, judge, or commissioner of a United States court, and found to be one not lawfully entitled to remain; *and in all such cases the person who brought, or aided in bringing, such person to the United States, shall be liable to the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act, or the act of which this is amendatory, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation, to be paid by the same officers. And the United States shall pay all charges for the maintenance and return of any person having the certificate prescribed by law as entitling such person to come into the United States, who may not have been permitted to land by reason of any provision of this act.*

Sec. 13. This act shall not apply to diplomatic and other officers of the Chinese *or other* governments traveling upon the business of that government, whose credentials shall be taken as equivalent to the certificate in this act mentioned, and shall exempt them and their body and household servants from the provisions of this act as to other Chinese persons.

Sec. 14. Hereafter no court shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.

Sec. 15. *The provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power; and* the words "Chinese laborers" shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining.

Sec. 16. *Any violation of any provision of this act, or of the act of which this is amendatory, the punishment of which is not otherwise herein provided for, shall be deemed a misdemeanor, punishable by fine not exceeding one thousand dollars, or by imprisonment for not more than one year, or both fine and imprisonment.*

Sec. 17. *Nothing contained in this act shall be construed to affect any proceeding, criminal or civil, begun under the act of which this is amendatory; but such proceeding shall proceed as if this act had not been passed.*

The convention between the United States and China for excluding Chinese laborers from coming to the United States, signed at Washington March 12, 1888, was as follows: (See ADDENDA.)

"Whereas, on the 17th day of November, A. D. 1880, a treaty was concluded between the United States and China for the purpose of regulating, limiting, or suspending the coming of Chinese laborers to, and their residence in, the United States;

"And whereas the government of China, in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers has

given rise in certain parts of the United States, desires to prohibit the emigration of such laborers from China to the United States;

"And whereas the government of the United States and the government of China desire to coöperate in prohibiting such emigration, and to strengthen in other ways the bonds of friendship between the two countries;"

Now, therefore, the President of the United States has appointed Thomas F. Bayard, secretary of state, as his plenipotentiary; and the Emperor of China has appointed Chang Yen Hoon, minister of the third rank of the Imperial Court, etc., as his plenipotentiary; and the said plenipotentiaries have agreed upon the following articles:

ARTICLE I.

"The high contracting parties agree that for a period of twenty years, beginning with the date of the exchange of the ratifications of this convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited; and this prohibition shall extend to the return of Chinese laborers who are not now in the United States, whether holding return certificates under existing laws or not.

ARTICLE II.

"The preceding article shall not apply to the return to the United States of any Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. Nevertheless, every such Chinese laborer shall, before leaving the United States, deposit, as a condition of his return, with the collector of customs of the district from which he departs, a full description in writing of his family, or property, or debts, as aforesaid, and shall be furnished by said collector with such certificate of his right to return under this treaty as the laws of the United States may now or hereafter prescribe and not inconsistent with the provisions of this treaty; and should the written description aforesaid be proved to be false, the right of return thereunder, or of continued residence after return, shall in each case be forfeited. And such right of return to the United States shall be exercised within one year from the date of leaving the United States; but such right of return to the United States may be extended for an additional period, not to exceed one year, in cases where by reason of sickness or other cause of disability beyond his control, such Chinese laborer shall be rendered unable sooner to return — which facts shall be fully reported to the Chinese consul at the port of departure, and by him certified, to the satisfaction of the collector of the port at which such Chinese subject shall land in the United States. And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required.

ARTICLE III.

"The provisions of this convention shall not affect the right at present enjoyed by Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, coming to the United States and residing therein. To entitle such Chinese subjects as are above described, to admission into the United States they may produce a certificate from their government or the government where they last resided, viséd by the diplomatic or consular representative of the United States in the country or port whence they depart.

"It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the government of the United States as may be necessary to prevent said privilege of transit from being abused.

ARTICLE IV.

"In pursuance of Article III of the Immigration Treaty between the United States and China, signed at Pekin on the 17th day of November, 1880, it is hereby understood and agreed that Chinese laborers, or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens. And the government of the United States re-affirms its obligation, as stated in said Article III, to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States.

ARTICLE V.

"Whereas, Chinese subjects, being in remote and unsettled regions of the United States, have been the victims of injuries in their persons and property at the hands of wicked and lawless men, which unexpected events the Chinese government regrets, and for which it has claimed an indemnity the legal obligation of which the government of the United States denies; and whereas the government of the United States, humanely, considering these injuries and bearing in mind the firm and ancient friendship between the United States and China, which the high contracting parties wish to cement, is desirous of alleviating the exceptional and deplorable sufferings and losses to which the aforesaid Chinese have been subjected; therefore, the United States, without reference to the question of liability therefor (which as a legal obligation it denies), agrees to pay on or before the first day of March, 1889, the sum of two hundred and seventy-six thousand six hundred and nineteen dollars and seventy-five cents ($276,619.75) to the Chinese minister at this capital, who shall accept the same, on behalf of his government, as full indemnity for all losses and injuries sustained by Chinese subjects as aforesaid, and shall distribute the said money among the said sufferers and their relatives.

ARTICLE VI.

"This convention shall remain in force for a period of twenty years, beginning with the date of the exchange of ratifications; and if, six months before the expiration of the said period of twenty years, neither government shall formally have given notice of its termination to the other, it shall remain in full force for another like period of twenty years."

The act of 1882 was framed in supposed conformity with the provisions of the supplemental treaty of 1880.[1] See REPEAL.

General or ambiguous expressions in the act are to be construed so as to make them conform to the treaty. . . "Chinese laborers" means those who come here with the intention to labor and enter into competition with the labor of the country.[2]

"Laborer" is used in its popular sense, and does not include any persons but those whose occupation involves physical toil, and who work for wages, or with a view of disposing of the product or result of their labor to others.[3]

A Mongolian was not entitled to become a citizen under the Revised Statutes as amended in 1875. He is not a "white person" within the meaning of those words as used in the naturalisation laws.[4] See express prohibition, sec. 14, act of July, 1884, *ante*.

A Chinaman who left this country between May 6, 1882, and July 5, 1884, and returned after the latter date, is entitled to land upon complying with the requirements of the act of 1882; such provisions of the act of 1884 as relate to evidence of identity not being retroactive.

A person who, while abroad, has lost by theft a certificate issued under § 4 of the act of 1882, may land on his return to the port whence he sailed (no one having meanwhile presented the certificate) on proving these facts, and identifying himself as the person to whom the certificate was issued.

A district court may, under R. S. § 753, issue a *habeas corpus* where a Chinaman is prevented from landing by the master of a vessel, by direction of the customs authorities, under the provisions of the foregoing acts; there being nothing in those acts, or in the treaty, making the decision of the customs officers final, or ousting the courts of jurisdiction.[5]

CHOLERA. See QUARANTINE, 2.

CHOOSE. See ELECT.

CHOSE.[6] A thing recoverable by an action at law: a thing, personalty.

Chose in action. A thing of which one has the right, but not the possession.[7] **Chose in possession.** Personalty in possession, in actual enjoyment.

Property in chattels personal may be either "in possession," — where a man has not only the right to enjoy, but has the actual enjoyment of, the thing; or else it is "in action," — where he has only a bare right, without any occupation or enjoyment. In the latter case the possession may be recovered by a suit or action at law: whence the thing so recoverable is called a thing or "chose in action" — as, money due on a bond, or recompense for breach of a contract.[1]

The general definition of "chose in action" is, a right not reduced into possession. A note, bond, or other promise not negotiable, is denominated a chose in action, before the promisor or obligor is liable to an action on it, as well as after. A note for money, payable on time, is a chose in action as soon as made.[2]

The term "chose in action" is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises which confer on one party the right to recover a personal chattel or a sum of money from another by action. A debt secured by a bond and mortgage is an example.[3]

In its enlarged sense, a chose in action may be considered as any right to damages, whether arising from the commission of a tort, the omission of a duty, or the breach of a contract.[4]

At common law a chose in action was not assignable. To make over a right of going to law was encouraging, it was thought, litigiousness. But in equity, at an early day, an assignment was viewed as a declaration of trust, and an agreement to permit the assignee to use the name of the assignor, for purposes of recovery — the transferee being rather an attorney in fact than an assignee.[5]

Bills of exchange, by the law-merchant, and promissory notes, by statute of 3 and 4 Anne (1705), c. 9, were made exceptions to the common-law rule; and so were bills of lading, by statute of 18 and 19 Vict. (1855), c. 111. By the Judicature Act of 1873 choses are assignable in all cases.

The assignee, except in the case of negotiable instruments, although without notice, takes the chose subject to all equities existing between the debtor and the assignor.[6]

The assignee cannot proceed in equity to enforce, for his own use, the legal right of his assignor, merely upon the ground that he cannot maintain an action at law in his own name. So held where the owner of letters-patent assigned them, with claims for damages

[1] *Re* Low Yam Chow, 7 Saw. 548-50 (Sept., 1882).

[2] *Re* Moncan, 8 Saw. 350-56 (Oct., 1882): s. c. 14 F. R. 44.

[3] *Re* Ho King, 8 Saw. 428 (1883). See also 13 F. R. 286, 291; 17 *id.* 634; 18 *id.* 28; 19 *id.* 184, 490; 22 *id.* 519; 23 *id.* 339, 441.

[4] R. S. § 2169; *Re* Ah Yup, 5 Saw. 155 (1878); 2 Kent, 72.

[5] United States *v.* Jung Ah Lung, 124 U. S. 621 (Feb. 13, 1888), affirming 25 F. R. 141. Opinion by Blatchford, J.; Harlan, Field, and Lamar, JJ., dissenting as to identification without the certificate.

[6] Shŏse. F. from L. *causa*, action, suit at law.

[7] 4 Bl. Com. 185.

[1] 2 Bl. Com. 388, 396, 442.

[2] Haskell *v.* Blair, 3 Cush. 535 (1849), Metcalf, J.

[3] Sheldon *v.* Sill, 8 How. 449 (1850), Grier, J.; 37 Alb. Law J. 44-46 (1888), cases.

[4] Magee *v.* Toland, 8 Port. 40 (Ala., 1839). See also 4 Ala. 351; 72 Ga. 51; 34 La. An. 608; 5 Mas. 82; 4 Denio, 82; 14 S. C. 538; 43 Wis. 32.

[5] 2 Bl. Com. 442; 4 *id.* 135; 1 Pars. Contr. 227.

[6] Hill *v.* Wanzer, 17 How. 367-68 (1854), cases; 20 Blatch. 277.

for infringement, and the assignee filed a bill to recover the damages. In such case the assignee must bring an action at law, in the name of the assignor, to his own use.[1]

See ASSIGN, 2; ATTACH, 2; CHAMPERTY; DONATIO; HUSBAND.

CHRISTIAN. One who believes or assents to the doctrines of Christianity, as taught by Jesus Christ in the New Testament, or who, being born of Christian parents or in a Christian country, does not profess any other religion, or does not belong to any one of the other religious divisions of man.[2] See NAME, 1.

Christianity. The system of doctrines and precepts taught by Christ; the religion founded by Christ.

Christianity is said to be part of the common law. "Christianity is parcel of the laws of England; and, therefore, to reproach the Christian religion is to speak in subversion of the law."[3]

"The essential principles of natural religion" and "of revealed religion are a part of the common law, so that any person reviling or subverting or ridiculing them may be prosecuted at common law."[4]

"The true sense of the maxim is that the law will not permit the essential principles of revealed religion to be ridiculed and reviled."[5]

Christianity is a part of the common law of Pennsylvania in the qualified sense that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public.[6] Not Christianity founded upon any particular religious tenets; but Christianity with liberty of conscience to all men.[7]

The maxim does not mean that Christianity is an established religion; nor that its precepts, by force of their own authority, form part of our system of municipal law; nor that the courts may base their judgments upon the Bible; nor that religious duties may be penally enforced; nor that legal discrimination in favor of Christianity is allowed.[8]

The best features of the common law, especially those which regard the family and social relations, if not derived from, have at least been improved and strengthened by, the prevailing religion and the teachings of its sacred Book. But the law does not attempt to enforce the precepts of Christianity on the ground of their sacred character or divine origin. Some of those precepts, though we may admit their continual and universal obligation, we must nevertheless recognize as being incapable of enforcement by human laws. Those precepts, moreover, affect the heart, and address themselves to the conscience; while the laws of the state can regard the outward conduct only: for which reasons Christianity is not a part of the law of the land in any sense which entitles the courts to take notice of and base their judgments upon it, except so far they can find that its precepts and principles have been incorporated in and made a component part of the law of the State.[1]

The maxim can have no reference to the law of the National government, since the sources of that law are the Constitution, treaties, and acts of Congress.[2]

See further LAW, Common; BLASPHEMY; HOLIDAY; POLICY, 2; RELIGION; SUNDAY.

CHROMO. See COPYRIGHT; PRINT.

CHURCH. A temple or building consecrated to the honor of God and religion; or, an assembly of persons, united by the profession of the same Christian faith, met together for all religious worship.[3]

Among those whose polity is congregational or independent, a body of persons associated together for the purpose of maintaining Christian worship and ordinances.[4]

A "religious society" may be a body of persons associated for worship, omitting the sacraments.[5]

"Church" and "society" popularly denote the same thing: a religious body organized to sustain public worship.[6]

A school-house in which religious services are held on Sunday is not a "church."[7]

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the

[1] N. Y. Guaranty Co. *v.* Memphis Water Co., 107 U. S. 214 (1882), cases. See R. S. § 723.

[2] [Hale *v.* Everett, 53 N. H. 50 (1868), Sargent, J. On the "Arrest and Trial of Jesus," see 36 Alb. Law J. 384–88 (1887); Greenleaf, Test. Evangelists, &c.

[3] Taylor's Case, Ventris, 293 (1676), Hale, C. J. See Rex *v.* Woolston, 2 Strange, 834 (1729); 4 Bl. Com. 59; 2 Steph. Hist. Cr. L. Eng. 438.

[4] Case of Evans, 2 Burn. Ec. L. 185 (1780), Mansfield, C. J.

[5] Lives of Chief Justices, vol. 3, p. 417, Ld. Campbell.

[6] Vidal *v.* Girard's Executors, 2 How. 198 (1844), Story, J.

[7] Updegraph *v.* Commonwealth, 11 S. & R. 399 (1824).

[8] See 18 Alb. Law J. 366 (1878); 21 Am. Law Reg. 201, 299, 587 (1873); People *v.* Ruggles, 8 Johns. *294 (1811), Kent, C. J.; Chapman *v.* Gillett, 2 Conn. 43 (1816); Updegraph *v.* Commonwealth, 11 S. & R. 399–401 (1824); State *v.* Chandler, 2 Harr., Del., 562 (1837); Shover *v.* State, 10 Ark. 263 (1850); Bloom *v.* Richards, 2 Ohio, 389 (1853); Lindenmuller *v.* People, 33 Barb. 56–68 (1861); Sparhawk *v.* Union Passenger Ry. Co., 54 Pa. 432 (1867); Hale *v.* Everett, 53 N. H. 304 (1868); Board of Education *v.* Minor, 23 Ohio St. 246–54 (1872); 20 Alb. Law J. 265, 285 (1879).

[1] Cooley, Const. Lim. 472, cases.

[2] See Wheaton *v.* Peters, 8 Pet. 591 (1834); Pennsylvania *v.* Wheeling, &c. Bridge Co., 13 How. 519 (1851).

[3] Robertson *v.* Bullions, 9 Barb. 95 (1850).

[4] [Silsby *v.* Barlow, 16 Gray, 330 (1860); Anderson *v.* Brock, 3 Me. *247 (1825).

[5] Society *v.* Hatch, 48 N. H. 396 (1869).

[6] State *v.* Midgett, 85 N. C. 538 (1881). See also 9 Cranch, 326; 16 Conn. 291; 3 Harr., Del., 257; 88 Ind. 121; 16 Mass. 498; 3 Paige, Ch. 301; 3 Tex. 298.

decision of controverted questions of faith within the association, and for the ecclesiastical government of all individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied assent to this government, and are bound to submit to it. . . . Each member is bound by the law of the society,—the written organic law, books of discipline, collections of precedents, usages and customs. The civil courts have only to do with the rights of property: they cannot revise an act of discipline, excommunication, etc., though they may inquire whether such act was the act of the church or of persons who did not constitute the church.

Where property is in dispute, the civil court inquires:

(1) Was the property or fund devoted, by the express terms of the gift, grant, or sale by which it was acquired, to the support of a specific doctrine or belief, or was it acquired for the general use of the society for religious purposes, with no other limitation? If so, when necessary to protect a trust, the court will inquire into the faith or practice of the parties claiming the use or control of the property, and see that it is not diverted from the trust.

(2) Is the society of the strictly independent form of government, owing no submission to any organization outside of the congregation? If so, the rights of conflicting claimants are determined by the ordinary rules which govern voluntary associations—the will of the majority, the decision of chosen officers, or otherwise. Those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property. No inquiry is made into the opinions of those who comprise the legal or regular organization.

(3) Is the society one of a number united to form a more general body of churches, with ecclesiastical control in the general association over the individual members and societies? The tribunals of such association decide all questions of faith, discipline, rule, custom, or government. When a right of property depends on one of those questions, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil courts accept that decision as final. The local society is but a member of a larger organization, under its control and bound by its judgments.[1]

Church and state. See RELIGION.

See also ASSEMBLY, Civil; BANNS; CANON, LAW; CHRISTIANITY; CONGREGATION; PARISH, 1; PEW; SANCTUARY, 1; SCHISM; SUBSCRIBE, 2; WORSHIP.

[1] Watson *v.* Jones, 13 Wall. 713, 722–34 (1871), cases, Miller, J. The litigation grew out of dissension, due primarily to differences of opinion upon the subject of slavery, among the members of the Third or Walnut Street Presbyterian Church, of Louisville, Ky. See also Bouldin *v.* Alexander, 15 *id.* 131, 140 (1872); Same *v.* Same, 103 U. S. 330 (1880); Hennessey *v.* Walsh, 55 N. H. 515, 526 (1875); Stack *v.* O'Hara, 98 Pa. 232 (1881); Graff *v.* Greer, 88 Ind. 131–32 (1882), cases; Hadley *v.* Mendenhall, 89 *id.* 136, 152–56 (1883), cases; Whitecar *v.* Michenor, 37 N. J. E. 6 (1883), cases; State *v.* Rector, 45 N. J. L. 220 (1883); 12 Am. Law Reg. 201, 329, 537 (1873), cases; 15 *id.* 276–92 (1876), cases; Relations of Civil Law to Church Polity, *etc.* (1875), Hon. William Strong.

CIDER. See LIQUOR.

CIRCUIT. A division of country visited by a judge for the dispensing of justice, as for the trial of causes; also, the periodical journey itself.

The judges of assize and of *nisi prius* are twice a year sent around the kingdom to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts at Westminster Hall. Formerly, the itinerant justices made their circuits once in seven years; but Magna Charta directed that they be sent into every county once a year. They usually went in the vacations, after Hilary and Trinity terms.[1]

The custom is retained in a few of the States.

Circuit court. See COURT, Circuit.

CIRCUITY. A round-about course: indirect action, or procedure.

Circuity of action. An indirect or round-about mode of suing: where a party by an indirect proceeding makes two or more actions necessary, when justice could be obtained by a single action involving a more direct course.

To prevent circuity of action, a court of equity often entertains jurisdiction upon this ground alone; and to avoid it, cross-demands and judgments are set off against each other.

Circuitus est evitandus. Circuity is to be avoided.[2]

CIRCULAR. 1, *adj.* Going around or about, from beginning to end: as, circular mileage, *q. v.*

2, *n.* In the post-office laws, a printed letter, which, according to internal evidence, is being sent in identical terms to several persons.

The date, names of sender and addressee, and typographical corrections, may be written on such circular.[3]

A circular is a paper intended to be issued to a great number of persons, or for general circulation. In the form of a letter, may be described in an indictment, as, a "letter and circular."[4] See MAIL, 2; POST-OFFICE.

CIRCULATION. Whatever passes from person to person, as, money, currency; also, the fact and the extent of a thing's being circulated.

Certificates of indebtedness issued by a person or a corporation are not taxable as "circulation," under Rev. St., § 3408, unless calculated or intended to circulate or to be used as money.[5]

[1] 3 Bl. Com. 57–58; 4 *id.* 422, 424; 1 Steph. Hist. Cr. L. Eng. 100.

[2] 18 Ct. Cl. 457; 15 M. & W. 208.

[3] Act 3 March, 1879: 20 St. L. 330, 1 Sup. R. S. 456.

[4] United States *v.* Noelke, 17 Blatch. 557 (1880); Commerford *v.* Thompson, 2 Flip. 615 (1880).

[5] United States *v.* Wilson, 106 U. S. 630 (1882). See

The act of February 8, 1875, c. 36, sec. 19 (18 St. L. 311), provides "that every person, firm, association other than national banking associations, and every corporation, State bank, or State banking association, shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by them." This act is to be construed in connection with the internal revenue law; is designed to provide a currency for the country, and to restrain the circulation of notes not issued by authority of Congress. An order by A in favor of B, or bearer, upon C for "five dollars in merchandise at retail," paid out by A and used as circulation, is not a note within the meaning of the act. Only such notes as are in law negotiable, so as to carry title in their general circulation from hand to hand, are the subjects of taxation under the act.[1]

A certificate by a national bank that a person named has deposited in it a certain sum, payable to the order of himself on return of the certificate properly indorsed, and understood not to be payable until a day agreed upon, is not forbidden.[2] See BANK, 2 (2); TAX, 2.

CIRCUMSTANCES. 1. Surroundings: the particulars which accompany an act or fact; *res gestæ*, q. v.

Reference to "surrounding circumstances" is made to ascertain the precise nature of a subject-matter or to explain terms used.

Circumstantial. Consisting in or pertaining to attendant circumstances or facts; afforded by what naturally accompanies: as, circumstantial evidence, *q. v.* See CASE, 1.

"Circumstance" and "fact" are often interchanged. When a conviction depends upon circumstantial evidence, it often happens that one or more of the ultimate or essential matters may appropriately be called a "circumstance," to be established beyond a reasonable doubt.[3]

2. A person's qualifications, status or condition, material, moral, and perhaps mental.

In a law providing that letters testamentary shall not be granted, unless a bond be filed, to a person whose "circumstances do not afford adequate security" for the due administration of the estate, the reference is not exclusively to pecuniary responsibility. Thrift, integrity, good repute, and stability of character are "circumstances."[4] See PECUNIARY.

"In failing circumstances," applied to a bank, means, in Missouri, a state of uncertainty whether the bank will be able to sustain itself, depending on favorable or unfavorable contingencies, which in the course of business may occur, and over which its officers have no control.[5]

Poverty is not such "extraordinary circumstance" as will defeat the rule of diligence in civil procedure in the Federal courts.[1]

CIRCUS. See THEATER.

CITE. To call, command, summon.

1. To notify a party of a proceeding against him.

2. To refer to or quote in support of a proposition; as, to cite a case or authority.

Citation. 1. Originally, a process to call a party before an ecclesiastical court.[2]

2. Official notice to appear and answer in a proceeding.

In this sense, used in the practice of courts of probate, surrogates' and orphans' courts; and in practice upon writs of error, as, writs from the Supreme Court.

A notice to the opposite party that a thing is about to be done, as, that a record is about to be transferred to another court, where he may appear, or decline to appear, as his judgment or inclination may direct.[3]

"Citation" and "notice" are not synonymous. A citation must be directed to some officer and be served by him; and, if issued by a court having a seal, must be under the seal of such court. It must contain the names of the persons upon whom service is to be had, unless in the case of unknown heirs who are served by publication. A notice is much less formal: it is not necessarily under seal, although issued by a court of record, and it may be served by a person not an officer.[4]

3. The act of quoting an authority; also, the authority itself. Compare PRECEDENT, 2.

CITIZEN. In the Roman government, seems to have designated a person who had the freedom of the city, and the right to exercise all political and civil privileges of the government. There was also, at Rome, a partial citizenship, including civil but not political rights. Complete citizenship embraced both.[5]

One who owes to government allegiance, service, and money by way of taxation, and to whom the government, in turn, grants and guarantees liberty of person and of conscience, the right of acquiring and possessing property, of marriage and the social relations,

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also Philadelphia, &c. R. Co. *v.* Pollock, 19 F. R. 408 (1884); United States *v.* White, *ib.* 723 (1884).

[1] Hollister *v.* Zion's Co-operative Institution, 111 U. S. 62 (1884): 8 Wall. 533; 96 U. S. 366; *Re* Aldrich, 16 F. R. 869 (1883).

[2] Hunt, Appellant, 141 Mass. 519 (1886): R. S. § 5183.

[3] Clare *v.* People, 9 Col. 124 (1886), Helm, J.

[4] Martin *v.* Duke, 5 Redf. 599 (1882), Rollins, Sur.

[5] Dodge *v.* Mastin, 17 F. R. 665 (1883).

[1] Whalen *v.* Sheridan, 10 F. R. 661 (1880); 91 U. S. 249; 96 *id.* 618.

[2] [3 Bl. Com. 100.

[3] [Cohens *v.* Virginia, 6 Wheat. 411 (1821), Marshall C. J.

[4] Perez *v.* Perez, 59 Tex. 324 (1883).

[5] Thomassen *v.* State, 15 Ind. 151 (1860), Perkins, J.; White *v.* Clements, 39 Ga. 259–62 (1869).

of suit and of defense, and security in person, estate, and reputation.[1]

A State may deny all her "political rights" to an individual, and he yet be a citizen. The rights of office and suffrage are political purely. A citizen enjoys "civil rights."[2]

For convenience it has been found necessary to give a name to membership in a political community or nation. The object is to designate by title the person and the relation he bears to the nation. For this purpose the words "subject," "inhabitant," and "citizen" have been used, and the choice between them is sometimes made to depend upon the form of the government. "Citizen" is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterward adopted in the Articles of Confederation and in the Constitution. Used in this sense it is understood as conveying the idea of membership in a nation, and nothing more.

Whoever was one of the people of either of the States when the Constitution was adopted became *ipso facto* a citizen — a member of the nation created by its adoption. . . Disputes have arisen as to whether or not certain persons or classes of persons were part of the people at the time, but never as to their citizenship, if they were.

Additions might be made by birth, and by naturalisation.

The Constitution does not, in words, say who shall be natural-born citizens. To ascertain that, resort must be had to the common law, with the nomenclature of which the framers were familiar. At common law, all children born in a country of parents who were its citizens became themselves, upon their birth, citizens. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but not as to the other class.

Sex has never been made one of the elements of citizenship in the United States. The Fourteenth Amendment did not affect the citizenship of women any more than that of men: it prohibited the State from abridging any of her privileges and immunities (*q. v.*), as a citizen of the United States, but it did not confer citizenship on her. That she had before its adoption. The right of suffrage was not co-extensive with citizenship before the adoption of the Amendment, nor was it added thereby.[3]

Citizen and "legal voter" are not synonymous terms. Minors and females may be citizens, yet they are not legal voters.[4]

[1] Amy *v.* Smith, 1 Litt. *342 (Ky., 1822), Mills, J. Approved, Van Valkenburg *v.* Brown, 43 Cal. 51 (1872).

[2] Minor *v.* Happersett, 21 Wall. 166-67, 170, 175 (1874), Chase, C. J. See also Dred Scott *v.* Sandford, 19 How. 404, 422 (1856), Taney, C. J.; 2 Kent, 258; 3 Story, Const. § 1687; 26 Cent. Mag. 178.

[3] People *v.* Town of Oldtown, 88 Ill. 205 (1878); United States *v.* Anthony, 11 Blatch. 202 (1873).

A person may be a citizen of the United States and of a State, and as such have different rights. Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as of their collective rights.[1]

By the definition usually given, a citizen is an "inhabitant of a city, town, or place," and so would include every person dwelling in the place named; but the term is subject to various limitations, depending upon the context. It may indicate a permanent resident, or one who remains for a time or from time to time.[2]

Citizenship implies residence with intention of remaining permanently at the particular place.[3] See INHABITANT; RESIDENT.

The word does not necessarily include the element of descent or inheritance, nor of sex, nor of race, nor of right to co-operate in government, nor of property.[4]

Citizenship as affected by the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution:

The object sought by these Amendments was "the freedom of the slave (African) race, the security and firm establishment of that freedom, and the protection of the freedman from the oppressions of those who had exercised dominion over him." But the letter and spirit of the Amendments "apply to all cases coming within their purview, whether the party concerned be African or not."[5]

Amendment XIII. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Ratified December 18, 1865.

Amendment XIV. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Ratified July 28, 1868.

Amendment XV. "The right of citizens of the United States to vote shall not be denied or abridged

[1] United States *v.* Cruikshank, 92 U. S. 549, 542 (1875), Waite, C. J.; Dred Scott Case, *ante*.

[2] Union Hotel Co. *v.* Hersee, 79 N. Y. 461 (1880).

[3] Winn *v.* Gilmer, 27 F. R. 817 (1886); 25 Am. Law Reg. 706 (1886); *ib.* 710-14, cases. As affecting citizenship, 31 Alb. Law J. 465 (1885) — consular instructions.

[4] See 16 Alb. Law J. 24, 176 (1877); 25 Am. Law Reg. 1-14 (1886), cases; 24 Cent. Law J. 540 (1887), cases; 11 Ohio, 27; Abbott, cases.

[5] Slaughter-House Cases, *post*.

by the United States or by any State on account of race, color, or previous condition of servitude." Ratified March 30, 1870.

In the case of each Amendment, Congress is given express power to enforce the provisions thereof by appropriate legislation.

The series have a common purpose: to secure to the negro race all the civil rights the white race enjoy; — to raise the colored race into perfect equality of civil rights with all others in the State; — to take away all possibility of oppression by law because of race or color; — to secure equal protection of the laws.

They are limitations on the power of the States, and enlargement of the powers of Congress. To carry out their purpose they are to be construed liberally.

The XIIIth Amendment forbids all forms of involuntary slavery — African slavery, Mexican peonage, Chinese coolie trade. It declares the personal freedom of all the human race within the jurisdiction of the United States. After the slave had been emancipated, certain States so curtailed his rights that his freedom was of little value: in this originated the XIVth Amendment. The laws being still administered by the white man alone, the XVth Amendment was adopted to make the negro a voter.

The XIVth Amendment conferred citizenship on the negro, defines citizenship in the United States *and* in the States, and protects the privileges and immunities of *citizens of the United States* from hostile legislation by the States. That is, it not only gave citizenship, but it denies a State power to withhold equal protection of the laws, and gives Congress power to enforce its provisions by appropriate legislation, as, by removal of a cause from a State to a Federal court. Its enforcement is left to the discretion of Congress. In an especial sense it makes one law for black and for white. It does not enumerate rights, but speaks in general terms. It confers a new constitutional right: exemption from discrimination between persons and classes of persons by action of any State; it does not refer to action by a private individual.[1]

The XIVth Amendment intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon the others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than is prescribed to all for like offenses. . . The Amendment does not interfere with the "police power" of the States — a regulation designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. . . Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.[1]

The XIVth Amendment forbids an ordinance which, though expressed in general terms, is directed against a particular class, as Chinese convicts, by imposing a degrading punishment, like that of cutting off the queue.[2]

An administration of an ordinance for carrying on a lawful business (that of a laundry), which makes discriminations founded upon differences of race between persons otherwise in similar circumstances, violates the XIVth Amendment.[3]

The XVth Amendment merely invests citizens of the United States with the constitutional right of exemption from discrimination in the enjoyment of the elective franchise on account of race, color, or previous condition of servitude.[4]

No one of the Amendments confers power on Congress to punish private persons who, acting without authority of the State, invade rights protected by the Amendments.[5]

See further CONSPIRACY; RIGHT, 2, Civil Rights; SCHOOL, Separate; SERVITUDE, 1; SUFFRAGE; VAGRANT; WAR. See also ALIEN, 1; ALLEGIANCE; CHINESE; CORPORATION, Private; DENIZEN; DOMICIL; EXPATRIATION; NATURALIZE; PERSON; PRIVILEGE, 1; STATE, 3 (2); SUFFRAGE; TERRITORY, 2; WHITE.

CITY.[6] 1. An incorporated town or borough, which, in England, is or has

[1] Slaughter-House Cases, 16 Wall. 36, 70–71 (1873), Miller, J. Regarded a "servitude" in property.

Strauder *v.* West Virginia, 100 U. S. 306, 310 (1879), Strong, J. S., a negro, tried for murder, had been denied a removal of the cause into a circuit court. Virginia *v.* Rives, *ib.* 318 (1879),— in which a mixed jury was denied.

Exp. Virginia, 100 U. S. 344–48 (1879), Strong, J. That State petitioned for the discharge of one Coles, a county judge, indicted for excluding a colored man from a jury. Bush *v.* Kentucky, 107 *id.* 118–19 (1882), cases.

Missouri *v.* Lewis, 101 U. S. 30–31 (1879), Bradley, J. Regarded a regulation of jurisdiction.

Neal *v.* Delaware, 103 U. S. 385–86 (1880), Harlan, J.; United States *v.* Woods, 106 *id.* 637–44 (1882), Woods, J.; United States *v.* Reese, 92 *id.* 214, 218 (1875), Waite, C. J.

[1] Barbier *v.* Connolly, 113 U. S. 31–32 (1885), Field, J. See also Pace *v.* Alabama, 106 *id.* 584 (1882); Railroad Tax Case (County of San Mateo *v.* South. Pacific R. Co.), 8 Saw. 251, 302 (1882); Civil Rights Cases, 109 U. S. 3, 11, 23, 24 (1883); 23 N. Y. 446.

[2] Ah Kow *v.* Nunan, 5 Saw. 552, 562 (1879).

[3] Yick Wo *v.* Hopkins, 118 U. S. 356, 365 (1886).

[4] United States *v.* Cruikshank, 92 U. S. 542 (1875). United States *v.* Harris, 106 *id.* 637 (1882).

[5] Le Grand *v.* United States, 12 F. R. 577, 583–85 (1882).

[6] L. *civitas*, citizens in a community: *civis*, a citizen

been the see of a bishop.[1] An incorporated town.[2]

The word "city" may include a town,[3] *q. v.*

2. A municipal corporation of the larger class, with powers of government confided in officers who are usually elected by popular vote.

A political division of a State, for the convenient administration of the government.[4]

An instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature.[4]

In a few States cities are of the first class, of the second class, etc., according to population.[5]

Under a constitutional power to organize cities and villages, the legislature is authorized to classify municipal corporations, and an act relating to any such class may be one of a general nature.[6]

City purpose. Any public improvement for the common benefit and enjoyment of all the citizens.[7]

Each case must depend largely upon its own facts.[7]

City vouchers are non-negotiable. See under NEGOTIATE, 2.

See generally CHARTER, 2; CORPORATION, Municipal; COUNCIL, 2; FIRE, Department; HEALTH, Board of; OFFICER; ORDINANCE, 1; PARK, 2; POLICE, 3; RECORDER, 2; SEWER; SIDEWALK; STREET; TELEGRAPH.

CIVIL. Pertaining to the citizen (Lat. *civis*) — the free inhabitant of an independent city, in distinction from the government, the soldier, the peasant, the ecclesiastic, and persons of other classes.[8]

1. Contrasted with *barbarous* or *savage*, *natural* or *uncivilized*, denotes a state of society reduced to order and regular government: as in speaking of civil — liberty, government, rights, society, *qq. v.*

2. Originating or existing among, pertaining to, or affecting, fellow-citizens of the same state or nation, and opposed to *foreign:* as, a civil — commotion, rebellion, war, *q. v.*

3. Accorded by just and equal laws; as opposed to *political* or that which is actually or practically enjoyed under law: as, again, civil — rights or liberty, *qq. v.*

4. Existing in contemplation of law; attributable under municipal law, and contrasted with *natural:* as, civil — life, death, disability, *qq. v.*

5. Concerning the rights of and wrongs to individuals considered as private persons, in contradistinction to *criminal* or that which concerns the whole political society, the community, state, government: as, civil — action, case, cause, code, court, damage, injury, jurisdiction, law, obligation or responsibility, proceeding, procedure, process, remedy, report, side, *qq. v.*

6. Pertaining to the administration of government, and contrasted with *military* and *ecclesiastical:* as, civil — office, officer, tenure, *qq. v.*

"Civil" is used, in contradistinction to "barbarous" or "savage," to indicate a state of society reduced to order and regular government; to "criminal," to indicate the private rights and remedies of men as members of the community, in contrast to those which are public, and relate to the government; to "military" and "ecclesiastical;" to "natural" or "foreign." In the Constitution, seems to be contradistinguished from "military," to indicate the rights and duties relating to citizens generally, as distinct from those of persons engaged in the land and naval service of the government.[1]

Civiliter mortuus. Civilly dead. See *Civil*, 4.

CLAIM.[2] A challenge by a man of the propriety [property] or ownership of a thing which he has not in possession, but which is wrongfully detained from him.[3]

In a juridical sense, a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty.[4]

A more limited but equally explicit definition is that given by Lord Dyer in *Stowel's Case.*[4, 5]

The assertion, demand, or challenge of something as a right, or the thing thus demanded or challenged.[6]

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[1] 1 Bl. Com. 114.

[2] Van Riper *v.* Parsons, 40 N. J. L. 4 (1878).

[3] People *v.* Stephens, 62 Cal. 236 (1882): Cal. Const., Art. X, sec. 19.

[4] New Orleans *v.* Clark, 95 U. S. 654 (1877), Field, J.

[5] See Kilgore *v.* Magee, 85 Pa. 411 (1877); 77 *id.* 346; 88 *id.* 256; 96 *id.* 422; 106 *id.* 377; 15 W. N. C. 209; 32 Kan. 431; 32 Mo. 388.

[6] State *ex rel.* Attorney-General *v.* Hudson, 44 Ohio St. 139 (1886), cases; Heck *v.* State, *ib.* 539 (1886).

[7] People *v.* Kelly, 76 N. Y. 487 (1879).

[8] A "civil" man once was one who fulfilled all the duties flowing from his position as a *civis*, and his relations to the other members of the *civitas* to which he belonged, and "civility" was the condition in which those duties were recognized and observed. Trench, Glossary, &c., 36.

[1] [1 Story, Const. § 791.

[2] L. *clamare*, to call out, demand.

[3] Stowel *v.* Zouch, 1 Plow. 359 (1568), Lord Dyer.

[4] Prigg *v.* Pennsylvania, 16 Pet. 615 (1842), Story, J.

[5] Fordyce *v.* Godman, 20 Ohio St. 14 (1874), Scott, J.

The subject-matter of a claim is the facts or circumstances out of which the claim arises or by reason of which the supposed right accrues.[1]

Something asked for or demanded on the one hand and not admitted or allowed on the other.[2]

When the demand is admitted it is not a mere claim, but a debt. It no longer rests in mere clamor or petition, but is something done upon which an action may be maintained. Thus, "a claim upon the United States" (R. S. § 3477) is something in the nature of a demand for damages arising out of some alleged act or omission of the government, but not yet provided for or acknowledged by law.[3]

Every account upon which any sum of money or other thing is or is claimed to be due to the person presenting it is a claim or demand; but every claim or demand is not an "account." The terms, however, may be used synonymously.[3]

May refer to such debt or demand against a decedent as might have been enforced against him in his life-time by personal action for the recovery of money, and upon which only a money judgment could have been rendered.[4]

Claims against an estate are those in existence at the death of the deceased. Other claims are properly denominated "expenses of administration."[5] See DEMAND, 1.

Referring to public lands, relates to a settler's right or improvement on land the fee of which is in the government.[6]

Within the meaning of Rev. St., § 3438, providing for the punishment of any person who prefers a claim (pension) against the Government, knowing the same to be false, "claim" is not used in the sense of a demand theretofore presented, but of a demand then existing, and known to be wrongful. The act of presenting it in the first instance is denounced as a crime.[7]

Under that section one is guilty who presents a claim which he believes to be just, but seeks to substantiate by the affidavit of a person who, to his knowledge, certifies to a fact of which the affiant knows nothing.[8]

Adverse claim. See POSSESSION, Adverse.

Claim and delivery; claim-bond. See REPLEVIN, 1.

Claim of title. See COLOR, 2. Of title.

Claimant. 1. One who demands a thing as a matter of right.

2. One who has filed a claim as the law requires.[1]

3. In admiralty, a person admitted to defend a libel *in rem*, q. v.

A *bona fide* claimant to land is one who supposes that he has a good title and knows of no adverse claim.[2] See FAITH, Good.

Under pre-emption laws "claim" and "claimant" are frequently used in connection with the right to acquire title to a part of the public lands upon compliance with the laws.[6]

Counter-claim. A cross-demand, existing in favor of a defendant. Includes recoupment and set-off.

"Counter" means contrary to, contrary way, opposition; and "claim," the demand of anything that is in the possession of another, the right to demand of another.[4]

The term of itself imports a claim opposed to, or which qualifies, or at least in some degree affects, the plaintiff's cause of action or the right to the relief to which he would otherwise be entitled by his action. "Consists of a set-off or claim by way of recoupment, or is in some way connected with the action stated in the complaint."[5]

Is broader than "set-off;" includes not only demands the subject of set-off and recoupment, but equitable demands.[6]

Under the laws of many States, if the claim and counter-claim are both established, the latter reduces the former; but if the counter-claim alone is established, judgment is recovered for the amount of it. See further SET-OFF.

Non-claim. Omission or neglect to make a demand; failure to assert a claim within the time limited by law.

"An infant shall lose nothing by non-claim, or neglect to demand his right."[7]

A statute of non-claim has all the characteristics of a statute of limitations.[8]

See AFFIDAVIT, Of claim; COURTS, United States; DISCLAIMER; INTERPLEAD; QUITCLAIM; RECLAIM; STALE.

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[1] Fordyce *v.* Godman, *ante*.

[2] Dowell *v.* Cardwell, 4 Saw. 228 (1877), Deady, J.

[3] Stringham *v.* Supervisors, 24 Wis. 600 (1869), Dixon, C. J.; 43 *id.* 644; 56 *id.* 170, 245; 40 Ala. 147.

[4] Fallon *v.* Butler, 21 Cal. 32 (1862), Field, C. J.; McCausland's Estate, 52 *id.* 577 (1878); 9 *id.* 616; 38 *id.* 23, 88; 46 *id.* 160; 9 Oreg. 391; 2 N. Y. 254; 43 *id.* 413.

[5] Dodson *v.* Nevitt, 5 Monta. 520 (1885); McLaughlin *v.* Winner, 63 Wis. 128 (1885).

[6] Bowman *v.* Torr, 3 Iowa, 574 (1856); United States *v.* Wilcox, 4 Blatch. 388–89 (1859).

[7] United States *v.* Rhodes, 30 F. R. 433 (1887), Brewer, J.

[8] United States *v.* Jones, 29 F. R. 492 (1887), Simonton, J.

[1] [Adams *v.* Worrill, 46 Ga. 295 (1872).

[2] Morrison *v.* Robinson, 31 Pa. 459 (1858): 1 Wash. 78. See also 12 F. R. 152.

[3] United States *v.* Spaulding, 3 Dak. 92–93 (1882).

[4] [Great Western Ins. Co. *v.* Pierce, 1 Wyom. 49–50 (1872), Fisher, C. J.

[5] Dietrich *v.* Koch, 35 Wis. 626 (1874), Lyon, J.: 24 How. Pr. 329, 332; 22 Barb. 143; 21 N. Y. 191, 196; 63 *id.* 549; 40 Ark. 78; 7 Ind. 523; 2 Pars. Contr. 741; Roberts *v.* Donovan, 70 Cal. 112 (1886), cases. In actions *ex delicto*, see 20 Cent. Law J. 363–65 (1885), cases.

[6] Roberts *v.* Donovan, 70 Cal. 112 (1886), cases; Cal. Code Civ. Proc., § 438.

[7] 1 Bl. Com. 465.

[8] Williamson *v.* McCrary, 33 Ark. 470 (1878).

CLANDESTINE. See CONVEYANCE, 2, Fraudulent; DISTRESS; FRAUD.

CLASS. Persons or things ranked together for like action, for similar or uniform treatment, as possessing a common attribute, or as being in the same category.

Used of legatees, obligees, and other persons;[1] of cities;[2] of legislation.[3] See CITY, 2; ENUMERATION; LEGACY.

CLAUSE. A separate portion: a part of a written instrument.

One of the subdivisions of a written or printed document.[4]

Clauses take their names from the nature of the provision intended to be made by them. Of the more common are: clause of jurisdiction — in a bill in equity; clause of accruer; commerce, dictionary, enacting, guaranty, penal, residuary, and sweeping clause, *qq. v.*

CLAUSUM. L. A close; an inclosure.

Quare clausum fregit (pl. *fregerunt*). Wherefore he broke the close. The emphatic words in the old Latin writ commanding a defendant to show cause why he made an alleged unlawful entry upon plaintiff's land.

Abridged to trespass *quare clausum, qu. cl. fr.*, and *q. c. f.* See CLOSE, 3; TRESPASS.

CLEAN. See HAND, 4; LADING, Bill of.

CLEAR. 1, *v.* To clear out a highway is to clear it out for all the purposes to which it is dedicated.[5]

"Clearing land," in the absence of words of limitation, means removing therefrom all the timber of every size, except taking out the stumps.[6]

2, *adj.* Free from, as, from taxes: said of an annuity.[7]

Clear yearly value: free from all out-go.[8]

Clearly. "Clearly established by satisfactory proof" is equivalent to established by proof beyond reasonable doubt.[9]

To require insanity, as a defense in homicide, to be proved by evidence which "clearly preponderates" is practically saying that it must be proved beyond all doubt or uncertainty.[10]

[1] 16 Pick. 132; 17 Wend. 52.

[2] 85 Pa. 401; 106 *id.* 377; 33 Kan. 431; 93 Mo. 393; 44 Ohio St. 139, 539.

[3] 109 U. S. 24.

[4] Eschbach *v.* Collins, 61 Md. 499 (1883).

[5] Winter *v.* Peterson, 24 N. J. L. 528 (1854).

[6] Seavey *v.* Shurick, 110 Ind. 496 (1886): Harper *v.* Pound, 10 *id.* 35 (1857).

[7] Hodgeworth *v.* Crawley, 2 Atkyns, 393 (1792).

[8] Tyrconnel *v.* Ancaster, 2 Ves. Sr. 504 (1754).

[9] People *v.* Hamilton, 62 Cal. 385 (1882).

[10] Coyle *v.* Commonwealth, 100 Pa. 580, 577 (1882).

CLEARANCE. A certificate from the collector of customs at a port that a vessel has complied with the customs and health laws, and has permission to sail.[1]

CLEARING-HOUSE. The object of a clearing-house association is to effect at one time and place the daily exchanges between the banks which are members of the association, and the payment of the balances resulting from such exchanges.[2]

Sending a note through the clearing-house is not a formal demand for immediate payment made during business hours, but it is equivalent to leaving the note at the bank for collection from the maker on or before the close of banking hours.[3] See LOAN, Certificate.

CLEARLY. See CLEAR, 2, Clearly.

CLERGY. Persons in holy orders; ecclesiastics, as a class; also, benefit of clergy.

Clergyable. Admitting or entitled to the benefit of clergy.

Benefit of clergy. Exemption from capital punishment, anciently allowed to churchmen, and, later, to laymen.

Originated in the regard princes had for the church, and the ill use made of that regard. In time, extended to the laity, and made to include all felonies. The claimant "prayed his clergy." If he could read a psalm correctly (usually, the fifty-first), he obtained a trial before twelve "clerks," *q. v.* They heard him on oath, with his witnesses and compurgators, who attested their belief in his innocence.[4]

Abolished in England by 7 and 8 Geo. IV (1827), c. 28; and in Federal practice by act of April 30, 1790. Was part of the common law of the older States.[4]

Clergyman. See COMMUNICATION, Privileged, 1.

CLERK. 1. A member of the clergy.

The clergy, as they engrossed almost every other branch of learning, were remarkable for their study of the law. The judges were usually created out of the sacred order, and all the inferior officers were supplied by the lower clergy, which occasioned their successors to be denominated "clerks."[5]

2. A person employed to keep records; as, a clerk of a court.

Clerk of courts. The chief clerk of the courts of quarter sessions and oyer and terminer. (Penn.) See PROTHONOTARY; MINUTES, 1.

[1] See R. S. §§ 4197, 4200, 4207.

[2] Nat. Exchange Bank *v.* Nat. Bank of North America, 132 Mass. 148 (1882).

[3] 4 Bl. Com. 356.

[4] See R. S. § 5329; 1 Bish. Cr. L. § 986; 1 Chitty, Cr. L. 667; 1 Steph. Hist. Cr. L. Eng. 459-72.

[5] 1 Bl. Com. 17.

Clerical error. See ERROR, 2 (1); RECORD, 2, Judicial.

3. A person employed to keep minutes, accounts, and the like.

A person, employed in an office, public or private, for keeping records, whose business is to write or register in proper form the transactions of the tribunal or body to which he belongs.[1]

An employee who attends to sales no further than delivering goods manufactured, and keeping a memorandum of the delivery for a temporary purpose, is not a "clerk" within the meaning of the rule which requires proof of the original entries.[2] See AGENT; SERVANT, 3; ENTRY, II, 1.

CLIENT.[3] One who employs a lawyer professionally.

Clientage. The patronage of clients; professional patronage.

A client is one who applies to an advocate for counsel and defense; one who retains an attorney, is responsible to him for his fees, and to whom the attorney is responsible for the management of the suit.[4]

Sergeants and barristers may take upon them the protection of suitors, plaintiffs and defendants, who are therefore called their "clients," like the dependents upon the Roman orators.[5]

Among the Romans, the "patron" was the legal adviser of the client, maintained and defended him in his lawsuits — cared for his interests, both public and private. The "client" contributed toward the marriage portion of the patron's daughter, to his ransom, to the costs and penalties of lost lawsuits, to the expense of any public office held by the patron. Neither could accuse, testify or vote against the other. The relation resembled kinship. It was the glory of illustrious families to have many clients.[6] See ATTORNEY; COMMUNICATION, Privileged, 1.

CLOSE. As a verb and an adjective, preserves its vernacular senses, except in the compound "foreclose," *q. v.*; as a noun, has the technical meaning noted below.

1, *v.* (1) To end, terminate, complete: as, to close a bargain or negotiation.[7]

(2) In a statute providing that places where intoxicating liquors are sold shall be "closed on Sundays," the meaning is that sales shall be entirely stopped, the traffic shut off effectually, so that drinking and the conveniences of drinking shall be no longer accessible.[1]

A saloon is not "closed," within the meaning of a law requiring such places to be closed at certain times, as long as it is possible for persons desiring liquor to get in peaceably, whether by an outside entrance or any other, or as long as a customer, who is inside at the time for closing, remains inside. And it is not important that there is no one attending bar, if the liquor is accessible, nor is it important that no liquor is sold.[2]

2, *adj.* Not proper for public inspection; hence, sealed on the outside: as, a close writ or roll; opposed to *patent* in letters-patent. See PATENT, 1 (1).

Not admitting corporators generally to vote for officers: as, a close corporation, *q. v.*

3, *n.* An interest in the soil.[3]

Taking sheaves from another's close is equivalent to a taking from his land.[3]

A portion of land, as, a field inclosed by a hedge, fence, or other sensible inclosure.[4]

Every unwarrantable entry on another's soil the law entitles a trespass by "breaking his close:" the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit*. For every man's land is, in law, inclosed and set apart from his neighbor's land.[5] See CLAUSUM; ENCLOSURE; INCLOSE.

CLOTHE. See VEST.

CLOTHING. See APPAREL; EXEMPTION.

CLOUD. "Cloud," and the fuller and more frequent expression "cloud upon the title," import that there is in existence something which shows a *prima facie* right in a person to an interest in realty in the possession of another.

A cloud exists upon a title where an instrument is outstanding which is void, or an unfounded claim is set up which complainant has reason to fear may at some time be used injuriously to his rights.[6]

Questions as to what constitutes a cloud upon a title and what character of title the complainant must

[1] People *v.* Fire Commissioners, 73 N. Y. 442 (1878), Allen, J. See also Ross *v.* Heathcock, 57 Wis. 96 (1883).

[2] Sickles *v.* Mather, 20 Wend. 72, 74 (1838).

[3] F. *client*, a suitor: L. *cliens*, one who hears, listens to advice.

[4] McFarland *v.* Crary, 6 Wend. 312 (1830).

[5] 3 Bl. Com. 28; 2 *id.* 64.

[6] See 2 Bl. Com. 21; Wharton's Law Dict.

[7] See 18 Barb. 60; 43 Sup. Ct., N. Y., 454.

[1] Kurtz *v.* People, 33 Mich. 282 (1876); People *v.* Cummerford, 58 *id.* 331 (1885); 49 *id.* 337; 52 *id.* 506. See also 59 Ala. 64; 47 Conn. 276; 65 Ga. 568; 57 Ill. 370; 68 *id.* 420.

[2] People *v.* Cummerford, 58 Mich. 328 (1885), cases, Morse, C. J.

[3] Richardson *v.* Brewer, 81 Ind. 108 (1881).

[4] Lochlin *v.* Casler, 52 How. Pr. 45 (1875).

[5] 3 Bl. Com. 209.

[6] Chipman *v.* City of Hartford, 21 Conn. 495 (1852); Ward *v.* Chamberlain, 2 Black, 444-45 (1862), cases; Waterbury Savings Bank *v.* Lawler, 46 Conn. 248 (1878); Teal *v.* Collins, 9 Oreg. 92 (1881).

have, to secure relief in equity, are decided upon principles long established. Prominent among them are: that the title of the complainant must be clear; that the pretended title, which is alleged to be a cloud upon it, must not only be clearly invalid or inequitable, but must be such as may, in the present or at a future time, embarrass the real owner in controverting it.[1]

Independently of statutes, the object of a bill to remove a cloud upon a title, and to quiet the possession, is to protect the owner of the legal title from being disturbed in his possession or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff.[2]

The remedy is to cancel the instrument;[3] or to annul or modify the proceeding or record which creates the cloud. Where the illegality of an agreement, deed, or other instrument, appears upon the face of it, so that its nullity can admit of no doubt, a court of equity will not direct it to be canceled or delivered up. There can be no danger that lapse of time may deprive the party of his full means of defense. Such a paper cannot, in strictness, be said to create a cloud, nor be a means of vexatious litigation, or of serious injury.[4]

A bill in equity lies to remove a cloud upon the title to realty where there is not a plain, adequate, and complete remedy at law.[5]

The jurisdiction of a court of equity is an independent source or head of jurisdiction, not requiring any accompaniment of fraud, accident, mistake, trust, account, or any other basis of equitable intervention.[6]

The decree, unless otherwise expressly provided by statute, is not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be canceled, or to execute a release to the plaintiff.[7]

See QUIET. Compare COLOR, 2, Of title.

CLUB LAW. The use of force or violence for the redress of wrong, actual or alleged.

CLUBS. Associations of persons for the promotion of a common purpose.

In this sense "club" has no very definite meaning. Clubs are formed for all sorts of purposes, and there is no uniformity in their constitutions and rules.[8]

A club of persons may own intoxicating liquors, and employ one member as steward to deliver drinks to other members upon the presentation of checks which are sold by the steward, the money received being used to buy other liquors as the property of the club, without violating a law forbidding the keeping of intoxicating liquors with intent to sell them.[1]

By-laws, which vest in a majority the power of expulsion for a minor offense, are, so far, void. The power of disfranchisement which destroys the member's franchise must be conferred by statute; it is never sustained as an incidental power except on conviction for an infamous offense, or for the commission of an act against the society which tends to its injury.[2] See ASSOCIATION.

CO. 1. An abbreviation of company and of county. See COMPANY, 1.

2. The Latin *con* (q. v.) used as a prefix, and meaning: with, together with, joined with — and, hence, companion, fellow, associate: as in co-administrator, co-conspirator, co-defendant, co-executor, co-heir, co-obligor, co-partner, co-plaintiff, co-salvor, co-surety, co-tenant, co-trespasser — in which the person spoken of possesses the characteristics of another person whose office or relation is more particularly mentioned. See each of those simple words; also JOINT.

COACH. A kind of carriage, distinguished from other vehicles chiefly as being a covered box, hung on leathers, with four wheels.[3] See RAILROAD; WAGON.

COAL. See ACQUA, Currit, etc.; MINERAL; WASTE, 2.

COASTING TRADE. By act of Congress of February 18, 1793, commercial intercourse carried on between different districts in different States, between different districts in the same State, and between different places in the same district, on the seacoast or on a navigable river.[4]

The reference is to vessels engaged in the domestic trade, plying between ports in the United States, as distinguished from vessels engaged in the foreign trade or plying between a port of the United States and a port in a foreign country.[5]

COAT OF ARMS. See HEIRLOOM.

COCK-FIGHTING. See CRUELTY, 3; GAME, 2.

[1] Phelps *v.* Harris, 101 U. S. 374-75 (1879), cases; Gilman *v.* Van Brunt, 29 Minn. 272 (1882), cases.

[2] Frost *v.* Spitley, 121 U. S. 556 (1887), cases, Gray, J.; Hariand *v.* Bankers' & Merchants' Tel. Co., 32 F. R. 308 (1887).

[3] Fox *v.* Blossom, 17 Blatch. 356 (1879), cases.

[4] 1 Story, Eq. § 700a.

[5] Russell *v.* Barstow, 144 Mass. 130 (1887). Where the alleged owner is in possession he cannot maintain a writ of entry without abandoning the possession.

[6] Dull's Appeal, 113 Pa. 510, 515-18 (1886), cases. See also Holland *v.* Challen, 110 U. S. 24 (1884); Pomeroy, Eq. J. § 1396.

[7] Harte *v.* Sansom, 110 U. S. 155 (1884), cases.

[8] Commonwealth *v.* Pomphert, 137 Mass. 567, 564 (1884). See 59 Ala. 34; 79 Ill. 85; 48 Ind. 21; 89 Iowa, 495; 85 Md. 568; 8 Q. B. D. 373.

[1] Commonwealth *v.* Pomphert, *ante*.

[2] Evans *v.* Philadelphia Club, 50 Pa. 107 (1865). See generally 5 Alb. Law J. 226 (1872), cases; Dawkins *v.* Antrobus, 37 Eng. R. 237 (1881); Loubat *v.* Le Roy, 40 Hun, 546 (1886), cases.

[3] Turnpike Co. *v.* Nell, 9 Ohio, 12 (1839).

[4] Steamboat Co. *v.* Livingston, 3 Cow. 747 (1825).

[5] [San Francisco *v.* Navigation Co., 10 Cal. 507 (1858), cases

CODE.[1] A reduction and revision of the law and procedure of a political community, upon one or more general subjects, and the enactment of this new, systematized statement as one statute.

An enactment of a more or less complete system of law, or of procedure, or of both law and procedure, upon one or more general subjects.

Codification. The act or process of reducing all the law upon one or more general subjects to a code.

The reduction of the existing law to an orderly written system, freed from the needless technicalities, obscurities, and other defects which the experience of its administration has disclosed.[2]

Codify. To reduce to the form of a code. *Uncodified:* not reduced to a code.

Codifier. One who makes or assists in making a code.

"A code ought to be based upon the principle that it aims at nothing more than the reduction to a definite and systematic shape of the results obtained and sanctioned by the experience of many centuries.[3]

The codes of New York have been the most celebrated and influential in this country. In that State the work of codification began under the constitution of 1846. Commissioners reported as complete the codes of Civil and Criminal Procedure in 1850, the Political Code in 1859, the Penal Code in 1864, and the Civil Code in 1865. Each of these has since been revised. The code of Civil Procedure, with some changes, has been adopted in Arizona, Arkansas, California, Colorado, Connecticut, Dakota, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oregon, South Carolina, Utah, Washington, Wisconsin, and Wyoming; and the code of Criminal Procedure, in Arizona, Arkansas, California, Dakota, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Montana, Nebraska, Nevada, Oregon, Utah, Washington, Wisconsin, and Wyoming. California and Dakota have also adopted the substance of the other three codes. Other States have partial revisions or consolidations sometimes called "codes." The New York codes are said to have also had an influence in framing the system adopted in England by the Judicature Act of 1873.[4]

In 1886 a codification of civil and criminal statutes was adopted in Alabama; a code of civil procedure in Connecticut; and a civil code in Virginia, taking effect January 1, 1888.

A large portion of the modern codes is but declaratory of the common law as expounded by the courts.[1]

A code is a general collection or compilation of laws by public authority; a collection and compilation of general statutes. . . The rule is, that when a statute is revised, or when one statute is framed from another, some parts being omitted, the parts so omitted are annulled. It must be presumed that the legislature has declared its entire will.[2] See REVISE.

CODICIL.[3] A supplement to a will, or an addition made by the testator, annexed to, and to be taken as part of, a testament: being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former disposition of the testator.[4]

A clause added to a will after its execution; the purpose of which usually is to alter, enlarge, or restrain the provisions of the will, or to explain, confirm, and republish it.[5]

Part of the will, to be construed with it, as one entire instrument. . . But the will is not altered by the codicil, except by express words or necessary implication. It is to be deemed altered by necessary implication where a subsequent provision is inconsistent with and repugnant to a prior provision. But where they can stand together, both shall have effect.[6]

The effect of republication of the will by the addition of a codicil is to bring both instruments to the same date.[4] See WILL, 2.

COERCION. Compulsion: constraint; duress.

Direct or positive coercion. When a person by physical force is compelled to do an act against his will.

Implied or legal coercion. When a person, under legal subjection to another, is induced to do an act involuntarily.

As free will is necessary to accountability, a person acting under coercion has no will. But the command of a superior to an inferior, of a parent to a child, of

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[1] F. *code;* L. *codex*, a tablet, a book. Codify, codifier, and codification are pronounced cŏd'—.

[2] 3 Stephen, Hist. Cr. L. Eng. 351.

[3] Mr. Justice Stephen.

[4] See 19 Alb. Law J. 192 (1879) — David Dudley Field; 1 Kent, 475, note; Edinb. Rev., Oct., 1869; Abbott, Bouvier, Law Dicts.

[1] Cincinnati *v.* Morgan, 3 Wall. 293 (1865).

[2] Mobile, &c. R. Co. *v.* Weimer, 49 Miss. 739 (1874). See also Sedgw. Stat. 439. See generally 3 South. Law Rev., o. s., 222 (1874); 2 *id.*, N. s., 215 (1876); 3 *id.* 573 (1877); 6 *id.* 1 (1880); 19 Am. Law Rev. 14–17 (1884); 20 *id.* 1–47, 315–38 (1886); 21 *id.* 194–209 (1887); 2 Law Q. Rev. 125 (1886); 35 Alb. Law J. 244–47, 264, 321 (1887); 36 *id.* 224 (1887); 37 *id.* 221–23 (1888); 26 Cent. Law J. 257 (1888); 22 Am. Law Rev. 1–29, 57–65 (1888); 4 Kans. Law J. 258 (1886) — Law Counselor.

[3] L. *codicillus*, a little book or writing.

[4] 2 Bl. Com. 500. See 4 Kent, 531.

[5] Lamb *v.* Lamb, 11 Pick. 375 (1831), Shaw, C. J. See Dunham *v.* Averill, 45 Conn. 79 (1877); Grimball *v.* Patton, 70 Ala. 631 (1881); Fairfax *v.* Brown, 60 Md. 58 (1882).

[6] Hatcher *v.* Hatcher, 80 Va. 173 (1885).

a master to a servant, or of a principal to his agent, does not, ordinarily, amount to coercion.

If a wife acts in company with her husband in the commission of a tort or a crime other than treason, homicide, or other heinous felony, it is presumed, at common law, that she acted under coercion and without guilty intent. But non-coercion may be proved.[1] See DURESS; WILL, 2.

COGNATI. See NATUS, Cognati.

COGNIZANCE.[2] 1. Recognition; acknowledgment.

When a defendant in replevin justifies a distress of goods in another's right as his bailiff or servant, he is said to make cognizance; that is, he acknowledges the taking, but insists that it was legal.[3] Compare AVOWRY; RECOGNIZANCE.

2. Judicial recognition; judicial power; jurisdiction.

A word of the largest import, embracing all power, authority, and jurisdiction: as in the provision that a particular court shall have full cognizance of capital crimes.[4]

COGNOVIT. L. He has confessed or acknowledged it.

Cognovit actionem. He has confessed the action. Sometimes called a *cognovit*.

An acknowledgment by a defendant that an action brought against him is rightly brought, and that the sum named is due to the plaintiff.[5]

An unsealed confession of judgment given to the plaintiff after suit is brought. A warrant of attorney is under seal and given before suit is entered.[6] See ATTORNEY, Warrant of.

COHABIT.[7] 1. The primary meaning is to dwell with some one, not merely to visit or to see that one.[8]

In criminal statutes, to live together as husband and wife.

As, in the act of Congress of March 22, 1882, c. 47, forbidding polygamy.[9]

To live together in the same house as married persons live together, or in the manner of husband and wife.[1]

2. In a popular sense, sometimes found in statutes and decisions, includes the idea of occupying the same bed, and sexual intercourse.[2]

Cohabitation. As a fact presumptive of marriage, not a sojourn, nor a habit of visiting, nor even a remaining with for a time. . . Neither cohabitation nor reputation of marriage, nor both, is marriage. Conjoined, they are evidence from which a presumption of marriage arises. The legal idea of cohabitation is that which carries with it a natural belief that it results from marriage only. To cohabit is to live or dwell together, to have the same habitation; so that where one lives and dwells there the other always lives and dwells. The Scotch expression, "the habit and repute" of marriage, conveys the true idea better, perhaps, than our own. When we see a man and a woman constantly dwelling together, we obtain the first idea in the presumption of marriage; and when we add to this that the parties thus constantly living together are reputed to be man and wife, and so taken and received by all who know them both, we take the second step in the presumption of the fact of a marriage. Marriage is the cause, these follow as the effect. . . An inconstant habitation and a divided reputation of marriage carry with them no full belief of an antecedent marriage as the cause. Irregularity in these elements of evidence is at once a reason to think that there is irregularity in the life itself which the parties lead: unless attended by independent facts, which aid in the proof of marriage. Without concomitant facts to prove marriage, such an irregular cohabitation and partial reputation of marriage avail nothing in the proof of marriage.[3]

See CONDONATION; DESERTION, 1; LASCIVIOUS; MARRIAGE; REPUTED.

COIN. A piece of metal stamped and made legally current as money.[4]

"Coin" and "coinage" apply to the stamping of metal in some way so as to give them currency.[5]

"The Congress shall have Power . . To coin Money, regulate the Value thereof, and of foreign

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[1] 4 Bl. Com. 28-29; State v. Shee, 13 R. I. 536 (1882), cases; State v. Boyle, *ib.* 588 (1882); 51 Me. 308; 97 Mass. 547; 106 *id.* 71; 65 N. C. 398; 1 Greenl. Ev. § 28; 2 Whart. Ev. § 1256; 1 B. & H. Ld. Cr. Cas. 76-87, cases; 2 Steph. Hist. Cr. L. Eng. 99-110.

[2] Kŏg'-ni-, or kŏn'-i-zans. F. *cognoissance*, knowledge: L. *cognoscere*, to know,— Skeat. Also cognisance, and, formerly, conusance.

[3] 3 Bl. Com. 150.

[4] Webster v. Commonwealth, 5 Cush. 400 (1850), Shaw, C. J. See also 68 N. Y. 101; 2 Bl. Com. 38; 3 *id.* 86, 298; 4 *id.* 278.

[5] Smith, Contracts, 280.

[6] 3 Bl. Com. 397.

[7] L. *con*, with; *habitare*, to have often, *i. e.*, abide with,— 54 Me. 366.

[8] [Calef v. Calef, 54 Me. 366 (1867), Appleton, C. J.

[9] Cannon v. United States, 116 U. S. 55, 74-75 (1885).

[1] Jones v. Commonwealth, 80 Va. 20 (1885), Fauntleroy, J.

[2] See 1 Bishop, Mar. & D. § 777, note, cases; 116 U. S. 75; 4 Paige, 425. As a married right, 19 Cent. Law J. 142 (1884), cases.

[3] Yardley's Estate, 75 Pa. 211 (1874), Agnew, C. J. See also Brinckle v. Brinckle, 84 Leg. Int. 428 (1877); Hynes v. McDermott, 91 N. Y. 459-62 (1883), cases; Teter v. Teter, 88 Ind. 498 (1883), cases; Appeal of Reading Fire Ins. & Trust Co., 113 Pa. 208 (1886), cases; 1 Whart. Ev. §§ 84-85, cases.

[4] United States v. Bogart, 9 Bened. 315 (1878), Wallace, J.; 5 Phila. 403; 16 Gray, 240.

[5] Meyer v. Roosevelt, 25 How. Pr. 105 (1863).

Coin."[1] "No State shall . . ,coin Money" or "make any Thing but gold and silver Coin a Tender in Payment of Debts."[2] See TENDER, 2 (2), Legal Tender Acts.

The gold coins of the United States shall be a one-dollar piece, which, at the standard weight of twenty-five and eight-tenth grains, shall be the unit of value; a quarter-eagle, or two and a half dollar piece; a three-dollar piece; a half-eagle, or five-dollar piece; an eagle, or ten-dollar piece; and a double eagle, or twenty-dollar piece.

The silver coins shall be [a trade-dollar,][3] a half-dollar or fifty-cent piece, a quarter-dollar or twenty-five-cent piece, a dime or ten-cent piece. The weight of [the trade-dollar shall be four hundred and twenty grains troy; the weight of] the half-dollar, twelve grams and one-half of a gram; the quarter-dollar and the dime, respectively, one-half and one-fifth of the weight of said half-dollar.

The standard of both gold and silver coins shall be such that of one thousand parts by weight nine hundred shall be pure metal and one hundred of alloy. The alloy of the silver coins shall be of copper. The alloy of the gold coins shall be of copper, or of copper and silver; but the silver shall in no case exceed one-tenth of the whole alloy.

The minor coins shall be a five-cent piece, a three-cent piece, and a one-cent piece; and their weight, respectively, seventy-seven and sixteen-hundredths grains troy, thirty grains, and forty-eight grains. The alloy of the five and three cent pieces shall be of copper and nickel, three-fourths to one-fourth; the alloy of the one-cent piece, ninety-five per centum of copper and five per centum of tin and zinc.

Any gold coins in the treasury, when reduced in weight by natural abrasion more than one-half of one per centum below the standard weight, shall be recoined.[4]

There shall be coined silver dollars of the weight of four hundred and twelve and a half grains troy of standard silver, as provided in the act of January 18, 1837 (5 St. L. 137).[5]

Foreign coins. The value of foreign coins as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the director of the mint, and be proclaimed on the first day of January by the secretary of the treasury.[6]

The valuation thus made is conclusive upon custom-house officers and importers.[7]

All foreign gold and silver coins received in payment for moneys due to the United States shall, before being issued in circulation, be coined anew.[1]

See ATTACHMENT, Execution; CURRENT, 2; MONEY.

COLD. See COOLING.

COLLATERAL.[2] Does not depart from its non-legal, popular signification.

1. Applied to a person or personal relation — that which is by the side, and not in the direct line: as collateral or a collateral — ancestor, charge, consanguinity, descent, heir, inheritance, kindred, kinsmen, relatives, *qq. v.*

2. Said of a right or a thing — depending upon another as the more important; additional to some other as principal: as collateral or a collateral — assurance, covenant, deed, estoppel, fact, issue, limitation, obligation, promise, security, undertaking, warranty, *qq. v.*

Collaterally attack or impeach. To question the validity of a thing done in court, in an independent proceeding:[3] as to collaterally attack a judgment or a judicial sale, *qq. v.*

Not permitted, except for fraud, of a matter regularly adjudicated by proper authority. See ADJUDICATION, Former.

Collaterals. 1. Collateral kinsmen. 2. Collateral securities, *q. v.*

COLLEAGUE. See ASSOCIATE, Counsel, Judge.

COLLECT. To gather together: to bring into the custody of one person.

1. To gather the assets of a decedent's estate: as for one to collect the goods of the estate for safe-keeping, until a will is proven and an executor qualified, or an administrator appointed.[4]

2. To receive or obtain money.

Collector. (1) A public officer charged with the duty of exacting and receiving payment of moneys due the government, as of taxes, or of customs or revenue duties. See DUTY, 2.

(2) A private person employed to demand and receive payment of money; a collecting agent, *q. v.*

Collection. The act or fact of claiming and receiving payment of money.

In New York, a guaranty of the collection of a demand, or that it may be collected, or is collectible,

[1] Constitution, Art. I, § 8, cl. 5.

[2] *Ibid.* § 10, cl. 1. See generally Bronson *v.* Rodes, 7 Wall. 247-54 (1868), Chase, C. J.

[3] Act 3 March, 1887 (24 St. L. 634), provides for the exchange and retirement of the trade-dollar.

[4] R. S. §§ 3511-15.

[5] 1 Sup. R. S. p. 306: Act 28 Feb., 1878.

[6] Act 3 March, 1873: R. S. § 3564.

[7] Arthur, Collector *v.* Richards, 23 Wall. 246 (1874); Cramer *v.* Arthur, 102 U. S. 612 (1880); Hadden *v.* Merritt, 115 *id.* 25 (1885).

[1] Act 9 Feb., 1793: R. S. § 3566.

[2] L. *collateralis*, side by side: *con*, by; *latus*, side.

[3] See generally 25 Cent. Law J. 387 (1887), cases.

[4] 2 Bl. Com. 510.

means that payment can be obtained either by demand or by resort to the proper legal remedy.[1] See RECOVER.

Collect on delivery. The initials C. O. D. mean collect on delivery, that is, deliver upon payment of the charges due to the seller for the price and to the carrier for the carriage of the goods. The initials have acquired a fixed meaning which the courts and juries may recognize from their general information.[2]

The contract of the carrier is not only for the safe carriage and delivery of the goods to the consignee, but also that he will collect the price and the charges due thereon, and return the price to the consignor. Should the goods be destroyed by any other agency than an act of God or of a public enemy, the carrier is liable, as in other cases.[3] See CARRIER, Common.

Collecting agent or agency. A collection to be made by a collecting agent imports an undertaking by such agent himself; not that he receives a claim for transmission to another for collection, for whose negligence he is not to be responsible.[4]

For collection. Indorsed on negotiable paper, restrains negotiability. The indorser may prove that he was not the owner and did not mean to give title to it or to its proceeds when collected. Such indorsement is not intended to give currency or circulation to the paper; its effect is limited to an authority to collect.[5]

There is a marked difference of opinion, expressed in the adjudged cases, respecting the liability of a collecting banker for the manner in which the notary, to whom notes are delivered for presentment and protest, discharges his duty. . . The supreme court of New York, in *Allen* v. *Merchants' Bank of New York*,[6] said that "a note or bill of exchange left at a bank and received for the purpose of being sent to a distant place for collection, would seem to imply, upon a reasonable construction, no other agreement than that it should be forwarded with due diligence to a competent agent to do what should be necessary in the premises. The person leaving the note is aware that the bank cannot personally attend to the collection, and that it must therefore be sent to some distant or foreign agent," and that there was nothing which could imply an assumption for the fidelity of the agent. The case being carried to the court of errors, the foregoing decision was reversed, and the doctrine declared that the bank was responsible for all subsequent agents employed in the collection of the paper.[1] The reversal was by a vote of fourteen senators against ten. The decision has since been followed in New York, and its doctrine adopted in Ohio. But in the courts of other States it has been generally rejected and the views expressed by the supreme court approved. In *Dorchester and Milton Bank* v. *New England Bank* it was held by the supreme court of Massachusetts that when notes or bills, payable at a distant place, are received by a bank for collection, without specific instructions, it is bound to transmit them to a suitable agent at the place of payment, for that purpose; and that when a suitable sub-agent is thus employed, in good faith, the collecting bank is not liable for his neglect or default.[8]

In the supreme courts of Connecticut, Maryland, Illinois, Wisconsin, and Mississippi, the doctrine of the supreme courts of New York and Massachusetts, in the cases cited, has been approved and followed.[9]

The indorsement upon a check "For collection; pay to the order of A," is notice to purchasers that the indorser is entitled to the proceeds.[3]

Whether a stipulation in a note for the payment of the expenses of collection is enforceable under statutes allowing costs or statutes against usury, or whether such stipulation renders the instrument so uncertain as to destroy its negotiable quality, are questions not uniformly settled.[4]

COLLEGE.[5] 1. In the civil law, corporations were called *collegia*, from the idea of individuals being gathered together.[6]

Tres faciunt collegium: three form a corporation.[6]

2. An organized assembly.

[1] See Moakley v. Riggs, 19 Johns. 70 (1821); Taylor v. Bullen, 6 Cow. 626 (1827); Cumpston v. McNair, 1 Wend. 469 (1828); Backus v. Shipherd, 11 Wend. 634 (1834); Loveland v. Shepard, 2 Hill, 139 (1841).

[2] State v. Intoxicating Liquors, 73 Me. 279 (1882), Peters, J. See also United States Express Co. v. Keifer, 59 Ind. 267 (1877); American Express Co. v. Leesm, 30 Ill. 333 (1866).

[3] See Pilgreen v. State, 71 Ala. 368 (1882); The Illinois, 2 Flip. 430 (1879); Higgins v. Murray, 73 N. Y. 252, 254 (1878); Wagner v. Hallack, 3 Col. 184 (1877); Gibson v. American Express Co., 1 Hun, 339 (1874); Baker v. Boucicault, 1 Daly, 26–27 (1860); cases *supra*.

[4] Hoover v. Wise, 91 U. S. 310–15 (1875), cases: Hunt, Field, Swayne, Davis, Strong, JJ., and Waite, C. J., concurring; Miller, Clifford, and Bradley, JJ., dissenting.

[5] Sweeney v. Easter, 1 Wall. 173–74 (1863), cases.

[6] 15 Wend. 487 (1836), cases.

[1] 22 Wend. 227–44 (1839), cases.

[8] Britton v. Niccolls, 104 U. S. 761–63 (1881), Field, J. See also First Nat. Bank of Lynn v. Smith, 132 Mass. 227 (1882); Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 381–93 (1884), cases; Central R. Co. v. First Nat. Bank of Lynchburg, 73 Ga. 383 (1884); Bank of Sherman v. Weiss, 67 Tex. 333–35 (1887), cases. The bank is liable for misappropriation by the agent; Power v. First Nat. Bank of Ft. Benton, 6 Monta. 251 (1887), cases: 35 Alb. Law J. 185–90, cases *contra*. See 18 Cent. Law J 165–70 (1884), cases; 20 Am. Law Rev. 889–901 (1886), cases.

[9] Bank of the Metropolis v. First Nat. Bank of Jersey City, 19 F. R. 302 (1884), cases.

[4] Merchants' Nat. Bank v. Sevier, 14 F. R. 668, 667–75 (1882), cases.

[5] L. *con-ligere*, to bring together, assemble.

[6] 1 Bl. Com. 469.

Electoral college. The body of electors chosen by the people, in pursuance of the XIIth Amendment, to elect a President and a Vice-President of the United States.[1] See ELECTORAL.

3. Referring to an institution of learning, may more naturally apply to the place where a collection of students is contemplated than to the hall or building intended for their accommodation.[2]

In a statute exempting colleges and academies from taxation, means a seminary of learning: not the assemblage of the professors and students, nor the trustees in their corporate capacity, but certain property belonging to them, with the edifices and the lands whereon the same are erected.[3] See ABODE; CHARITY, 2; ENDOWMENT, 2; MEDICAL; PERMANENT; SCHOOL, Public.

COLLISION.[4] A striking together or impact of two bodies — vehicles or vessels, more commonly the latter.

Includes "allision" — when a stationary body is struck by a moving body; also, injuries from one thing being rubbed or pressed against another — as one vessel lying alongside of another.[5]

1. As to collisions between vehicles, see ACCIDENT; CARRIER, Common; NEGLIGENCE; ROAD, 1, Law of.

2. A vessel engaged in commerce is liable for damage occasioned by a collision, on account of the complicity, direct or indirect, of the owner, or the negligence or want of care or skill of the navigator. The reason is, the owner employs the master and the crew. Any fault is imputed to him, and his vessel is liable. Otherwise when the person in fault does not stand in the relation of agent to the owner.[6]

Where neither vessel is in fault, a loss rests where it falls; where both vessels are in fault, the damages are proportioned equally; where one vessel alone is in fault, it pays all damages. When both vessels are in fault, an innocent person, as, a shipper or consignee, who is injured, may recover of either vessel or of its owner all the loss, and may pursue his remedy at common law, or in admiralty by proceedings *in rem* or *in personam*.[7] For suits *in personam*, the United States courts, as courts of admiralty, have not exclusive jurisdiction, the right to any common-law remedy being expressly saved by statute (R. S. § 563).[1]

Under the act of March 3, 1851 (R. S. §§ 4283–87), the owner is entitled to a limitation of liability to the value of his interest in the ship and in her earned freight, at the termination of the voyage,—which may be by loss of the ship at sea. The subsequent repair of a wrecked vessel, giving her increased value, is not an element; nor is any insurance had on the vessel: that being a collateral and personal interest. And the right to proceed for a limitation of liability is not lost by a surrender of the vessel to the underwriters.[2]

The limitation may be claimed by way of defense, or by surrendering the ship or by paying her value into court. The latter method is necessary when the owner desires to bring all claimants into concourse for distribution.[3]

Where both vessels are in fault, the one that suffers least is decreed to pay the other the amount necessary to make them equal; that is, one-half the difference between the respective losses.[4] The decree should be, not *in solido* for all damages and costs, but severally against each vessel for one-half thereof, any balance unrecovered from one to be paid by the other vessel, and to the extent of her stipulated value beyond the moiety due from her.[5]

Where the collision is between foreign vessels on the high seas, the Federal courts have jurisdiction, the first court that obtains it exercising it under the general maritime law as understood in the courts of the country.[6]

See further ACCIDENT, Inevitable; ACTOR, 1, Sequitur; ADMIRALTY; LIBEL, 4; RES; RESTITUTIO; TUG.

COLLOQUIUM. L. A speaking together: a conversation.

An averment, in an action for slander, that the defendant spoke the words in a certain conversation (*in quodam colloquio*) he had with another person, concerning the plaintiff.

When the words are actionable in themselves, a *colloquium*, averring a speaking of and concerning the plaintiff, is sufficient. When the words have a slanderous meaning, not of their own intrinsic force, but by reason of the existence of some extraneous

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[1] See 2 Story, Const. §§ 1438–74; 15 Alb. Law J. 220 (1877).

[2] [Stanwood *v.* Peirce, 7 Mass. 460 (1811), Parsons, C. J.

[3] [State *v.* Ross, 24 N. J. L. 498 (1854), Haines, J.,—Case of the College of New Jersey.

[4] L. *collidere*, to strike together.

[5] See The Moxey, 1 Abb. Adm. 73 (1847); Wright *v.* Brown, 4 Ind. 96 (1853); The City of Baltimore, 5 Bened. 474 (1872).

[6] Sturgis *v.* Boyer, 24 How. 123 (1860), Clifford, J.; The Clarita, 23 Wall. 11 (1874).

[7] Union Steamship Co. *v.* N. Y. & Va. Steamship Co., 24 How. 313 (1860), Clifford, J.; The Continental, 14 Wall. 355 (1871); The Atlas, 93 U. S. 302 (1876); The Juniata, *ib.* 337 (1876); Vanderbilt *v.* Reynolds, 16 Blatch. 84–91 (1879), cases; The Clara, 102 U. S. 203 (1880), cases; The Benefactor, *ib.* 214 (1880).

[1] Schoonmaker *v.* Gilmore, 102 U. S. 118 (1880), cases.

[2] The City of Norwich, 118 U. S. 469, 489–506 (1886), Bradley, J.: Waite, C. J., Field, Woods, and Blatchford, JJ., concurring; Matthews, Miller, Harlan, and Gray, JJ., dissenting — *ib.* pp. 526–41. The other cases, The Scotland, *ib.* 507, and The Great Western, *ib.* 520, being considered in the same connection.

[3] The Great Western, 118 U. S. 520 (1886). See also Norwich Co. *v.* Wright, 13 Wall. 104, 116–26 (1871), cases; The Benefactor, 103 U. S. 246 (1880).

[4] The North Star, 106 U. S. 20, 17–22 (1882), cases, Bradley, J. See, as to dividing the loss, 2 Law Q. Rev. 357–63 (1886).

[5] The Stirling, 106 U. S. 647 (1882), cases, Waite, C. J.

[6] The Belgenland, 104 U. S. 355, 361 (1885), cases.

fact, this fact must first be averred as inducement, and then there must be a *colloquium*, averring a speaking of or concerning the plaintiff. Lastly, the word "meaning," or *innuendo*, is used to connect the matters thus introduced with the particular words laid, showing their identity, and drawing what is the legal inference from the whole declaration that such was, under the circumstances thus set out, the meaning of the words.[1] See INNUENDO; SLANDER.

COLLUSION.[2] An agreement between persons to defraud another of his rights by the forms of law or to obtain an object forbidden by law.[3] Whence collusive. See FRAUD.

COLONIES. See INDEPENDENCE; LAW, Common; RELIGION; STATE, 2 (2, *b*); TAX, 2; WRECK.

COLOR. 1. Darkness of skin from presence of African blood.

The phrase "persons of color" embraces, universally, not only all persons descended wholly from African ancestors, but also those who have descended in part only from such ancestors, and have a distinct admixture of African blood.[4]

"Colored" race means "African" race.[5]

In 1866, in Virginia, "colored person" was substituted for "negro," which word before that time included "negro" and "mulatto." The act of February 27, 1866, like the Code of 1849, provided that "every person having one-fourth or more negro blood shall be deemed" a colored person.[6] See CITIZEN; SCHOOL, Separate; WHITE.

2. Appearance; apparent reality, validity, or legality; also, pretense.

Colorable. Existing in aspect merely; not real: as, a colorable abridgment or alteration of a copyrighted production, imitation of a trade-mark, assignment, claim or defense, change of possession, title, *qq. v.*

Colorless. Without intimation as to motive or preference.

Colorless will. A will characterized by a general intent to effect a stated disposition of property, without intimation as to the motives for making the several gifts, or without indication of preference for any beneficiary, class, or object.

Where a general and a particular intent are expressed, the latter, in a case of doubt as to the testator's meaning, is made to yield to the former.[1] See CY PRES; WILL, 2.

Color of law. Pretense or semblance of legal right or authority.[2] See EXTORTION.

Color of office. Pretense or semblance of official right to do an act by one who has no right; pretended authority of office. See further OFFICER, De facto; OFFICIUM, Colore.

Color of title. That which in appearance is title, but which in reality is no title.[3]

The resemblance or appearance of title. Whenever an instrument, by apt words of transfer from grantor to grantee, in form passes what purports to be the title, it gives color of title.[4]

May be made through a conveyance, a bond, a contract, or bare possession under a parol agreement. Whether the title be weak or strong is of no importance. What is color of title is a matter of law for the court. If good faith be a necessary element in the claim, that is for a jury. . . . A claim under a conveyance, however inadequate to carry the true title, and however incompetent the grantor, is such a claim under color of title, and one which will draw to the possession of the grantee the protection of the statute of limitations, other requisites of the statutes being complied with.[5] See POSSESSION, Adverse. Compare CLOUD, On title.

Give color. To admit the appearance of right in favor of an adverse party.

"In trespass, if the defendant desires to refer the validity of his title to the court, he may state his title specially, and at the same time 'give color' to the plaintiff, or suppose him to have an appearance of title, bad indeed in point of law, but of which a jury are not competent to judge."[6]

"Giving color" is a phrase borrowed from the ancient rhetoricians. In pleading it signifies an apparent or *prima facie* right; and the meaning of the rule that every pleading in confession and avoidance must give color is, that it must admit an apparent right in the opposite party, and rely, therefore, on some new matter by which that apparent right is defeated. . . . The kind of color which is naturally

[1] Carter *v.* Andrews, 16 Pick. 6 (1834), Shaw, C. J. See also 23 Pa. 89; 53 *id.* 421; 1 Greenl. Ev. § 417.

[2] L. *colludere*, to co-act in a fraud: *con-ludere*, to play together.

[3] See Baldwin *v.* Mayor of New York, 45 Barb. 369 (1866): s. c. 30 How. Pr. 30, quoting Bouvier and others.

[4] Johnson *v.* Town of Norwich, 29 Conn. 408 (1861), Storrs, C. J. See also Van Camp *v.* Board of Education, 9 Ohio St. 411 (1859); 9 Ired. L. 384; 31 Tex. 67.

[5] Clark *v.* Directors of Muscatine, 24 Iowa, 275 (1868); People *v.* Hall, 4 Cal. 399–404 (1854); 37 Miss. 209.

[6] Jones *v.* Commonwealth, 80 Va. 542–44 (1885).

[1] See Schouler, Wills, § 476, cases; 1 Redf. Wills, *433, cases.

[2] See United States *v.* Deaver, 14 F. R. 599 (1882).

[3] Wright *v.* Mattison, 18 How. 56–59 (1855), cases.

[4] Hall *v.* Law, 102 U. S. 466 (1880), Field, J.

[5] Wright *v.* Mattison, *supra*. See also 26 Am. Law Reg. 409–19 (1887), cases; 4 Saw. 529; 4 Dill. 555–56; 10 F. R. 536; 33 Cal. 676; 33 Ga. 242; 66 *id.* 170; 93 Ill. 510; 69 *id.* 140; 30 Iowa, 486; 33 Md. 358; 27 Minn. 69–63; 79 N. C. 491; 38 Vt. 345; 6 Wis. 536.

[6] 3 Bl. Com. 309.

latent in the structure of all regular pleadings in confession and avoidance is "implied color," to distinguish it from the kind which, in instances, is formally inserted in the pleading, and known as "express color." To the latter, the term usually applies.[1]

Colore officii. By color of office. See COLOR, 2, Of office.

COLT. See HORSE.

COLUMBIA. See COURTS, United States; DISTRICT, Of Columbia.

COM. See CUM.

COMBAT. A combat in which both parties enter willingly is "mutual."

A person who enters into a combat armed with a concealed deadly weapon may use it to protect his life, if his adversary, who struck the first blow, resorts to such a weapon; and he will not be guilty of assault with intent to murder unless he intended from the first to use the weapon if necessary to overcome his antagonist.[2] See FIGHT.

COMBINATION. 1. In the law of patents, the union of different elements.

A combination is patentable only when the several elements of which it is composed produce by their joint action a new and useful result, or an old result in a cheaper or otherwise more advantageous way.[3]

Limitations and provisos imposed by the inventor will be construed strictly against him, as in the nature of disclaimers.[4]

A combination may be infringed when some of its elements are employed and for others are used mechanical equivalents known to be such when the patent was granted.[5]

See further NOVELTY; EQUIVALENT, 2; PATENT, 2.

2. In penal and criminal laws (as in a statute providing that one common carrier may not combine with another for any purpose), a coalition, union, mutual agreement, or other blending, for any purpose whatever; as, for creating a monopoly.[6]

A combination between the manufacturers of a patented article (a balance shade-roller), intended not to restrict production but simply to maintain a fair and uniform price, and to prevent the injurious effects to producers and consumers of fluctuating prices caused by undue competition, is not in restraint of trade or against public policy.[1]

A combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief.[2]

The gist of the offense is the conspiracy. If the motives of the confederates be to oppress, or the means unlawful, or the consequences to others injurious, it is a conspiracy. Thus, a confederation to raise or depress the price of stocks, labor, merchandise, or the natural products, is a conspiracy.[3]

A confederation or conspiracy by an associated body of ship-owners, which is calculated to have and has the effect of driving the ships of other persons, and those of the plaintiff in particular, out of a certain line of trade,— even though the immediate object be not to injure the plaintiff but to secure to the conspirators a monopoly of the carrying trade between certain ports,— is, or may be, indictable, and therefore actionable, if private and particular damage can be shown. To warrant the court in granting an interim injunction he who complains must show that he has or will sustain "irreparable damage," that is, damage for which he cannot obtain adequate compensation without the special interference of the court.[4]

"If a large number of men, engaged for a certain time, should combine together to violate their contract, and quit their employment together, . . it would surely be a conspiracy to do an unlawful act, though of such a character that, if done by an individual, it would lay the foundation of a civil action only, and not of a criminal prosecution."[5]

See BOYCOTTING; CONSPIRACY; STRIKE, 2; TRADE, Restraints; TRADES-UNIONS.

COME. See APPEARANCE, 8; RESIDE; VENIRE.

COMES. L. See CONSTABLE; COUNTY.

COMFORT. Whatever is necessary to give security from want, and furnish reasonable physical, mental, and spiritual enjoyment.

So held where an executor was directed to pay the testator's widow as much of a certain fund as is "necessary for her comfort."[6] See AID, 1.

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[1] Stephen Plead., Tyl. ed., 206, 210. See Gould, Pl. 222; 2 Chitty, Pl. 555.

[2] Aldrige *v.* State, 59 Miss. 255 (1881), Chalmers, C. J.

[3] Stephenson *v.* Brooklyn R. Co., 114 U. S. 157 (1885); Thatcher Heating Co. *v.* Burtis, 121 *id.* 286, 295 (1887), cases.

[4] Sargent *v.* Hall Safe and Lock Co., 114 U. S. 86 (1885), cases.

[5] Rowell *v.* Lindsay, 113 U. S. 102 (1885), cases. See also Booth *v.* Parks, 1 Flip. 381 (1884), cases; Hill *v.* Sawyer, 31 F. R. 282 (1887), cases; 20 Wall. 368; 92 U. S. 357; 109 *id.* 420; 111 *id.* 103; 17 F. R. 80, cases; 19 *id.* 509, cases.

[6] Watson *v.* Harlem, &c. Navigation Co., 52 How. Pr. 353 (1877).

[1] Central Shade-Roller Co. *v.* Cushman, 143 Mass. 364 (1877); Craft *v.* McConoughy, 79 Ill. 346 (1875). See generally as to combinations for stifling competition, 20 Am. Law Rev. 195–216 (1886), cases.

[2] Commonwealth *v.* Carlisle, Brightly's Rep. 40 (Pa., 1821), Gibson, J. See Commonwealth *v.* Gallagher, 2 Pa. L. J. Rep. 64 (1844).

[3] Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. 173, 186–88 (1871), cases. See also Vanarsdale *v.* Laverty, 69 *id.* 103, 108 (1871)— an agreement not to employ one as a teacher.

[4] Mogul Steamship Co. *v.* M'Gregor, Gow & Co., L. R., 15 Q. B. D. 476, 482 (1885), Coleridge, C. J.

[5] Commonwealth *v.* Hunt *et al.*, 4 Metc. 131 (1842), Shaw, C. J.

[6] Forman *v.* Whitney, 2 Keyes, 168 (1865)

COMITATUS. See COUNTY, Power of.

COMITY.[1] Courtesy: deference, from good feeling or feeling of equality.

Comity of nations, or between States. Expresses the basis upon which one independent sovereignty applies within its own territory the laws of another sovereignty, in a matter as to which the latter or its citizen is concerned.[2]

Upon this basis rest observances under extradition treaties, *q. v.* And some adjudications upon the estates of decedents and insolvents are respected, between the States, to the extent that reciprocity obtains.

Comity obtains to permit the corporations of one State to pursue a lawful business in another State.[3]

Judicial comity. The respect which tribunals of independent jurisdictions entertain for the decisions of each other, in the determination of questions involving reference to extra-territorial law.

The Federal courts adopt the construction given to a State's constitution or statutes by the courts of that State, whatever the opinion as to their soundness, except where the highest State court has given different constructions, and rights have been acquired under the earlier construction; in which case they follow the latter;[4] except, also, in interpreting a contract between States, whether the contract is in the shape of a law or of a covenant by State agents;[5] and except in cases where the Constitution, a treaty, or a statute of the United States, provides otherwise.[6] They give a change in construction the same effect in its operation upon existing contract rights that they give to a legislative amendment — they make it prospective.[7] But they are not bound by decisions upon commercial law.[8]

Where the law of a State is not settled, it is the right and the duty of the Federal courts to exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts have been entered into, and rights have accrued thereon under a particular state of the decisions, or where there has been no decision, of the State tribunals, the Federal courts claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean to an agreement of views with the State courts if the question seems to them balanced with doubt. As, however, the object of giving to the National courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices, it is their duty to exercise an independent judgment in cases not foreclosed by previous adjudication.[1]

COMMAND. See MANDATE; PROHIBERE; RATIHABITIO.

COMMENCE. In several uses has a somewhat technical import:

Commencement of a building. Work done on the ground the effect of which is apparent. See further BUILDING.

Commencement of an action, prosecution, or suit. Such inception of judicial proceedings as affects the several defendants; as saves the cause from the bar of the statute of limitations, *q. v.*; or as assures the jurisdiction, when collaterally questioned.

In civil actions, at common law, suing out or issuing the writ "commences" an action; in equity practice, filing the bill, or, perhaps, issuing and endeavoring to serve the subpœna; under codes of procedure, service or publication of the summons.[2] See BROUGHT.

Before an action can be commenced, the cause of action must be complete, — the day for payment must have passed, a precedent condition must have been performed; the plaintiff must have the necessary privity, and as against the particular defendant; in the case of a tort there must be a legal injury (*q. v.*), and, possibly, the act must not amount to an untried felony; where there is a breach of a public duty, particular damage must have resulted to the plaintiff.[3]

Commencement of an indictment. The most common form (derived from England) is "The jurors of the people of the State of ——, in and for the body of the county of ——, upon their oath present," etc.[4] Compare CAPTION, 2.

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[1] L. *comitas*, urbanity: *comis*, friendly.

[2] See Story, Confl. Laws, §§ 23, 33-38.

[3] Cowell *v.* Saratoga Springs Co., 100 U. S. 59 (1879); Memphis, &c. R. Co. *v.* Alabama, 107 *id.* 581, 585 (1882), cases.

[4] Fairfield *v.* County of Gallatin, 100 U. S. 52 (1879), cases; Caroll County *v.* Smith, 111 *id.* 563 (1884), cases.

[5] Jefferson Branch Bank *v.* Skelly, 1 Black, 436 (1861); Wright *v.* Nagle, 101 U. S. 793 (1879).

[6] Oates *v.* Nat. Bank of Montgomery, 100 U. S. 246 (1879), cases.

[7] Machine Co. *v.* Gage, 100 U. S. 676 (1879); Douglass *v.* County of Pike, 101 *id.* 687 (1879).

[1] Burgess *v.* Seligman, 107 U. S. 33-34 (1882), cases, Bradley, J. See also Pana *v.* Bowler, *ib.* 541 (1882), cases; Norton *v.* Shelby County, 118 *id.* 439 (1886).

[2] See generally 26 Cent. Law J. 31-33 (1888), cases; 2 McCrary, 189; 4 Woods, 108; 11 F. R. 217; 17 *ia.* 475; 10 Ark. 120, 479; 19 Cal. 557; 21 *id.* 351; 45 *id.* 125; 30 Ga. 873; 1 Ind. 276; 11 *id.* 48, 354; 8 Iowa, 309; 9 *id.* 178; 10 *id.* 308, 418; 16 *id.* 59; 3 A. K. Marsh. 18; 5 Bush, 435; 15 Mass. 455; 7 Me. 370; 33 Mich. 112; 42 Miss. 241; 36 *id.* 40; 5 N. H. 225; 47 *id.* 24; 37 N. Y. 122; 10 Barb. 318; 6 Cow. 471, 519; 17 Johns. 65; 36 Pa. 474; 24 *id.* 124; 15 *id.* 233; 1 R. I. 17; 11 Humph. 303; 10 Tex. 155; 28 *id.* 713; 30 *id.* 494; 42 Vt. 552; 55 *id.* 355; 6 W. Va. 336.

[3] See 21 Cent. Law J. 401-12 (1885), cases.

[4] People *v.* Pennett, 37 N. Y. 122 (1867).

COMMENDATIO. L. Commending; recommending.

Simplex commendatio non obligat. A mere recommendation does not bind: the expression of an opinion does not constitute a warranty. Abridged, *Simplex commendatio.*

A false assertion of value, when no warranty is intended, is not a ground of relief to a purchaser: the assertion is a matter of opinion, which does not imply knowledge, and in which men may differ. Every person reposes at his peril in the opinion of others, when he has equal opportunity to form and exercise his own judgment.[1]

"The law recognizes the fact that men will naturally overstate the value and qualities of the articles which they have to sell." A buyer has no right to rely upon mere "dealer's talk."[2] See CAVEAT, Emptor; WARRANTY, 2.

COMMERCE.[3] In its simplest signification, an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities and enter into commerce.[4]

The interchange or mutual change of goods, productions, or property of any kind, between nations or individuals.[5]

"Transportation" is the means by which "commerce" is carried on.[6]

Commercial. Concerning commerce, trade, or traffic; pertaining to the customs of merchants, or to the law-merchant; mercantile: as, commercial or a commercial — broker, corporation, domicil, law, paper, regulation, term, *qq. v.*

Commercial law is not peculiar to one State nor dependent upon local authority, but arises out of the usages of the commercial world. The Federal courts are not controlled by the decisions of the courts of a State upon matters of commercial law.[7]

Mercantile law is a system of jurisprudence acknowledged by all commercial nations. Upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world.[1] See NEGOTIABLE.

Commercial agency. See COMMUNICATION, Privileged, 2.

Commercial traveler. See below, and DRUMMER; MERCHANT.

In some connections "commerce" relates to dealings with foreign nations; "trade," to mutual traffic among ourselves, or to the buying, selling, or exchange of articles among members of the same community.[2]

The application of the term commerce is generally discussed with reference to the provision (called the commerce or commercial clause of the Constitution) that "The Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."[3]

By force of this provision, the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation by Congress.[4, 5]

Commerce is more than traffic. It embraces, also, transportation by land and water, and all the means and appliances necessarily employed in carrying them on.[6]

A term of the widest import, comprehending intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities.[7]

Commercial intercourse between nations and parts of nations, in all its branches.[8]

"To regulate" this trade and intercourse is to prescribe the rules by which it shall be conducted.[9]

Commerce comprehends navigation,[4] including navigation on rivers and in ports;[9] transportation of

[1] 2 Kent, 485, cases; Gordon *v.* Parmelee, 2 Allen, 214 (1861), Bigelow, C. J.; Hull *v.* Field, 76 Va. 605 (1882); Tenney *v.* Cowles, 67 Wis. 594 (1886); Dillman *v.* Nadlehoffer, 119 Ill. 575 (1887), cases.

[2] Kimball *v.* Bangs, 144 Mass. 323 (1887), Morton, C. J.; Mooney *v.* Miller, 102 *id.* 220 (1869); Gordon *v.* Butler, 105 U. S. 557 (1881); Southern Development Co. *v.* Silva, 125 *id.* 256 (1888).

[3] L. *commercium*, trade: *con*, with; *merx*, goods.

[4] Gibbons *v.* Ogden, 9 Wheat. 1, 229 (1824), Marshall, Chief Justice.

[5] Council Bluffs *v.* Kansas City, &c. R. Co., 45 Iowa, 349 (1876), Miller, C. J. See also People *v.* Raymond, 34 Cal. 497 (1868).

[6] Brooklyn, &c. R. Co. *v.* Nat. Bank of Republic, 102 U. S. 31–32 (1880); *ib.* 55.

[1] Goodman *v.* Simonds, 20 How. 364 (1857); 12 Am. L. Reg. 473 (1873).

[2] People *v.* Fisher, 14 Wend. 15 (1835), Savage, C. J. See also People *v.* Brooks, 4 Denio, 436 (1847); Sears *v.* Commissioners, 36 Ind. 270–80 (1871).

[3] Constitution, Art. I, sec. 8, cl. 3.

[4] Gibbons *v.* Ogden, *ante.*

[5] Council Bluffs *v.* Kansas City, &c. R. Co., *ante.*

[6] Chicago, &c. R. Co. *v.* Fuller, 17 Wall. 568 (1873); 2 Story, Const. §§ 1061–62.

[7] Welton *v.* Missouri, 91 U. S. 280, 275 (1875), Field, J.; Webber *v.* Virginia, 103 *id.* 350 (1880); Walling *v.* Michigan, 116 *id.* 454 (1886); Robbins *v.* Taxing District, 120 *id.* 497 (1887); 122 *id.* 358; 128 *id.* 129.

[8] Henderson *v.* Mayor of N. Y. City, 92 U. S 270 (1875), Miller, J.; Gloucester Ferry Co. *v.* Pennsylvania, 114 *id.* 203 (1885).

[9] Gilman *v.* Philadelphia, 3 Wall. 724 (1865); South

passengers;[1] intercourse by telegraph.[2,3] But it does not concern matters of trade and traffic between citizens of the same State; as, a trade-mark or a policy of insurance.[3]

"Commerce with foreign Nations" refers to commerce between citizens of the United States and subjects of foreign countries: foreign commerce. Commerce "among (*q. v.*) the several States" refers to commerce between citizens of different States: domestic commerce.[3] Commerce "with the Indian Tribes" applies only to cases where the tribe is wholly within the limits of a State.[4]

Commerce being national in its operation is placed under the protecting care of the National government.[5] Commercially this is but one country, and intercourse is to be as free as due compensation to the carrier interest will allow. Local interference is forbidden.[6] The power is vested in Congress to insure uniformity of commercial regulations, where such uniformity is practicable, and as against conflicting State regulations. The non-exercise of the power is equivalent to a declaration that it shall be free from restrictions.[7]

It is not everything that affects commerce that amounts to a "regulation" of it; as, local regulations of ferries, of hackmen, millers, inn-keepers, warehousemen.[8,9]

Each State retains absolute control over its own territory, highways, bridges, corporations, etc.[9]

The powers vested in Congress keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They were intended for the government of the business to which they relate at all times, and under all circumstances.[9]

Commerce by *water* was principally in the minds of the framers of the Constitution; transportation on land being then in vehicles drawn by animals.[9]

The Constitutional provision covers property transported as an article of commerce from foreign countries, or from another State, from hostile or interfering State legislation, until mingled with part of the general property of the country, and protects it, after it has entered the State, from burdens imposed by reason of its foreign origin.[1]

In every case where a State law has been held null, it created, in the way of a tax, a license, or a condition, a direct burden upon commerce or interfered with its freedom;[2] it regulated or impeded commerce or discriminated between its own citizens and outsiders, prejudicially to the latter.

For example, a State cannot require a license to sell foreign goods remaining in the packages in which they were imported: that would operate as a tax on the goods.[2,3] Nor may it discriminate against peddlers;[4] nor against commercial travelers or drummers;[5] nor against sewing machine companies.[6] It may not tax sales of foreign liquors, unless domestic liquors are taxed in equal degree;[6] nor tax passengers, freight, or cars brought into, taken from, or carried through its borders to or from other States or countries.[7] It may not exact wharfage solely of a vessel laden with articles not products of the State; nor impose tonnage duties upon foreign vessels, to pay quarantine expenses;[8] nor collect tonnage duties of its own citizens, engaged in commerce within its own limits,[9] except as to a vessel owned by a resident of a city, for city purposes and not for the privilege of trading;[10] nor may it exact a premium for a vessel brought to its ports;[11] nor require a sum for each passenger brought from a foreign country;[12] nor extort money to prevent immigration;[13] but it may require a list of passengers, with their ages, occupations, etc.[14] What it may do to keep out paupers and convicts, in the absence of legislation by Congress, has not as yet been decided.[15]

Carolina *v.* Georgia, 93 U. S. 13 (1876); Western Union Tel. Co. *v.* Pendleton, 122 *id.* 348 (1887); 115 *id.* 203.

[1] Steamboat Co. *v.* Livingston, 3 Cow. 713 (1825); People *v.* Raymond, 34 Cal. 497 (1868).

[2] Western Union Telegraph Co. *v.* Atlantic, &c. Tel. Co., 5 Nev. 109 (1869).

[3] Trade-Mark Cases, 100 U. S. 96, 95 (1879); County of Mobile *v.* Kimball, 102 *id.* 697 (1880); Gloucester Ferry Co. *v.* Pennsylvania, 114 *id.* 197 (1885).

[4] United States *v.* Holliday, 3 Wall. 417-18 (1865); United States *v.* Forty-Three Gallons of Whiskey, 108 U. S. 494 (1883).

[5] Pensacola Telegraph Co. *v.* Western Union Tel. Co., 96 U. S. 9 (1877).

[6] Baltimore, &c. R. Co. *v.* Maryland, 21 Wall. 474, 472, 470 (1874).

[7] Gilman *v.* Philadelphia, and other cases, *ante*.

[8] State Tax on Railroad Receipts, 15 Wall. 293 (1872).

[9] Munn *v.* Illinois, 94 U. S. 135 (1876).

[1] Welton *v.* Missouri, and other cases, *ante*.

[2] Sherlock *v.* Alling, 93 U. S. 103 (1876).

[3] Brown *v.* Maryland, 12 Wheat. 436 (1827); Cook *v.* Pennsylvania, 97 U. S. 566 (1878).

[4] Ward *v.* Maryland, 12 Wall. 418 (1870); Walling *v.* Michigan, 116 U. S. 454 (1886).

[5] Howe Machine Co. *v.* Gage, 100 U. S. 676 (1879).

[6] Tiernan *v.* Rinker, 102 U. S. 123 (1880).

[7] State Freight Tax, 15 Wall. 282 (1872); State Tax on Railway Receipts, *ib.* 284 (1872); Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 203 (1885); Pickard *v.* Pullman Southern Car Co., 117 *id.* 34 (1886); Philadelphia, &c. Steamship Co. *v.* Pennsylvania, 122 *id.* 326, 338-46 (1887), cases, Bradley J., explaining State Tax on Railway Receipts, *supra*.

[8] Peete *v.* Morgan, 19 Wall. 581 (1873); Cannon *v.* New Orleans, 20 *id.* 577 (1874).

[9] State Tonnage Tax, 12 Wall. 204 (1870).

[10] The North Cape, 6 Biss. 505 (1876); Wheeling, &c. Transportation Co. *v.* Wheeling, 99 U. S. 273 (1878).

[11] Steamship Co. *v.* Port-Wardens, 6 Wall. 31 (1867).

[12] Passenger Cases, 7 How. 283 (1849); People *v.* Compagnie Transatlantique, 107 U. S. 59-60 (1882), cases; Wiggins Ferry Co. *v.* East St. Louis, *ib.* 374-75 (1882) cases; 92 *id.* 266-69.

[13] Chy Lung *v.* Freeman, 92 U. S. 275 (1875). But Congress may regulate it by imposing a duty to mitigate incidental evils; Head Money Cases, 112 *id.* 580 (1884).

[14] City of New York *v.* Miln, 11 Pet. 102 (1837); 92 U. S. 265-69.

[15] Henderson *v.* Mayor of N. Y. City, 92 U. S. 260 (1875).

A State may not grant an exclusive right to maintain telegraph lines within its borders.[1] Nor may it prohibit the driving of cattle into it, during certain months.[2]

Inter-State commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on wholly within the State. The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is inter-State commerce. Therefore, a State statute imposing a license tax upon "drummers" and others selling by sample is unconstitutional as applied to citizens of other States.[3]

If the power to tax inter-State or foreign commerce exists, it has no limit but the discretion of the State, and might be exercised in such a manner as to drive away the commerce, or to load it with an intolerable burden, seriously affecting the business and prosperity of other States; and if those States, by way of retaliation, or otherwise, should impose like restrictions, the utmost confusion would prevail in our commercial affairs. This state of things actually existed under the Confederation.[4]

A statute requiring locomotive engineers to be licensed by a board of examiners, and prescribing penalties for its violation, is not unconstitutional, as a regulation of inter-State commerce, even when applied to the case of an engineer operating a locomotive attached to a train running between points in different States.[5]

Some statutes also conflict with the prohibition on the States against levying imposts or duties on imports or exports. But since this provision refers exclusively to articles brought from foreign countries, a State may tax auction sales or other property when there is no discrimination against citizens or products of another State. A purchaser of goods from abroad, which are at his risk until delivered, is not an importer, and the goods may be taxed.[6]

A State may authorize the building of bridges or dams over navigable rivers, provided they do not materially obstruct navigation.[7] See SPAN.

[1] Pensacola Telegraph Co. *v.* Western Union Tel. Co., 96 U. S. 9 (1877).

[2] Hannibal, &c. R. Co. *v.* Husen, 95 U. S. 465 (1877).

[3] Robbins *v.* Taxing District of Shelby County, Tennessee, 120 U. S. 497 (March 7, 1887), Bradley, J.; Waite, C. J., Field, and Gray, JJ., dissenting; 121 *id.* 246; *Exp.* Asher, 22 Tex. Ap. 602 (1887): 27 Am. Law Reg. 77 (1888); *ib.* 89–94, cases; 25 Cent. Law J. 26 (1887).

[4] Philadelphia & Southern Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 340 (1887), Bradley, J.; Brown *v.* Maryland, 12 Wheat. 446 (1827), Marshall, C. J.

[5] Smith *v.* Alabama, 124 U. S. 465 (1888), Matthews, J.; Bradley, J., dissenting. Act of Ala. 28 Feb., 1887.

[6] Waring *v.* Mayor of Mobile, 8 Wall. 110 (1868); Woodruff *v.* Parham, *ib.* 123 (1868); Hinson *v.* Lott, *ib.* 148 (1868).

[7] Willison *v.* Blackbird Creek Marsh Co., 2 Pet. 245 (1829); Wheeling Bridge Case, 18 How. 421 (1855); Gilman *v.* Philadelphia, 3 Wall. 724 (1865); Escanaba, &c. Transp. Co. *v.* Chicago, 107 U. S. 683, 687 (1882), cases.

State legislation is not forbidden on matters either local in nature or operation, or intended to be mere aids to commerce, for which special regulations can more effectually provide; such as harbor pilotage, beacons, buoys, and navigable rivers within a State, if free navigation is not thereby impaired. With respect to all such subjects Congress, by non-action, declares that, until it deems fit to act, they may be controlled by State authority. . . The States have as full control over their purely internal commerce as Congress has over inter-State and foreign commerce. . . But as far as an exercise of the power relates to matters which are purely national in character, and require uniformity of regulation affecting all the States, the power is exclusive in Congress.[1]

It is Congress, not the judicial department, that is to regulate commerce. The courts can never take the initiative on this subject. They interpose to prevent or redress acts done or attempted under the authority of unconstitutional State laws: the non-action of Congress, in the cases, being deemed an indication of its will that no exaction or restraint shall be imposed.[2]

The power in Congress is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over commerce, must give way before the supremacy of the national authority. As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised. And when it is manifest that Congress intends to leave commerce free and unfettered by positive regulations, such intention would be contravened by State laws operating as regulations of commerce as much as if these had been expressly forbidden. In such cases, the existence of the power in Congress has been construed to be exclusive, withdrawing the subject as the basis of legislation altogether from the States. There are many cases, however, where the acknowledged powers of a State may be so exerted as to affect foreign or inter-State commerce without being intended to operate as commercial regulations. If such regulation conflicts with the regulation of the same subject by Congress, either as expressed in positive laws or as implied from the absence of legislation, such State legislation, to the extent of that conflict, must be regarded as annulled. To draw the line of interference between the two fields of jurisdiction, and to define and declare the instances of unconstitutional encroachment, is a judicial question often of much difficulty, the solution of which, perhaps, is not to be found in any single and exact rule of decision. Some

[1] County of Mobile *v.* Kimball, 102 U. S. 696–99 (1880), Field, J.

[2] Transportation Co. *v.* Parkersburg, 107 U. S. 701, 704 (1882), Bradley, J. See generally *Re* Watson, 16 F. R. 511, 514–31 (1882), cases; Kaeiser *v.* Illinois Central R. Co., 18 *id.* 158 (1883).

lines of discrimination, however, have been drawn in the various decisions of the Supreme Court.[1]

See further BONUS, 2 (1); IMMIGRATION; INDIAN; INSPECTION, 1; LIEN, Maritime; NAVIGABLE; POLICE, 2; PRIVILEGE, 2; PROHIBITION, 2; QUARANTINE, 2; REGULATE; TAX, 2; TONNAGE; WAREHOUSE; WHARFAGE.

A statute of a State, intended to regulate, to tax, or to impose any other restriction upon the transmission of persons or property or telegraphic messages from one State to another, is not within that class of legislation which the States may enact in the absence of legislation by Congress; and such statutes are void even as to that part of such continuous conveyance as is within the limits of the State.[2]

The case of *The Wabash, &c. R. Co.* v. *Illinois*, declared unconstitutional a statute of Illinois which enacted that if any railroad company within that State should charge or receive for transporting passengers or freight of the same class, the same or a greater sum for any distance, than it charged for a larger distance, it should be liable to a penalty for unjust discrimination. The defendant company discriminated against a shipper at Gilman and in favor of a shipper at Peoria, by charging more for the haul from Gilman although eighty-six miles nearer New York City, the place of unloading. This decision was followed by the act of Congress of February 4, 1887, "An act to regulate commerce," known as the **Inter-State Commerce Act** (24 St. L. 379), which is here reprinted entire: (as amended March 2, 1889, see ADDENDA.)

Section 1. The provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to any adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use

[1] Smith *v.* Alabama, 124 U. S. 473 (1888), Matthews, J. See Tests of Regulation, 1 Harv. Law Rev. 159–84 (1887), cases.

[2] Wabash, St. Louis & Pacific R. Co. *v.* Illinois, 118 U. S. 557, 560–77 (Oct. 25, 1886), cases, Miller, J.; Field, Harlan, Woods, Matthews, and Blatchford, JJ., concurring; Waite, C. J., Bradley, and Gray, JJ., dissenting, pp. 577–96, opinion by Bradley, J.

In the case of The Reading Railroad Co. *v.* Pennsylvania, commonly called the Case of the State Freight Tax, 15 Wall. 232 (1872), it was held that a tax upon freight taken up within a State and carried out of it, or taken up outside of the State and brought within it, is an unlawful burden on inter-State commerce. In Fargo *v.* Michigan, 121 U. S. 230 (April 4, 1887), it was held that a State statute which levies a tax upon the gross receipts of railroads for the carriage of freight and passengers into, out of, or through the State, is also unconstitutional. See Reading Railroad Case explained, *ib.* 240, Wabash Railway Case, *ib.* 247, and other cases, *ib.* 242–46. The State may of course tax money after it has passed the stage of compensation for carrying persons or property, *ib.* 230. The Wabash Railway case ruled the case of The Commonwealth *v.* Housatonic R. Co., 143 Mass. 266 (Jan. 7, 1887).

of its tracks or terminal facilities to another carrier engaged in like business.

Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

Sec. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

Sec. 6. That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force upon such railroad, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, of at least the size of ordinary pica, and copies for the use of the public shall be kept in every depot or station upon any such railroad, in such places and in such form that they can be conveniently inspected.

Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep for public inspection, at every depot where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed.

No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reductions in such published rates, fares, or charges may be made without previous public notice; but whenever any such reduction is made, notice of the same shall immediately be publicly posted and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection.

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Every common carrier subject to the provisions of this act shall file with the commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said commission of all changes made in the same. Every such common carrier shall also file with said commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said commission, in so far as may, in the judgment of the commission, be deemed practicable; and said commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published; but no common carrier party to any such joint tariff shall be liable for the failure of any other common carrier party thereto to observe and

adhere to the rates, fares, or charges thus made and published.

If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of *mandamus*, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated or wherein such offense may be committed, and if such common carrier be a foreign corporation, in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the commissioners appointed under the provisions of this act; and failure to comply with its requirements shall be punishable as and for a contempt; and the said commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent foreign countries, or between ports of transhipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act.

Sec. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 10. That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense.

Sec. 11. That a commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, A. D. 1887, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said commissioners shall not engage in any other business, vocation, or employment. No vacancy in the commission

shall impair the right of the remaining commissioners to exercise all the powers of the commission.

Sec. 12. That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and for the purposes of this act the commission shall have power to require the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic, or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Sec. 14. That whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.

All reports of investigations made by the commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

Sec. 15. That if in any case in which an investigation shall be made by said commission it shall be made to appear to the satisfaction of the commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the commission; and if, within the time specified, it shall be made to appear to the commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

Sec. 16. That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey any lawful order or requirement of the commission in this act named, it shall be the duty of the commission, and lawful for any company or person interested in such order or requirement, to apply, in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants, in such manner as the court shall direct; and said court shall proceed

to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said commission shall be *prima facie* evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of five hundred dollars for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining, or into court to abide the ultimate decision of the court, or into the treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the commission it shall be the duty of the district attorney, under the direction of the attorney-general of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session.

Sec. 17. That the commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the commission shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said commission and be heard, in person or by attorney. Every vote and official act of the commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said commission shall have an official seal, which shall be judicially noticed. Either of the members of the commission may administer oaths and affirmations.

Sec. 18. That each commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the salaries of judges of the courts of the United States. The commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties, subject to the approval of the secretary of the interior.

The commission shall be furnished by the secretary of the interior with suitable offices and all necessary office supplies. Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners, or by their employees under their orders, in making any investigation in any other places than in the city of Washington, shall be allowed and paid, on the presentation of itemized vouchers therefor approved by the chairman of the commission and the secretary of the interior.

Sec. 19. That the principal office of the commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the commission may hold special sessions in any part of the United States. It may, by one or more of the commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

Sec. 20. That the commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the commission may need information. Such annual reports shall show in

detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipment; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the commission may require; and the said commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Sec. 21. That the commission shall, on or before the first day of December in each year, make a report to the secretary of the interior, which shall be by him transmitted to Congress, and copies of which shall be distributed as are the other reports issued from the interior department. This report shall contain such information and data collected by the commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the commission may deem necessary.

Sec. 22. That nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this act.

Sec. 23. That the sum of one hundred thousand dollars is hereby appropriated for the use and purposes of this act for the fiscal year ending June 30, A. D. 1888, and the intervening time anterior thereto.

Sec. 24. That the provisions of sections eleven and eighteen of this act, relating to the appointment and organization of the commission herein provided for, shall take effect immediately, and the remaining provisions of this act shall take effect sixty days after its passage. See ADDENDA.

March 22, 1887, President Cleveland appointed the following commissioners: Thomas M. Cooley, of Michigan, for the term of six years; William R. Morrison, of Illinois, for the term of five years; Augustus Schoonmaker, of New York, for the term of four years; Aldace F. Walker, of Vermont, for the term of three years; Walter L. Bragg, of Alabama, for the term of two years. At the first meeting of the commission, March 31, Mr. Cooley was chosen chairman.[1]

April 4, 1887, in the circuit court of Oregon, in a case concerning the transportation of goods by the Oregon and California Railroad (which lies wholly within Oregon), destined for San Francisco, Judge Deady, after explaining that the act "does not include or apply to all carriers engaged in inter-State commerce, but only to such as use a railway or railway and water-craft under common control or management for a continuous carriage or shipment of property from one State to another," held that it does not "apply to the carriage of property by rail wholly within the State, although shipped from one destined to a place without the State, so that such place is not in a foreign country."[2]

June 15, 1887, the commission summarized its conclusions upon the construction to be placed upon the fourth section of the act, in the following language:

First. That the prohibition against a greater charge for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, as qualified therein is limited to cases in which the circumstances and conditions are substantially similar.

Second. That the phrase "under substantially similar circumstances and conditions" in the fourth section, is used in the same sense as in the second section; and under the qualified form of the prohibition in the fourth section carriers are required to judge in the first instance with regard to the similarity or dissimilarity of the circumstances and conditions that forbid or permit a greater charge for a shorter distance.

Third. That the judgment of carriers in respect to the circumstances and conditions is not final, but is subject to the authority of the commission and of the courts, to decide whether error has been committed, or whether the statute has been violated. And in case of complaint for violating the fourth section of the act the burden of proof is on the carrier to justify any departure from the general rule prescribed by the statute by showing that the circumstances and conditions are substantially dissimilar.

Fourth. That the provisions of section one requiring charges to be reasonable and just, and of section two, forbidding unjust discrimination, apply when

[1] The first and the present secretary of the commission is Edward A. Moseley; and the present auditor is C. C. McCain.

[2] *Exp.* Koehler, 1 I. C. R. 28; 30 F. R. 867.

exceptional charges are made under section four as they do in other cases.

Fifth. That the existence of actual competition which is of controlling force, in respect to traffic important in amount, may make out the dissimilar circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul over the same line in the same direction, the shorter being included in the longer in the following cases:

1. When the competition is with carriers by water which are not subject to the provisions of the statute.

2. When the competition is with foreign or other railroads which are not subject to the provisions of the statute.

3. In rare and peculiar cases of competition between railroads which are subject to the statute, when a strict application of the general rule of the statute would be destructive of legitimate competition.

Sixth. The commission further decides that when a greater charge in the aggregate is made for the transportation of passengers or the like kind of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance, it is not sufficient justification therefor that the traffic which is subjected to such greater charge is way or local traffic, and that which is given the more favorable rates is not.

Nor is it sufficient justification for such greater charge that the short-haul traffic is more expensive to the carrier, unless when the circumstances are such as to make it exceptionally expensive, or the long-haul traffic exceptionally inexpensive, the difference being extraordinary and susceptible of definite proof.

Nor that the lesser charge on the longer haul has for its motive the encouragement of manufactures or some other branch of industry.

Nor that it is designed to build up business or trade centres.

Nor that the lesser charge on the longer haul is merely a continuation of the favorable rates under which trade centres or industrial establishments have been built up.

The fact that long-haul traffic will only bear certain rates is no reason for carrying it for less than cost at the expense of other traffic.[1]

Where the conditions are dissimilar there is no prohibition; a doubt should be solved in favor of the object of the law.[2]

Railroads doing an express business are within the act; independent express companies are not.[3]

A road wholly within a State, but used as a means of conducting inter-State traffic by companies owning connecting inter-State roads, is subject to the provisions of the act.[4]

[1] Report, 1887, pp. 64, 84–85. See *ib.* 18–20. *Re* Petition of Louisville & Nashville R. Co., and others.

[2] Missouri Pacific R. Co. *v.* Texas & Pacific R. Co., 31 F. R. 862 (June 21, 1887), Pardee, J.

[3] *Re* Express Companies, 1 I. C. R. 677–83 (Dec. 28, 1887), Walker, C. See also Report, 1887, pp. 12–14. As to sleeping and parlor car companies, and transporters of mineral oil, see *ib.* 15.

[4] Heck *v.* East Tennessee, &c. R. Cos. (Feb. 17, 1888).

The act does not embrace *carriers wholly by water*, though they may also be engaged in the like commerce and as such be rivals of the carriers which the act undertakes to control. Perhaps the most influential reasons for omitting them were that the evils of corporate management have not been so obvious in their case as in that of carriers by land, and their rates of transportation were so low that they were seldom complained of even when unjustly discriminating. The fact that in their competition with carriers by land they were at a disadvantage had some influence in propitiating public favor, inasmuch as they appeared to operate as obstacles to monopoly and as checks upon extortion.[1]

May 25, 1887, the following rules of practice were adopted by the commission: (See ADDENDA.)

I. When at Washington the commission will hold its general sessions at 11 o'clock A. M. daily, except Saturdays and Sundays, for the reception and hearing of petitions and complaints, and the transaction of such other business as may be brought before it. The sessions will be held at the office of the commission in the Sun Building, No. 1315 F street northwest. When special sessions are held at other places such regulations as may be necessary will be made by the commission.

II. Applications under the fourth section of the act for authority to charge less for longer than for shorter distances for the transportation of passengers or property must be made by petition addressed to the commission by the carrier or carriers desiring the relief. The petition must state with particularity the extent of the relief desired and the points at and between which authority is asked to charge less for longer distances; the reasons for the relief sought must also be set forth, and the facts upon which the application is founded. The petition must be verified by some officer or agent of the carrier in whose behalf it is presented, to the effect that the allegations of the petition are true to the knowledge or belief of the affiant. Notice must be published by a petitioner in not less than two newspapers along the line of the road having general circulation, for at least ten days prior to the presentation of a petition, stating briefly the nature of the relief intended to be applied for and the time when the application will be presented, and proof of each publication must be filed with the petition.

III. Upon the presentation of a petition for relief an investigation will be made by the commission at a time and place to be designated, when testimony will be received for and against the prayer of the petition. After investigation the commission will make such order as may appear to be just and appropriate upon the facts and circumstances of the case.

IV. Complaints under section 13 of the act of anything done or omitted to be done by any common carrier subject to the provisions of the act, in contravention of the provisions thereof, must be made by petition, which must briefly state the facts which are claimed to constitute a violation of the act, and must be verified by the petitioner, or by some officer or agent of the corporation, society, or other body or organization making the complaint, to the effect that

[1] Report of 1877, pp. 11–12.

the allegations of the petition are true to the knowledge or belief of the affiant.

The complainant must furnish as many written or printed copies of the complaint or petition as there may be parties complained against to be served. When a complaint is made the name of the carrier complained against must be set forth in full, and the address of the petitioner and the name and address of his attorney or counsel, if any, must be indorsed upon the complaint.

The commission will cause a copy of the complaint to be served upon each common carrier complained against, by mail or personally, in its discretion, with notice to the carrier or carriers to satisfy the complaint or to answer the same in writing within the time specified.

V. A carrier complained against must answer the complaint made within twenty days from the date of the notice, unless the commission shall in particular cases prescribe a shorter time for the answer to be served, and in such cases the answer must be made within the time prescribed. The original answer must be filed with the commission, at its office in Washington, and a copy thereof must at the same time be served upon the complainant by the party answering, personally or by mail. The answer must admit or deny the material allegations of fact contained in the complaint, and may set forth any additional facts claimed to be material to the issue. The answer must be verified in the same manner as the complaint. If a carrier complained against shall make satisfaction before answering, a written acknowledgment of satisfaction must be filed with the commission, and in that case the fact of satisfaction without other matter may be set forth in the answer filed and served on the complainant. If satisfaction be made after the filing and service of an answer, a supplemental answer setting forth the fact of satisfaction may be filed and served.

VI. If a carrier complained against shall deem the complaint insufficient to show a breach of legal duty, it may, instead of filing an answer, serve on the complainant notice for a hearing of the case on the complaint, and in case of the service of such notice, the facts stated in the complaint will be taken as admitted. The filing of an answer will not be deemed an admission of the sufficiency of the complaint, but a motion to dismiss for insufficiency may be made at the hearing.

VII. Adjournments and extensions of time may be granted upon the application of parties in the discretion of the commission.

VIII. Upon issue being joined by the service of answer, the commission, upon request of either party, will assign a time and place for hearing the same, which will be at its office in Washington, unless otherwise ordered. Witnesses will be examined orally before the commission, except in cases when special orders are made for the taking of testimony otherwise. The petitioner or complainant must in all cases prove the existence of the facts alleged to constitute a violation of the act, unless the carrier complained of shall admit the same, or shall fail to answer the complaint. Facts alleged in the answer must also be proved by the carrier, unless admitted by the petitioner on the hearing.

In cases of failure to answer, the commission will take such proof of the charge as may be deemed reasonable and proper, and make such order thereon as the circumstances of the case appear to require.

IX. Subpœnas requiring the attendance of witnesses will be issued by any member of the commission in all cases and proceedings before it, and witnesses will be required to obey the subpœnas served upon them requiring their attendance or the production of any books, papers, tariffs, contracts, agreements, or documents relating to any matter under investigation or pending before the commission.

Upon application to the commission authority may be given, in the discretion of the commission, to any party to take the deposition of any witnesses who may be shown, for some sufficient reason, to be unable to attend in person.

June 15, 1887, this rule was modified to the extent that where a cause is at issue on petition and answer, each party may proceed at once to take depositions of witnesses in the manner provided by sections 863 and 864 of the Revised Statutes of the United States, and transmit them to the secretary of the commission, without making any application to, or obtaining any authority from, the commission for that purpose.

X. Upon application by any petitioner or party amendments may be allowed by the commission, in its discretion, to any petition, answer, or other pleading in any proceeding before the commission.

XI. Copies of any petition, complaint, or answer, in any matter or proceeding before the commission, or of any order, decision, or opinion by the commission, will be furnished upon application by any person or carrier desiring the same, upon payment of the expense thereof.

XII. Affidavits to a petition, complaint, or answer may be taken before any officer of the United States, or of any State or Territory, authorized to administer oaths.

The history of the development of the railroad system of the United States, with relation to inter-State commerce and to the corporate abuses which led to the passage of the foregoing act of 1887, may be summarized as follows: —

When the grant of the power to regulate commerce was made, the commerce between the States was insignificant — carried on by coastwise vessels and other water-craft, sailed or rowed, within the interior. The inter-State commerce on land was little, and its regulation was by the common law. To a few associations of regular carriers of passengers on definite routes exclusive rights were granted, in the belief that otherwise the regular transportation would not be adequately provided for.

For regulation of commerce on the ocean and other navigable waters Congress passed the necessary laws; but not until 1824 (in the case of *Gibbons* v. *Ogden*) was it settled that such waters of a State as constitute a highway for inter-State commerce are subject to Federal legislation equally with the high seas. But Congress still abstained from regulating commerce by land — leaving even the Cumberland road, a national highway, to the supervision of the States through which it should be built.

When the application of steam to vessels as a motive power so stimulated internal commerce as to necessitate improved highways, these, both turnpikes and canals, were State creations, the General government merely making some appropriations for canals. It was natural that the States should control these highways, so long as there was no discrimination against the citizens of other States. When, in 1830, steam power was applied to land vehicles, the same reasons for State control prevailed.

For a long time Federal regulation of inter-State commerce was purely negative, merely restraining excessive State power, through the judicial department, in isolated cases. Thus, the corporations monopolizing commerce made the law for themselves — State power and common law being inadequate to complete regulation and National power not yet being put forth. The circumstances of railroad development tended to make this indirect and abnormal lawmaking unequal and oftentimes oppressive. Later, when the promoters of railroads were viewed as public benefactors, laws were passed, under popular clamor, allowing municipalities to use public money and public credit in aid of roads. So much money thus lent (to irresponsible parties) was lost, that constitutional amendments were adopted prohibiting such use of the public money or credit.

The inadequate business of many roads led to destructive competition, to the undue favoring of large dealers, and secret arrangements in the form of special rates, rebates, and drawbacks, underbilling, reduced classification, or whatever else might be best adapted to keep the transaction from a public not deceived but practically helpless through dependence. Intelligent shippers, even the favored ones, realized that any reasonable, non-discriminating, permanent schedule of rates was preferable to one so fluctuating and untrustworthy as to make business contracts virtually lottery ventures.

Special terms were often made with large shippers to increase the volume of business, in order either to attract purchasers of stock, justify some demand for an extension of line or other large expenditure, or to assist in making terms in a consolidation or strengthen the demand for a larger share in a pool.

Whatever the motive, the allowance of a special rate or rebate was not only unjust, wronging and often ruining the small dealer, but it was also demoralizing,— sufferers, doubtful of obtaining redress in the courts, becoming parties to the evil by seeking similar favors.

The discriminations applied to places not less than to persons, often resulting, through necessities artificially created, in charging more for a short than for a long haul on the same line in the same direction, so that towns with superior natural advantages withered away under the mischievous influence.

Not less conspicuous were the evils of the free transportation of persons, causing the corruption of some public officials and subjecting others to unjust and cruel suspicion, all leading to a deterioration of the moral sense of the community. Railroads themselves were in cases the sufferers, the demand for passage often partaking of the nature of blackmail.

In addition to these evils, rates, through the absence of competition or the consolidation of competing roads, were kept oppressively high; they were also changed at pleasure, and without notice. Secret dealings made the public unable to judge of the reasonableness of charges. Such publications of tariffs as were made were so complicated as not to be intelligible to the uninitiated, and rather tended to increase the difficulties.

Still another evil was the strengthening of a class feeling between those whose interests demanded harmony.

The manipulation of capital stocks for the benefit of managers and to the destruction of the interest of the owners resulted in great wrong, directly to individuals and indirectly to the public. The large fortunes amassed in a short time by some officials created in the public mind suspicion and an unfair prejudice against railroad management in general, which developed into an unfortunate breach between the public and all railroad corporations.

In short, the manifest misuse of corporate powers created an irresistible demand for "National legislation, and this very naturally, because the private gains resulting from corporate abuse were supposed to spring, to some extent at least, from excessive burdens imposed upon that commerce which the nation ought to regulate and protect." In response to this demand the act of 1887 lays down rules to be observed by the carriers to which its provisions apply, which are intended to be rules of equity and equality, and "to restore the management of the transportation business of the country to public confidence."[1]

COMMISSION.[2] Doing, performing; execution.

1. An undertaking, without recompense, to do a thing for another person; a gratuitous bailment, *q. v.*

2. (1) Formal written authority from a court to do something pertaining to the administration of justice: as, a commission to ascertain whether one is a bankrupt, or a lunatic; a commission to take depositions or testimony, *qq. v.*

A writ or process issued, under seal, by the special order of a court.[3]

(2) Formal authority from a government

[1] See Report of Commission, 1887, pp. 2-10.

That report presents the views of the board upon the following general subjects: The carriers subject to its jurisdiction, pp. 11-15; the long and short haul clause of the act, 15-23; the filing and publication of tariffs, 23-24; general supervision of the carriers subject to the act, 24-27; proceedings before the commission, 27-28; expense of hearings, 28-29; annual reports from carriers, 29-30; classification of passengers and freight, 30-32; voluntary association of railroad managers, 33-36; reasonable charges, 36-41; general observations, 41-42; amendments of the law, 42-43, 14-15.

[2] L. *committere*, to place with, intrust to: *com*, with; *mittere*, to send.

[3] [Tracy *v.* Suydam, 30 Barb. 115 (1859); Boal *v.* King, 6 Ham., Ohio, 18 (1833), cases.

for the doing of something belonging to the exercise of its powers.

Imports, *ex vi termini*, written authority from a competent source.[1] Compare WARRANT, 2.

(3) The body or board of persons intrusted with the performance of some public service or duty: as, to revise statutes, codify laws, fix the boundary lines between States, enforce the inter-State commerce act.

The instrument evidences the fact of the appointment, *q. v.*, and the nature and extent of the powers conferred.[2]

Commissioner. Such person as has a commission, letters-patent, or other lawful authority, to examine any matter or to execute any public office.[3]

An officer of a court, appointed to assist it in administering justice in a particular case or cases. Compare MASTER, 4.

The supreme court of California appoints, and may at any time remove, three persons of legal learning and personal worth to assist the court in the performance of its duties, and in the disposition of the undetermined causes now pending. Each commissioner holds office for the term of four years, and during that period may not engage in the practice of the law. The court appoints one as chief commissioner.[4] Whence C., and C. C.

An officer who assists in the administration of government, being usually charged with administering the laws relating to some one department thereof: as, the commissioner of agriculture, of a circuit court, of a county, of deeds, of education, of fisheries, of the general land-office, of highways, of Indian affairs, of internal revenue, of patents, of pensions.[5] See MINISTERIAL.

Commissioner of bail. An officer authorized to take bail for hearings or trials before a court and jury, in cases admitting of release from confinement when the accused can furnish bail.

Commissioner of the circuit courts. See under COURTS, United States.

Commissioner of deeds. An officer authorized to take acknowledgments and depositions, and to probate accounts.

County commissioners. See COUNTY.

3. Compensation for services rendered. The plural, commissions, is often used.

A percentage on price or value.[1]

A sum allowed as compensation to a servant, factor, or agent, who manages the affairs of another, in recompense for his services.[2]

"Commission" generally signifies a percentage upon the amount of money involved in the transaction, as distinguished from "discount," which is a percentage taken from the face value of the security or property negotiated.[3]

A reasonable commission is allowed to administrators, assignees, auctioneers, brokers, executors, receivers, and other agents or trustees, *qq. v.* But the service must be completed, and due care and skill and perfect fidelity have been employed. The amount is a reasonable percentage upon the sum received or paid out, and is regulated by custom, or by the discretion of the appointing authority.

Commission merchant. A factor, *q. v.*

COMMIT. To intrust to; to confide in.

1. To delegate a duty to a person or persons. See COMMISSION; COMMITTEE.

2. To send to a place of confinement a person found to be a lunatic.

May contemplate a sending without an adjudication by a court or a magistrate.[4] See LUNACY.

3. To send to prison a person, charged with or convicted of a crime.

Commitment. The act of sending an accused or convicted person to prison; also, the warrant by virtue of which the incarceration is made.

"To commit" was regarded as the separate and distinct act of carrying a party to prison, after having taken him into custody by force of a warrant of commitment.[5]

Commitment, Warrant of. Written authority to commit a person to prison or custody, until a further hearing in the matter as to which he is charged can be had, or until he is discharged by due course of law; a *mittimus*; a *committitur*.

Committing. Authorized to hear charges of crime, and to discharge or take bail for trial before a jury.

Committing magistrate. Any (inferior) officer empowered to hear charges of crime and to commit the accused to prison or accept bail for their appearance before a higher

[1] United States *v.* Reyburn, 6 Pet. *364 (1832).

[2] Marbury *v.* Madison, 1 Cranch, 155 (1803); Lessee of Talbot *v.* Simpson, 1 Pet. C. C. 94 (1815); United States *v.* Vinton, 2 Sumn. 307 (1836).

[3] [Jacob's Law Dict.; 14 N. J. L. 498.

[4] Cal. Statutes, 1885, p. 161. Similar provision was made in Kansas in 1887,—Laws, c. 148; and on March 5, three commissioners were appointed by the governor, with the consent of the senate,—36 Kan. R. iii.

[5] See Index, Revised Statutes.

[1] Brennan *v.* Perry, 7 Phila. 243 (1869).

[2] [Ralston *v.* Kohl, 30 Ohio St. 98 (1876), Scott, J.

[3] Swift *v.* United States, 18 Ct. Cl. 57 (1883).

[4] Cummington *v.* Wareham, 9 Cush. 585 (1852).

[5] [French *v.* Bancroft, 1 Met. 504 (1840), Shaw, C. J. See also 112 Mass. 69; 133 *id.* 400.

court; as, a justice of the peace, some aldermen, mayors, and commissioners of bail.

If the offense is not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice, or warrant under his hand and seal, containing the cause of his commitment; there to abide till delivered by due course of law.[1]

Commitment for crime being only for safe-keeping, when bail will answer the purpose it is generally taken. The warrant is in the name of the State; is under the hand and seal of the magistrate; shows his authority, and the time and place of issue; describes the prisoner by name; specifies the place of confinement, and is directed to the keeper thereof; states that the party has been charged on oath with a particular offense. When the offense is bailable the direction is "to keep in safe custody for want of sureties, or until discharged by due course of law;" when not bailable, "until discharged by due course of law;" and when for further examination of the charge, "for further hearing."[2] See BAIL, 1 (2); CAPERE, Capias, Cepi.

COMMITTEE. One or more persons to whom a matter is referred for examination, deliberation, superintendence, action, or recommendation.

An individual or a body to which others have committed or delegated a particular duty, or who have taken upon themselves to perform it in the expectation of their act being confirmed by the body they profess to represent or to act for.[3]

More particularly, a person appointed by a court to take charge of the person or the estate, or of both, of a lunatic, habitual drunkard, or spendthrift.

The committee of a lunatic is a bailiff whose power is limited to the mere care of the estate under the direction of the court.[4]

The civil law assigned a *tutor* to protect the person, and a *curator* to manage the estate. . . To prevent sinister practices the next of kin was seldom appointed committee of the person, but generally manager of the estate, accountable to the court, to the representative of the lunatic, and to the lunatic himself upon recovery.[5]

But now, for committee of the person, the next of kin is favored; and for committee of the estate, the heir at law.[6]

COMMITTITUR. See COMMIT, 3; INTERIM.

COMMODATUM. See ACCOMMODATUM.

[1] 4 Bl. Com. 300; 3 *id.* 134; 112 Mass. 62.

[2] See 4 Bl. Com. 296-300; 4 Cranch, 129; 17 F. R. 156; 9 N. H. 185; 6 Humph. 391.

[3] Reynell *v.* Lewis, 15 M. & W. *529 (1846), Pollock, C. B.

[4] Lloyd *v.* Hart, 2 Pa. 478 (1846), Gibson, C. J.

[5] 1 Bl. Com. 306; 3 *id.* 427.

[6] Shelford, Lunacy, 137, 140, 441.

COMMODITY.[1] Convenience, privilege, profit, gain; popularly, goods, wares, merchandise.

Within the meaning of the constitution of Massachusetts "commodities" embraces everything which may be the subject of taxation,— including the privilege of using a particular branch of business or employment: as, the business of an auctioneer, of an attorney, of a tavern-keeper, of a retailer of liquors.[2]

"Commodity" is a general term, and includes the privilege and convenience of transacting a particular business.[3] See MONOPOLY; STAPLE.

COMMODUM. L. Convenience, benefit, advantage.

Nullus commodum capere potest de injuria sua propria. No one advantage shall take of his own wrong-doing — as a cause of action or of defense.

Applies where a partner retires from a firm, and fails to give notice of the change; where a person inadvertently or fraudulently mingles grain of his own with higher-priced grain belonging to another; where a tenant for years or for life cuts down trees and then claims them; where a grantor attempts to dispute the validity of the title he has conveyed; where one party binds another to a condition impossible to be performed, or does something to prevent or hinder performance.

The maxim applies only to the extent of undoing an advantage gained against the right of another, not to taking away a right previously possessed.[4]

Thus, also, an admission, whether of law or of fact, which has been acted upon by another, is conclusive against the person who made it.[5]

Qui sentit commodum, sentire debet et onus. He who enjoys the benefit, ought also to bear the burden. He who enjoys the advantage of a right takes the accompanying disadvantage — a privilege is subject to its condition.

Illustrated in the rights and liabilities arising out of the relation of principal and agent, grantor and grantee, lessor and lessee, attorney and client, husband and wife, innkeeper and guest, a carrier and the public — the principle pervades the law in all its branches.[6]

On this principle rests the law of alluvion: the

[1] L. *commodus*, convenience.

[2] [Portland Bank *v.* Apthorp, 12 Mass. 256 (1815), Parker, C. J.

[3] Commonwealth *v.* Lancaster Savings Bank, 123 Mass. 495 (1878); Connecticut Ins. Co. *v.* Commonwealth, 133 *id.* 163 (1882); Gleason *v.* McKay, 134 *id.* 424-25 (1883), cases; Hamilton Company *v.* Massachusetts, 6 Wall. 640 (1867); 24 How. Pr. 492.

[4] See Broom, Max. *279; State *v.* Costin, 89 N. C. 516 (1883).

[5] See 1 Greenl. Ev. §§ 207-9.

[6] See Cooper *v.* Louanstein, 37 N. J. E. 305 (1883); Mundorff *v.* Wickersham, 63 Pa. 89 (1869), cases.

owner takes the chances of injury and of benefit arising from situation.[1] Compare ONUS, Cum onere.

COMMON. 1, *adj.* (1) Belonging to, or participated in, by several or more persons; mutual: as, a common — ancestor, benefit, labor or service, master, property, recovery, tenants in common,[2] *qq. v.*

(2) Originating with, or subsisting for, the people at large; belonging to, or affecting, the public; not private, but public or general, *q. v.*: as, a common or the common — bench, carrier, council, fishery, highway, inn, law, nuisance, pleas, right, schools, way, *qq. v.*

(3) Ordinary, usual, customary, familiar; opposed to special: as, common or a common — appearance, *assumpsit*, assurance, bail, bar, bond, care or diligence, costs, count, informer, intendment, intent, jury, mortgage, seal, stock, traverse, warranty, *qq. v.*

(4) Frequent, habitual: as, common offenders — barrator, drunkard, gambler, prostitute, scold, thief, *qq. v.*

Three distinct acts of sale of liquors are necessary to constitute a "common" seller. Such has been the rule as to common barrator, and other cases of this nature.[6]

(5) Ordinary; manual; opposed to mental or intellectual: as, common labor, *q. v.*

2, *n.* The common field; ground set apart for public uses.[4]

The waste grounds of manors (*q. v.*) were called "commons."[5]

Land appropriated to a public common may not be diverted to other uses, to the prejudice of individuals who have purchased lots adjoining it.[6]

Where privileges of a public nature are beneficial to private property, as in the case of land upon a public square, the enjoyment of the privileges will be protected, by injunction, against encroachment.[7] See DEDICATION, 1.

Common, or right of common. A profit which a man hath in the lands of another: as, to feed his beasts thereon, to catch fish, to cut wood.[1]

Commoner. A person invested with a right of common.

Existed between the owner of a manor and his feudal tenants,— for the encouragement of agriculture. The tenant's right was to pasture his cattle, provide necessary food and fuel for his family, and repair his implements of husbandry, from the lord's land.[2]

An incorporeal hereditament. The right usually meant is common of pasture: the right of feeding beasts on another's land. There was also *common of estovers:* the liberty of taking necessary wood, for use of house or farm — house-bote, fire-bote, hay-bote, hedge-bote, etc.; *common of piscary:* the liberty of fishing (*q. v.*) in another's water; *common of turbary:* a right to dig turf; *common in the soil:* a right to dig for minerals, etc. All the species result from the same necessity — the maintenance and carrying on of husbandry.

Commonable beasts. Beasts of the plow; beasts which manure the ground.

Inter-commoning. Where the beasts of adjacent manors have immemorially fed upon adjoining commons.

Commons of pasture were *appendant*, when regularly annexed to arable land,— for the support of commonable beasts; *appurtenant*, when annexed to lands in other lordships,— for the support of all kinds of animals, and arose neither from necessity nor from any connection of tenures; *in gross* or *at large*, when annexed to a man's person, by grant to him and his heirs; *because of vicinage*, when the inhabitants of adjoining townships intercommoned.[3] See FEUD.

The right of common, with many of its old common-law incidents, was formerly recognized in this country, particularly in the middle and eastern States.[4]

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[1] County of St. Clair *v.* Lovingston, 23 Wall. 69 (1874).

[2] Chambers *v.* Harrington, 111 U. S. 352 (1884).

[3] Commonwealth *v.* Tubbs, 1 Cush. 3 (1848), Dewey, J.

[4] Patterson *v.* McReynolds, 61 Mo. 203 (1875); Crawford *v.* Mobile, &c. R. Co., 67 Ga. 416 (1881).

[5] 2 Bl. Com. 32.

[6] See Emerson *v.* Wiley, 10 Pick. 315 (1831); Carr *v.* Wallace, 7 Watts, 394 (1838); Abbott *v.* Mills, 3 Vt. 525 (1831); State *v.* Trask, 6 *id.* 364 (1834).

[7] Wheeler *v.* Bedford, 54 Conn. 248-49 (1886), cases: 2 Story, Eq. § 927; High, Inj. § 551. An injunction to prevent inclosing part of a town common or public park, by the owner of a lot adjoining the lot of complainant.

[1] 2 Bl. Com. 32.

[2] 3 Kent, 403.

[3] 2 Bl. Com. 33-35; 3 *id.* 237.

[4] See Watts *v.* Coffin, 11 Johns. *495 (1814),— as to lands in the city of Hudson, Columbia county, N. Y.; Livingston *v.* Ten Broeck, 16 *id.* *15 (1819),— town of Livingston, same county; Leyman *v.* Abeel, *ib.* *30 (1819),— Catskill patent; Van Rennselaer *v.* Radcliff, 10 Wend. *639 (1833),— town of Guilderland, Albany county.

See also Western University of Pennsylvania *v.* Robinson *et al.*, 12 S. & R. *29 (1824), and Carr *v.* Wallace, 7 Watts, 394 (1838),— both as to one hundred acres of land in the town of Allegheny, Pa. (now constituting the parks in the central portion of the city), in which the State, in 1787, created the right of "common of pasture" in the purchasers of "in-lots" in the plan of lots laid out and sold by the State for the purpose of raising money with which to pay public debts. In 1819 the legislature, without the consent of the owners of those lots, granted fifty acres of these "commons" to the university named, but the supreme court, in Robinson's Case, held that the State

COMMONS, HOUSE OF. See PARLIAMENT.

COMMONWEALTH. The common or public weal: the republic; the state, or a State; the people, *qq. v.*

"The commonwealth or public polity of the kingdom."[1] Blackstone also wrote it "common wealth."[2]

The legal title of a few of the States, as of Kentucky, Massachusetts, Pennsylvania, Virginia.

COMMORANT.[3] Inhabiting, dwelling, residing; as, in saying that a person is or is not commorant in a particular place. Whence commorancy.[4]

COMMORIENTES. L. Those who die at the same time, from the same accident or calamity. See SURVIVE, 2.

COMMOTION. A "civil commotion" is an insurrection of the people for general purposes, though it may not amount to a rebellion, in which there is usurped power.[5]

COMMUNE. See COMMUNISM.

COMMUNICATION. Information imparted by one person to another.

Confidential communication. Information imparted between persons who occupy a relation of trust and duty; a privileged communication.

Privileged communication. 1. Information imparted which the law does not require to be disclosed in a judicial or legislative examination.

Public policy forbids the disclosure of matters which the law regards as confidential, and as to which it will not allow confidence to be violated.[1]

The rule, at common law, does not extend to confessions made to clergymen. This has been changed by statute in some States, as in Iowa, Michigan, Missouri, New York, and Wisconsin.[2]

Confidence between husband and wife, as to the interests of either, is forever inviolable.[3]

A lawyer who has counseled with a client cannot disclose information received from him. The inhibition includes a clerk or a student in the lawyer's office; and applies also to a scrivener or a conveyancer. But a legal adviser may testify as to "negotiations" between clients who later become adversaries. The rule does not cover a disclosure of an intention to break the law, nor testamentary communications, nor information obtained outside of the professional relation.[4]

A communication to a medical attendant is not privileged. A few of the States (among others, those mentioned above) have conferred the immunity, excepting consultations for criminal purposes.[5] See INFORMATION, 1.

State secrets are privileged. This embraces communications to any high officer of state, and consultations with the executive, or a committee of the legislature.[6]

Prosecuting attorneys are privileged as to confidential matters.[7] See ACCOMPLICE.

Communications between a party and a witness, by way of preparation for trial, are privileged.[8]

Neither arbitrators, judges, nor jurors can be compelled to disclose the grounds of their findings.[9] See JURY, Grand.

Ties of blood create no privilege.[10]

Telegrams (*q. v.*) are not protected.[11]

2. In the law of slander and libel, false matter not actionable, because the circum-

had only the right of soil, subject to the right of common, which latter right the lot-holders could release or modify at pleasure, with the concurrence of the legislature. Some three years later, at the request of a large majority of the lot-owners, the legislature granted ten acres of the same common to trustees representing the Presbyterian Church in the United States, for the uses of a theological seminary. After the lapse of several years, during which more than $25,000 had been expended in improvements, one Carr, who had acquiesced in this disposition of the common ground, by suit in court questioned the validity of the grant to the trustees. The supreme court held that by failing to complain at the proper time he had approved what had been done.

See also Thomas *v.* Marshfield, Mass., 10 Pick. 364 (1830), and Phillips *v.* Rhodes, 7 Metc. 322 (1843),— as to rights of common in a beach; and Hall *v.* Lawrence, 2 R. I. 218 (1852),— which concerned a similar right at Newport, in 1776. On the origin of rights of common, see 3 Law Q. Rev. 373–98 (1837).

[1] 4 Bl. Com. 127.

[2] 3 Bl. Com. 9.

[3] Cŏm'-mo-rant. L. *commorari*, to abide.

[4] See 3 Bl. Com. 364; 4 *id.* 273; Wright *v.* Smith, 74 Me. 497 (1883); Me. Laws, 1876, c. 93.

[5] [Langdale *v.* Mason, 2 Marsh. Ins. 792 (1780), Ld. Mansfield; May, Ins. § 403.

[1] Totten *v.* United States, 92 U. S. 107 (1875).

[2] 1 Greenl. Ev. §§ 247–48, cases; 1 Whart. Ev. §§ 596–98, cases.

[3] 1 Greenl. Ev. §§ 254, 334; 1 Whart. Ev. §§ 427–32; 112 Mass. 160; 46 Barb. 158; 35 Vt. 379.

[4] 1 Greenl. Ev. §§ 237–46; 1 Whart. Ev. §§ 576–93; 74 Me. 543; 101 Mass. 193.

[5] 1 Greenl. Ev. § 248; 1 Whart. Ev. § 606; Connecticut Mut. Life Ins. Co. *v.* Union Trust Co., 112 U. S. 254 (1884); Gartside *v.* Connecticut Mut. Life Ins. Co., 76 Mo. 449–53 (1882), cases, statutes.

[6] 1 Greenl. Ev. §§ 250–51; 1 Whart. Ev. §§ 604–5, cases; Worthington *v.* Scribner, 109 Mass. 488–98 (1872), cases; Totten *v.* United States, 92 U. S. 105 (1875); Hartranft's Appeal, 85 Pa. 433 (1878); Rex *v.* Hardy, 24 How. St. Tr. 815 (1794); 15 Op. Att.-Gen. 9, 378, 416; 50 Md. 626.

[7] Vogel *v.* Gruaz, 110 U. S. 311, 316 (1884), cases; 1 Whart. Ev. § 603.

[8] 1 Whart. Ev. § 594.

[9] 1 Whart. Ev. §§ 599–601; 1 Greenl. Ev. §§ 249, 252.

[10] 1 Whart. Ev. § 607; 14 Ill. 89; 8 Wis. 456; L. R., 19 Eq. 649.

[11] 1 Whart. Ev. §§ 595, 617.

stances gave the defendant a right to make the statement.

The occasion on which the communication was made rebuts the inference arising, *prima facie*, from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact — that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made.[1]

"Privileged" in this connection means simply that the circumstances under which the communication was made were such as to repel the legal inference of malice, and to throw upon the plaintiff the burden of offering evidence of its existence beyond the mere falsity of the charge.[2]

A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable.[3]

Where a person is so situated that it becomes right, in the interests of society, that he should tell a third person certain facts, then if he *bona fide* and without malice does tell them it is a privileged communication. The jury must say whether the statement was made in good faith.[4]

In some instances a voluntary imparting of information will be justified; in others the privilege applies only to information in response to inquiries. The subject may be one that is privileged, and a communication on that subject be unprivileged. If the restraints imposed by law upon the publicity to be given the communication be disregarded, the communication is unprivileged and actionable, although made from the best of motives. The act of communicating defamatory matter to a person with respect to whom there is no privilege is without legal justification or excuse. Good faith and honest belief will not justify defamation.[5]

In the law of libel, privileged communications are: 1. When an author or publisher acted in *bona fide* discharge of a public or private duty, legal or moral; or in the prosecution of his own rights or interests. 2. Anything said or done by a master in giving the character of a servant who has been in his employment. 3. Words used in the course of a legal or judicial proceeding, however harsh. 4. Publications duly made in the ordinary mode of parliamentary proceedings. . . In these cases the complainant must show express malice, by construction of the matter, or by facts accompanying the matter or the parties.[1]

In some jurisdictions the privilege is spoken of as "absolute," that is, it rests upon grounds of policy, requiring freedom in debate or argument, and in giving testimony — in which cases proof of even actual malice is not received, unless it be as to the last: as, for utterances by a legislator, judge, advocate, or witness; and as "presumptive," that is, in which the plaintiff may prove absence of good faith or actual malice: as, communications in discharge of social duties; when the author or recipient has a legal interest to be promoted; answers to legitimate inquiries; characters given to servants; statements to sellers as to credit of buyers; notices protective of one's interests or in discharge of a corporate duty.[2]

Utterances in the course of church discipline, to or of a member of the church, are not actionable unless express malice be proved.[3] See LIBEL, 5; SLANDER.

COMMUNIS. See ERROR, 1, Communis.

COMMUNISM. A name given to schemes of social innovation which have for their common starting-point the overthrow of absolute rights of ownership in private property as an institution. Most theories further comprehend the regulation of industry and the sources of livelihood, as well as of the domestic relations, and some involve the abrogation of all central authority in a State, and the substitution of that of the commune.[4]

It is the latter feature that constitutes a distinction between communism and socialism.[4] See ANARCHY; GOVERNMENT; NIHILIST.

COMMUNITY.[5] 1. Unity; mutuality: as, community of interest or of intention. See PARTNERSHIP.

2. In Louisiana, Texas, California, and perhaps in New Mexico and Arizona, a species of partnership created between husband and wife by the contract of marriage, in acquisitions of property made or received during the continuance of that relation.

This community is *conventional* when formed by express agreement in the contract

[1] Wright *v.* Woodgate, 2 Cromp., M. & R. 577 (1835), Parke, B.

[2] Lewis *v.* Chapman, 16 N. Y. 373 (1857), Selden, J.

[3] Harrison *v.* Bush, 5 Ellis & B. *347-48 (1855), Campbell, C. J.

[4] Davies *v.* Snead, L. R., 5 Q. B. *611 (1870), Blackburn, J. See Waller *v.* Loch, 7 Q. B. D. 621-22 (1881); Marks *v.* Baker, 28 Minn. 164-65 (1881), cases; Erber *v.* Dun, 12 F. R. 530 (1882); Trussell *v.* Scarlett, 18 *id.* 214, 216-20 (1882), cases; Locke *v.* Bradstreet, 22 *id.* 771 (1885); 26 Am. Law Reg. 681-93 (1887), cases.

[5] King *v.* Patterson, 49 N. J. L. 421, 419-32 (1887), cases, Depue, J. The plaintiff (above) published in his "mercantile agency notification sheet" the false information that the defendant had executed a chattel mortgage upon her stock of goods.

[1] White *v.* Nicholls, 3 How. 286-92 (1845), cases, Daniel, J. As to newspaper publications, see 21 Cent. Law J. 86-90, 450-55 (1885), cases.

[2] See O'Donaghue *v.* M'Govern, 23 Wend. *29 (1840); Howard *v.* Thompson, 21 *id.* 325 (1839).

[3] Coombs *v.* Rose, 9 Blackf. *157 (1846), cases. *Contra*, Fitzgerald *v.* Robinson, 112 Mass. 371-78 (1873), cases; Magrath *v.* Finn, 16 Alb. Law J. 186 (1877) — Irish Common Pleas.

[4] [Worcester's Dict.

[5] L. *communis*, common

of marriage; *legal*, when it arises by operation of law — as where there is no express stipulation.

At the dissolution of the relation the effects are divided equally, as between heirs.[1]

Statutes upon the subject proceed upon the theory that the marriage, in respect to property acquired during its existence, is a community, of which each spouse is a member, equally contributing by his or her industry to its prosperity and possessing an equal right to succeed to the property after dissolution, in the event of surviving the other. To the community all acquisitions by either, whether made jointly or separately, belong. No form of transfer or mere intent of parties can overcome this positive rule of law. All property is common property, except that owned previous to marriage or acquired after the relation has ceased. The presumption is against separate ownership. A purchase made with separate funds must be affirmatively established by clear and decisive proof. The husband has the entire control of the common property; and it is liable for his debts.[2]

3. A society of people having common rights, interests, or privileges in matters of property, representation, etc.

An association by which each member surrenders his property into one common stock for the mutual benefit of all during their joint lives, with the right of survivorship, reserving to each member the right to secede at any time during his life, is not prohibited by law.[3]

4. A society of people possessing common political interests; a political society. See STATE, 2 (2).

COMMUTATION.[4] Putting one thing for another; substitution.

As, of a tax, for a personal service; an annuity to a tribe of Indians, for goods; rations to a soldier, for money;[5] an artificial limb, for its value in money.[6]

Commutation of punishment. The substitution of a less for a greater penalty or punishment;[7] the change of one punishment for another and different punishment, both being known to the law.[8] See PARDON.

Commutable; commutative. Capable or admitting of substitution; not interchangeable for another — of less or equal value or degree. Opposed, incommutable, incommutative, non-commutable.

COMPACT. An agreement or contract — between independent sovereignties.[1]

Original or social compact. The implied contract of association of individuals in a community, by which, in return for the benefits of the association, the individual surrenders such of his natural freedom as is necessary for the good of society.

Thereby, whatever power the individual had to punish offenses against the law of nature is vested in the magistrate — the sovereign power.[2] See BODY, 2, Corporate.

COMPANY. 1. The member of a partnership (*q. v.*) whose name does not appear in the name of the firm.

The use of the collective designation "& Co.," as part of the name of a firm, creates a presumption that there is a partner in addition to the person or persons whose names are given; but this presumption is rebuttable. Statutes in Louisiana and New York forbid the use of the addition unless an actual partner is represented by it; but a fanciful title, such as "Eureka Co.," may still be used; and the reference may be to a person under disability. Such statutes are intended to protect persons who give credit to, not those who obtain credit from, a firm.[3]

2. Applied to persons engaged in trade, those united for the same purpose or in a joint concern.[4]

"Company" or "association," when used in the Revised Statutes, acts or resolutions of Congress, in reference to corporations, shall be deemd to embrace the words "successors and assigns of such company or association" in like manner as if these last-named words, or words of similar import, were expressed.[5]

The simple word "company" will include individuals as well as corporations.[6]

Often designates a numerous association, chartered or unchartered. Every unincorporated company is a partnership.

See ASSOCIATION; PARTNERSHIP, Limited; STOCK, 3 (2); BUBBLE; EXPRESS; PROSPECTUS; RAILROAD; TELEGRAPH; TRANSPORTATION.

[1] La. Civ. Code, 2375, 2393; 10 La. 146, 172, 181; 12 *id.* 668. See as to Texas, Hanrick *v.* Patrick, 119 U. S. 172 (1886), cases.

[2] Tibbetts *v.* Fore, 70 Cal. 244-45 (1886), cases; Schuyler *v.* Broughton, *ib.* 263 (1886), cases.

[3] Schriber *v.* Rapp (Harmony Society), 5 Watts, 351, 360 (1836); Baker *v.* Nachtrieb, 19 How. 126 (1856); Speidel *v.* Henrici, 120 U. S. 377 (1887).

[4] L. *commutare*, to exchange with.

[5] United States *v.* Lippitt, 100 U. S. 663, 670 (1879).

[6] R. S. § 4788.

[7] Lee *v.* Murphy, 22 Gratt. 799, 793-800 (1872), cases.

[8] *Exp.* Janes, 1 Nev. 321 (1865).

[1] See 8 Wheat. 92; 11 Pet. 185; 1 Bl. Com. 45.

[2] 1 Bl. Com. 233, 299; 3 *id.* 160; 4 *id.* 8, 71, 382. See 1 Shars. Bl. Com. 232; Atlantic Monthly, June, 1887, p. 750, article by A. L. Lowell, who undertakes to show that the theory, first propounded in 1594 by Richard Hooker, adopted by Hobbs, Locke, Rousseau, the framers of the constitution of Massachusetts, and Kant, has been made the servant of absolutism, democracy, revolution, and transcendental ethics.

[3] 1 Bates, Partn. §§ 191, 198, cases; Gay *v.* Seibold, 97 N. Y. 476 (1884); Lauferty *v.* Wheeler, 11 Daly, 197 (1882); Zimmerman *v.* Erhard, 83 N. Y. 76 (1880); Kent *v.* Mojoiner, 36 La. An. 259 (1884).

[4] Palmer *v.* Pinkham, 33 Me. 36 (1851), Shepley, C. J.

[5] R. S. § 5: Act 25 July, 1866.

[6] Chicago Dock Co. *v.* Garrity, 115 Ill. 164 (1885).

COMPARATIVE. See JURISPRUDENCE; NEGLIGENCE.

COMPARISON. See HANDWRITING.

COMPENSATION. That return which is given for something else — a consideration: as, the compensation of an office.[1]

Compensatory. Serving as an equivalent; making amends: as, compensatory damages, *q. v.*

1. Recompense; remuneration: as, for services rendered by an officer, agent, attorney, trustee.

When not fixed by agreement, evidence of the amount ordinarily charged in like cases is admissible. The service, however, must be lawful. An agreement to pay a contingent compensation for professional services in prosecuting a claim against the government, pending in a department, is not unlawful.[2]

In a constitutional provision that the "compensation" of any public officer shall not be increased or diminished during his term of office, applies to officers who receive a fixed salary from the public treasury, not to such minor officers as are paid by fees taxed or allowed for each item of service as it is rendered.[3]

When Congress has said that a sum appropriated shall be "in full compensation" of the services of a public officer, the courts cannot allow him a greater sum. The appropriation of a fixed sum as compensation, followed by the appropriation of a round sum as "additional" pay, evinces an intention not to allow further compensation during the period specified. So, a statute which fixes the annual salary of an officer at a designated sum without limitation as to time, is not abrogated by subsequent enactments appropriating a less amount for his services for a particular fiscal year, but containing no words which expressly or impliedly modify or repeal it.[4] See COMMISSION, 3; CONTINUANCE, 3; COUNT, 4 (1), Common; EXPERT; IMPAIR; LEGAL; SALARY.

2. Remuneration for loss of time, necessary expenditures, and for permanent disability, if such be the result.[5]

As, compensation for personal injuries caused by another's negligence. See DAMAGES.

3. Amends for privation of a thing; an equivalent for property taken for a public use.

Just compensation. Private property cannot be taken for a public use without just compensation being made or secured. This means pecuniary recompense equivalent in value to that of the property.[1]

"Just" intensifies the meaning of "compensation"— imports that the equivalent shall be real, substantial, full, ample.[2]

Nearly all of the authorities agree that "just compensation" consists in making the owner good, by an equivalent in money, for the loss he sustains in the value of his property by being deprived of a portion of it.[3]

In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in the sale of property between private persons. The inquiry is, What is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable purposes. . . So many and varied are the circumstances to be taken into the account that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule. As a general thing, the compensation is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.[4]

When an incorporated company appropriates land, the measure of compensation is the difference between the value of the property before and after the taking, and as affected by the taking.[5]

See DOMAIN, Eminent; POLICE, 2; STREET; TAKE, 8.

4. In equity, something to be done for, or money to be paid to, a person, equal in value or amount to the right or thing of which he has been deprived.

Ordinarily decreed as incidental to other relief sought by the bill, or where there is no adequate remedy at law, or where a peculiar equity intervenes.[6]

Compensation may be decreed where the court cannot grant the specific relief prayed for. Thus, if a plaintiff was originally entitled to specific performance of a contract of sale, but it so happens that before the final decree it becomes impracticable for the defendant to make a conveyance, so that the specific relief sought for cannot be decreed, the court will not

[1] Searcy *v.* Grow, 15 Cal. 123 (1860).

[2] Stanton *v.* Embrey, 93 U. S. 548 (1876).

[3] Supervisors of Milwaukee *v.* Hackett, 21 Wis. 617-18 (1867), Dixon, C. J.

[4] United States *v.* Fisher, 109 U. S. 143 (1883); United States *v.* Mitchell, *ib.* 146 (1883); United States *v.* Langston, 118 *id.* 389 (1886).

[5] Parker *v.* Jenkins, 3 Bush, 591 (1868).

[1] Council Bluffs R. Co. *v.* County of Otoe, 16 Wall. 674 (1874), Strong, J.

[2] Virginia, &c. R. Co. *v.* Henry, 8 Nev. 171 (1873). Whitman, C. J.

[3] Bigelow *v.* West Wisconsin R. Co., 27 Wis. 487 (1871), cases, Lyon, J.

[4] Mississippi, &c. Boom Co. *v.* Patterson, 98 U. S 407-8 (1878), Field, J.

[5] See Lake Erie, &c. R. Co. *v.* Kinsey. 87 Ind 516 21 (1882), cases; Shenango, &c. R. Co. *v.* Braham, 79 Pa 452 (1875), cases; 39 Ala. 171-72; 42 *id.* 8; 46 *id.* 579; 69 Ga. 322; 133 Mass. 255, 433; 34 Miss. 227; 36 *id.* 300. 17 N. J. L. 47; 20 *id.* 252; 38 *id.* 155; 14 Ohio, 175; 9 Oreg 379-80; 2 Kent, 338; Pierce, Railr. 210, 212, 224.

[6] 2 Story, Eq. Ch. XIX.

turn the plaintiff over to seek his damages in an action at law, but will proceed directly to decree him compensation.[1] See CONDITION, Precedent, Subsequent.

5. A mode of extinguishing a debt, and takes place, by mere operation of law, where debts equally liquidated and demandable are reciprocally due.[2]

COMPERUIT. See DIES, Comperuit.

COMPETENT. Answering the requirement of the law; legally able, fit, or qualified; also, proper or admissible as evidence. Whence competency; incompetent, incompetency.

A judge is said to be incompetent to hear a cause in which he is interested; and an infant, or a married woman, incompetent to contract for an article not a necessary.

All witnesses that have their reason, except such as are infamous, or, at common law, are interested in the event of the cause, are competent, but the jury must judge of their credibility,[3] *q. v.*

Competency is a question for the court. Every witness is presumed to be competent. Ordinarily, incompetency is to be objected to when first known or discovered — before the witness is sworn and his testimony found to be unfavorable.[4] See further EVIDENCE, Competent; WITNESS.

COMPETITION. See MONOPOLY; POLICY, 2; TRADE, Restraints.

Competitive examinations. See SERVICE, 3, Civil.

COMPILE. To copy from various authors into one work. Implies the exercise of judgment in selecting and combining the extracts.[5]

A compiler may take existing materials from sources common to all writers, and, by arranging them in combination in a new form, give them an application unknown before. Others may use the materials, but not his improvement. The "fair use" which is allowable applies to the materials, not to another's plan and arrangement.[6]

A compilation made from original sources is a new work. The fact of originality may be proved by another than the author. . . A compiler is an "author," within the meaning of the Constitution and the copyright laws. . . A compilation, which is the result of labor devoted to gathering from original sources and to arranging in convenient form facts open to be published by any one, is a new work. . "Colorable differences" applies to devices intended to cover a literary piracy, not to real and substantial differences.[1]

A compilation made from voluminous public documents, and arranged to show readily the date and order of historic events, may be copyrighted. Such publications are valuable sources of information and require labor, care, and some skill in their preparation.[2] See further ABRIDGE; PIRACY, 2; REPORT, 1 (2); REVIEW, 3.

COMPLAINT. 1. A formal charge that a person named has committed an offense, preferred before a magistrate or a tribunal authorized to inquire into the probable truth of the accusation.

Refers to a proceeding before a magistrate.[3] But may include an indictment.[4] Implies that an oath has been administered.[5]

A complaint is the initial proceeding in criminal prosecutions and examinations before magistrates, and is made upon oath. If a jurat be attached, and it be properly certified by the magistrate, as is frequently the case, it will be essentially an "affidavit." But a complaint is not necessarily an affidavit, nor are they understood as convertible terms. For, though a complaint may be reduced to writing and subscribed, it need not be certified by the magistrate, since the fact may otherwise appear from his record. And it may be merely formal, made by one who has little, if any, knowledge about the facts, and the examination consist of the depositions of other witnesses. An "affidavit," on the other hand, as the term is ordinarily used, is a sworn statement of facts or a deposition in writing, and includes a jurat — a certificate of the magistrate showing that it was sworn to before him, including the date, and sometimes also the place.[6]

2. The first pleading filed by a plaintiff in a civil action.

The first pleading in an action; containing a statement of the cause of action, with a demand for the appropriate relief to which the party may be entitled.[7]

Complainant. One who prefers a charge of crime; also, he who institutes a civil suit, particularly a suit in equity.

See DECLARATION, 2; PLAINT. Compare AUDIRE, Audita, etc.

COMPLETE. See CAUSE, 2, Of action; INCHOATE; PERFECT.

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[1] Mason's Appeal, 70 Pa. 29-30 (1871), cases; 77 *id.* 227; 75 *id.* 483; 13 Ves. 73, 227.

[2] See Dorvin *v.* Wiltz, 11 La. 520 (1856); Stewart *v.* Harper, 16 *id.* 181 (1861).

[3] 3 Bl. Com. 369. As to moral status, see 19 Am. Law Rev. 343-58 (1585), cases; as to mental status, *ib.* 922-92 (1885), cases.

[4] 1 Greenl. Ev. § 50; 1 Whart. Ev. §§ 391-411, 418-30.

[5] Story's Ex'rs *v.* Holcombe, 4 McLean, 313 (1847).

[6] Lawrence *v.* Dana, 4 Cliff. 75-86 (1869), cases.

[1] Bullinger *v.* Mackey, 15 Blatch. 555, 558 (1879), cases.

[2] Hanson *v.* Jaccard Jewelry Co., 33 F. R. 203 (1887). Thayer, J.; Drone, Copyr. 152-54, cases.

[3] Commonwealth *v.* Davis, 11 Pick. 436 (1831).

[4] Commonwealth *v.* Haynes, 107 Mass. 197 (1871).

[5] Campbell *v.* Thompson, 16 Me. 120 (1839).

[6] State *v.* Richardson, 34 Minn. 117-18 (1885), cases, Vanderburgh, J. Extradition Act, R. S. § 5278.

[7] M'Math *v.* Parsons, 26 Minn. 347 (1879).

COMPOS. L. Having control of; possessing power over.

Compos mentis. Having capacity of mind; sound in mental faculties; of sound mind. **Non compos mentis.** Not of sound mind; lunatic; insane. See INSANITY.

COMPOSITION. 1. In the law of copyright, the invention or combination of the parts of a work — literary, musical, or dramatic: as, in the case of a letter, discourse, or book; or of an opera; but not of a mere exhibition, spectacle, or scene.[1] See BOOK, 1; COPYRIGHT; DRAMA; OPERA.

2. In the law of patents, a mixture or chemical combination. See PATENT, 2; PROCESS, 2.

3. Payment of part in satisfaction of the whole of a debt. See COMPOUND, 3.

Composition in bankruptcy or insolvency. A contract by which creditors agree to accept a part of their demands, and to discharge the debtor from liability for the rest.

An arrangement between a creditor and his debtor for the discharge of the debt, on terms or by means different from those required by the original contract or by law.[2]

This may be by a composition agreement so called, by a letter of license, or by a deed of inspectorship. See LICENSE; INSPECTION, 3.

A strict composition agreement is an agreement whereby the creditors accept a sum of money, or other thing, at a certain time or times, in full satisfaction and discharge of their respective debts.[3]

Obviates the necessity of a discharge by the court; if made in good faith and fairly and strictly conducted, will be upheld. The agreement is evidenced by an instrument signed by the debtor and the creditors, and called a composition *deed*, although, at common law, such instrument is not necessary.[4] See ACCORD; BANKRUPTCY; PREFER, 2.

COMPOUND. 1, *v.* (1) To put parts together to form a whole. See COMPOSITION.

(2) To add interest to principal for a new principal. See INTEREST, 2 (3).

(3) To "compound" a debt is to abate a part on receiving the residue. Demands are compounded when adjusted by payment of part in satisfaction of the whole.[1] See COMPOSITION, 3.

(4) To take goods, or other amends, upon an agreement not to prosecute a person for a crime.

Compounding a misdemeanor is sometimes allowed by leave of court, as affecting the individual, he having a right of action for damages. Compounding a felony is, at common law, an offense of an equivalent nature [to the felony], and is, besides, an additional misdemeanor against public justice by contributing to make the laws odious.[2] See BOTE, Theft; LEGAL, Illegal.

By stat. 25 Geo. II (1752), c. 36, advertising a reward for the return of things stolen, "no questions to be asked," subjects the advertiser and the printer to a forfeiture of £50 each.[3]

2. *adj.* See INTEREST, 2 (3); LARCENY.

COMPRISE. See INCLUDE.

COMPROMISE.[4] An agreement in settlement of a controverted matter.

The yielding of something by each of two parties.[5]

A mutual yielding of opposing claims; the surrender of some right or claimed right in consideration of a like surrender of some counter-claim.[6]

Compromises are highly favored in law.

An "offer" to do something by way of compromise of a controversy, as, to pay a sum of money, to allow a certain price, to deliver certain property, and like offers, made to avoid litigation, is not receivable in evidence against the maker as an admission. If the offer is plainly for a compromise, the rule is to presume it to have been made without prejudice — it is open to explanation. But an admission made during or in consequence of the offer is receivable.[7]

To admit evidence of an offer to compromise litigation would discourage the amicable settlement of disputes. When the object is to buy peace, an offer will be excluded.[8] See PREJUDICE, Without.

If the right surrendered is of doubtful validity, its surrender may be a valuable consideration for the promise.[9]

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[1] Martinetti *v.* Maguire, 1 Abb. U. S. 362 (1867); The "Dlante" Case, 15 F. R. 439 (1883); 17 F. R. 595, cases; 9 Am. Law Reg. 33; 23 Bost. L. R. 397.

[2] [4 South. Law Rev. 639–75, 805–42 (1878), cases.

[3] Clarke *v.* White, 12 Pet. 178 (1838); 20 Cent. Law J. 385–88 (1885), cases; 3 McCrary, 608; 21 Cal. 122; 49 Conn. 105; 75 Ind. 127; 30 Kan. 361; 80 Ky. 614; 71 N. C. 70; 92 Pa. 474; 100 *id.* 164; R. S. § 5103; 2 Kent, 309, b.

[1] [Haskins *v.* Newcomb, 2 Johns. *408 (1807), Kent, Chief Justice.

[2] [4 Bl. Com. 136. See Smith, Contr. 226.

[3] 4 Bl. Com. 133.

[4] L. *com-promittere*, to mutually promise; to arbitrate.

[5] Bellows *v.* Sowles, 55 Vt. 399 (1883).

[6] Gregg *v.* Wethersfield, 55 Vt. 387 (1883); *ib.* 397; 10 Neb. 360; 2 Wis. *6.

[7] West *v.* Smith, 101 U. S. 273 (1879), cases; Home Ins. Co. *v.* Baltimore Warehouse Co., 93 *id.* 548 (1876); 1 Pet. 222; 16 Op. Att-Gen. 250; 87 Ind. 465; 4 La. 456; 50 Md. 45; 44 N. J. L. 174; 1 Greenl. Ev. § 192; 2 Whart. Ev. § 1090.

[8] International, &c. R. Co. *v.* Ragsdale, 67 Tex. 27

An administrator may compound a debt, if for the benefit of the estate;[1] and so may a partner for the benefit either of himself or of the firm — statutes in many of the States making a release of one joint debtor not a release of others.[2]

The courts are inclined to favor a compromise fairly made by an attorney at law, and will uphold it for good reason shown.[3] See ACCORD.

COMPTROLLER, or CONTROLLER. One who keeps a counter-roll, a duplicate register, of accounts: an officer charged with the duty of verifying accounts in the fiscal department of government.

In the treasury there are two comptrollers, designated as the first and the second. Their duties are prescribed by statute.[4] See BANK, 2 (3).

In 1880 there was published, by direction of the treasurer, a volume of the decisions of the first comptroller, of a general character; and, in 1881, a second volume. Since 1882, one volume a year has been issued under authority of a resolution of Congress of August 8, 1882. In the introduction to volumes one, two, and three, more especially to volume three, will be found an outline of the nature and extent of the important jurisdiction exercised by the first comptroller, and of the nature of the powers exercised by accounting officers generally, as compared with strictly judicial power.

COMPULSORY. Involuntary; constrained: as, a compulsory — arbitration, assignment, condition, nonsuit, payment, process, *qq. v.* See VOLUNTARY.

Compulsion. Coercion; duress, *qq. v.* Compare BOYCOTTING.

COMPURGATORS. Neighbors of a person, made a defendant in a criminal or a civil action, who testified under oath that they believed he swore to the truth.[5] See further WAGER, 1, Of law.

COMPUTARE. L. To sum up; to account, *q. v.*

Insimul computassent. They settled an account together.

An averment that a balance was struck by the parties to an account, and that the defendant, against whom the balance appeared, promised, by implication of law, to pay it to the plaintiff.[6]

Plene computavit. He has accounted in full.

A plea in the action of account-render that the defendant has fully accounted.

Quod computet. That he account, — *computent*, that they account.

An interlocutory judgment in account-render or action of account, at law or in equity, that the defendant render an account before an auditor or a master.[1]

COMPUTE. See under CERTUM; COMPUTARE; DAY; TIME.

CON. 1. A form of *cum* (q. v.), in compound words.

2. An abbreviation of *contra*, and of conversation, *qq. v.*

CONCEAL. To hide, keep from view, cover up, secrete; to prevent discovery of; to withdraw from reach; to withhold information.

1. To hide or secrete a physical object from sight or observation.[2]

The act of March 2, 1799, authorizing the seizure of "concealed" goods, subject to duty, requires that the goods be secreted — withdrawn from view. It does not apply to a mere removal, though fraudulent.[3]

To "conceal property" in order to prevent its being taken on process includes not only physical concealment — literal secreting or hiding, but also the doing of any act by which the title of a party is concealed, — his property so covered up that it cannot be reached by process. The provision may apply to realty as well as to personalty.[4]

A horse may be "concealed" by destroying the means of identifying him. The word includes all acts which render the discovery or identification of property more difficult.[5]

A "concealed weapon" is a weapon willfully covered or kept from sight.[6] See further WEAPON.

2. To shelter from observation; to harbor; to protect. See HARBOR, 1.

3. To withdraw to a place where one cannot be found; to abscond, *q. v.*

"Concealment by a debtor to avoid the service of summons" involves an intention to delay or prevent creditors from enforcing their demands in the ordinary legal modes. It may be by the debtor's secreting himself upon his own premises, or by departing secretly to a more secure place, in or out of the county of his residence.[7]

(1887), cases; Chicago, &c. R. Co. *v.* Catholic Bishop, 119 Ill. 531 (1887).

[1] Jeffries *v.* Mutual Life Ins. Co. of New York, 110 U. S. 309-10 (1884), cases.

[2] 1 Bates, Partn. §§ 382, 387, cases.

[3] Whipple *v.* Whitman, 13 R. I. 512-15 (1882), cases; Township of North Whitehall *v.* Keller, 100 Pa. 108 (1882); Holker *v.* Parker, 7 Cranch, 452 (1813).

[4] See R. S. §§ 269, 273.

[5] See 3 Bl. Com. 341-48.

[6] 3 Bl. Com. 164; 61 N. Y. 271.

[1] 3 Bl. Com. 164; 1 Story, Eq. § 548.

[2] [Gerry *v.* Dunham, 57 Me. 339 (1869).

[3] United States *v.* Chests of Tea, 12 Wheat. 486 (1827).

[4] [O'Neil *v.* Glover, 5 Gray, 159 (1855); 4 Cush. 453.

[5] State *v.* Ward, 49 Conn. 442 (1881).

[6] Owen *v.* State, 31 Ala. 389 (1858).

[7] Dunn *v.* Salter, 1 Duv. 345 (1864). See also Frey *v.* Aultman, 30 Kan. 182, 184 (1883).

Leaving a place, requesting that false information of the person's movements be given, is concealment.[1]

4. To contrive to prevent the discovery or disclosure of a fact.

When the operation of a statute of limitations is to be suspended if the debtor "conceals the cause of action," there must be an arrangement or contrivance of an affirmative character to prevent subsequent discovery.[2]

To "conceal the death of a bastard child" is a misdemeanor. The time was when the mother had to prove, by at least one witness, that the infant was dead-born; if she could not she was presumed to be guilty of murder.[3] See AIDER AND ABETTER.

The fact that the owner of stolen goods does not know of the theft does not amount to a "concealment of the larceny" on the part of the thief, within a provision that where a thief conceals his crime the period of concealment is not to be included within the period of limitation.[4]

5. To neglect or forbear to disclose information; to withhold intelligence of a fact which in good faith ought to be communicated.[5]

In insurance law, concealment is the intentional withholding of any fact material to the risk, which the assured, in honesty and good faith, ought to communicate to the underwriter. . . That is a "material fact" the knowledge or ignorance of which naturally influences the judgment of the underwriter in making the contract, or in estimating the degree and character of the risk, or in fixing the rate of the premium.[6] See further REPRESENTATION, 1 (2).

"Fraudulent concealment" is the suppression of something which a party is bound to disclose. The intention to deceive must clearly appear. The test is, whether one party knowingly suffered the other to deal under a delusion.[6]

"Undue concealment," which amounts to fraud in the sense of a court of equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right not merely in *foro conscientiæ*, but *juris et de jure*, to know.[7]

Deliberate concealment is equivalent to deliberate falsehood.[8]

In making a contract, each party is bound to communicate his knowledge of the material facts, provided he knows that the other party is ignorant of them, and they are not open and naked, or equally within the reach of the party's observation, and that there is an obligation to communicate truly and fairly, by confidence reposed, or otherwise.[1] See FRAUD.

Aliud est celare, aliud tacere. It is one thing to conceal, another to be silent.

Silence is not concealment — where matters are equally open for the exercise of judgment. See CAVEAT, Emptor; SILENCE.

CONCEPTION. See QUICKENING; PREGNANCY; VENTER.

CONCERN. To affect the interest of, be of importance to, a person. See INTEREST, 1.

Sales of property for charges by a bailee, or for taxes, "for whom it may concern," mean for the unknown or non-claiming owner.

A policy of insurance "on account of whom it may concern," or with equivalent terms, will be applied to the interests of the persons who ordered it, provided they had authority to insure. Thus, an agent, factor, carrier, bailee, trustee, consignee, mortgagee, or any other lien-holder may insure the property to the extent of his own interest, and, by the use of the words in question, for all other persons, to the extent of their respective interests, when he has previous authority or subsequent ratification.[2]

Concerning. In R. S., § 3894, which provides that no letter "concerning lotteries" shall be carried in the mails, refers to letters sent out to advertise lotteries.[3]

Concerns. Under a statute exempting persons from turnpike tolls when traveling on "ordinary domestic business of family concerns," a physician going to visit his patients is not exempt.[4]

CONCESSION. See CESSION.

CONCLUDE.[5] 1. To close, end, terminate; to finish, complete.

Conclusion. (1) An ending or closing, as of an instrument or a pleading. See DECLARATION, 2; INDICTMENT; PLEA, 2.

(2) The last argument to a court, or the last address to a jury. See BURDEN, Of proof.

(3) An inference or deduction: as, a conclusion of fact, or of law. See PRESUMPTION.

2. To put an end to, close up; to be final; to estop, bar, preclude.[6]

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[1] North *v.* McDonald, 1 Biss. 59 (1854).

[2] Boyd *v.* Boyd, 27 Ind. 429 (1867).

[3] 4 Bl. Com. 198, 358.

[4] Free *v.* State, 13 Ind. 334 (1859).

[5] See Gerry *v.* Dunham, 57 Me. 339 (1869).

[6] Magee *v.* Manhattan Life Ins. Co., 92 U. S. 93 (1875), Swayne, J.; Bartholmew *v.* Warner, 32 Conn. 103 (1864).

[7] 1 Story, Eq. § 207; Paul *v.* Hadley, 23 Barb. 524 (1857).

[8] Crosby *v.* Buchanan, 23 Wall. 454 (1874).

[1] 4 Kent, 482, note (*a*).

[2] Hooper *v.* Robinson, 98 U. S. 536, 538 (1878), Swayne, J.; Robbins *v.* Firemen's Fund Ins. Co., 16 Blatch. 127 (1879).

[3] Cummerford *v.* Thompson, 2 Flip. 614 (1880).

[4] Centre Turnpike Co. *v.* Smith, 12 Vt. 216 (1840).

[5] L. *claudere*, to shut up, close.

[6] See Hilliard *v.* Beattie, 58 N. H. 112 (1877).

Conclusive. Determinative, decisive; not to be questioned, controverted, or contradicted, nor requiring support. **Inconclusive:** presumptive, rebuttable.

As, in speaking of a judgment, or of a return of service that is conclusive, and of conclusive and inconclusive evidence or presumptions, *qq. v.*

A party who fails to assert his right, after receiving notice of a proceeding affecting it, is said to be "concluded" by the judgment.

CONCUBINAGE. "Concubinage" and "prostitution" have no common-law meaning. In their popular sense they include all cases of lewd intercourse,[1] *q. v.* See also PROSTITUTION.

CONCUR. 1. To go along together; to co-exist: as, in saying that in malicious prosecution malice and want of probable cause must concur.

Concurrent. Co-existing; having effect, operation, or validity at one and the same time: as, a concurrent or concurrent — agreements, covenants, or promises, consideration, jurisdiction, negligence, possession or seisin, remedies, *qq. v.*

2. To entertain like views; to agree: as, to concur in an opinion, and concurring opinion. Opposed to dissent. See OPINION, 8.

CONDEMN. To pronounce wrong.

1. To sentence; to adjudge.

Condemnation. A sentence or judgment which condemns a person to do, give, or pay something; or which declares that his claim or pretensions are unfounded.

Condemnation money. Money which the law sentences a party to pay;[2] also, in appeal bonds, the damages that may be awarded against the appellant, by judgment of the court.[3]

Bail above or bail to the action undertake that if the defendant is condemned in the action he will pay the costs and the condemnation, or else that they will.[4] See APPEAL, 2, Bond.

2. To declare forfeited: as, to condemn merchandise offered for sale in violation of a revenue law.

In Federal practice, proceedings in such cases are *in rem*, against the thing as offending. Whence the title of cases: United States *v.* Chests of Tea, Boxes of Cigars, Gallons of Whiskey. See RES.

3. To confiscate as contraband of war. See CONFISCATE.

4. To declare a vessel to be a prize, or unfit for service.[1] See PRIZE, 3.

5. To adjudge necessary for the uses of the public: as, to condemn private property under the power of eminent domain. See DOMAIN, 2.

A condemnation of lands is a purchase of them *in invitum;* the title acquired is a quitclaim.[2]

6. To judicially determine that realty, out of its rents and profits, clear of reprises, will not satisfy a judgment within a prescribed period, as, seven years. See INQUEST, Of lands.

CONDITIO. L. A stipulation, proviso, condition, *q. v.*

Conditio sine qua non. A condition without which (a thing can) not (exist); an indispensable prerequisite.

Melior est conditio. See DELICTUM, In pari, etc.

CONDITION. 1. State, status, predicament.[3]

2. A restriction placed upon the use of a thing.[4]

Some quality annexed to real estate by virtue of which it may be defeated, enlarged, or created upon an uncertain event; also, a quality annexed to a personal contract or agreement.[5]

The uncertain event itself; and the clause, in the instrument, which expresses the contingency.

An estate upon condition is such that its existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated.[6]

An estate upon condition *implied* in law is where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition is

[1] People *v.* Cummons, 56 Mich. 545 (1885), Campbell, J.

[2] Lockwood *v.* Saffold, 1 Ga. 74 (1846).

[3] Doe *v.* Daniels, 6 Blackf. 9 (1841); 107 U. S. 381-92.

[4] 3 Bl. Com. 291.

[1] See 1 Kent, 101; 3 *id.* 103; 3 Wall. 28, 170, 514, 603; 5 *id.* 1, 28; 11 *id.* 268, 308; 106 U. S. 3.6.

[2] Lake Merced Water Co. *v.* Cowles, 31 Cal. 217 (1866).

[3] See Dunlap *v.* Mobley, 71 Ala. 105 (1881).

[4] See Ayling *v.* Kramer, 133 Mass. 13 (1882), cases.

[5] [Selden *v.* Pringle, 17 Barb. 465 (1854); Laberee *v.* Carleton, 58 Me. 213 (1865).

[6] 2 Bl. Com. 152, 154, 340. See also 4 Kent, 126; Adams *v.* Copper Co., 4 Hughes, 593-94 (1880); 31 Conn. 475; 39 Ga. 207; 31 Mich. 49; 1 Nev. 53; 70 N. Y. 309.

expressed in words; as, that proper use shall be made of a franchise. . . An estate on condition *expressed* in the grant itself is where an estate is granted with an express qualification annexed, whereby the estate shall either commence, be enlarged, or defeated, upon performance or breach of such qualification or condition.[1]

As respects realty, a "charge" is a devise with a bequest out of the subject-matter; and a charge upon the devisee personally is an estate on condition.[2] A "condition" is made by a grantor, and only he or his heir can take advantage of a breach.[3] A "covenant" is made by both grantor and grantee.[4] A "limitation" ends the estate without entry or claim; and a stranger may take advantage of the determination.[5]

Conditional. Subject to, or dependent upon, a condition; opposed to *unconditional:* as, a conditional — contract, conveyance, fee, guaranty, indemnity, liability, obligation, pardon, sale, *qq. v.*

Words which create a condition are "provided," "on account of," "if," and other words expressive of the intention. "Upon condition" is appropriate, but does not of necessity create an estate upon condition.[6]

Condition precedent. Such condition as must happen or be performed before the estate can vest or be enlarged. **Condition subsequent.** A condition upon the failure or non-performance of which an estate already vested may be defeated.[7]

Thus, if an estate for life be limited to A upon his marriage with B, the marriage is a condition precedent. Examples of conditions subsequent are: a grant of a fee-simple with a right to re-enter upon non-payment of the rent reserved; an estate held upon the condition that the grantee does not remarry, or continues to live at a certain place.

A "condition precedent" is one which must happen before either party becomes bound by the contract. A "condition subsequent" is one which follows the performance of the contract, and operates to defeat and annul it upon subsequent failure of either party to comply with the condition.[8]

Whether a qualification, restriction, or stipulation is a condition precedent or subsequent depends upon the intention of the parties, as gathered from the whole instrument.[1]

A condition precedent must be literally observed; a condition subsequent, tending, as it does, to destroy the estate, is not favored, and is construed strictly.[2]

No one can take advantage of a "condition subsequent" annexed to an estate in fee but the grantor or his heir, or the successor of an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. . . In what manner the reserved right of the grantor must be asserted depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, or there must be some legislative assertion of ownership of the property on account of a breach of the condition.[3]

Failure to perform a "condition precedent" bars relief; but equity will relieve against a forfeiture under a "condition subsequent" upon the principle of compensation, when that principle can be applied, giving damages, if damages should be given, and the amount is ascertainable. . . If a "condition subsequent" be possible at the time of making it, and becomes afterward impossible to be complied with, by the act of God, the law, or the grantor, the estate of the grantee, being once vested, is not thereby divested, but becomes absolute.[4]

Where an act is to be performed by the plaintiff before the accruing of the defendant's liability under his contract, the plaintiff must prove either his performance of such condition precedent, or an offer to perform it which the defendant rejected, or his readiness to fulfill the condition until the defendant discharged him from so doing, or prevented the execution of the matter which the contract required him to perform. . . Conditions precedent may be waived by the party in whose favor they are made. . . Where the conditions are dependent and of the essence of the contract, the performance of one depends upon the performance of another, and the prior condition must be first performed. In cases where either party may be compensated for a breach, the conditions are mutual and independent.[5]

When a condition subsequent is broken, relief may be had upon equitable terms; but when the condition is a precedent one, and neither fulfilled nor waived, no right or title vests, and equity can do nothing for the party in default: as, where an assured is to pay the premium before the assurer shall be bound.[6]

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[1] 2 Bl. Com. 152, 154, 340.

[2] See 4 Kent, 604; 12 Wheat. 498.

[3] See 2 Bl. Com. 155; 4 Kent, 122, 127; 21 Wall. 63; 3 Gray, 142; 41 N. J. L. 76; 19 N. Y. 100.

[4] 2 Coke, Litt. 70; 2 Pars. Contr. 81; 6 Barb. 336.

[5] 16 Me. 158; 3 Gray, 142; 5 Neb. 407.

[6] Stanley *v.* Colt, 5 Wall. 165 (1866); Sohier *v.* Trinity Church, 109 Mass. 19 (1871); Casey *v.* Casey, 55 Vt. 520 (1883).

[7] 2 Bl. Com. 154; Towle *v.* Remsen, 70 N. Y. 309 (1877).

[8] Story, Contr. §§ 40, 42-43; Jones *v.* United States, 96 U. S. 27-29 (1877), cases; Redman *v.* Ætna Fire Ins. Co., 49 Wis. 438 (1880); 17 Nev. 415; 35 N. H. 450; 47 Barb. 263.

[1] Lowber *v.* Bangs, 2 Wall. 736, 746 (1864), cases; 70 N. Y. 311; 2 Bl. Com. 156-57; 4 Kent, 130.

[2] 2 Bl. Com. 154; 4 Kent, 125; 3 Pet. 374; 9 Wheat. 341.

[3] Schulenberg *v.* Harriman, 21 Wall. 63 (1874), cases, Field, J.

[4] Davis *v.* Gray, 16 Wall. 239 (1873), cases, Swayne, J.

[5] Jones *v.* United States, 96 U. S. 27-29 (1877), cases, Clifford, J.; Lowber *v.* Bangs, 2 Wall. 736, 746 (1864), cases; Ruch *v.* Rock Island, 97 U. S. 693, 696 (1878), cases; The Tornado, 108 *id.* 352 (1883).

[6] Giddings *v.* Northwestern Mut. Life Ins. Co., 102 U. S. 111 (1880). See 2 Story, Eq. §§ 1309-11.

Repugnant conditions. Such conditions as tend to the subversion of the estate; such as totally prohibit the alienation or use of property conveyed.

Conditions which prohibit alienations to particular persons, or for a limited period, or subject to particular uses, are not subversive of the estate: they do not destroy or limit its alienable or inheritable character. Hence, property may be conveyed in fee and yet be exempted from use as a slaughter-house, soap-factory, distillery, livery-stable, tannery, machine-shop, or place where intoxicating liquors are manufactured, sold, or stored.[1]

Conditions are also distinguished as: *affirmative* or *positive*, prescribing the doing of a positive act, and opposed to such as are *negative;* as *collateral*, regarding some act incidental to another act; as *compulsory*, expressly requiring the doing of an act; as *consistent*, agreeing with each other or others, and opposed to such as are *inconsistent;* as *copulative*, for the doing of related things, and opposed to such as are *single*, for the performance of one thing only; as *disjunctive*, for the doing of one of several things; as *express*, stated in express words, and opposed to such as are *implied*, imposed by inference of law; as *possible*, performable, however difficult, and opposed to such as are *impossible*, or not performable.

Although words in a deed or devise are sufficient to create a condition, the breach of which would forfeit the estate, the courts lean against such a construction, and hold that words which may be treated as a covenant or restriction do not amount to a condition.[2]

See AFTER; CONDONATION; CONTRACT; DEFEASANCE; IF; PERFORMANCE; PROMISE; PROVIDED; REPRESENTATION, 1; SALE; TERM, 2; TRADE; WHEN.

CONDONATION.[3] Forgiveness by a husband or a wife of a breach, in the other, of marital duty.

The free, voluntary, and full forgiveness and remission of a matrimonial offense.[4]

Unless accompanied by that operation of the mind, even cohabitation, without fraud or force, is insufficient to establish condonation.[4]

A mere inference of law from proven facts. It is the remission, by one of the parties, of an offense which the other has committed against the marriage, on condition of being afterward treated with conjugal kindness. While the condition remains unbroken, remedy for the condoned offense is barred. In cases of "connivance" (*q. v.*) no injury is done.[1]

Condonation of cruel treatment is conditioned upon the treatment ceasing.[2] See DIVORCE.

CONDUCT. See BEHAVIOR; DISORDER, 2; ESTOPPEL, Equitable.

A declaration of the result of a popular election may be included in power conferred upon the managers to "conduct" the election.[3]

CONFECTIONER. See MANUFACTURER; SUNDAY.

Selling liquors by the drink is not part of the business of a confectionery, and is not covered by a "confectioner's" license.[4]

CONFEDERACY.[5] A league, or compact; a combination.

1. An improper agreement or combination alleged against defendants in equity: whence "clause of confederacy" in a bill in equity.

2. A (criminal) conspiracy,[6] *q. v.*

3. A political confederation, *q. v.*

CONFEDERATION.[5] A compact. An agreement between states or nations by which they unite for mutual welfare.

Confederation, Articles of. The instrument under which the compact between the Thirteen States was formed.

The full title was "Articles of Confederation and perpetual union between the States of New Hampshire," etc. The Articles were reported July 12, 1776; recommended for adoption November 17, 1777; ratified by eight States July 9, 1778, and by the last State (Maryland) March 1, 1781. The First Congress thereunder met March 2, 1781. The Articles continued in force to March 4, 1789, when the first Congress under the Constitution met.[7] See STATE, 3 (2).

Confederation of Southern States; Confederate States of America. See GOVERNMENT, De facto; MONEY, Lawful; OATH, Of office; STATE, 3 (2); WAR.

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[1] Cowell *v.* Colorado Springs Co., 100 U. S. 57-58 (1879), cases, Field, J. See Camp *v.* Cleary, 76 Va. 143 (1882), cases; Case *v.* Dwire, 60 Iowa, 444 (1883), cases; Smith *v.* Barrie, 56 Mich. 317-20 (1885), cases; Munroe *v.* Hall, 97 N. C. 210 (1887). In wills, see Webster *v.* Morris, 66 Wis. 366-68 (1886), cases; 19 Cent. Law J. 122-26, 462-67 (1884), cases; 20 Alb. Law J. 4-8 (1884), cases.

[2] Adams *v.* Valentine, 33 F. R. 4 (1887), cases, Wallace, J.

[3] L. *condonare*, to remit, pardon.

[4] Betts *v.* Betts, 2 Robt. 696 (N. Y., 1864), Barbour, J.

[1] [2 Bish. Mar. & Div. §§ 33-34; 1 *id.* § 95 a. See also Morrison *v.* Morrison, 142 Mass. 362-65 (1886), cases; 23 Ark. 615; 23 Ga. 296; 73 Ill. 500; 34 Ind. 369; 60 *id.* 258; 140 Mass. 528; 32 Miss. 289; 8 Oreg. 294.

[2] Rose *v.* Rose, 87 Ind. 481 (1882). See generally Ohio Law J., Aug. 23, 1884.

[3] Blake *v.* Walker, 23 S. C. 526 (1885).

[4] New Orleans *v.* Jans, 34 La. An. 667 (1882).

[5] L. *con-fœderare*, to unite by covenant: *fœdus*, a league.

[6] See State *v.* Crowley, 41 Wis. 284 (1876).

[7] See R. S. p. 7; 1 Story, Const. § 226; Owings *v.* Speed, 4 Wheat. 420 (1820); 1 Bancroft, Const. 3-113 (1884).

CONFESSIO. L. Acknowledgment; admission; confession.

Confessio facti. Admission of a fact. **Confessio juris.** Admission of the law — of the effect of a thing in law.

The latter is not received in evidence, for the party may not know the legal effect of a thing, as of an instrument.[1] See DECREE, Pro confesso; IGNORANCE.

CONFESSION. Acknowledgment; admission.

1. In civil law, the admission of a fact as true, existing, binding, or valid.

Confession and avoidance. The act or proceeding by which a party admits the truth of an allegation he proposes to answer, and then states matter intended to avoid the legal inference which may be drawn from the admission.

Some pleas of this sort are in justification or excuse — show that the plaintiff never had any right of action, because the act charged was lawful; while other pleas are in discharge — show that a right of action once existed, but that it is released by some subsequent matter.[2] See AVOID, 2; COLOR, 2; MATTER, 3, New.

Confession of action. A plea confessing the complaint, in whole or in part.[3]

An admission of a cause of action, as alleged in the declaration, to the extent of its terms.[4]

Confession of judgment. A voluntary submission to the jurisdiction of the court, giving, by consent and without the service of process, what could [might] otherwise be obtained by complaint, summons, and other formal proceedings.[5] See ATTORNEY, Warrant of; COGNOVIT.

2. In criminal law, acknowledgment of guilt.[6]

Direct, indirect, or incidental confession. An acknowledgment of criminal intent, made like an "implied admission" (*q. v.*) in civil cases.[7]

Judicial confession. A confession made before a magistrate or in a court, in the course of legal proceedings. **Extra-judicial confession.** Such as is made elsewhere than before a magistrate or in court; and embraces not only explicit and *express* confessions of crime, but all admissions from which guilt may be implied.[1]

Naked confession. A confession uncorroborated by other proof of the *corpus delicti*.[2]

Voluntary confession. The presumption is that all confessions are voluntary: free from promise or threat. The state of mind must be brought about by the accused's own independent reasoning.[3]

A confession, when the free prompting of a guilty conscience, unincited by hope or fear, is evidence. It is receivable although obtained by artifice, by liquor given, or under promise of some collateral good, or made to a physician, parent, or spiritual adviser. At common law, an attorney is the only protected confidant.[4]

The practice is to inquire of the witness whether the prisoner had been told, in effect, that it would be better for him to confess, or worse for him if he did not confess. The judge, exercising a legal discretion, and governed by extreme caution, receives or rejects the proposed proof.[5] See further ACCOMPLICE; ADMISSION, 2; COMMUNICATION, Privileged, 1.

CONFESSIONAL. See COMMUNICATION, Privileged, 1.

CONFIDENCE. See COMMUNICATION; CREDIT; FAITH; FIDUCIARY; TRUST, 1; USE, 3.

CONFINEMENT. See PRISON.

CONFIRMATION. Making firm what was before infirm.[6]

1. Affirmation; ratification, *q. v.*

2. A secondary or derivative conveyance, defined by Coke to be "a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased."[7]

3. The judicial sanction of a court: as, the confirmation of a sale.[8]

A decree of confirmation upon a judicial sale is a judgment of the court, which determines the rights of the parties. Before confirmation, the whole proceed-

[1] 1 Greenl. Ev. §§ 96, 208.

[2] Steph. Pl. 72, 79, 229; 1 Chitty, Pl. 540; 2 *id.* 644; 3 Bl. Com. 310; 31 Conn. 177.

[3] [3 Bl. Com. 303, 307.

[4] Hackett *v.* Railroad Co., 35 N. H. 397 (1857).

[5] First Nat. Bank of Canandaigua *v.* Garlinghouse, 53 Barb. 619 (1868).

[6] 1 Greenl. Ev. § 170.

[7] 1 Greenl. Ev. § 214.

[1] [1 Greenl. Ev. § 216; 1 Cliff. 23; 28 Mo. 230.

[2] 1 Greenl. Ev. § 217.

[3] Commonwealth *v.* Sego, 125 Mass. 213 (1878); Speer *v.* State, 4 Tex. Ap. 479-86 (1878), cases; People *v.* McGloin, 91 N. Y. 247 (1883).

[4] 1 Greenl. Ev. ch. XII.

[5] 1 Greenl. Ev. § 219. And see Hopt *v.* Utah, 110 U. S. 584-87 (1884), cases; 4 Bl. Com. 357; 1 B. & H. Lead. Cr. Cas. 112, note; 59 Cal. 457; 68 Ga. 663; 34 La. An. 17-18; 89 N. C. 629.

[6] [Coke, Litt. 295.

[7] 2 Bl. Com. 325; 1 Inst. 295; Litt. §§ 515, 516, 531; Langdeau *v.* Hanes, 21 Wall. 530 (1874).

[8] Langyher *v.* Patterson, 77 Va. 473 (1883).

ing is *in fieri*, and under the control of the court. Until confirmation, the accepted bidder is not regarded as the purchaser. Whether the sale will be confirmed depends upon the circumstances of each case, and the sound discretion of the court in view of fairness, prudence, and the rights of all concerned.[1]

CONFISCATE.[2] To transfer property from private to public use; to forfeit property to the prince or state.[3]

Usage tends to confine the word to seizures of property by way of punishment of a breach of allegiance, or in the exercise of rights given by the laws of war.[4]

"Confiscation" is the act of the sovereign against a rebellious subject. "Condemnation" as prize is the act of a belligerent against another belligerent. Confiscation may be effected by such means, summary or arbitrary, as the sovereign, expressing its will through lawful channels, may please to adopt. Condemnation as prize can only be made in accordance with principles of law recognized in the common jurisprudence of the world. Both are proceedings *in rem*, but confiscation recognizes the title of the original owner to the property, while in prize the tenure of the property is qualified, provisional, and destitute of absolute ownership.[5]

Confiscation Acts of 1861 and 1862. The act of August 6, 1861, and the act of July 17, 1862.[6]

Made in exercise of the war powers of the Government. The right to make such laws exists alike in civil and foreign war. Congress determines what property shall be taken.[7]

The proceedings are justified as an exercise of belligerent rights against a public enemy, and are not a punishment for treason. Hence, the pardon of an act of treason will not restore rights of property previously condemned.[8]

The act of 1862, as explained by a resolution of the same date, provided that forfeiture of realty should not extend beyond the life of the offender. Passing this act was an exercise of war powers, not a criminal proceeding.[9] Its design was to strengthen the Government and to enfeeble the enemy by taking from the adherents of that enemy the power to use their property in aid of the hostile cause. It provided for the seizure and condemnation of the life-estate, with the fee left in the heirs.[1]

The act of 1861 made property a lawful subject of capture and prize. The object of the act of 1862 was to confiscate the property of traitors by way of punishment for countenancing the rebellion.[2]

The act of 1862, generally known as *the* Confiscation Act, and the joint resolution of the same day explanatory thereof, must be construed together. In a sale of property thereunder, all that could be sold was a right to the property seized, terminating with the life of the offender. Such sale does not affect the rights of a mortgagee in favor of a third person. The property goes to the Government or to the purchaser *cum onere*.[3]

Debts and credits, which are intangible, are nowhere confiscated.[4] See ATTAINDER; PARDON; PROHIBITION, 2; WAR.

CONFLAGRATION. See FIRE, Department; NECESSITY; TAKE, 8.

CONFLICT. Striking together; meeting in collision; opposition, as of authority, interest, jurisdiction, titles.

Conflict of laws. Opposition of laws upon the same object, whether of the same or of different jurisdictions.

As between different States, there is more or less disagreement in the laws relating to marriage and divorce, legitimacy, pending suits, judgments, intestate estates, assignments by insolvents, bills and notes, remedies, and some other subjects.

The laws of each State affect all persons, property, contracts, acts and transactions within its boundaries. Foreign laws are allowed to bind foreign-made transactions unless they injuriously affect citizens, violate statutes, or are opposed to good morals or public policy. Realty is governed by the law of the place where it is situated; personalty, by the law of the owner's domicil.[5]

See COMITY; COMMERCE; LAW, Foreign; MARSHAL, 1, (2); PLACE, Of contract, delivery, payment; PROPERTY; REPEAL.

CONFORMITY. Agreement; adjustment.

A bill in equity filed by an executor or administrator, when he finds the affairs of the estate so much involved that he cannot safely administer the estate except under the

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[1] Brock *v.* Rice, 27 Gratt. 815-16 (1876), cases; Terry *v.* Coles's Executor, 80 Va. 702-7 (1885), cases.

[2] L. *confiscare*, to transfer to the public purse: *fiscus*, a purse.

[3] Ware *v.* Hylton, 3 Dall. 234 (1796); 12 Mo. Ap. 234.

[4] See 1 Bl. Com. 299; 1 Kent, 52.

[5] Winchester *v.* United States, 14 Ct. Cl. 48 (1879), Davis, J.

[6] 12 St. L. 319, 590.

[7] Miller *v.* United States, 11 Wall. 308, 312-13 (1870); Alexander's Cotton, 2 *id.* 419 (1864).

[8] Semmes *v.* United States, 91 U. S. 27 (1875).

[9] Bigelow *v.* Forrest, 9 Wall. 350, 338 (1869); Miller *v.* United States, 11 *id.* 304, 268 (1870); Day *v.* Micou, 18 *id.* 160 (1873).

[1] Wallach *v.* Van Riswick, 92 U. S. 207 (1875); Waples *v.* Hays, 108 *id.* 8 (1882).

[2] Kirk *v.* Lynd, 106 U. S. 319 (1882); Phœnix Bank *v.* Risley, 111 *id.* 125 (1884).

[3] Shields *v.* Schiff, 124 U. S. 356 (1888), Bradley, J.; Avegno *v.* Schmidt, 35 La. An. 585 (1883): 113 U. S. 300 (1885).

[4] 1 Kent, 64-65. See further 4 Cranch, 415; 6 *id.* 286; 8 *id.* 122, 128; 13 Wall. 351; 15 *id.* 591; 20 *id.* 92; 2 Dill. 555; Chase, Dec. 259; 111 U. S. 125, 52; 96 *id.* 176.

[5] See Story, Wharton, Conf. of Laws.

direction of court, is called a "bill of conformity."[1]

The suit is against the creditors generally, for the purpose of having all their claims adjusted, and a final decree made settling the order and payment of the assets.

So called because the plaintiff undertakes to "conform" to the decree, or because the creditors are compelled to conform thereto.[1]

CONFRONT. To bring face to face.

The constitutional provision that the accused shall be "confronted with the witnesses against him" means that the witnesses on the part of the State shall be personally present when the accused is on trial;[2] or that they shall be examined in his presence, and be subject to cross-examination by him.[3]

If witnesses are absent by the procurement of the accused, competent evidence of the testimony they gave on a previous trial will be received.[4]

A person accused of a crime is deprived of his right of appearing in person and of being confronted with the witnesses against him if the jury view the *locus in quo* without his presence.[5] See DECLARATION, 1, Dying.

CONFUSION. Mixing, intermixture; intermingling, blending; confounding.

Confusion of boundaries. Where the boundary lines of different titles are conflicting, disputed, or uncertain; also, that branch of equity jurisprudence which ascertains such boundaries, *q. v.*

Confusion of debts. The concurrence of two adverse rights to the same thing in one and the same person.[6]

Confusion of goods. Intermixture of the goods of different owners so that the separate properties are indistinguishable.

Applies to the mixing of chattels of one and the same general description. "Accession" (*q. v.*) is where various materials are united in one product.[7]

He who causes a confusion of goods must bear whatever loss or disadvantage results.

The general rule that governs cases of intermixture of property has many exceptions. It applies in no case where the goods intermingled remain capable of identification, nor where they are of the same quality or value; as where guineas are mingled, or grain of the same quality. Nor does the rule apply where the intermixture is accidental, or even intentional, if not wrongful. All authorities agree, however, that if a man willfully and wrongfully mixes his own goods with those of another owner, so as to render them indistinguishable, he will not be entitled to his proportion, or any part, of the property; certainly not, unless the goods of both owners are of the same quality and value. Such intermixture is a fraud. And so, if a wrong-doer confounds his own goods with goods which he suspects may belong to another, and does this with intent to mislead or deceive that other, and embarrass him in obtaining his right, the effect must be the same. . . . Even where the articles are of the same kind and value, the wronged party has a right to the possession of the entire aggregate, leaving the wrong-doer to reclaim his own, if he can identify it, or to demand his proportional part. So held where bales of cotton, of different weight and grade, were purposely intermixed to render identification of particular bales impracticable.[1]

Confusion of rights or titles. In civil law, when titles to the same property unite in the same person.

"Confusion" in the civil law is synonymous with "merger" in the common law.[2]

CONGEABLE.[3] Permissible; done lawfully.

"If his entry were congeable, it will be considered as limited by his right."[4]

CONGREGATION. An assemblage or union of persons for a religious purpose.[5]

A voluntary association of individuals or families, united for the purpose of having a common place of worship, and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances.[6] See CHURCH.

CONGRESS. See CONSTITUTION.

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[7]

"The House of Representatives shall be composed of Members chosen every second Year by the

[1] 1 Story, Eq. §§ 544–45.

[2] Westfall *v.* Madison Co., 62 Iowa, 427 (1883).

[3] Howser *v.* Commonwealth, 51 Pa. 338 (1865).

[4] Reynolds *v.* United States, 98 U. S. 158–60 (1878), cases; United States *v.* Angell, 11 F. R. 43 (1881); 34 La. An. 121.

[5] People *v.* Lowrey, 70 Cal. 198 (1886).

[6] Woods *v.* Ridley, 11 Humph. 198 (1840); Story, Prom. Notes, § 439.

[7] 1 Schouler, Pers. Prop. 41, 40–54.

[1] The Idaho, 93 U. S. 585–86 (1876), cases, Strong, J. See also Jewett *v.* Dringer, 30 N. J. E. 291–311 (1878), cases; Queen *v.* Wernwag, 97 N. C. 393 (1887); 11 Wall. 369; 21 *id.* 64; 1 Saw. 306; 14 Ala. 695; 44 *id.* 609; 81 Ill. 293; 36 *id.* 150; 12 Me. 243; 56 *id.* 566; 8 Md. 301; 21 Pick. 298; 6 Gray, 134; 14 Allen, 376; 107 Mass. 123; 10 Mich. 423; 22 *id.* 311; 31 *id.* 215; 25 Minn. 88; 12 Mo. Ap. 284–85; 33 N. H. 423; 39 *id.* 557; 57 *id.* 514; 10 N. Y. 213; 24 *id.* 595; 6 Hill, 461; 24 Pa. 246; 20 Wis. 615; 20 Vt. 333; 2 Bl. Com. 405; 2 Kent, 365.

[2] Palmer *v.* Burnside, 1 Woods, 183 (1871).

[3] Cŏn'-ge-able. F. *congé*, leave: L. *commeare*, to go and come.

[4] Ricard *v.* Williams, 7 Wheat. 107 (1822), Story, J.; Litt. § 279.

[5] [Runkel *v.* Winemiller, 4 H. & M'H. 459 (1799).

[6] Baptist Church of Hartford *v.* Witherall, 3 Paige, Ch. 301 (1832), Walworth, Ch.

[7] Constitution, Art. I, § 1. On the powers of Congress, see 2 Bancroft, Const. VII, VIII; *ib.* abr. ed. 222–225 (1884),—summarizes the discussions in the original constitutional convention.

People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." [1]

"No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." [2]

"Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . . excluding Indians not taxed. . ." [3]

"When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." [4]

"The House of Representatives shall chuse their Speaker and other Officers. . ." [5]

"The Senate shall be composed of two Senators from each State chosen by the Legislature thereof, for six years; and each Senator shall have one vote." [6]

One-third of the Senators are chosen every second year. "If Vacancies happen by Resignation or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." [7]

"No Person shall be a Senator who shall not have attained the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." [8]

"The Vice President . . . shall be President of the Senate, but shall have no Vote, unless they be equally divided." [9]

"The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States." [10]

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." [11]

"The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day." [12]

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide." [1]

"Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two-thirds, expel a Member." [2]

"Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of each House on any question shall, at the Desire of one-fifth of those Present, be entered on the Journal." [3]

"Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting." [4]

"The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." [5]

"No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any office under the United States, shall be a member of either House during his Continuance in Office." [6]

"All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur in Amendments as on other Bills." [7]

It is provided by statute that Representatives shall be chosen in single districts; [8] and that the elections shall take place on the Tuesday next after the first Monday of November. [9] Vacancies are filled as may be provided by State laws. [10] Votes must be by written or printed ballot: other votes are of no effect. [11]

For the election of Senators it is provided that the legislature of each State, chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress, shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator. [12] At least one

[1] Constitution, Art. I, § 2, cl. 1.
[2] Constitution, Art. I, § 2, cl. 2.
[3] Constitution, Art. I, § 2, cl. 3.
[4] Constitution, Art. I, § 2, cl. 4.
[5] Constitution, Art. I, § 2, cl. 5.
[6] Constitution, Art. I, § 3, cl. 1.
[7] Constitution, Art. I, § 3, cl. 2.
[8] Constitution, Art. I, § 3, cl. 3.
[9] Constitution, Art. I, § 3, cl. 4.
[10] Constitution, Art. I, § 3, cl. 5.
[11] Constitution, Art. I, § 4, cl. 1.
[12] Constitution, Art. I, § 4, cl. 2.

[1] Constitution, Art. I, § 5, cl. 1.
[2] Constitution, Art. I, § 5, cl. 2.
[3] Constitution, Art. I, § 5, cl. 3.
[4] Constitution, Art. I, § 5, cl. 4.
[5] Constitution, Art. I, § 6, cl. 1.
[6] Constitution, Art. I, § 6, cl. 2.
[7] Constitution, Art. I, § 7, cl. 1.
[8] R. S. § 23: Acts 2 Feb., 30 May, 1872.
[9] R. S. § 25: Acts 2 Feb., 1872, 3 March, 1875.
[10] R. S. § 26: Act 2 Feb., 1872.
[11] R. S. § 27: Acts 28 Feb., 1871, 30 May, 1872; 76 Mo. 146.
[12] R. S. § 14: Act 25 July, 1866.

vote must be taken every day, during the session, until a person is chosen.[1] An existing vacancy is filled at the same time and in the same way;[2] and a vacancy occurring during the session is filled by election, the proceedings for which are had on the second Tuesday after the legislature has organized and has had notice of the vacancy.[3]

When Congress convenes, the president of the Senate administers the oath of office to its members;[4] and takes charge of the organization. The clerk of the preceding House of Representatives makes a roll of the Representatives-elect, and places thereon the names of those persons whose credentials show that they were regularly elected in accordance with the law.[5] If the clerk cannot serve, from sickness, absence, etc., the sergeant-at-arms of the preceding House performs this duty.[6]

In 1866 the salary of members of Congress was fixed at $5,000, and mileage, by the most usual route, at twenty cents a mile. In 1873 the salary was raised to $7,500; and in 1874 reduced to $5,000.[7]

See further, as to powers, such subjects as ACT, 3; BANKRUPTCY; CENSUS; COMMERCE; COIN; CONFEDERATION; CONTEMPT, 2; COPYRIGHT; COURTS, United States; DUTIES; ELECTORAL; FRANK; IMPEACH, 4; JOURNAL; LAND, Public; LOBBY; MARQUE; NATURALIZE; OATH, Of office; PATENT, 2; PIRACY, 1; POST-OFFICE; PRESIDENT; REVENUE; SWEEPING CLAUSE; TENDER, 2, Legal; TENURE, Of office; TERRITORY, 2; TREATY; VETO; WAR; WEIGHTS; WELFARE; YEAS AND NAYS.

CONJUNCTIVE. See DISJUNCTIVE.

CONJURATION. See WITCHCRAFT.

CONNECTING. See CONNECTION, 1.

CONNECTION. 1. "Railroad connection" means either such a union of tracks as to admit the passage of cars from one road to another, or such intersection of roads as to admit the convenient interchange of freight and passengers.[8]

The word conveys no implication of a right to connect business with business.[9]

The "connections" of a steamer, referred to in a policy of insurance, may refer to regular connections only.[10]

Connecting line. In the sense of the Georgia act of 1874, is where any railroad at its terminus, or any intermediate point along its line, joins another, or where two railroads have the same terminus; or where a railroad is adjacent to another and capable of being joined to it by a switch, either at its terminus or where ever along its line they meet or converge, and the right is given to make such connection, whether it be voluntarily granted or not.[1] See COMMERCE.

2. Any relation by which one society is linked or united to another.[2]

3. "Connections" is more vague than "relations." In popular phrase, a wife's relations are her husband's connections; but connections, unless they are also relations, never take by the statute of distributions.[3] See RELATION, 3.

4. "Guilty connection," applied to a man and a woman, imports carnal connection.[4]

CONNIVANCE.[5] Intentional failure or forbearance to see or actually know that a tort or offense is being committed; willful neglect to oppose or prevent; specifically, assent or indifference, by a husband, to immoral behavior by his wife.

It has been repeatedly held, under 20 and 21 Vict. (1857), c. 85, and similar statutes in this country, that a husband's connivance at his wife's prostitution bars subsequent complaint or cause of action on his part. The connivance need not be active: it is sufficient if it be made to appear that there has been a course of criminal conduct of which he actually was or must have been cognizant. Total indifference may justify inference of original consent.

It has also been held that if he once consents to her fall from virtue he cannot complain of any other act naturally resulting from such fall; but that doctrine carried too far would deprive a man of all hope, however repentant he may be, and however he may strive to win his wife to repentance. No authority decides that, under all circumstances, connivance at one act is an absolute bar to a divorce for a prior act as to which consent was not given, expressly or by implication.[6]

To be a bar to a decree for divorce the fact must appear that the libelant either desired and intended, or at least was willing, that the libelee should err. "A corrupt intention," it has been said, "is necessary to constitute connivance."[7]

See COLLUSION; CONDONATION; CRIME, Recriminate; DIVORCE; VOLO, Volenti, etc.

CONSANGUINITY.[8] The connection or relation of persons descended from the same stock or common ancestor;[9] blood-relationship. Opposed, *affinity*, q. v.

[1] R. S. § 15: Act 25 July, 1866.
[2] R. S. § 16: Act 25 July, 1866.
[3] R. S. § 17: Act 25 July, 1866.
[4] R. S. § 28: Act 1 June, 1798.
[5] R. S. § 31: Acts 21 Feb., 1867, 3 March, 1868.
[6] R. S. §§ 32-33: Act 21 Feb., 1867.
[7] R. S. § 35: Act 26 July, 1866, 3 Mar., 1873, 20 Jan., 1874.
[8] Philadelphia, &c. R. Co. *v.* Catawissa R. Co., 53 Pa. 90, 59 (1866); 60 Md. 269.
[9] Atchison, &c. R. Co. *v.* Denver, &c. R. Co., 110 U. S. 676-79 (1884).
[10] Schroeder *v.* Schweizer Lloyd Mar. Ins. Co., 60 Cal. 478 (1882).

[1] Logan *v.* The Central R. Co., 74 Ga. 684, 693 (1885).
[2] [Allison *v.* Smith, 16 Mich. 433 (1868).
[3] Storer *v.* Wheatley, 1 Pa. 507 (1845), Gibson, C. J.
[4] State *v.* Georgia, 7 Ired. L. 324 (1847).
[5] L. *con-nivere*, to close the eyes, wink at.
[6] Morrison *v.* Morrison, 142 Mass. 363-65 (1886), cases.
[7] Robbins *v.* Robbins, 140 Mass. 530-31 (1885), cases. See also 2 Bishop, Mar. & D. § 17; 34 Am. Law Reg 98-100 (1886), cases.
[8] L. *consanguineus: con*, together; *sanguis*, blood.
[9] 2 Bl. Com. 202.

Consanguinei. Blood relations.

Consanguineal; consanguineous. Of the same blood or ancestor.

The subject is of importance in the law of inheritance and marriage.

Lineal consanguinity. Subsists between persons of whom one is descended in a direct line from the other. **Collateral consanguinity.** Subsists between persons who descend from the same stock or ancestor, but not one from the other.[1]

The common ancestor is the *stirps* or root, the *stirpes*, trunk or common stock, whence the relations branch out.[1]

The method of computing degrees in the *canon law*, adopted into the common law, is, to begin at the common ancestor (*propositus*) and reckon downward: and in whatever degree the two persons or the most remote is distant from the common ancestor, that is the degree in which they are related. The method in the *civil law* is to count upward, from either of the persons related, to the common stock, and then downward to the other, reckoning a degree for each person both ascending and descending.[2]

The canonists take the number of degrees in the longest line; the civilians, the sum of the degrees in both lines.[2]

The canon law rule prevails in the United States.

See ANCESTOR; DESCENT; INCEST.

CONSCIENCE. The moral sense; the sense of right and justice.

Many violations of natural justice are left wholly to conscience, and are without redress, equitable or legal.[4]

Human laws are not so perfect as the dictates of conscience, and the sphere of morality is more enlarged than the limits of civil jurisdiction. There are many duties, belonging to the class called "imperfect obligations," which are binding on conscience, but which human laws do not and cannot undertake to enforce directly. When the aid of a court of equity is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway.[4]

See RIGHT, 1; FAITH.

Conscience of the court. To "inform the conscience of the court" is to furnish a court such data as will enable it to decide a matter discreetly and equitably.

Thus, the verdict of a jury out of chancery is intended to inform the conscience of the chancellor.[5]

Court of conscience. The title of a court for the recovery of debts not exceeding forty shillings, formerly existing in some districts of England, as, in London, for the benefit of trade.

Examinations were summary, on the oath of the parties and witnesses. Such order was made as seemed consonant with equity and conscience. In 1846 jurisdiction was transferred to the county courts.[1]

Rights of conscience. The constitutional declaration that "no human authority can control or interfere with the rights of conscience," refers to the right to worship the Supreme Being according to the dictates of the heart: to adopt any creed or hold any opinion on the subject of religion; and, for conscience sake, to do, or to forbear to do, any act not prejudicial to the public weal.[2]

Where liberty of conscience would impinge on the paramount right of the public it ought to be restrained. . . There are few things, however simple, that stand indifferent in the view of all the sects.[3]

"The constitution of this State secures freedom of conscience and equality of religious right. No man can be coerced to profess any form of religious belief or to practice any peculiar mode of worship, in preference to another. Beyond this, conscientious doctrines and practices can claim no immunity from the operation of general laws made to promote the welfare of the whole people. So long as no attempt is made to force upon others the adoption of a belief, so long is conscience left in the enjoyment of its natural right of individual decision."[3]

See further BLASPHEMY; CONSCIONABLE; EQUITY; HOLIDAY; RELIGION; SUNDAY.

CONSCIONABLE. In accord with strict honesty and justice: as, a conscionable appraisement or inventory of the articles of a decedent's estate. **Unconscionable.** Contrary to probity, fair-dealing, or what a fair-minded man would do or refrain from doing: as, an unconscionable contract or bargain, *q. v.*

Conscionable is an ill-contrived word: from conscience-able, or conscible (not now in use).[4]

CONSCIOUS. The expression, in a charge, "conscious of what he (a prisoner alleged to be insane) was doing," refers to the real nature, the true character, of the act as a crime, not to the mere act itself.[5]

CONSENSUAL. See CONSENT.

CONSENSUS. L. Perceiving or feeling alike; agreement; consent.

Consensus facit legem. Consent makes the law: the terms of a contract, lawful in

[1] [2 Bl. Com. 203–4; 45 Pa. 432.

[2] 2 Bl. Com. 206–7.

[3] 4 Kent, 412; 2 Coke, Litt. *158; 1 Williams, Ex. 364; 45 Pa. 432–33.

[4] 1 Story, Eq. §§ 14, 2.

[5] 2 Kent, 490; 1 Story, Eq. § 306; 1 Johns. Ch. 630.

[6] Watt v. Starke, 101 U. S. 252 (1879).

[1] See 3 Bl. Com. 81.

[2] Commonwealth v. Lesher, 17 S. & R. 160 (1827), Gibson, C. J.

[3] Specht v. Commonwealth, 8 Pa. 322 (1848).

[4] Skeat, Etym. Dict.

[5] Brown v. Commonwealth, 78 Pa. 128 (1875).

its purposes, constitute the law as between the parties.

Consensus, non concubitus, facit matrimonium. Consent, not intercourse, creates marriage.

Consensus tollit errorem. Consent removes error: the effect of a mistake is obviated or waived by concurrence.

Applies to an irregularity or a matter of mere form in procedure. A defect in substance, pleaded over, is still demurrable.[1]

Also applies to voluntary payments of illegal exactions, where recovery could have been prevented.[2]

Qui tacet consentire videtur. He who is silent is regarded as consenting: silence gives consent.

A man who is fully aware of what is being done against his interest cannot remain passive and afterward resist the disadvantage his silence has caused.[3] Nor can a person complain of the effect of words uttered in his presence, when he should have denied their truth.[4]

The maxim is to be construed as applying only to those cases where the circumstances are such that a party is fairly called upon to deny or to admit his liability. But if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak.[5] See ESTOPPEL; SILENCE.

CONSENT. Agreement of mind; concurrence of wills; approval. Compare ASSENT; CONSENSUS.

An agreement of the mind to what is proposed or stated by another.[6]

The synonym of assent, acquiescence, concurrence; agreement or harmony of opinion or sentiment.[7]

Implies assent to some proposition submitted. In cases of contract, means the concurrence of wills. Supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers.[8]

The theory of the law in regard to acts done and contracts made by parties, affecting their rights, is, that in all cases there must be a free and full consent to bind the parties. Consent is an act of the reason, accompanied with deliberation. . . Hence, if consent is obtained by meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind. . . Upon this ground the acts of a person *non compos mentis* are invalid.[1]

Consent rule. See EJECTMENT.

Consensual. 1. Formed by mere consent.

In civil law, a contract of sale is consensual; not so a contract of loan. In the case of a sale, upon consent given, the parties have reciprocal actions; in the case of a loan, there is no action till the thing is delivered.[2]

2. In the sense of resting upon mere consent, all contracts, except marriage, may be said to be consensual.

See ACQUIESCENCE; AGE; DECREE; DURESS; RATIFICATION.

CONSEQUENCES. Persons of sound mind are held to intend whatever are the natural and necessary consequences of their acts: they are supposed to know what these consequences will be.

Experience has shown the rule to be a sound one, and one safe to be applied in criminal as well as in civil cases. Exceptions to it undoubtedly arise, as where the consequences likely to flow from the act are not matters of common knowledge, or where the act or the consequence is attended by circumstances tending to rebut the ordinary probative force of the act or to exculpate the intent of the agent.[3]

The law does not undertake to charge a person with all the possible consequences of a wrongful act, but only with its probable and natural result; otherwise the punishment would often be disproportioned to the wrong, thereby impeding commerce and the ordinary business of life, and rendering the rule impracticable. Although the damages may arise remotely out of the cause of action, or be, to some extent, connected with it, yet if they do not flow naturally from it, or could not, in the ordinary course of events, have been expected to arise from it, they are not sufficiently proximate to authorize a recovery.[4] See CAUSE, 1; DELIBERATION; INTENT; NEGLIGENCE.

Consequential. See CASE, 8; DAMAGES.

CONSERVATOR. One who preserves, or has the charge of a matter or thing, as, of the peace, *q. v.*

In Connecticut and Illinois, the committee of a lunatic or distracted person.[5]

[1] See Rogers v. Cruger, 7 Johns. *611 (1808); Morrison v. Underwood, 5 Cush. 55 (1849); Cushing v. Worrick, 9 Gray, 386 (1857); Wilkinson's Appeal, 65 Pa. 190 (1870).

[2] Chicago & Northwestern R. Co. v. United States, 104 U. S. 687 (1881).

[3] See 99 U. S. 581; 20 Conn. 98; 41 N. H. 465; 9 Barb. 17; 2 Pars Contr. 759.

[4] 1 Greenl. Ev. § 197.

[5] Day v. Caton, 119 Mass. 515-16 (1876), cases.

[6] Plummer v. Commonwealth, 1 Bush, 78 (1866).

[7] Clem v. State, 33 Ind. 431 (1870).

[8] Howell v. McCrie, 36 Kan. 644 (1887), Simpson, C.

[1] 1 Story, Eq. §§ 222-23.

[2] See Hare, Contracts, 85-86.

[3] Clarion Bank v. Jones, 21 Wall. 337 (1874), Clifford, J. See also Reynolds v. United States, 98 U. S. 167 (1878); 5 Cush. 305; 4 Bl. Com. 197.

[4] Smith v. Western Union Tel. Co., 83 Ky. 115 (1885).

[5] Treat v. Peck, 5 Conn. *280 (1824); Hutchins v. Johnson, 12 *id.* 376 (1837); Nuetzel v. Nuetzel, 13 Bradw. 542 (1883).

The duties of a conservator of the estate of a ward are defined, in a general way, by statute. He acts independently of the ward, and is alone responsible for his acts. Debts incurred by the ward prior to the appointment of the conservator remain claims against the ward alone.[1]

CONSIDERATION.[2] 1. Deliberation, mature reflection.

"It is considered" is equivalent to "it is adjudged" by the court.[3]

The corresponding Latin formula is *consideratum est per curiam*. It imports that a judgment is the act of the law, pronounced by the court, after due deliberation and inquiry.[4]

The phrase is not an essential part of a judgment in a criminal case.[5]

2. That which the party to whom a promise is made does or agrees to do in exchange for the promise.[6]

The reason which moves a party to enter into a contract. . . The civilians hold that in all contracts there must be something given in exchange, something that is mutual or reciprocal. This thing, which is the price or motive of the contract, is called the consideration.[7]

Something esteemed in law as of value in exchange for which a promise is made.[8]

The "motive" for entering into a contract and the "consideration" of the contract are not the same. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking. Expectation of results will not constitute a consideration.[9]

That which one party to a contract gives or does or promises in exchange for what is given or done or promised by the other party.[10]

The proper test is detriment to the promisee. All our "considerations" would be "reasons" (*causæ*) in the Roman law; but it does not follow that all "reasons" — *e. g.*, desire to aid a meritorious object, or to benefit a member of one's own family — are considerations in our sense. And though all "considerations" are reasons, many of them are so slight that as mere reasons they would be entitled to little weight. With us, there must be a material *quid pro quo*, something given or surrendered in return, no matter how slight, to make the promise binding.[10]

Void for want of consideration are: a promise to make a gift, the promisee surrendering nothing; a warranty given after a sale; a promise to pay for unsolicited past services; a promise to pay toward a religious or charitable object, when purely gratuitous; promises to pay debts that have been released.[1]

Any damage to another, or suspension or forbearance, is a foundation for an undertaking, and will make it binding; though no actual benefit accrues to the party undertaking.[2]

It is not absolutely necessary that a benefit should accrue to the person making the promise. It suffices that something valuable flows from the person to whom it is made; and that the promise is the inducement to the transaction. In the case of a letter of credit given by A to B, the person who, on the faith of that letter, trusts B, has a remedy against A although no benefit accrued to him.[3]

Damage to the promisee constitutes as good a consideration as benefit to the promisor.[4]

Any benefit, delay, or loss to either party. More fully, either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made.[5]

If there is a benefit to the defendant or a loss to the plaintiff consequent upon and directly resulting from the defendant's promise in behalf of the plaintiff, there is a sufficient consideration moving from the plaintiff to enable him to maintain an action upon the promise to recover compensation.[6]

A valuable consideration may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.[7]

"Any damage or suspension of a right, or possibility of a loss occasioned to the plaintiff by the promise of another, is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrues to the party promising." This rule is sustained by a long series of adjudged cases.[8]

The performance of gratuitous promises depends wholly upon the good-will which prompted them, and will not be enforced by the law. The rule is that, to support an action, the promise must have been made upon a legal consideration moving from the promisee to the promisor. To constitute such consideration there must be either a benefit to the maker of the promise, or loss, trouble, or inconvenience to, or a charge or obligation resting upon, the party to whom the promise is made.[9]

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[1] Brown *v.* Eggleston, 53 Conn. 119 (1885).

[2] L. *considerare*, to view attentively.

[3] Terrill *v.* Auchauer, 14 Ohio St. 85 (1862).

[4] 3 Bl. Com. 396, 180.

[5] Staff *v.* Lake, 34 La. An. 1070 (1882); State *v.* Bassett, *id.* 1110 (1882); 39 Wis. 393.

[6] Phœnix Life Ins. Co. *v.* Raddin, 120 U. S. 197 (1887), Gray, J.

[7] [2 Bl. Com. 443.

[8] [Bishop, Contr. § 38, citing definitions.

[9] Pnupot *v.* Gruninger, 14 Wall. 377 (1871), Strong, J.

[10] 1 Whart. Contr. § 498.

[1] 1 Whart. Contr. §§ 494-95.

[2] Pillans *v.* Van Mierop, 3 Burr. 1673 (1765), Yates, J.

[3] Violett *v.* Patton, 5 Cranch, 150 (1809), Marshall, C. J.

[4] Townsley *v.* Sumrall, 2 Pet. 182 (1829), Story, J.; United States *v.* Linn, 15 *id.* 314 (1841).

[5] 2 Shars. Bl. Com. 443 (1859).

[6] Platt *v.* United States, 22 Wall. 507 (1874), Clifford, J

[7] Currie *v.* Misa, L. R., 10 Ex. 162 (1875), Lush, J.

[8] Hendrick *v.* Lindsay, 93 U. S. 143 (1876), Davis, J Purports to quote Pillans *v.* Van Mierop, *supra*.

[9] Cottage Street M. E. Church *v.* Kendall, 121 Mass

A valuable consideration may consist either in some right, interest, profit, or benefit accruing to the one party, or some extension of time of payment, detriment, loss, or responsibility given, suffered, or undertaken by the other.[1]

Executed consideration. An act already done, or value already given; a consideration already received or wholly past.

Executory consideration. A promise to do or to give something in the future; a consideration to be rendered.[2]

Good consideration. That of blood, or natural affection between near relatives.

Valuable consideration. Money, marriage, work done, services rendered, or the like.

Each is viewed as an equivalent. The former is founded in motives of generosity, prudence, and natural duty; the latter in motives of justice.[3]

"Good consideration" sometimes means a consideration which is valid in point of law; and it then includes a meritorious, as well as a valuable, consideration. But it is more often used in contradistinction to valuable consideration.[4]

By "consideration" as defined to be any benefit, delay, or loss to either party to a contract, is all that is meant by "valuable consideration." The distinction between "good" and "valuable" consideration is largely speculative.[5]

Moral consideration. The duty to perform, voluntarily, an obligation which is no longer enforceable in law.

This is sufficient to support an executed contract; and it will serve as a consideration for a new promise: as, a promise to pay a debt contracted in infancy, or outlawed, or discharged by a decree in bankruptcy. In such cases the moral duty was once a legal duty.[6]

The duty to perform a positive promise, not contrary to law or public policy, or obtained by fraud or mistake, is an obligation in morals, and a sufficient consideration for an express promise.[7] See OBLIGATION, 1.

Considerations are also distinguished as: *concurrent*, such as arise at the same time, or under promises made simultaneously; as *continuing*, executed in part only; as *entire*, incapable of division or severance, unapportionable — if part is illegal, all is illegal; as *equitable*, based upon moral duty, moral; as *express*, stated in words, oral or written; as *gratuitous*, founded on no detriment to the promisee;[1] as *implied*, not stated in words, yet regarded in law as the consideration; as *legal*, valid in law, and as opposed to such as is *illegal, invalid, immoral;*[2] as *impossible*, such as, in the nature of things, cannot be performed, and not such as is merely very difficult;[3] as *nominal*, consisting of a sum or value purely nominal, as that of "one dollar;" and as *sufficient*, such as satisfies the requirement of law.

A valid consideration is absolutely necessary to a contract. An engagement without it is a *nudum pactum*, and totally void; as, a promise to make a gift.[4] The purpose is to prevent the too free-handed, the improvident, the reckless, from binding themselves to the performance of undertakings either wasteful of their means or else affording no reciprocal advantage.[5] But any degree of reciprocity will take an agreement out of this category.[6] See PACT, Nude.

Common examples of valid considerations are: prevention of litigation; forbearance to enforce a well-founded claim; assignment of a debt or right; work and service; trust and confidence; advances made, or liability incurred, in consequence of a subscription of money.

A seal imports a consideration.

Every bond, from the solemnity of the instrument, and every promissory note, from the subscription, carries with it internal evidence that a sufficient consideration has passed.[6]

A good consideration will not avail when the contract tends to defraud creditors or others of their rights. A valuable consideration will always support a contract in a court of common law, and, if adequate, in a court of equity.[7]

However small the consideration, if given in good faith, it will support the contract.[8]

A past consideration will not support a promise unless requested beforehand. A previous request is implied from service accepted or benefits received.[9]

529-30 (1877); cases, Gray, C. J.; University of Des Moines *v.* Livingston, 57 Iowa, 307 (1881).

[1] Nat. Bank of the Republic *v.* Brooklyn City, &c. R. Co., 102 U. S. 46 (1880), Clifford, J. See also 6 Col. 192; 17 Conn. 517; 58 N. H. 443.

[2] See Bishop, Contr. §§ 76-82, cases; Leake, Contr. 18; 1 Story, Contr. § 22; 1 Whart. Contr. § 493.

[3] 2 Bl. Com. 297, 444. See 4 Kent, 464; 1 Story, Eq. § 354; Bishop, Contr. § 42, cases; 58 Ala. 307; 20 Cal. 294-25; 9 Barb. 225.

[4] [1 Story, Eq. § 354. See 3 Cranch, 157.

[5] See 1 Whart. Contr. § 497.

[6] See Bishop, Contr. § 44, cases; 1 Pars. Contr. 431-36; 1 Story, Contr. § 590; 1 Whart. Contr. § 512; Leake, Contr. 86, 615; 2 Bl. Com. 445; 25 How. Pr. 484.

[7] Bentley *v.* Lamb, 112 Pa. 484 (1886): 25 Am. Law Reg. 635-36 (1886), cases.

[1] 1 Whart. Contr. § 494; M. L. Church *v.* Kendall, *ante*.

[2] See 1 Pars. Contr. 479.

[3] [1 Pars. Contr. 460.

[4] See 2 Bl. Com. 445.

[5] See Broom, Philosophy of Law, 38.

[6] See 2 Bl. Com. 446; Whart. Contr. § 498, Smith, Contr. 13.

[7] See 2 Bl. Com. 444, 297.

[8] Lawrence *v.* McCalmont, 2 How. 452 (1844); Bish. Contr. § 45, cases.

[9] 1 Pars. Contr. 427, 474.

A consideration subsequently arising may cure a deed defective for want of a consideration.[1]

The consideration of a written contract may be shown by parol.[2]

As to the parties to a deed, the consideration clause is *prima facie* evidence, with the effect only of a receipt, open to explanation and contradiction, not to defeat the deed as a conveyance, but to show the true consideration.[3]

See further ADEQUATE, 1; CONTRACT; CONVEYANCE, 2, Voluntary; DELIBERATION; FAITH, Good; FORBEARANCE; LEGAL, Illegal; NEGOTIABLE; SECURITY, 1; VALUE, Received; VOID.

CONSIGN.[4] 1. In civil law, for a debtor, under the direction of a court, to deposit with a third person an article of property for the benefit of a creditor.

Consignation. A deposit which a debtor makes, by authority of court, of the thing which he owes, in the hands of a third person.[5]

2. In mercantile law, to send or transmit goods to a merchant or factor for sale. . . The radical meaning of the word, which is of French origin, is to deliver or transfer as a charge or trust.[6]

Modern usage extends the meaning to transmission, by the agency of a common carrier, of merchandise or other movables for custody, sale, etc.

Consignee.[7] The factor or agent to whom merchandise or other personal property is consigned. **Consignor.** He who makes a consignment of personal property.

Consignment. Property intrusted to a common carrier for delivery to a person named in the bill of lading; also, the act or transaction by which the property is transported. See BAILMENT; CARRIER; FACTOR; LADING, Bill of.

CONSIMILI. See CASUS, Consimili.

CONSISTENT. See CONDITION; CUSTOM; REPEAL.

CONSISTING. Is not synonymous with "including," which implies that there may be other objects in the same category, though not specified. The words "consisting of" will be limited to the things specifically mentioned.[1]

The devise "I give all my worldly goods, consisting of household furniture, money, cattle, likewise my house and the lot I now occupy," was held not to pass other realty than that particularly designated.[1]

CONSOLIDATE. To unite or merge into one; to combine; to amalgamate.

To unite into one mass or body, as, to consolidate various funds; to unite in one, as, to consolidate legislative bills.[2]

Consolidation of actions. A direction that one of several pending actions, involving the same facts and issues, shall be tried, the result of the trial to be an adjudication of all the causes; or else that all the actions proceed to trial and judgment as one suit.

Sometimes termed the "consolidation rule."[3]

Allowed in suits against several insurers; in suits on separate promissory notes of the same date; but not in actions upon independent contracts, nor where claims have different guarantees; nor in actions upon distinct penalties.

The United States courts may consolidate actions of a like nature, or relative to the same question, as they deem reasonable.[4]

Consolidation of associations. Union or merger into one, of two or more companies or corporations organized for the same, or for some related, purpose. In England, "amalgamation."

Whether the consolidation of two companies works a dissolution of both, and the creation of a new corporation, depends upon the intention of the legislature.[5]

A sale by one corporation of all of its property to another corporation, is, as against creditors not assenting thereto, fraudulent and void.[6]

When two companies unite or become consolidated under the authority of law, until the contrary appears the presumption is that the united or consolidated company has all the powers and privileges, and is subject to all the restrictions and liabilities, of the companies out of which it was created.[7]

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[1] Jones *v.* N. Y. Guaranty, &c. Co., 101 U. S. 627 (1879).

[2] See 1 Greenl. Ev. §§ 32, 26; 71 Ala. 95; 55 Pa. 504; 37 *id.* 410; 13 R. I. 95.

[3] Allen *v.* Kennedy, 91 Mo. 328 (1886), cases.

[4] L. *con-signare*, to mark, seal: to register, attest. In civil law a consignment of money was sealed up,—Bouvier.

[5] Weld *v.* Hadley, 1 N. H. 304 (1818).

[6] Gillespie *v* Winberg, 4 Daly, 330 (1872), Daly, C. J.

[7] Con-si-nee'; con-sin'-or.

[1] Farrish *v.* Cook, 6 Mo. Ap. 328, 331 (1878).

[2] Indep. District of Fairview *v.* Durland, 45 Iowa, 56 (1876), Seevers, C. J.

[3] See Gould, Plead., IV, s. 108; Cox, Com. L. Pr. 239; 59 Miss. 126.

[4] R. S. § 921; Keep *v.* Indianapolis, &c. R. Co., 3 McCrary, 302 (1882): 10 F. R. 455.

[5] Central R. Co. *v.* Georgia, 92 U. S. 670–76 (1875), cases; Branch *v.* Charleston, *ib.* 677, 682 (1875), cases; Green County *v.* Conness, 109 *id.* 106 (1883); Tyson *v.* Wabash R. Co., 11 Biss. 510 (1883); Woodruff *v.* Erie R. Co., 93 N. Y. 615–16 (1883).

[6] Hibernia Ins. Co. *v.* St. Louis, &c. Transp. Co., 4 McCrary, 432 (1892).

[7] Tennessee *v.* Whitworth, 117 U. S. 147 (1886), cases.

CONSORT. 1. A companion.

Consortship. Fellowship, companionship, *consortium*, q. v.

2. A vessel that keeps company witl. another vessel.

Consort-ship. A contract between owners of wrecking vessels to share mutually with each other moneys awarded as salvage, whether earned by one vessel or by both.[1]

Prevents mischievous competitions, and collisions. When made for an indefinite time, continues until dissolved by notice; not dissolved by mere removal of a master. Enforceable in admiralty, against property or its proceeds in the custody of the court.[1]

CONSORTIUM. L. Union of lots or chances: companionship; society; conjugal fellowship and assistance.

The right which a husband has to the conjugal fellowship of the wife, to her company, coöperation, and aid in every conjugal relation. . . He is not the master of the wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word *consortium*. Some acts of a stranger to the wife are of themselves invasions of the husband's right and necessarily injurious to him; others may or may not injure him, according to their consequences: in which cases the injurious consequences must be proved, and that the husband actually lost her company and assistance.[2]

Per quod consortium amisit. By which he lost her assistance.

For a common battery upon the person of the wife trespass for damages is to be brought by husband and wife jointly; but, if, by reason of the maltreatment, he is deprived of her company and assistance, he has a separate remedy therefor.[3]

CONSPIRACY.[4] A combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means.[5]

The unlawful combination or agreement of two or more persons to do an act unlawful in itself, or to do a lawful act by unlawful means.[6]

When two or more persons, in any manner or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common, unlawful design. . . A combination formed by two or more persons to effect an unlawful end, they acting under a common purpose to accomplish that end.[1]

The combination of two or more persons to do something unlawful, as a means or as an ultimate end. Many acts not indictable come within this definition. It is sufficient if the end proposed, or the means employed, are, by reason of the power of combination, particularly dangerous to the public interests or injurious to some individual, although not criminal.[2]

At common law the gist of the offense is the unlawful agreement. The offense is complete without an overt act — the law punishes the unexecuted intent.[3]

While, by statute, in many of the States, some overt act is necessary, the final result of such act does not vary the legal character of the offense.[4]

As known at common law conspiracy is not defined in any act of Congress as an offense against the United States, nor is it, therefore, cognizable as such in her courts.[5]

The act of Congress of May 17, 1879,[6] which is a substitute for the act of March 2, 1867,[7] provides that: "If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner for any purpose, and one or more of such parties do any act to effect the object of the conspiracy; all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court."

Although by that enactment something more than the common-law definition is necessary to complete the offense, to wit, some act done to effect the object of the conspiracy, it remains true that the combination of minds in any unlawful purpose is the foundation of the offense. The conspiracy is for *any* fraud or offense against the United States.[8]

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[1] Andrews *v.* Wall, 3 How. 571 (1845), cases, Story, J.

[2] Bigaouette *v.* Paulet, 134 Mass. 124 (1883), W. Allen, J. See also Winsmore *v.* Greenbank, Willes, 577 (1745); Bigelow, Ld. Cas. Torts, 328, 333-40, cases; Jones *v.* Utica, &c. R. Co., 40 Hun, 351 (1886).

[3] 3 Bl. Com. 140.

[4] L. *con*, together; *spirare*, to breathe, whisper.

[5] [Commonwealth *v.* Hunt, 4 Metc. 123, 121 (1842), Shaw, C. J. Approved in Spies *et al.* *v.* People (Anarchists' Case), 122 Ill. 213 (1887); Heaps *v.* Dunham, 95 *id.* 586 (1880); 3 Greenl. Ev. § 89.

[6] Buffalo Lubricating Oil Co. *v.* Everest, 30 Hun, 588 (1883); 17 F. R. 147.

[1] United States *v.* Babcock, 3 Cent. Law J. 144 (1876), Dillon, J.; United States *v.* Nunnemacher, 7 Biss. 190 (1876).

[2] [Commonwealth *v.* Waterman, 122 Mass. 57 (1877), cases, Colt, J.

[3] United States *v.* Walsh, 5 Dill. 60 (1878); United States *v.* Martin, 4 Cliff. 162-63 (1870), cases; 16 Blatch. 24-25; 97 Pa. 405.

[4] State *v.* Norton, 23 N. J. L. 40-46 (1850); Hazen *v.* Commonwealth, 23 Pa. 363-64 (1854), cases.

[5] United States *v.* Martin, 4 Cliff. 160 (1870).

[6] 1 Sup. R. S. p. 484; 21 St. L. 4.

[7] R. S. § 5440.

[8] United States *v.* Hirsch, 100 U. S. 34-35 (1879). See also 1 Low. 266; 11 Blatch. 168; 16 *id.* 15, 21; 2 Woods.

As soon as the conspiracy is formed and an act is done in pursuance thereof, the crime is consummated. In three years thereafter the bar of the statute of limitations is complete.[1]

An overt act, being necessary, must be alleged.[2]

Also punishable by acts of Congress are (or have been) conspiracies: to prevent a person from accepting or exercising an office; to deter a person from attending court as a party, witness, or juror; to impede the due course of justice, with intent to deny equal protection of the laws; to prevent a person from supporting a Federal elector or a member of Congress;[3] to destroy a vessel or the goods aboard with intent to injure any underwriter or lender of money;[4] to levy war against the United States;[5] to obtain approval of false claims for lands, pensions, etc.[6]

But no provision of the Constitution authorizes Congress to enact a law under which two or more free white citizens can be punished for conspiracy or going in disguise to deprive another free white citizen of a right accorded by the law of the State to all classes of persons.[7]

At common law a general allegation of a conspiracy to effect an object criminal in itself is sufficient, although the indictment omits all charges of the particular means employed.[8]

When the criminality consists in an unlawful agreement to promote a criminal or illegal purpose, that purpose must be clearly and fully stated in the indictment. When the criminality consists in the agreement to promote a purpose not of itself criminal or unlawful, by the use of fraud, force, falsehood, or other criminal or unlawful means, such intended use of fraud, etc., must be set out in the indictment.[9]

The connection of the members being once shown every act and declaration of each member, in pursuance of the common purpose, is the act and declaration of all.[10]

If one concur, proof of agreement to concur is not necessary. As soon as the union of wills for the unlawful purpose is perfected the offense is complete. The joint assent may be established as an inference from other facts.[1]

It is not necessary to prove that the accused came together and agreed, in terms, to have a common design, and to pursue it by common means. It is enough to prove that they pursued the same objects, often by the same means, one performing one part, another another part of the same, so as to complete it with a view to the attainment of that same end.[2]

Every person entering into a conspiracy already formed is in law a party to all the acts done by any of the other parties, before or afterward, in furtherance of the common design.[3]

It makes no difference in the degree of responsibility that some of the conspirators were not present at the consummation of the design.[4]

If the act of one, proceeding according to the common intent, terminates in a criminal result, though not the particular result meant, all are liable. That is, a person may be guilty of a wrong he did not specifically intend, if it came naturally, or even accidentally, through some other specific or general evil purpose.[5]

He who conspires with others to do such an unlawful act as will probably result in the taking of human life is presumed to have understood the consequences which might reasonably be expected from carrying it into effect, and to have assented thereto.[6]

"He who inflames people's minds, and induces them, by violent means, to accomplish an illegal object, is himself a rioter, though he takes no part in the riot." . . If he awakes into action an indiscriminate power, he is responsible. If he gives directions vaguely and incautiously, and the persons receiving them act according to what he might have foreseen would be the understanding, he is responsible.[7]

Such declarations of a conspirator as are in furtherance of the common design can be introduced against the other conspirators. Declarations which are merely narrative as to what has been or will be done may be admitted against him who made them or in whose presence they were made. . . The rule that the conspiracy must first be established *prima facie* before the acts of one confederate can be received in evidence against another cannot well be enforced where the proof depends upon a vast number of iso-

175, 197; 3 *id.* 47; 4 Dill. 128, 145, 407; 5 *id.* 58; 3 Hughes, 553; 12 F. R. 250; 32 *id.* 534, *infra*.

[1] United States *v.* Owen, 32 F. R. 534 (1887).

[2] United States *v.* Reichert, 32 F. R. 142 (1887). Field, J.

[3] R. S. §§ 1980, 5518-19.

[4] R. S. § 5364.

[5] R. S. § 5336.

[6] See R. S., Index, "Conspiracy."

[7] United States *v.* Harris, 106 U. S. 637-44 (1882), cases. Declared unconstitutional the act of Congress of April 20, 1871: R. S. § 5519. See also Baldwin *v.* Franks, 120 U. S. 678 (1887).

[8] See Commonwealth *v.* Fuller, 132 Mass. 566 (1882); United States *v.* De Griff, 16 Blatch. 24-25 (1879), cases; Barras *v.* Bidwell, 3 Woods, 47 (1876); Hazen *v.* Commonwealth, 23 Pa. 363-64 (1854), cases; Rex *v.* Gill & Henry, 2 B. & Ald. 205 (1818); 109 U. S. 199; 113 *id.* 104.

[9] Commonwealth *v.* Hunt, 4 Metc. 126 (1842), Shaw, C. J. See also 4 Bl. Com. 136; 3 *id.* 126; 3 Ala. 360; 6 *id.* 765; 12 Conn. 101; 30 *id.* 507; 25 Ill. 17; 30 Me. 132; 48 *id.* 218; 1 Mich. 220; 4 *id.* 444; 15 N. H. 394; 16 Johns. 592; 76 N. Y. 247; 41 Wis. 278; 2 Q. B. D. 59; 11 Q. B. 245; 10 Cox, Cr. Cas. 325.

[10] 1 Greenl. Ev. § 111; 64 Ind. 473; 87 *id.* 28; 88 *id.* 15; 66 Ga. 636.

[1] Spies *et al.* *v.* People, 122 Ill. 213 (1887), citing 2 Bish. Cr. Law, § 190.

[2] Spies *v.* People, *ib.* 170, citing 3 Greenl. Ev. § 93.

[3] Spies *v.* People, *ib.* 179, citing 3 Greenl. Ev. § 93.

[4] Spies *v.* People, *ib.* 177, 253, citing Williams *v.* People, 54 Ill. 422 (1870); Brennan *v.* People, 15 *id.* 517 (1854); Whart. Hom. § 338.

[5] Spies *v.* People, *ib.* 225, quoting 1 Bish. Cr. Law, § 636, cases.

[6] Spies *v.* People, *ib.* 226, 229, cases; 1 Whart. Cr. Law, § 225 *a*.

[7] Spies *v.* People, *ib.* 198, 224, 230, quoting Regina *v.* Sharpe, 3 Cox, C. C. 288 (1848), Wilde, C. J.; 1 Bish. Cr. Law, §§ 640-41; Queen *v.* Most, L. R., 7 Q. B. D. 244 (1881).

lated circumstances. In any case, where the whole evidence shows that a conspiracy actually existed, it will be considered immaterial whether the conspiracy was established before or after the introduction of the acts and declarations of the members.[1]

A simple conspiracy is not the subject of a *civil action* unless it results in actual damage to the person aimed at. If such damage, but not the combination, is proven, the plaintiff is entitled to a verdict against any defendant shown to have committed an unlawful act.[2]

A bill in equity will not lie against persons (pilots) who have confederated to destroy the business of the owner of a vessel by publications in newspapers, by instituting suits, and in other ways. The injured person has adequate remedies at law for each of those acts.[3]

See ACCOMPLICE; BOYCOTTING; COMBINATION, 2; INDICTMENT; PROSECUTION, Malicious; SEDITION; STRIKE, 2; TRADES-UNIONS.

CONSTABLE.[4] 1. Originally, an officer who regulated matters of chivalry, tournaments, and feats of arms, performed on horseback.

2. An officer appointed to preserve the peace, and to execute the processes of a justice of the peace.[5]

Constabulary. Pertaining to or consisting of peace-officers. **Constablery.** The jurisdiction of a constable.

High constable. 1. A constable, or "lord high constable," in the primitive sense above noted. 2. The chief police officer in a town or city: the *chief* constable.

Petty constable. 1. An inferior officer in every town and parish, subordinate to a high constable.[6] 2. An officer charged with keeping the peace within a county or other district, and with executing such processes as are issued by justices of the peace.

Special constable. A person appointed to execute a warrant on a particular occasion or to co-operate in preserving the peace on a special emergency. See ARREST, 2; COUNTY, Power of; MARSHAL, 1 (3); PEACE, 1.

CONSTAT. L. 1, *v.* It appears: literally, it is established, certain, made manifest. Compare CONSTATE.

Non constat. It does not appear; it does not follow: it is not certain. *Non constitit:* it did not appear.

"Before judgment, *non constat*, the accused may be innocent."[1] "*Non constat* by the record, who gave notice."[2] "Whether the title was to come from him, and when, and on what conditions, *non constat*."[3] "*Non constituit* whether a felony was committed till the principal was attainted."[4]

2, *n.* A certificate of what appears upon record as to a matter in question.

Thus, an exemplification of the enrollment of letters-patent under the great seal was called a "constat."[5]

There may be a possession of a vessel under a claim of title "with a constat of property."[6]

CONSTATE.[7] To establish, ascertain; to evidence, testify, prove.

"Unless there has been some violation of the charter or the constating instruments" of the corporation, "the directors will not be personally liable."[8]

CONSTITUENT. See AGENT.

CONSTITUTED. See AUTHORITY, 2.

CONSTITUTION.[9] Originally, an important decree or edict. Later, the laws and usages which gave a government its characteristic features — the organic law.[10]

The constitution of England consists of customs, statutes, common laws, and decisions of fundamental importance. American constitutions are enacted; but the meaning of much of them is found in decided cases.[10]

The English constitution is a growth. Rights in favor of the Commons were established as follows: (1) In the reign of Henry III (1216–72), participation in levying taxes and in legislation, and control of applications for supplies. (2) In the reign of Edw. III (1326–77), enlarged participation in levying taxes and in legislation; inquiry into public abuses; impeachment of public ministers. (3) In the reigns of Hen. IV, V, and VI (1399–1461), the exclusive right to impose taxes; the right to grant supplies to the sovereign upon redress of grievances; larger participation in legislation; control of the administration; impeachment of ministers; and certain rights of privilege — freedom of speech in Parliament, freedom from arrest

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[1] Spies *v.* People, *ib.* 237–39; State *v.* Winner, 17 Kan. 298 (1876); 1 Greenl. Ev. § 111; Roscoe, Cr. Ev. 414–15.

[2] Buffalo Lubricating Oil Co. *v.* Everest, 30 Hun, 588 (1883), cases.

[3] Francis *v.* Flinn, 118 U. S. 385 (1886).

[4] F. *conestable:* L. *comes stabuli*, count of the stable.

[5] [1 Bl. Com. 355.

[6] [1 Bl. Com. 355.

[1] 16 Wall. 370.

[2] 59 Wis. 652.

[3] 58 Pa. 398.

[4] 4 Bl. Com. 323. See also 6 Wheat. 229; 34 La. An. 1134.

[5] Coke, Litt. 225.

[6] The Tilton, 5 Mas. 468 (1830), Story, J.

[7] Con-state'. L. *con-stare*, to stand firm, be certain, known. See CONSTAT.

[8] Ackerman *v.* Halsey, 37 N. J. E. 363 (1883), Runyon, Ch.

[9] L. *constituere*, to make to stand together, to establish.

[10] Lieber, Encyc. Am., tit. Constitution.

during attendance upon Parliament, and the right of deciding upon election returns.[1]

An act of extraordinary legislation by which the people establish the structure and mechanism of their government, and in which they prescribe fundamental rules to regulate the motion of the several parts.[2]

The body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.[3]

Although, in some sense, every State may be said to have a constitution, the expression "constitutional government" applies to those States only whose fundamental rules or maxims prescribe how those shall be chosen who are to exercise the sovereign powers, and impose restraints upon that exercise, for the purpose of protecting individual rights, and of shielding them against any assumption of arbitrary power.[3]

If the constitution is unwritten there may be laws or documents which declare some of its important principles; as, in England, in the cases of the Magna Charta, Petition of Rights, Habeas Corpus Act, Bills of Rights, and the Common Law as the expositor of those charters.[3]

In America, the principle of constitutional liberty is that sovereignty resides in the people; and, as they could not collectively exercise the powers of government, written constitutions were agreed upon. These instruments create departments for the exercise of sovereign powers; prescribe the extent and methods of the exercise, and, in some particulars, forbid that certain powers, which would be within the compass of sovereignty, shall be exercised at all. Each constitution is, moreover, a covenant on the part of the people with each individual thereof, that they have divested themselves of the power of making changes in the fundamental law except as agreed upon in the constitution itself.[3]

A written constitution establishes iron rules, which, when found inconvenient, are difficult of change; it is sometimes construed by technical rules of verbal criticism rather than in the light of great principles; and it is likely to invade the domain of legislation, instead of being restricted to fundamental rules, and thereby to invite demoralizing evasions. An *unwritten* constitution is subject to perpetual change at the will of the law-making authority; against which there can be no security except in the conservatism of that authority, and in its responsibility to the people, or, if no such responsibility exists, then in the fear of resistance by force.[1]

Our State constitutions are forms of government ordained and established by the people in their original sovereign capacity to promote their own happiness and permanently secure their rights, property, independence, and common welfare. They are deemed compacts in the sense of their being founded on the voluntary consent or agreement of a majority of the qualified voters of the State. A constitution is in fact a fundamental law or basis of government, and falls strictly within the definition of "law" as given by Blackstone,—a rule of action prescribed by the supreme power in a state, regulating the rights and duties of the whole community. It is in this light that the language of the Constitution of the United States contemplates it; for it declares that this constitution, etc., "shall be the supreme Law of the land."[2]

A constitution is the letter of attorney from the people.[3]

Constitutions guard the rights of personal security, personal liberty, private property, and of religious profession and worship.[4]

Constitutions are mainly for the protection of minorities. In times of excitement and distress, their rights are most likely to be sacrificed.[5]

By the Revolution the transcendent powers of Parliament devolved upon the people. A portion of this power they delegated to the government of the United States. Such as remained they bestowed upon the governments of the States, with certain express limitations and exceptions. The Federal Constitution confers powers particularly enumerated; that of each State is a grant of all powers not excepted. The former is construed strictly against those who claim under it; the latter, strictly against those who stand upon the exceptions, and liberally in favor of the government itself. The Federal government can do whatever is author-

[1] See 4 Bl. Com. Ch. XXXIII; 3 Law Quar. Rev. 204-10 (1887).

[2] Eakin v. Raub, 12 S. & R. 347 (1825), Gibson, J. See also Wabash, &c. R. Co. v. People, 105 Ill. 240 (1883), Walker, J.

[3] [Cooley, Princ. Const. Law, 22-23; Const. Lim. 2-3. See also Hurtado v. California, 110 U. S. 531-32 (1884), Matthews, J.

[1] [Cooley, Princ. Const. Law, 22-23.

[2] 1 Story, Const. §§ 338-39.

[3] 1 Sharswood, Bl. Com. *147, note.

[4] 1 Kent, 407.

[5] Bunn v. Gorgas, 41 Pa. 446 (1862).

and, expressly or by clear implication; the government of a State, whatever is not prohibited.[1]

The Federal Constitution went into effect the first Wednesday of March, 1789. September 14, 1786, commissioners from five States met at Annapolis, and recommended that a general convention be held at Philadelphia, to revise the Articles of Confederation. February 21, 1787, the congress of the confederation made a similar recommendation. May 25, 1787, the delegates assembled, organized, and, about four months later, to wit, September 17th, adjourned, having drafted a "Constitution of the United States of America." June 21, 1788, the document, as a constitution, was ratified by the ninth State. September 13, 1788, Congress set the time for choosing Presidential electors, appointing March 4, 1789, as the day, and New York City as the place, when and where the new Government of the United States should begin operations.[2] See CONFEDERATION, Articles of; NATIONAL.

The Constitution was ordained and established by "the people of the United States." It was not necessarily carved out of existing State sovereignties, nor was it a surrender of powers already existing in State institutions, for the powers of the States depend upon their own constitutions; and the people of every State had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is clear that the sovereign powers vested in the State governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the *States* respectively, or to the *people*." (Amd. Art. X.) The government, then, can claim no powers which are not granted to it, and the powers actually granted must be such as are expressly given, or given by necessary implication. . . The instrument is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restricted to particular cases, unless that construction grows out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, not in a sense unreasonably restricted or enlarged. It unavoidably deals in general language. It did not suit the purpose of the people in framing this great charter of our liberties to provide for minute specifications of its powers, or to declare the means by which these powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was intended to endure through a long lapse of ages. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, require.[1]

The Federal government is one of enumerated powers. The question respecting the extent of the powers actually granted will continue to arise, as long as our system shall exist. There is no phrase in the instrument which excludes incidental or implied powers, and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, . . nor prohibited by it to the States, are reserved to the States respectively, or to the people;" thus leaving the question, whether the particular power, which may become the subject of contest, has been delegated to the one government or prohibited to the other, to depend upon a fair construction of the whole instrument. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. The powers given imply at least the ordinary means of execution. The government which has a right to do an act, and has imposed on it the duty of performing that act, must be allowed to select the means.

But this use of means is not left to general reasoning. To the enumerated powers is added that of making "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (Art. I, sec. 8, cl. 18.) "Necessary" (*q. v.*) does not here import an absolute physical necessity, so strong that one thing to which another may be termed necessary cannot exist without that other. If this clause does not enlarge it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government.[2]

The revolution which established the Constitution was not effected without immense opposition. Fears were entertained that the very powers which were

[1] Sharpless *v.* Mayor of Philadelphia, 21 Pa. 160-64, 172-73 (1853), cases, Black, C. J.; 17 *id.* 119; 52 *id.* 427; 13 Conn. 125; 46 N. Y. 401; 16 How. 428.

[2] See R. S. p. 17; Century Mag., Sept., 1887; Bancroft, Const.

[1] Martin *v.* Hunter's Lessee, 1 Wheat. 324-27 (1816), Story, J.; Gibbons *v.* Ogden, 9 *id.* 187 (1824), Marshall, C. J.

[2] M'Culloch *v.* State of Maryland, 4 Wheat. 405-23 (1819), Marshall, C. J.,—upon the constitutionality of the act of April 10, 1816, incorporating the Bank of the United States. See also Legal Tender Case, 110 U. S. 441 (1884); *Exp.* Yarbrough, *ib.* 651, 658 (1884).

essential to union might be exercised in a manner dangerous to liberty.[1]

The rule laid down in *M'Culloch* v. *Maryland* has ever since been accepted as a correct exposition of the Constitution. It is settled that the words "all Laws which shall be necessary and proper for carrying into Execution" powers expressly granted or vested have a sense equivalent to the words: laws, not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects intrusted to the government. It was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. Perhaps the largest part of the functions of the government have been performed in the exercise of implied powers.[2]

It is indispensable to keep in view the objects for which the powers were granted. If the general purpose of an instrument of any nature is ascertained the language of its provisions must be construed with reference to that purpose and so as to subserve it. And there are more urgent reasons for looking to the ultimate purpose in examining the powers conferred by the Constitution than there are for construing any other instrument. We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from these outlines. . . The powers conferred upon Congress must be regarded as related to each other, and all means for a common end. Each is but part of a system, a constituent of one whole. No single power is the ultimate end for which the Constitution was adopted. A subordinate object is itself a means designed for an ulterior purpose. It is impossible to know what those non-enumerated powers are, and what their nature and extent, without considering the purposes they were intended to subserve. Those purposes reach beyond the mere execution of all powers definitely intrusted to Congress and mentioned in detail. . . In the nature of things, enumeration and specification of all the means or instrumentalities, necessary for the preservation and fulfillment of acknowledged duties, were impossible. They are left to the discretion of Congress, subject only to the restrictions that they be not prohibited and be necessary and proper for carrying into execution the enumerated powers. . . The existence of a power may be deduced fairly from more than one of the substantive powers expressly defined. . . Congress has often exercised powers not expressly given nor ancillary to any single enumerated power. These are *resulting* powers, arising from the aggregate powers. Illustrative instances of the recognition and exercise of such powers are found in the right to sue, and to make contracts; the oath required of officers; building a capitol or Presidential mansion; the penal code; the census "of free white persons in the States," as to persons not free and in the Territories; the collection of statistics; carrying the mails, and punishing offenses against the postal laws; improving harbors; establishing observatories, light-houses, break-waters; the registry and construction of ships, and the government of seamen; the United States bank — for the convenience of the treasury and internal commerce, and to which the government subscribed one-fifth of the stock, although the bank was a private corporation doing business for its own profit; priority of debts due to the United States over other creditors; the Legal Tender Acts of 1862 and 1863.[1]

Constitutions are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings.[2]

A constitutional provision is "self-executing" or "self-enacting" when it supplies the rule by which the right given may be enjoyed and protected, or the duty imposed may be enforced. It is not self-executing when it merely indicates the principles, without laying down rules by means of which those principles may be given the force of law. . . Some provisions are mandatory; others, without legislation, are dormant.[3]

Constitutional. 1. Relating to the framing or formation of a written constitution: as, a constitutional convention.

2. Based upon, secured, or regulated by a constitution: as, constitutional — governments, liberty, rights.

3. Authorized by a particular constitution, whether written or unwritten.

Unconstitutional. Contrary to the principles or rules of a constitution. Whence constitutionality, unconstitutionality.

An "unconstitutional" law either assumes power not legislative in its nature, or is inconsistent with some provision of the Federal or State constitution.[4]

A State legislature cannot pass a law conflicting with the rightful authority of Congress, nor perform a judicial or executive function, nor violate the popular privileges reserved by the Declaration of Rights, nor change the organic structure of the government, nor exercise any other power prohibited in the consti-

[1] Barron *v.* Mayor of Baltimore, 7 Pet. 250, 247 (1833).

[2] Hepburn *v.* Griswold, 8 Wall. 614–15 (1869), Chase, C. J. This power (Art. I, sec. 8, cl. 8) "was so clearly necessary that without cavil or remark it was unanimously agreed to" by the members of the Constitutional convention; 2 Bancroft, Const. 149.

[1] Legal Tender Cases, 12 Wall. 533–47 (1870), cases, Strong, J.; (Second) Legal Tender Case, 110 U. S. 439 (1884); *Exp.* Yarbrough, *ib.* 658 (1884); Holmes *v.* Jennison, 14 Pet. 571 (1840).

[2] 1 Story, Const. § 451; *ib.* § 419; 7 Tex. Ap. 210; 24 N. Y. 486. See also Burke *v.* Hinton, 77 Va. 29 (1883).

[3] Cooley, Const. Lim. 99–101; Groves *v.* Slaughter, 15 Pet. 500 (1841); 92 U. S. 214; 10 F. R. 508; 9 Cal. 341; 33 *id.* 497; 43 *id.* 279; 13 Ill. 1; 69 *id.* 390; 62 *id.* 38; 64 *id.* 41; 68 *id.* 286; 99 Ind. 115; 94 La. An. 214; 2 Mich. 560; 7 *id.* 488; 29 *id.* 108; 8 Miss. 14; 69 Mo. 444; 81 Pa. 428; 20 Gratt. 733; 9 W. Va. 708.

[4] Commonwealth *v.* Maxwell, 27 Pa. 456 (1856).

tution. The judiciary, in clear cases, has always exercised the right to declare such acts void. But beyond this there lies a vast field of power, granted to the legislature by the general words of the constitution, and not reserved, prohibited, or given away to others: their use of which is limited only by their own discretion. The constitution gives a list of the things the legislature may do. For the judiciary to extend that list would be to violate the letter and the spirit of the organic law itself. The people rely for faithful execution of the powers given to the legislature on the wisdom and honesty of that department, and on the direct accountability of the members to their constituents. The mere abuse of power was not meant to be corrected by the judiciary — for judges can be imagined to be as corrupt and wicked as legislators. And the general principles of justice, liberty, and right, not contained or expressed in the body of the constitution itself, are not elements for a judicial decision upon the constitutionality of an enactment.[1]

To justify a court in pronouncing an act unconstitutional, in whole or in part, it must be able to vouch some exception or prohibition clearly expressed or necessarily implied. To doubt is to favor constitutionality. That meaning of words is to be taken which will support the statute.[2]

A separable portion of an act may be unconstitutional, and the rest be valid, provided the law as a whole can be executed.[3]

The rule is to enforce statutes as far as they are constitutionally made, rejecting those provisions only which show an excess of authority, conformably to the settled maxim *ut res magis*, etc.[4]

The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility.[5]

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, for the court to undertake to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial departments, and to tread on legislative ground."[6]

The duty to declare an act of Congress repugnant to the Constitution is one of great delicacy, only to be performed where the conflict is irreconcilable. Every doubt is to be resolved in favor of constitutionality.[1]

The reasons against the unconstitutionality should at least preponderate; if they are equally balanced, the court should declare the statute valid.[2]

Proper respect for a co-ordinate branch of the government requires the Federal courts to give effect to the presumption that Congress will pass no act not within constitutional power. This presumption should prevail unless the lack of authority is clearly demonstrated. At the same time, the government being one of delegated, limited, and enumerated powers, every valid act must find in the Constitution some warrant for its authority.[3]

See AMENDMENT, 2; CITIZEN; COURTS, United States; FEDERALIST; IMPAIR; LAW, Supreme; LEGISLATURE; POLITICS; PREAMBLE, 1; RELIGION; RIGHTS, Bill of; STATE, 3 (2); TAX, 2; TENDER, 2, Legal.

CONSTRUCTION.[4] 1. Putting together, ready for use; building; erecting: applied to houses, vessels,[5] railroads,[6] machines.[7] See BUILD; ERECT; CONTRACTOR.

2. Drawing conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text — conclusions within the spirit, though not within the letter, of the text.[8]

"Interpretation" is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey.[9]

In common use, "construction" embraces all that is covered by both synonyms.[9]

Rules of construction have for their object the discovery of the true intent and meaning of instruments — the thought expressed.[10]

Where the language is transparent there is no room for the office of construction. There should be no construction where there is nothing to construe.[11]

Liberal construction. Such construction as enlarges or restrains the letter of an agreement or instrument so as more effectually to accomplish the end in view. **Also** called *equitable* construction. **Strict construction.** Such as limits the application

[1] Sharpless *v.* Mayor of Philadelphia, 21 Pa. 160-64 (1853), cases, Black, C. J.

[2] Commonwealth *v.* Butler, 99 Pa. 540 (1882), Sharswood, C. J.; State *v.* Hipp, 38 Ohio St. 219 (1882).

[3] United States *v.* Reese, 92 U. S. 221 (1875); Virginia Coupon Cases, 114 *id.* 305 (1885); Presser *v.* Illinois, 116 *id.* 263 (1886), cases; Spraigue *v.* Thompson, 118 *id.* 90, 95 (1886); Baldwin *v.* Franks, 120 *id.* 689 (1887); State *v.* Kelsey, 44 N. J. L. 29 (1882).

[4] Adler *v.* Whitbeck, 44 Ohio St. 575 (1886); 15 Ohio, 645. See also Black *v.* Trower, 79 Va. 127-28 (1884), cases; Reid *v.* Morton, 119 Ill. 118, 129 (1886); 83 Ky. 68.

[5] Fletcher *v.* Peck, 6 Cranch, 128 (1810); County of Livingston *v.* Darlington, 101 U. S. 410 (1879), cases.

[6] M'Culloch *v.* Maryland, 4 Wheat. 421, 423 (1819), Marshall, C. J.; Hepburn *v.* Griswold, 8 Wall. 614-15 (1869); Legal Tender Cases, 12 *id.* 538 (1870).

[1] Mayor of Nashville *v.* Cooper, 6 Wall. 251 (1867); 20 *id.* 668.

[2] Cherokee County *v.* State, 36 Kan. 339 (1887), cases.

[3] United States *v.* Harris, 106 U. S. 635 (1882), Woods, J. See 2 Story, Const. § 1243.

[4] L. *construere*, to put together.

[5] Sprague, 180; 103 Mass. 227.

[6] 11 Iowa, 17; 115 Mass. 400.

[7] 17 How. 72.

[8] Lieber, Hermen., Ham. ed., 44, 11; 36 N. J. L. 209; 2 Pars. Contr. 491.

[9] [Cooley, Const. Lim. *38.

[10] People *v.* May, 9 Col. 85 (1885).

[11] Lewis *v.* United States, 92 U. S. 621 (1875), Swayne, J.; Benn *v.* Hatcher, 81 Va. 34 (1885).

to cases clearly described by the words used; a close adherence to words. Also called *literal* construction.[1]

By a liberal interpretation of a letter of guaranty we do not mean that the words should be forced out of their natural meaning: simply that they should receive a fair and reasonable interpretation, so as to attain the object for which the instrument is designed and the purpose to which it is applied.[2]

Other expressions are: *artificial*, *forced* or *strained*, *refined*, *reasonable* construction.

A reasonable construction of an instrument, as of the Constitution, means that in case the words are susceptible of two senses, the one strict, the other more enlarged, that should be adopted which is most consonant with the apparent intent.[3]

The object is not to make or modify the instrument, but to find the sense. Hence, the whole document is to be construed together. This is to be done by the court, except when the writing contains technical words, or terms of art, or when it is introduced collaterally, or when its effect depends upon extrinsic circumstances — in which cases the duty devolves upon the jury.[4]

It is a cardinal rule in the construction of all instruments that, if possible, effect should be given to all parts and to every clause, *ut res magis*, etc.[5]

See further CONDITION; CONSTITUTION; CONSTRUCTIVE; CONTRACT; COVENANT; DEED, 2; EXPOSITIO; EXPRESSIO; FORFEITURE; FRANCHISE, 1; GRANT; IMPAIR; INSTRUMENT, 3; INSURANCE, Policy; NOSCITUR; PUNCTUATION; REPEAL; REPUGNANT; STATUTE; TRUST, 1; USUS, Utile, etc.; VERBUM; WILL, 2; WORD.

CONSTRUCTIVE. Determined by construction: inferred or implied, presumed or imputed; opposed to actual: as,

Constructive — annexation, appropriation, assent or consent, attachment, breaking, close, contempt, conversion, damages, delivery, fraud, larceny, levy, loss, malice, notice, possession, presence, service, taking, treason, trust, *qq. v.*

CONSUETUDO. L. Custom; usage; practice.

Consuetudo est altera lex. Custom is another law.

Consuetudo interpres legum. Custom is the expounder of laws.[6]

Consuetudo loci observanda. The custom of the place is to be conformed to. See CUSTOM.

CONSUL.[1] "Consul," "consul-general," and "commercial agent," in the Revised Statutes, denote full, principal and permanent consular officers, as distinguished from subordinates and substitutes.[2]

"Deputy consul" and "consular agent" denote officers subordinate to such principals, exercising the powers and performing the duties within the limits of their consulates or commercial agencies respectively, the former at the same ports or places, and the latter at ports or places different from those at which such principals are located respectively.[3]

"Vice-consuls" and "vice-commercial agents" denote consular officers, who shall be substituted, temporarily, to fill the places of consuls-general, consuls, or commercial agents, when they shall be temporarily absent or retired from duty.[4]

"Consular officer" includes consuls-general, consuls, commercial agents, deputy consuls, vice-consuls, vice-commercial agents, consular agents, and none others.[5]

The word "consul" shall be understood to mean any person invested by the United States with and exercising the functions of consul-general, vice-consul-general, consul or vice-consul.[6]

A "consul" is an officer of a particular grade in the consular service; in a broad generic sense, the word embraces all consular officers of whatever grade.[7]

Under treaties, consuls have had conferred upon them judicial authority over their own countrymen: as in the decision of controversies in civil cases; the administration of estates; the registering and certifying of wills, contracts, etc. When residing in a country of different political and religious institutions, they have also a limited criminal jurisdiction over their countrymen.[8]

Consuls are approved and admitted by the local sovereign. If guilty of illegal or improper conduct, the *exequatur* (q. v.) which has been given may be revoked, and they may be punished, or sent out of the country, at the option of the offended government. In

[1] [Bouvier's Law Dict.; 1 Wash. T. 351; 1 Shars. Bl. Com. 87; 23 Cent. Law J. 483 (1886), cases.

[2] Lawrence *v.* McCalmont, 2 How. 449 (1844), Story, J.; Crist *v.* Burlingame, 62 Barb. 355 (1862).

[3] [1 Story, Const. § 419.

[4] Goddard *v.* Foster, 17 Wall. 142 (1872), cases; Beardsley *v.* Hotchkiss, 30 Hun, 613 (1883); 1 Law Quar. Rev. 466 (1885).

[5] May *v.* Saginaw County, 28 F. R. 632 (1887).

[6] 116 U. S. 622.

[1] L. *consulere*, to consult.

[2] R. S. § 1674, par. 1.

[3] *Ibid.*, par. 2.

[4] *Ibid.*, par. 3.

[5] *Ibid.*, par. 4.

[6] Act 1 Feb. 1876: R. S. § 4130.

[7] Dainese *v.* United States, 13 Ct. Cl. 74 (1878).

[8] See R. S. § 4083; 11 F. R. 607.

civil and criminal cases they are subject to the local law in the same manner as other foreign residents owing a temporary allegiance to the state. A trading consul, in all that concerns his trade, is liable as a native merchant.[1]

See further DIPLOMATIC; MINISTER, 3.

CONSUMMATE.[2] Complete, finished, perfected, entire; opposed to inchoate, *q. v.*

An estate by curtesy is consummate on the death of the wife.[3]

Consummation. In the law of marriage, copulation.[4] See CUM, Copula; MARRIAGE.

CONSUMPTION. See LEGACY; LOAN, 1; TAX, 2, Indirect.

CONTAGIOUS. See DISEASE; DISORDER, 1; HEALTH.

CONTAINED. See PREMISES, 3.

Buggies insured as "contained in" a livery-stable were destroyed while in a factory for repairs. *Held*, that the words quoted were a warranty as to property whose use did not require removal.[5]

The description of a horse as "contained in" a barn, in a policy against lightning, was held not to be a contract that the horse was to be kept all the time in the barn. "Danger from lightning exists almost wholly in the summer season, when stock of all kinds upon farms is kept in the fields. A policy which covered stock only when in the barn would not furnish indemnity."[6]

Household furniture, described in a policy as "contained in" a certain house, was removed, without the insurer's knowledge, to a house on another street, where it was destroyed by fire. *Held*, that as the statement of locality was to be construed as a continuing warranty, the insured could not recover.[7]

A seal-skin dolman, insured as wearing apparel by a policy describing it as "contained in" a particular dwelling-house, was burned while in the store of a furrier, to which it had been sent for repair. *Held*, that the insurer was liable, although the risk was increased: temporary removal or absence being necessarily incident to the use of such property, and presumptively contemplated by the parties.[8]

CONTEMPLATION. Bankrupt and insolvent laws provide that acts done "in contemplation" of bankruptcy or insolvency shall be void.

The bankrupt act of 1841, by the phrase "contemplation of bankruptcy," did not intend contemplation solely of being a bankrupt, but contemplation of actually stopping business because of insolvency and incapacity to carry it on.[1]

The debtor must have contemplated more than a state of insolvency,—an act of bankruptcy, or an application to be declared a bankrupt.[1]

In the act of 1867, the phraseology is "in contemplation of insolvency or bankruptcy." This was held not to require an absolute inability to pay all debts in full on a close of business; only that the debtor could not pay his debts in the ordinary course of business.[2]

See BANKRUPTCY; INSOLVENCY.

CONTEMPORANEA. See EXPOSITIO.

CONTEMPT.[3] Disrespect; willful disregard of the authority of a court or legislature.

1. To the head of summary proceedings is referred the method, immemorially used by the superior courts, of punishing contempts by attachment. . . Contempts are either direct [sometimes called *criminal*], which openly insult or resist the powers of the courts or the persons of the judges who preside there; or else are consequential [sometimes called *constructive*], which, without such gross insolence or direct opposition, plainly tend to create a universal disregard of their authority.

The principal instances are: 1. Those committed by inferior judges and magistrates — by acting unjustly, oppressively, or irregularly in administering justice; disobeying writs issuing out of the superior courts by proceeding in a cause after it is put a stop to or removed by writ of prohibition, *certiorari*, error, *supersedeas*, etc. 2. Those committed by sheriffs, bailiffs, jailors, and other officers of the court — by abusing the process of the law or deceiving the parties; by acts of oppression, extortion, collusive behavior, or culpable neglect of duty. 3. Those committed by attorneys (*q. v.*), who are also officers of court — by gross fraud and corruption, injustice to their clients, or other dishonest practice. 4. Those committed by jurymen — by making default when summoned, refusing to be sworn or to give a verdict, accepting entertainment at the cost of a party, etc. 5. Those committed by witnesses — by making default when summoned, by refusing to be sworn or examined, by prevaricating in their evidence. 6. Those committed by parties — by disobedience to a rule or order, by non-payment of costs, non-performance of awards, etc. 7. Those committed by any other persons — as

[1] Coppell *v.* Hall, 7 Wall. 553 (1868), cases; The Anne, 3 Wheat. 445-46 (1818); 1 Kent, 53.

[2] Con-sum'-mate.

[3] 2 Bl. Com. 128; 17 Ct. Cl. 178.

[4] See 1 Bl. Com. 435.

[5] London, &c. Fire Ins. Co. *v.* Graves, 12 Ins. Law J. 808 (1883), cases,—Superior Ct. Ky.: 48 Am. Rep. 84; Longueville *v.* Western Assur. Co., 51 Iowa, 553 (1879).

[6] Haws *v.* Fire Association of Philadelphia, 114 Pa. 434 (1886).

[7] Lyons *v.* Providence Washington Fire Ins. Co., 14 R. I. 109 (1883), reversing Same *v.* Same, 13 *id.* 347.

[8] Noyes *v.* Northwestern Nat. Ins. Co., 64 Wis. 419-21 (1885), cases.

[1] Arnold *v.* Maynard, 2 Story, 353 (1854); Morse *v.* Godfrey, 3 *id.* 386 (1844); Everett *v.* Stone, *ib.* 453 (1844).

[2] Rison *v.* Knapp, 1 Dill. 194-95 (1870), cases; Martin *v.* Toof, *ib.* 206, 211 (1870); *Re* Smith, 13 Rep. 296 (1881); R. S. § 5110; 4 Bankr. Reg. 203; 21 How. Pr. 420; 61 Wis. 635.

[3] L. *contemptus*, scorn: *tenere*, to despise.

in cases of forcible rescue, disobedience to the prerogative writs.

Some of these contempts may arise in the face of the court — as by rude and contumelious behavior, obstinacy, perverseness, prevarication, breach of the peace, or other willful disturbance; others, in the absence of the party — as by disobeying the writ, rule, or other process of the court; perverting a writ or process to purposes of private malice, extortion, or injustice; speaking or writing contemptuously of the court or judges acting in their judicial capacity; printing false accounts (or even true accounts, without permission) of causes pending in judgment; anything, in short, that demonstrates a gross want of that respect without which the authority of the courts, among the people, would be lost.

The process of attachment for contempts must necessarily be as ancient as law itself. Laws without authority to secure their administration from disobedience would be nugatory. The power, therefore, to suppress a contempt by an immediate offender results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal.

If the contempt be committed in the face of the court the offender may be instantly apprehended and imprisoned, in the discretion of the judges. But in matters that arise at a distance, if the judges upon affidavit see sufficient ground they may rule the suspected party to show cause why he should not be attached; in a flagrant case the attachment may be issued in the first instance. Once in court, the party must either stand committed or put in bail, in order to answer upon oath such interrogatories as shall be administered to him for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, to be exhibited within a reasonable period, as, four days. If the party can clear ["purge," *q. v.*] himself upon oath, he is discharged. If he confesses the contempt, the court may fine or imprison him. This mode of trial, which is derived from the courts of equity, is sanctioned by immemorial usage.[1]

While a justice of the peace has no power to punish a contempt committed before him, he may bind the party to answer an indictment for obstructing the administration of justice, and to be of good behavior meanwhile.[2]

The act of Congress of March 2, 1831, "declaratory of the law concerning contempts of court," limits the power of the circuit and district courts to three classes of cases: 1, where there has been misbehavior of a person in the presence of a court, or so near thereto as to obstruct the administration of justice; 2, where there has been misbehavior of any officer of a court in his official transactions; 3, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of a court.[1]

Such has always been the power of the courts, both of common law and of equity. The exercise of the power has a twofold object: to punish disrespect to the court or its order, and to compel performance of some act or duty. In the former case, the court must judge for itself of the nature and extent of the punishment. In the latter case the party refusing to obey should be fined and imprisoned until he performs the act or shows that it is not in his power to do it.[3]

When a contempt is committed *in facie curiæ*, the punishment is generally summary; when committed elsewhere, initial proceedings are necessary, with notice, and opportunity to defend. A common initial process is a rule to show cause why an attachment or warrant for contempt should not issue, of which service should be made. In a proceeding to punish for criminal contempt, personal notice of the accusation is indispensable.[2]

2. The power in a legislature to determine the rules of its proceedings, and to punish for disorderly behavior, includes power to enforce its rules in the customary way — by attachment as for contempt.

The necessity for the existence and exercise of this incidental power rests upon the principle of self-preservation.[4]

There is in the Constitution no express authority for the power. Neither House of Congress is a court of judicature, as was Parliament originally. The Houses may punish for disorderly conduct or for failure to attend sessions; may decide contested elections, determine the qualifications of members, impeach officers of government. Where, in an examination necessary to the performance of these duties, a witness proves contumacious, he may be fined and imprisoned; but this can never be extended to an inquiry into his private affairs, on the plea that he is a debtor to the United States — that is a matter exclusively for the judiciary.[5]

[1] 4 Bl. Com. 283–88. See 21 Conn. 199; 65 Ind. 508; 49 Me. 393; L. R., 9 Q. B. 224; 25 Ala. 81; 16 Ark. 384; 25 Miss. 883; 37 N. H. 450; 29 Ohio, 330; 8 Oreg. 497; 13 R. I. 427; 29 Am. Law Reg. 81, 145, 217, 289, 361, 425 (1881).

[2] Albright *v.* Lapp, 26 Pa. 101 (1856); The Queen *v.* Lefroy, L. R., 8 Q. B. 137–40 (1873).

[1] *Exp.* Robinson, 19 Wall. 510–11 (1873), Field, J.; Fischer *v.* Hayes, 19 Blatch. 13, 18 (1881); Worden *v.* Searls, 121 U. S. 121–26 (1887): R. S. § 725; 10 F. R. 629–33, cases.

[2] *Re* Chiles, 22 Wall. 168 (1874), Miller, J.; *Exp.* Hollis, 59 Cal. 406 (1881). See generally 23 Cent. Law J. 464–66 (1886), cases. History of constructive contempt, 33 Alb. Law J. 145–47 (1886), cases.

[3] Wheeler & Wilson Manuf. Co. *v.* Boyce, 36 Kan. 356 (1887); Rapalje, Cont. § 96.

[4] 1 Kent, 236–37; 2 Story, Const. §§ 305–17.

[5] Kilbourn *v.* Thompson, 103 U. S. 168, 181–205 (1880), cases, Miller, J. It had been alleged that Jay Cooke & Co., bankrupts, who were indebted to the United States, were interested in a "real-estate pool" in Washington, D. C., and that their trustee had settled with the associates of the firm to the disadvantage of the creditors. The House of Representatives authorized a committee to be appointed to investigate the matter. Kilbourn, being subpœnaed, appeared before the committee, but refused to give the names of the

The case of *Anderson* v. *Dunn* [1] declared that representative bodies possess inherently the power to punish for contempt. For sixty years this decision stood unquestioned. The repeated and unqualified declarations of the principle by courts and text-writers are to be traced to that case. The case of *Kilbourn* v. *Thompson* seems to deny that general and unlimited power exists inherently.[2]

A city council is not a legislature; nor is it vested with judicial functions; and its members are not chosen with reference to their fitness to exercise such functions. To allow it the right to imprison for refusal to answer any inquiry the whole body or one of its committee may choose to make would be a dangerous invasion of the rights and liberties of the citizen. . . The legislature cannot confer upon municipal bodies or officers, not courts of justice nor exercising judicial power, authority to imprison and punish without the right of appeal or of trial by jury.[3]

CONTENTS. 1. The clause, in a bill of lading, "shipped in good order . . contents unknown," acknowledges only fair external appearance; it includes no implication as to quantity, quality, or condition of the article: so that a shipper must prove the actual good condition of the contents.[4] See CARRIER.

2. In the Judiciary Act of September 24, 1789, § 11, in the phrase "any suit to recover the contents of any promissory note or other chose in action," means the sum named therein, payable by the terms of the instrument itself.[5]

An action to recover damages for a refusal to accept and pay for merchandise purchased under an oral contract is a suit to recover the "contents . . of a chose in action," within the act of March 3, 1887. The quoted words were taken from the judiciary act of 1789. Primarily they were intended to apply to commercial instruments, such as promissory notes, acceptances, and bonds, in which the sum promised is familiarly spoken of as the "contents" of such instrument.[1]

A suit to enforce the specific performance of a contract is a suit to recover the contents of a chose in action, within the meaning of § 629, Rev. St.[2]

3. In the House of Lords the "contents" are those who assent to, and the "non-contents" those who oppose, a bill.

CONTEST.[3] To make the subject of litigation; to litigate; to dispute or resist.

Contestable. Disputable; subject to resistance in a court; opposed to *non-contestable.*

Contestant. A litigant; a suitor.

To contest an election means to deny the legality thereof; to contest a will, to resist the probate of a writing alleged to be a will,— see INFLUENCE; ISSUE, 3, Feigned.

Some policies of insurance, by covenant on the part of the insurer, are not contestable after a certain period, as, three years, for a matter which arose prior to the end of that period.

CONTESTATIO. See LIS, Contestatio.

CONTEXT. See CONSTRUCTION.

CONTIGUOUS. In actual close contact; touching; near.

A relative term; referring to a building, means in close proximity to the same.[4]

A building any particular number of feet, as twenty-five, from a detached dwelling, is not "contiguous" to it.[5]

The charter of a water-works company provided that it should not prevent the city council from granting to persons "contiguous" to the Mississippi river the privilege of laying pipes to the river for their own use. *Held*, that no lot can be contiguous unless it fronts on the river or is separated only by a public highway, with no private owner intervening, or, possibly, on a block or square so situated.[6] Compare ADJACENT; ALONG.

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members of the pool, or to produce designated books and papers. The House ordered the speaker to issue his warrant, directed to Thompson, the sergeant-at-arms, to arrest Kilbourn, who, when brought before the House, still refused to impart the desired information. For this contempt he was committed to the custody of Thompson until he would obey the original subpœna, meanwhile to be confined in the common jail of the District. At the end of forty-five days he was released on a *habeas corpus*, and at once sued the speaker, the committeemen, and the sergeant-at-arms for forcible arrest, and imprisonment. The members of the House were held protected from prosecution; but a verdict for $60,000 damages was recovered against Thompson. This verdict being set aside as excessive, on the second trial $39,000 were awarded. This sum was reduced to $20,000, and paid by order of Congress, with interest, and costs. See MacArthur & Mackey, 401-32 (1883); 23 St. L. 467; *Re* Pacific Railway Commission, 32 F. R. 251-53 (1887).

[1] 6 Wheat. 204 (1821).

[2] *Exp.* Dalton, 44 Ohio St. 150-53 (1886), cases.

[3] Whitcomb's Case, 120 Mass. 123-24, 120-23 (1876), cases, Gray, C. J.

[4] Clark v. Barnwell, 12 How. 283 (1851).

[5] Barney v. Globe Bank, 5 Blatch. 115 (1862).

[1] Simons v. Ypsilanti Paper Co., 33 F. R. 193-94 (1888), Brown, J.

[2] Shoecraft v. Bloxham, 124 U. S. 730 (1888).

[3] L. *con-testari*, to call to witness.

[4] Arkell v. Commerce Ins. Co., 69 N. Y. 193 (1877); 10 Hun, 26.

[5] Olson v. St. Paul, &c. Fire Insurance Co., 35 Minn 433 (1886).

[6] New Orleans Water-Works Co. v. Ernst, 32 F. R. 6 (1887), Billings, J., following Water-Works Co. v. Rivers, 115 U. S. 674 (1885), which concerned the St. Charles Hotel, five blocks from the river. Compare New Orleans Water-Works Co. v. Louisiana Sugar Co., 125 *id.* 18 (1888).

CONTINGENCY.[1] An event which may happen; a possibility. A fortuitous event which comes without design, foresight, or expectation.

A remainder which depends upon an uncertainty is a "contingent" remainder. An expense which depends upon some future uncertain event is a "contingent" expense.[2]

"Contingencies," in an estimate of expenses, means expenses not yet ascertained, as yet unknown, uncertain, such as may or may not be incurred.[3]

Contingency with a double aspect. Occurs where remainders are so limited that one is a substitute for the other, in the event of the latter failing, and not in derogation of the latter.[3]

As, a grant to A for life, and if he have a son, then to the son in fee, and if no son, then to B.

Contingent. Possible; liable to occur; dependent upon an uncertainty: as, contingent or a contingent — damage, demand or liability, devise or legacy, estate or interest, fee or compensation, remainder, use, *qq. v.*

Applied to a use, remainder, devise, bequest, or other legal right or interest, implies that no present right exists, that whether a right ever will exist depends upon a future uncertain event.[4]

An estate will not be held contingent unless decided terms are used, or it is necessary to infer that a contingency was meant to carry out other parts of the will.[5]

As a rule, contingent interests are assignable, devisable, and descendible.[6]

See also ABSOLUTE; AFTER; CERTAIN; THEN; UPON, 2; WHEN.

CONTINUANCE. 1. After an issue or demurrer has been joined, as well as in previous stages of a proceeding, a day is given, and entered upon the record, on which the parties are to appear from time to time as the exigence of the case may require. The giving of this day is called the "continuance," because thereby the proceedings are continued without interruption from one adjournment to another.[7]

2. Adjournment, postponement, to another term of court.

May be had on account of — the absence of a material witness, who has been subpœnaed, unless the opposite party admits what such witness would testify to; inability to obtain the evidence of a witness out of the State in time for trial; detention of a party in a public service; sickness or death of a party or of counsel; commission outstanding for taking testimony; amendment to pleadings which occasions surprise; filing a bill of discovery. An affidavit to the alleged fact constituting the ground for continuance is required. See AMENDMENT, 1; NISI.

Puis darrein continuance. Since the last adjournment or term of court. A plea by which the defendant takes advantage of a matter which has arisen since he entered his original defense.[1]

As, that the plaintiff, who was then a *feme sole*, has married; or that she has given a release.[1]

In effect, a pleading of facts occurring since the last stage of the suit, whatever that be, provided it precedes the trial.[2]

Confesses the matter which was before in dispute. Not allowed if a continuance has intervened between the time when the matter arose and when it was pleaded: for the defendant is guilty of neglect, and is, besides, supposed to rely upon his former plea. Nor is it allowed after a demurrer has been determined, or a verdict been given: because relief may be had by motion.[3]

The appointment of a successor in office, after proceedings by *mandamus* are begun, may be set up by a plea *puis darrein continuance*.[4] See CONTINUANDO; DISCONTINUANCE.

3. "Continuance in office," in a constitution prohibiting the legislature from increasing the compensation of any public officer during such period, means continuance under one appointment.[5] See COMPENSATION, 1.

CONTINUANDO. L. By continuing; by continuance.

In trespasses of a permanent nature, where the injury is continually renewed, the declaration may allege that the injury has been committed by continuation from one given time to another. This is called "laying the action with a *continuando*." The plaintiff is not then compelled to bring a separate action for each day's separate offense. But where the trespass is by one or several acts, each terminating in itself, and being once done cannot be done again, it cannot be laid with a *continuando;* yet if there be repeated acts of trespass committed (as, cutting a certain number of trees), they may be laid to be done, not continually, but at divers days and times within a given period;[6] or on a given day and "on divers other days and times between" that and another particular day.[7]

[1] L. *con-tingere*, to touch; to relate to, happen.

[2] People *v.* Yonkers, 39 Barb. 272 (1863). See also 16 Op. Att.-Gen. 413; 30 Me. 334.

[3] See Fearne, Cont. Rem. 373.

[4] Jemison *v.* Blowers, 5 Barb. 692 (1849); Haywood *v.* Shreve, 44 N. J. L. 104 (1882).

[5] Weatherhead *v.* Stoddard, 58 Vt. 623 (1886), cases.

[6] Kenyon *v.* See, 94 N. Y. 568 (1884).

[7] [3 Bl. Com. 316.

[1] [3 Bl. Com. 296. See Steph. Pl. 64.

[2] [Waterbury *v.* McMillan, 46 Miss. 640 (1872).

[3] 3 Bl. Com. 296; 4 Del. Ch. 352.

[4] Thompson *v.* United States, 103 U. S. 480, 483 (1880).

[5] Smith *v.* City of Waterbury, 54 Conn. 176 (1886).

[6] 3 Bl. Com. 212.

[7] Gould, Plead. 86-96; State *v.* Bosworth, 54 Conn. 1 (1886); 58 N. H. 41.

CONTINUING. Extending from one time or condition to another: as, a continuing — consideration, breach, damage, guaranty, nuisance, *qq. v.* See also PRESUMPTION.

CONTINUOUS. 1. Uninterrupted; unintermitted; unbroken: as, a continuous adverse use;[1] that a custom (*q. v.*) must be continuous; a continuous carriage, passage, trip, or voyage.[2] See CARRIER, Common; LADING, Bill of.

2. As applied to an "injury," recurring at repeated intervals, of repeated occurrence; of the same sort of damnification an actual continuous mischief would be.[3] Compare CONTINUANDO.

Non-continuous. A grant of a right or easement (*q. v.*) in land is "non-continuous" when the use of the premises by the grantee will be only intermittent and occasional, and not embrace the entire beneficial occupation and improvement of the land.[4]

CONTRA. L. Against; in opposition to; to the contrary effect; contrary.

Standing alone (1) denotes opposition of counsel to matters urged in argument, as "A. B., *contra;*" (2) indicates cases or authorities which do not agree with others cited. See CON, 2; COUNTER.

Contra bonos mores. Against good morals, *q. v.*

Contra formam statuti. Against the form (*q. v.*) of the statute.

Contra pacem. Against the peace, *q. v.*

Contra proferentem. Against the proposer. See VERBUM, Verba fortius, etc.

CONTRABAND.[5] Contrary to a ban — a public proclamation.

Contraband of war. Prohibited by the laws of war. Describes goods which a neutral may not furnish to a belligerent.

Articles manufactured and primarily or ordinarily used for military purposes in time of war are always contraband. Articles which may be used for war or peace according to circumstances are contraband only when actually destined to the use of the belligerent. Articles exclusively used for peaceful purposes are not contraband, though liable to seizure for violation of blockade or siege. Contraband articles contaminate non-contraband, if belonging to the same owner. In ordinary cases the conveyance of contraband articles attaches only to the freight.[1]

Provisions, and money, destined for hostile use, are contraband.[2]

Treaty provisions enumerate the articles which shall be deemed contraband.

CONTRACT.[3] 1, *n.* (1) An agreement, upon sufficient consideration, to do or not to do a particular thing.[4]

A compact between two or more parties.[5]

An agreement in which a party undertakes to do, or not to do, a particular thing.[6]

In the Constitution, as elsewhere, the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to the terms is of the very essence,[7]

An interchange, by agreement, of legal rights.[8]

A deliberate engagement between competent parties, upon a legal consideration, to do, or to abstain from doing, some act.[9]

A promise from one or more persons to another or others, either made in fact or created by the law, to do or refrain from some lawful thing; being also under the seal of the promisor, or being reduced to a judicial record, or being accompanied by a valid consideration, or being executed, and not being in a form forbidden or declared inadequate by law.[10]

In its widest sense includes *records* and *specialties*, but is usually employed to designate simple or parol contracts; *i. e.*, not only verbal and unwritten contracts, but all contracts not of record or under seal. This is strictly the legal signification, inasmuch as the existence of a consideration which is necessary to constitute a parol agreement is not requisite, or rather

[1] 59 Ind. 411; 4 De G. J. & S. 199; 18 F. R. 115.

[2] 4 Saw. 114; 12 Weekly Dig. (N. Y.) 375.

[3] Wood *v.* Sutcliffe, 8 Eng. L. & Eq. 220 (1851).

[4] Jamaica Pond Aqueduct Corporation *v.* Chandler, 9 Allen, 164 (1864), Bigelow, C. J.; Fetters *v.* Humphreys, 18 N. J. E. 262 (1867).

[5] *Contrabannum*, in mediæval Latin, is *merces bannо interdictæ*. "The sovereign of the country made goods contraband by an edict prohibiting their importation or their exportation,"— Woolsey, Int. Law, § 192; *ib.* §§ 192-99. See BAN.

[1] The Peterhoff, 5 Wall. 58 (1866), Chase, C. J.

[2] The Commercen, 1 Wheat. 387 (1816); United States *v.* Dickelman, 92 U. S. 626 (1875); 1 Kent, 138-43.

[3] L. *con-trahere*, to draw together: for minds to meet.

[4] 2 Bl. Com. 442, quoting some previous author.

[5] Fletcher *v.* Peck, 6 Cranch, 136 (1810), Marshall, C. J.

[6] Sturges *v.* Crowninshield, 4 Wheat. 197 (1819), Marshall, C. J. See also *ib.* 656, 682; 11 Pet. *572; 109 U. S. 288; 113 *id.* 464; 71 Ala. 432; 34 La. An. 45; 30 Tex. 422; 4 Tex. Ap. 321.

[7] Louisiana *v.* Mayor of New Orleans, 109 U. S. 288 (1883), Field, J.; Chase *v.* Curtis, 113 *id.* 464 (1885).

[8] 1 Whart. Contr. § 1.

[9] Story, Contr. § 1; also 1 Pars. Contr. 6.

[10] Bishop, Contr. § 22, where definitions from other books are quoted.

is presumed, in obligations of record and in specialties.[1]

There must be a person able to contract; a person able to be contracted with; a thing to be contracted for; a sufficient consideration; words clearly expressing the agreement; and the assent of both parties to the same thing in the same sense.[2]

A contract is resolvable into proposal and acceptance; the proposal not to bind beyond a reasonable time, and, until accepted, may be conditional. The place and time of acceptance are the place and time of the contract. The assent must be definite; non-refusal is not enough.[3] See UNDERSTANDING. Compare TRANSACTION.

(2) The language, written or unwritten, which evidences a mutual engagement or exchange of promises.

Does not, like "deed," "bond," or "promissory note," necessarily import a written instrument.[4] It applies to agreements obligating both parties, hence not to bills and notes.[5]

Generally, "agreement" is the weaker, more vernacular word, "contract" the more technical and forcible. "Agreement" is more apt to be used of an engagement formed by actual negotiation, but not embodied in the most solemn formality of writing, seal, etc.; "contract," where the intention is to embrace the whole range of enforcible obligations created by mutual consent. "Bargain" seems to be used like "contract" in importing a consideration and full legal obligation; like "agreement" in implying actual negotiation and assent rather than definite legal formalities.

In the best use "contract" does not embrace obligations which society imposes for reasons of general expediency, only obligations founded upon assent of parties; nor a mere moral obligation, unrecognized by law, deducible from a promise unsupported by a consideration; nor a judgment; nor, generally, a charter, nor a license from government; nor is a public office the subject of a contract. Marriage is rather a civil or social status than a contract. Obligations in which there is no apparent mutuality have been excluded: mutuality of assent and of act being of the essence of a contract.

Formerly, lawyers spoke of "obligations" (meaning bonds, in which "obliged" is a formal term), "covenants," and "agreements" — the last word being used as "contract" is now used.[6]

2, *v*, *adj.* Agreed to; stipulated; undertaken; incurred.

A "debt contracted" may include a debt founded upon a tort.[7]

[1] Story, Contr. § 1; also 1 Parsons, Contr. 6; Bishop, Contr. §§ 108, 140, 151, 162.

[2] Justice *v.* Lang, 42 N. Y. 497 (1870).

[3] 1 Whart. Contr. Chap. I.

[4] Pierson *v.* Townsend, 2 Hill, 551 (1842).

[5] Safford *v.* Wyckoff, 4 Hill, 456 (1842).

[6] [Addison, Contr. *1–2, Am. ed., A. & W. (1888), note.] See also Bishop, Contr. §§ 191–92, 107.

[7] *Re* Radway, 3 Hughes, 631 (1877); State *v.* O'Neil, 7 Oreg. 142 (1879).

Contractual. Arising out of a contract: as, a contractual relation. Whence *non-contractual*.

Besides the general distinctions noted below, contracts are: *accessory*, when assuring the performance of another contract; *aleatory*, when performance depends upon an uncertainty: as, an annuity, a contract of insurance; *consensual*, when dissolvable by mere consent; *dependent*, when made to rest upon some connected act to be done by another — opposed to *independent*, in which the acts have no inter-relation; *parol*, when verbal or in writing but not under seal — opposed to *sealed* contract, which is a specialty; *personal*, when relating to personalty, or else requiring some action of a person — opposed to *real*, which regards realty, q. v.; *quasi*, when the relation existing is analogous to that of a contract, and the law attaches similar consequences; *separable* or *severable*, when divisible, not entire, q. v.; *simple*, when evidenced neither by a specialty nor by a record; *specialty* (q. v.), when under seal; *verbal*, when simple or parol. See also FIDUCIARY; HAZARDOUS; MARITIME; ONEROUS; QUASI; WAGERING.

More general and important distinctions are the following:

Absolute contract. An agreement to do or not to do something at all events. Conditional contract. An executory contract, the performance of which depends upon a condition — precedent or subsequent.[1]

Bilateral contract. Two promises given in exchange for and in consideration of each other. Unilateral contract. A binding promise not in consideration of another.

A bilateral contract becomes unilateral when one of the promises is fully performed.[2]

In a suit upon a unilateral contract, it is only where the defendant has had the benefit of the consideration, for which he bargained, that he can be held bound.[3]

Divisible contract. A contract the consideration of which is, *by its terms*, susceptible of apportionment on either side so as to correspond to the unascertained consideration on the other side. Entire contract.

[1] Story, Contr. §§ 39–40.

[2] Langdell, Sum. Contr. §§ 183, 12; Butler *v.* Thompson, 92 U. S. 415 (1875); 6 Col. 324.

[3] Richardson *v.* Hardwick, 106 U. S. 255 (1882), cases

A contract the consideration of which is entire on both sides. The entire fulfillment of the promise by either is a condition precedent to the fulfillment of any part by the other.[1]

Examples of a divisible contract are an engagement to pay a person the worth of his services as long as he will do certain work; or, to give a certain price for every bushel of so much grain as corresponds to a sample. The criterion is, the extent of the consideration on either side is indeterminate until the contract is performed.[1]

A contract by which one subscribes for a copy of a book, to be published, delivered, and paid for in parts, is entire.[2]

Special contract. (1) A contract under seal; a specialty, *q. v.*

(2) A contract incidental to another as the original or principal; as, for extra work or material in the construction of a house. See *Dermott* v. *Jones*, page 249.

(3) A contract specially entered into, or with peculiar provisions in distinction from such ordinary terms as, in the absence of a particular agreement, the law supplies.

As, that made with an employee for compensation, and that with a common carrier (*q. v.*) in limitation of his liability at common law.

Express contract. When the agreement is formal, and stated either verbally or in writing. **Implied contract.** When the agreement is matter of inference and deduction.

The distinction between them is in the mode of proof. In an "implied contract" the law supplies that which, not being stated, must be presumed to have been the agreement intended.[3]

Express contracts are sometimes said to be of record, by specialty, or by simple contract. See DEBT, Of record, etc.; JUDGMENT.

An "express contract" exists where the terms of the agreement are openly uttered and avowed at the time of the making; as, to pay a stated price for certain goods. An "implied contract" is such as reason and prejudice dictate, and which therefore the law presumes that every man undertakes to perform; as, to pay the worth of services requested of another; to pay the real value of goods delivered without agreement as to price. A species of implied contract, annexed to all other contracts, conditions, and covenants, is, that if one party fails in his part of the agreement he will pay the other party any damages thereby sustained.[4]

An implied contract is co-ordinate and commensurate with *duty*, and whenever it is certain that a man ought to do a particular thing the law supposes him to have promised to do that thing.[1]

In that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting. Thus, if a party obtain the money of another by mistake, it is his duty to refund it, from the general obligation to do justice which rests upon all persons.[2]

A contract may be inferred when it is found that there is an agreement and an intention to create a contract, although that intention has not been expressed in words of contract. A contract is also sometimes said to be implied when there is no intention to create a contract, and no agreement of parties, but the law has imposed an obligation which is enforced as if it arose *ex contractu*, instead of *ex lege*.[3]

The distinction between express and implied contracts may well be indicated by saying that the former are actual, the latter constructive, imputed by law rather because justice requires treating parties as if under contract than because of any real supposition that they have contracted.[4]

Joint contract. A contract by which the parties together are bound to perform the obligation or are entitled to receive the benefit of it. **Several contract.** A contract by which the individuals are separately concerned.

Where there is more than one person on either side the contract will be construed as a joint right or obligation, unless it be made several by the terms of the contract.[5] See further JOINT.

Executed contract. A contract whose object has been performed. **Executory contract.** One in which a party binds himself to do, or not to do, a particular thing.[6]

A contract may either be "executed," as if A agrees to change horses with B, and they do it immediately, in which case the possession and the right are transferred together; or it may be "executory," as if they agree to change next week. In the latter case the right only vests, and their reciprocal property in each other's horse is "in action;" for a contract executed conveys a chose in possession, a contract executory, a chose in action.[7]

A "contract executed" is one in which nothing remains to be done by either party, and where the transaction is completed at the moment the agreement is made. An "executory contract" is a contract to do some future act. A contract to sell personalty is executory, while a completed sale by delivery is ex-

[1] Story, Contr. §§ 25-26; Pars. Contr. 517; 2 McCrary, 769; 3 *id.* 130, 144-46, cases.

[2] Barrie *v.* Earle, 144 Mass. 4 (1886).

[3] Story, Contr., § 11; Leake, Contr. 11.

[4] 2 Bl. Com. 443; 3 *id.* 158-66.

[1] Illinois Central R. Co. *v.* United States, 16 Ct. Cl. 333 (1880), Drake, C. J. See also 55 Vt. 417; 2 Kent, 450

[2] Pacific Mail Steamship Co. *v.* Joliffe, 2 Wall. 457 (1864); Milford *v.* Commonwealth, 144 Mass. 65 (1 87)

[3] Inhabitants of Milford *v.* Commonwealth, 144 Mass 65 (1887), Field, J.

[4] Addison, Contr. *2, Am. ed., A. & W. (1888), note

[5] Story, Contr. §§ 53-55.

[6] [Fletcher *v.* Peck, 6 Cranch, 136 (1810), Marshall, C. J

[7] 2 Bl Com. 443.

ecuted; but as to which is meant the language may not always be decisive. An undertaking may be of the nature of both.[1]

In an "executory contract" it is stipulated by the agreement of minds, upon sufficient consideration, that something is to be done or not to be done by one or both of the parties. Only a slight consideration is necessary. On the other hand, a contract is "executed" where every thing that was to be done is done, and nothing remains to be done; as, a grant actually made. This requires no consideration to support it: a gift consummated is as valid as anything can be.[2]

An executed contract stands for and against all parties. To the extent that an invalid contract is not performed, it is voidable.[3]

While a special contract remains executory the plaintiff may sue upon it. When it has been fully executed according to its terms, and nothing remains to be done but to pay the price, he may sue upon the contract, or in *indebitatus assumpsit*, and rely upon the common counts. In either case the contract will determine the rights of the parties. But when he has been guilty of fraud, or has willfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. When he has in good faith fulfilled the contract, but not in the manner or not within the prescribed time, and the other party has sanctioned or accepted the work, he may recover upon the common counts in *indebitatus assumpsit*. In that case he must produce the contract upon the trial, and it will be applied as far as it can be traced; but if, by the fault of the defendant, the cost of the work or material has been increased, so far the jury may depart from the contract prices. In such case the defendant may recoup any damages sustained by plaintiff's deviations from the contract, and not induced by himself, both as to the manner and the time of performance.[4]

Pre-contract. An engagement which renders a person unable to enter into another legal contract; in particular, a contract of marriage which renders void a subsequent marriage.[5]

Sub-contract. A contract, by one who has engaged to do a thing, with another who agrees to do all or a part of that thing. See CONTRACTOR.

A contract, procured by fraud, or for an immoral purpose, or against an express enactment, or in general restraint of trade, or contrary to public policy, will be declared void.

For cases other than those within the Statute of Frauds, there is no prescribed form.

At common law, damages for breach of contract is the only remedy; in equity, specific performance (*q. v*) may be had. Where one party refuses to perform his part the other has an immediate right of action, and need not wait for the time of performance.[1] See VALUE, Market.

A mere assertion that the party will be unable or will refuse to perform his contract is not sufficient; it must be a distinct, unequivocal, absolute refusal to perform the promise, and be treated and acted upon as such by the promisee.[2]

The complaint must aver a promise and a breach thereof.[3]

It is well settled that the plaintiff may recover as a part of the damages for the breach of a special contract such profits as would have accrued from the contract as the direct and immediate result of its fulfilment.[4] "These are part of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized from an independent and collateral undertaking, although entered into in consequence and on the faith of the principal contract, they are too uncertain and remote to be considered part of the damages."[5] That is, the damages "must be such as might naturally be expected to follow the violation of the contract; and they must be certain in their nature and as to the cause from which they proceed. The familiar rule that the damages must flow directly and naturally from the breach is a mode of expressing the first; and that they must be the proximate consequence, and not be speculative or contingent, are modifications of the last."[6] In cases of executory contracts for the purchase of personalty, ordinarily the measure of damages is the difference between the contract price and the market price when the contract is broken. This rule may be varied where

[1] Story, Contr. §§ 22-23.

[2] Farrington *v.* Tennessee, 95 U. S. 683 (1877), cases, Swayne, J.

[3] Thomas *v.* West Jersey R. Co., 101 U. S. 85 (1879).

[4] Dermott *v.* Jones, 2 Wall. 9 (1864), Swayne, J.; Chicago *v.* Tilley, 108 U. S. 146, 154 (1880), cases; Cutter *v.* Powell, 2 Sm. L. Cas. 1-60, cases; Chitty, Contr., 612; 49 Conn. 206; 20 Kan. 328.

[5] 1 Bl. Com. 435; Bishop, Mar. & D. § 58.

[1] Grau *v.* McVicker, 8 Biss. 18-20 (1874), cases, Drummond, J.; Burtis *v.* Thompson, 42 N. Y. (Hand), 246 (1870); Cort *v.* The Ambergate, &c. R. Co., 6 E. L. & E. 230, 234-37 (1851), cases.

[2] Benjamin, Sales, 2 ed. § 568. Approved, Smoot's Case, 15 Wall. 48 (1872), cases; Dingley *v.* Oler, 117 U. S. 503 (1886), cases; Johnstone *v.* Milling, 16 Q. B. D. 467, 470, 473 (1886), cases.

[3] Du Brutz *v.* Jessup, 70 Cal. 75 (1886).

[4] Masterton *v.* City of Brooklyn, 7 Hill, 67 (1845), Nelson, C. J.,—the leading case: United States *v.* Speed, 8 Wall. 84 (1868); United States *v.* Behan, 110 U. S. 349 (1884); Insley *v.* Shepard, 31 F. R. 873 (1887). In Masterton's case it was also said that "the plaintiff may recover the difference between the cost of doing the work, and what he was to receive for it, making a reasonable reduction for the less time engaged, and the release from the care, trouble, risk, and responsibility attending the full execution of the contract."

[5] Fox *v.* Harding, 7 Cush. 522 (1851), Bigelow, J.

[6] Griffin *v.* Colver, 16 N. Y. 489 (1858). See also Booth *v.* Rolling Mill Co., 60 *id.* 492 (1875), cases; White *v.* Miller, 71 *id.* 133 (1877), cases; Billmeyer *v.* Wagner, 91 Pa. 94 (1879); 48 *id.* 407; 11 Atl. Rep. 300; Kendall Bank Note Co. *v.* Commissioners, 79 Va. 573 (1884).

the contract is made in view of special circumstances in contemplation of both parties.[1]

When a party sues for a part of an entire indivisible demand, and recovers judgment, he cannot subsequently maintain an action for another part of the same demand.[2]

Where a writing is the sole repository of an agreement, its construction is a matter of law for the court. Words are to be taken in the meaning usually attached to them. But a true interpretation requires that they be applied to the subject-matter, the situation of the parties, and the usual and known course of business. The common meaning of expressions, otherwise clear, may thus be modified by parol, without invasion of the rule which makes the writing the only proper evidence of the agreement.[3]

In construing contracts, especially those of a distinct class (like policies of insurance), in regard to which, owing to long and constant use of forms substantially alike, there has grown up a common and general use of language which may be said to constitute *jus et norma loquendi*,—it is not safe to adopt the mere etymological meaning of words, nor the definition which lexicographers give them. It is often necessary to ascertain whether a word or phrase has acquired a special or peculiar meaning, or whether it is used with any restricted signification by authors or jurists or those conversant with the business to which it relates.[4]

Contracts are to be construed according to their plain meaning to men of understanding, and not according to forced or artificial constructions.[1]

The court seeks to place itself in the place of the parties, and to view the circumstances as they viewed them.[2]

Where the meaning is not clear the court takes the light of the circumstances in which the contract was made, and the practical interpretation the parties by their conduct may have given it.[1]

When the language is ambiguous, the practical interpretation given by the parties is entitled to great, if not controlling, influence.[3]

Such practical construction will always prevail over the literal meaning.[4]

It is a fundamental rule that the courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and avail themselves of the light the parties possessed when the contract was made.[5]

Written instruments are always to be construed by the court, except when they contain technical words or terms of art, or when the instrument is introduced in evidence collaterally, or where its effect depends not merely on the construction and meaning of the instrument but upon extrinsic facts and circumstances, in which case the inference to be drawn from it must be left to the jury. . . It is for the jury to say what is the meaning of peculiar expressions, but it is for the court to decide what is the meaning of the contract.[6]

It is the business of the courts to enforce contracts, not to make or modify them.[6]

The law of contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life. All social life presumes it, rests upon it: out of contracts, express or implied, declared or understood, grow all rights, all duties, all obligations, all law. Almost the whole procedure of human life is the continual fulfillment of contracts. . . Implied contracts are co-ordinate and commensurate with *duty*, with what a man ought to do. These, in particular, form the warp and woof of actual life. To compel the performance of contract duties, the law exists. The well-being of society may be measured by the degree in which the law construes contracts wisely; eliminating whatever is of fraud or error, or otherwise wrongful; and carrying them into their full and proper effect and execution. These results the law seeks by means of principles; that is, by

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[1] Western Union Tel. Co. *v.* Hall, 124 U. S. 444, 453 (1888), cases, Matthews, J. The plaintiff brought suit for damages for the non-delivery of a message instructing the addressee to buy 10,000 barrels of petroleum, the price of which, when the message should have been delivered, was $1.17 per barrel, but when received had advanced to $1.35 per barrel. The addressee did not purchase. *Held*, that the plaintiff, having suffered no actual loss, could recover only nominal damages, not the contingent profit he might have made by buying and selling.

In Hadley *v.* Baxendale, 9 Exch. *354 (1854), it was said "the damages for which compensation is allowed are such as naturally and ordinarily flow from the breach; such as may be supposed to have entered into the contemplation of the parties when they made the contract, or such as, according to the ordinary course of things, might be expected to follow its violation." The rule as here expressed has been frequently followed in this country, as see Murdock *v.* Boston, &c. R. Co., 133 Mass. 15 (1882); Bodkin *v.* Western Union Tel. Co., 31 F. R. 136 (1887); Poposkey *v.* Munkwitz, 68 Wis. 330 (1887), cases; and cases *ante*.

"In an action for a breach of contract to deliver iron the plaintiff recovers the difference between the contract price and the market price at the date of the refusal to fulfill the contract." Roberts *v.* Benjamin, 124 U. S. 64 (1888), cases. Blatchford, J.

[2] Baird *v.* United States, 22 U. S. 432 (1877); Warren *v.* Comings, 6 Cush. 103 (1850), cases.

[3] Palmer *v.* Clark, 106 Mass. 387 (1871), Colt, J. See Bishop, Contr. §§ 379–82, cases.

[4] Dole *v.* New Eng. Mut. Ins. Co., 6 Allen, 386 (1863), Bigelow, C. J.

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[1] Lowber *v.* Bangs, 2 Wall. 737 (1864), cases; Nash *v.* Towne, 5 *id.* 699 (1866), cases.

[2] Goddard *v.* Foster, 17 Wall. 142 (1872), cases, Clifford, J.; Dewelley *v.* Dewelley, 143 Mass. 513 (1887): 20 Pick. 503.

[3] Chicago *v.* Sheldon, 9 Wall. 54 (1869); Topliff *v.* Topliff, 122 U. S. 131 (1887).

[4] District of Columbia *v.* Gallaher, 124 U. S. 510 (1888); Rowell *v.* Doggett, 143 Mass. 487 (1887).

[5] Merriam *v.* United States, 107 U. S. 441 (1882), cases, Woods, J. See also United States *v.* Gibbons, 109 *id.* 200, 203 (1883).

[6] The Harriman, 9 Wall. 173 (1869); 10 *id.* 171.

means of truths, ascertained, defined, and so expressed as to be practical and operative.[1]

See further AGREEMENT; ART, 3; ASSENT; ASSIGN, 2; ASSUMPSIT; CERTAINTY; COMPACT; CONDITION; CONSIDERATION, 2; CONTRACTOR; CONTRACTUS; COVENANT; CONVENTIO; CUSTOM; DAMAGES; DESCRIPTION, 4; DISABILITY; DURESS; DUTY, 1; EARNEST; EXCEPTION, 1; FRAUD; GRANT; IMPLIED; INFLUENCE; INSANITY, 2 (4); LEGAL; LET, 1 (2); LETTER, 3; LICENSE, 3; MERGER, 2; NOVATION; OBLIGATION; OFFER, 1; OPTION; PACT; PAROL, 2; PARTNERSHIP; PARTY, 2; PERFORMANCE; PLACE, Of contract; POSSIBLE; PRIVITY; PROMISE; RATIFICATION; READING; REFORM; RES, Perit, Ut res; RESCISSION; REVIVAL; SALE; SATISFACTORY; STULTIFY; SUBROGATION; SUNDAY; TIME; TRADE; USUS, Utile; VALUE; VOID; WAIVER; WAR.

CONTRACTOR. The primary meaning is one who contracts; one of the parties to a bargain; he who agrees to do anything for another.

One who contracts with a government to furnish provisions or supplies or to do work; one who agrees to construct a portion of a work, as, a railroad.[2]

Standing alone, or unrestrained by the context or particular words, may mean a sub-contractor or a person remotely engaged under a contract and doing the work, as well as an original contractor.[3]

Although, in a general sense, every one who enters into a contract may be called a "contractor," yet that word, for want of a better, has come to be used with special reference to a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for other persons without submitting himself to their control in respect to the petty details of the work. . . . The true test is to ascertain whether one who renders the service does so in the course of an independent occupation, representing the will of his employer only as to the *result* of his work and not as to the means by which it is accomplished. . . . If he submits himself to the discretion of his employer as to the details of the work, fulfilling his will not merely as to the result but also as to the means by which that result is to be attained, the contractor becomes a servant in respect to the work.[4]

The ordinary relation of principal and agent, master and servant, does not subsist in the case of an independent employee or contractor who is not under the immediate direction of the employer.[5]

See Phillips Construction Co. *v.* Seymour, under COVENANT; RESPONDEAT.

CONTRACTUS. L. A drawing together: a meeting of minds; a contract. See FORUM; LOCUS.

Ex contractu. By virtue of a contract. Applied to a right or a duty founded upon a contract relation. Opposed, *ex delicto:* by force of a wrongful act, or tort.

Whence actions *ex contractu* and *ex delicto*. See ACTION, 2; DELICTUM.

The civil law refers the greater part of rights and duties to the head of obligations *ex contractu* and *quasi ex contractu:* express and implied contracts.[1]

CONTRADICT. See PAROL; REBUT.

CONTRARY. A verdict "contrary to law" is contrary to the principles of law applicable to the facts which the jury were to try.[2] See AGAINST.

CONTRAVENE. To conflict, oppose. Whence contravention.

A right which militates with another right is sometimes called a "contravening equity."[3]

CONTRIBUTION. The share provided by or due from one of several persons to assist in discharging a common obligation or in advancing a common enterprise.[4]

Contributive; contributory. Helping to bring about a result; directly contributing to an injury: as, contributory negligence, *q. v.*

"Contributory" is also used in the sense of **contributor:** a person liable to contribution to the assets of a company which is being wound up, *q. v.*

A right to contribution exists where a debt owed by several persons jointly is collected from one; when one of two or more sureties pays the sum for which both or all are bound; when one co-devisee or co-distributee pays a charge upon land devised or descended; when a partner pays more than his share of the firm's debts; where recourse to private property is had to pay the debt of an insolvent corporation; where a co-insurer pays the whole loss; where a party-wall or a division-fence is constructed or repaired.[5]

Equal contribution to discharge a joint liability is not inequitable, even as between wrong-doers, although the *law* will not, in general, support an action to enforce it where the payments have been unequal.[6]

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[1] 1 Pars. Contr. 1-5; 2 Bl. Com. 443; 3 Law Quar. Rev. 168-79 (1887).

[2] Kent *v.* N. Y. Central R. Co., 12 N. Y. 631 (1855).

[3] Mundt *v.* Sheboygan, &c. R. Co., 31 Wis. 457 (1872), Dixon, C. J.; 12 N. Y. 631; 5 How. Pr. 454; 25 Minn. 524.

[4] Shearman & Redf., Neg. §§ 76-77: quoted, 71 Me. 322; 7 Lea, 373; 57 Tex. 510. See also Carter *v.* Berlin Mills Co., 56 N. H. 52-58 (1876), cases; Edmundson *v.* Pittsburgh, &c. R. Co., 111 Pa. 319 (1885); 86 *id.* 159; 17 Mo. 121.

[5] Cunningham *v.* International R. Co., 51 Tex. 511 (1879), cases. See also Robinson *v.* Blake Manuf. Co., 143 Mass. 532 (1887); 27 Conn. 274; 45 Ill. 455; 3 Gray, 349; 4 Allen, 133; 11 *id.* 419; 125 Mass. 232; 66 N. Y. 184; 46 Pa. 213; 57 *id.* 374; 9 M. & W. 673.

[1] 2 Bl. Com. 443.

[2] [Bosseker *v.* Cramer, 18 Ind. 45 (1862); Candy *v* Hanmore, 76 *id.* 128 (1881).

[3] 101 U. S. 739.

[4] [Abbott's Law Dict.

[5] See 1 Story, Eq. §§ 484-505.

[6] Selz *v.* Unna, 6 Wall. 336 (1867), Clifford, J.; 98 Conn. 455; 1 Bibb, 562.

The remedy in equity is more effective; as, between co-sureties.[1]

But there is "no contribution between wrong-doers." This rule applies appropriately only to cases where there has been *intentional* violation of law, and where the wrong-doer is to be presumed to have known that the act was unlawful.[2] It fails when the injury grows out of a duty resting primarily upon one of the parties, and but for his negligence there would have been no cause of action against the other. . . A servant is liable to his master for the damages recovered against him in consequence of the negligence of the servant.[3]

A municipality, made to pay damages for an injury resulting from the negligence of a private citizen, may recover the amount from the citizen.[4] See AVERAGE, General; JOINT.

CONTROL. See PROHIBITION; REGULATE.

In a contract by a railroad company concerning the roads which it might "control," held to refer to the immediate or executive control which it exercised by officers and agents acting under instructions from the board of directors.[5]

The "control" is a necessary incident to the "regulation" of the streets of a city.[6]

CONTROLLER. See COMPTROLLER.

CONTROVERSY. Any issue, whether of a civil or criminal nature; a case, *q. v.*

A dispute arising between two or more persons.[7]

A civil proceeding; as, that the judicial power of the United States shall extend "to Controversies to which the United States shall be a Party; — to Controversies between two or more States," etc.[8]

A controversy between citizens is involved in a suit whenever any property or claim of the parties capable of pecuniary estimation is the subject of litigation, and is presented by pleadings for judicial determination.[9]

See further CASE, 2, Cases, etc.; DISPUTE; MATTER; PROBATE; REMOVE, 2.

CONTUMACY.[10] Refusal or neglect to appear or to answer in a court; contempt for the order of a court or legislature. Whence contumacious. See CONTEMPT.

CONUSANCE. See COGNIZANCE.

CONUSOR. See RECOGNIZANCE.

CONVENIENTLY. See SOON.

Whatever it is the duty of an officer to do in the performance of service enjoined by law, and which may be accomplished by the exercise of reasonable diligence, that he can "conveniently" do.[1]

CONVENTIO. L. A coming together: agreement, engagement.

Conventio vincit legem. Agreement takes the place of the law: the express understanding of parties supersedes such understanding as the law would imply.

Parties are permitted to make law for themselves where their agreements do not violate the express provisions of any municipal law nor injuriously affect the interests of the public.[2]

Setting aside the application of a general rule of law is not intended.[3]

CONVENTION. A general term for any mutual engagement, formal or informal. See CONVENTIO.

Conventional. Agreed upon; created by act of parties — by agreement; opposed to *legal* — created by construction and operation of law: as, a conventional estate for life;[4] a conventional community, *q. v.*

There are postal conventions between nations; and constitutional conventions by delegates chosen to frame constitutions, *q. v.* Compare RECONVENTION.

CONVERSATION. 1. The etymological meaning (which see, below) seems to be preserved in the offense termed *criminal conversation:* adultery regarded as an injury to the husband, entitling him to damages in a civil action.[5]

The abbreviation "crim. con." has acquired a fixed and universal signification which the courts will take notice of without proof.[6]

The development of the word has been substantially as follows: L. *conversatio*, frequent use, habitual abode, intercourse: *conversari*, to turn to often, to dwell, live with.

(1) Manner of living; habits of life; behaving, behavior; conduct; life.

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[1] White, Ld. Cas. 66; 1 Ld. Cas. Eq. 100; 13 Am. Law Reg. 529.

[2] Bailey *v.* Bussing, 28 Conn. 458-61 (1859), cases; The Atlas, 93 U. S. 315 (1876), cases; The Hudson, 15 F. R. 167 (1883), cases; 13 Bradw. 565.

[3] Merryweather *v.* Nixon, 2 Sm. L. C. 483, 480, cases; Chicago City *v.* Robbins, 2 Black, 418 (1862); Robbins *v.* Chicago City, 4 Wall. 657 (1866).

[4] Clinton, &c. R. Co. *v.* Dunn, 59 Iowa, 619 (1882), cases; Cooley, Torts, p. 145.

[5] Pullman Palace Car Co. *v.* Missouri Pacific R. Co., 8 McCrary, 647 (1882).

[6] Chicago Dock Co. *v.* Garrity, 115 Ill. 164 (1885).

[7] Barber *v.* Kennedy, 18 Minn. 226 (1872); 33 *id.* 350; 77 Va. 125.

[8] Constitution, Art. III, sec. 2; 2 Dall. 431-32; 109 U. S. 477; Story, Const. § 1668.

[9] Gaines *v.* Fuentes, 92 U. S. 20 (1875), Field, J.; Searl *v.* School District, 124 *id.* 199 (1888), cases, Matthews, J.

[10] L. *contumax*, stubborn, obstinate.

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[1] Guerin *v.* Reese, 33 Cal. 297 (1867).

[2] Little Rock, &c. R. Co. *v.* Eubanks, 48 Ark. 467 (1886); 22 N. Y. 249.

[3] Story, Agency, § 368; 14 Gray, 446; 59 Pa. 96; 10 Wall. 644.

[4] 2 Bl. Com. 120.

[5] 3 Bl. Com. 139.

[6] Gibson *v.* The Cincinnati Enquirer, 5 Cent. Law J. 331 (1877); Same *v.* Same, 2 Flip. 125 (1877). See Wales *v.* Miner, 89 Ind. 118 (1883); 15 Am. Law Reg. 451-60 (1876), cases.

As, in the expressions: "of upright conversation;"[1] "the filthy conversation of the wicked,"[2] — *i. e.*, their lascivious life; "the conversation of the wives . . chaste conversation."[3]

(2) Intimate relation, association; companionship; familiar intercourse.

(3) Sexual acquaintance; illicit intimacy.

2. Familiar discourse; oral communication. See COMMUNICATION; COLLOQUIUM; DECLARATION, 1.

CONVERSION. Changing into another state or condition.

1. Of partnership debts: the changing of their original character and obligation with the consent of the creditors; so that, if they are originally joint debts of all the partners, they become, by consent, the separate debts of one partner; or if they are the separate debts of one partner, they become, by like consent, the joint debts of all the partners.[4]

2. In equity, money which, according to a will or agreement, is to be invested in land is regarded as realty; and land which is to be converted into money is regarded as money, and treated accordingly.[5]

Whence the doctrine of **equitable conversion**; whence, also, **reconversion**: the change of property, once converted, into other property of the former species.

The application to deeds and wills of the principle which treats that as done which ought to be done.[6]

A conversion will be regarded as such only for the purposes of the will, unless a different intention is distinctly indicated.[7]

An implied direction to sell land, for the payment of legacies, works an equitable conversion. The immediate effect of such direction is to break the descent, by vesting the estate in the trustee clothed with power to sell, and to confer on the legatees, not an interest in the land, but simply a right to the proceeds of the sale, in designated proportions,— which is a mere chose in action.[8]

When the purpose for which the conversion was to take place totally fails, the property is regarded as being what it is in fact, no conversion then taking place.

"To establish a conversion, the will must direct it absolutely or out and out, irrespective of all contingencies. The direction to convert must be positive and explicit, and the will, if it be by will, or the deed, if it be by contract, must decisively fix upon the land the quality of money. The direction to sell must be imperative."[1]

A naked or merely discretionary power to sell, unless, perhaps, coupled with an interest, does not effect a conversion.[2]

Where land is to be sold, and legatees interested in the proceeds elect to take it as such, it then becomes bound by liens.[3]

There is no conversion where a widow elects to take against a will directing a sale.[4]

To effect a *reconversion*, an election to take the land, instead of the proceeds, must be by an unequivocal act on the part of all persons interested.[5]

Intention is the governing rule as to conversions.[6]

3. Any unauthorized dealing with another's personalty as one's own.

The exercise of dominion and control over property inconsistent with and in defiance of the rights of the true owner or party having the right of possession.[7]

This may be *actual*, and either *direct* or *constructive*.

It is not necessary that there be a manual taking of the thing, nor that the defendant has applied it to his own use. The one inquiry is: Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If so, that is a conversion, be it for his own or another's use.[8]

Trover and conversion. The action for damages for a conversion, maintainable by him who has the right to immediate possession.[9]

The property may be a deed, a negotiable security, money, a copy of a record, an untamed animal reclaimed, trees or crops severed, liquors adulterated, or goods confused.

Includes using a thing without right, or in excess of license; misuse — detention, delivery in violation of

[1] The King's Bible (1611) — Psalms, xxxix, 14.

[2] 2 Pet. ii, 7.

[3] 1 Pet. iii, 1–2.

[4] Story, Partn. § 369.

[5] Seymour v. Freer, 8 Wall. 214 (1868).

[6] Chew v. Nicklin, 45 Pa. 87 (1863); De Wolf v. Lawson, 61 Wis. 477–78 (1884), cases; Effinger v. Hall, 81 Va. 107 (1885).

[7] Johnson v. Holifield, 82 Ala. 127–28 (1886), cases.

[8] Beatty v. Byers, 18 Pa. 107 (1851).

[1] Anewalt's Appeal, 42 Pa. 416 (1862), cases; Jones v. Caldwell, 97 *id.* 45 (1881), cases; Hammond v. Putnam, 110 Mass. 235 (1872); 8 Ves. 388; 19 *id.* 424.

[2] Bleight v. Bank, 10 Pa. 131 (1848); Chew v. Nicklin, 45 *id.* 84 (1863); Dundas's Appeal, 64 *id.* 325 (1870).

[3] Brownfield v. Mackay, 27 Pa. 320 (1856); Brolasky v. Gally, 51 *id.* 513 (1866); Evans's Appeal, 63 *id.* 183 (1869).

[4] Hoover v. Landis, 76 Pa. 354 (1874).

[5] Beatty v. Byers, 18 Pa. 107 (1851); Evans's Appeal, *supra*; 8 Va. Law J. 513 (1884).

[6] See generally Fletcher v. Ashburner, 1 Brown, C. C. *497 (1779); 1 W. & T. Lead. Cas. Eq. 1118–71, cases; 1 Story, Eq. §§ 562–71, 790–93; 2 *id.* §§ 1212–30; 2 Kent, 230, 476; Craig v. Leslie, 3 Wheat. 577–78, 582 (1818); 10 Pet. *563; 5 How. 233; 4 Del. Ch. 72; 15 B. Mon. 118; 27 Md. 563; 3 Gray, 180; 63 N. C. 332, 381; 5 Paige, Ch. 172; 6 *id.* 448; 13 R. I. 507.

[7] Badger v. Hatch, 71 Me. 565 (1880), Barrows, J.

[8] Bristol v. Burt, 7 Johns. *258 (1810), Per curiam.

[9] 3 Bl. Com. 152; 127 Mass. 64; 1 Sm. L. C. 230; 89 Ind 245.

orders, or non-delivery and even a wrongful sale, by a bailee; improper seizure or sale by an officer; not an accidental loss, nor mere non-feasance.[1] An original unlawful taking is conclusive; but where the original taking is lawful, and the detention only is illegal, a demand and refusal to deliver is necessary and must be shown.[2]

The action of trover and conversion, though originally for damages against one who had *found* and appropriated the goods of another, now reaches all cases where one has obtained such goods by any means, and has sold or used them, without assent, or has refused to deliver them on demand.[3]

The measure of damages is the value of the property at the time of the conversion, with legal interest.[4]

As to what is conversion of public moneys by public officers, see Revised Statutes, §§ 5488, 5496.

See further DETINUE; REPLEVIN; TROVER.

CONVEYANCE.[5] A carrying from place to place; also, transmission, transfer, from one person to another.

1. Transportation,—the act, or the means employed.

Public conveyance. A vessel or vehicle employed for the general conveyance of passengers. **Private conveyance.** A vessel or vehicle belonging to and used by a private individual.[6]

An omnibus used to carry, free of charge, guests of a hotel to and from railroad stations is not a "public" conveyance.[7] See VEHICLE.

2. Transfer of title to realty; and, the instrument by which this is done.

Properly, the term does not relate to a disposition of personalty, although sometimes so used,[8] as see under *Fraudulent Conveyance*.

The conveyance or transfer of title to vessels is regulated by the act of July 29, 1850, re-enacted into Rev. St. as § 4192.

To "convey" real estate is, by an appropriate instrument, to transfer the legal title from the present owner to another.[9]

In a deed, is equivalent to "grant."[1] See COVENANT, 1.

Imports an instrument under seal.[2]

May include a lease,[3] or a mortgage.[4]

Is simply a deed which passes or conveys land from one man to another,[5] or conveys the property of lands and tenements from man to man.[6] Evidences an intention to abandon the land.[7]

Involves a transfer of a freehold estate.[8]

Absolute conveyance. A conveyance entirely executed; not conditional, as in the case of a mortgage, *q. v.*

Adverse conveyance. A conveyance opposed to another conveyance; one of two or more conveyances passing or pretending to pass rights which are inconsistent with each other.

As, two or more transfers of absolute ownership in the same piece of land to different persons. See POSSESSION, Adverse.

Conveyances at common law. Some of these may be called *original* or *primary*, those by means whereof the benefit or estate is created or first arises; others, *derivative* or *secondary*, those whereby the benefit or estate originally created is enlarged, restrained, transferred, or extinguished.[9]

Original are: feoffment, gift, grant, lease, exchange, partition. Derivative are: release, confirmation, surrender, assignment, defeasance—each of which presupposes some other conveyance precedent.[9]

Conveyances under the Statute of Uses. Such as have force and operation by virtue of that statute.[10]

They are: covenant to stand seized to uses, bargain and sale, lease and release, deed to lead or declare the use of another more direct conveyance, deed or revocation of a use.[11]

At common law, words of conveyance were give, grant, bargain and sell, alien, enfeoff, release, confirm, quitclaim, *qq. v.* The meaning of these terms has been somewhat modified.[12]

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[1] 3 Bl. Com. 152, etc., *ante*.

[2] 1 Chitty, Pl. 179; 126 Mass. 132; 2 Greenl. Ev. § 644.

[3] Boyce *v.* Brockway, 31 N. Y. 493 (1865), cases; 61 *id.* 477; 68 *id.* 524; 10 Johns. 172. See also 9 Ark. 55; 2 Cal. 571; 19 Conn. 319; 10 Cush. 416; 2 Allen, 184; 36 Me. 439; 35 N. C. 340; 39 N. H. 101; 48 *id.* 406; 10 Oreg. 84; 9 Heisk. 715; 39 Vt. 480; L. R., 7 Q. B. 629; 9 Ex. 89.

[4] Grimes *v.* Watkins, 59 Tex. 140 (1883); 46 *id.* 402; 6 *id.* 45. As to limitation of actions, see 21 Cent. Law J. 245–47 (1885), cases.

[5] F. *convier*, to transmit: L. *conviare*, to accompany.

[6] Ripley *v.* Insurance Co., 16 Wall. 338 (1872), Chase, C. J.; Oswego *v.* Collins, 38 Hun, 170 (1885).

[7] City of Oswego *v.* Collins, 38 Hun, 171 (1885).

[8] Dickerman *v.* Abrahams, 21 Barb. 561 (1854).

[9] Abendroth *v.* Town of Greenwich, 29 Conn. 365 (1860); Edelman *v.* Yeakel, 27 Pa. 29 (1856).

[1] Patterson *v.* Carneal, 3 A. K. Marsh. 621 (1821); Lambert *v.* Smith, 9 Oreg. 198 (1881).

[2] Livermore *v.* Bagley, 3 Mass. 510–11 (1807).

[3] Jones *v.* Marks, 47 Cal. 246 (1874).

[4] Odd Fellows' Savings Bank *v.* Banton, 46 Cal. 607 (1873); Babcock *v.* Hoey, 11 Iowa, 377 (1860); Pickett *v.* Buckner, 45 Miss. 245 (1871); Rowell *v.* Williams, 54 Wis. 639 (1882). See N. Y. R. S. 762, § 38; 2 *id.* 137, § 7.

[5] Brown *v.* Fits, 13 N. H. 285 (1842); Klein *v.* McNamara, 54 Miss. 105 (1876).

[6] 2 Bl. Com. 309.

[7] 2 Bl. Com. 10.

[8] Hutchinson *v.* Bramhall, 42 N. J. E. 335 (1886).

[9] 2 Bl. Com. 309, 324; 9 Oreg. 187.

[10] 2 Bl. Com. 309, 327.

[11] 2 Bl. Com. 338–39.

[12] Richardson *v.* Levi, 67 Tex. 367 (1887).

The forms of conveyance are prescribed by statutes in many States; but such statutes are generally deemed directory only, not mandatory; and the common-law modes are recognized as effectual. Conveyance by bargain (*q. v.*) and sale is the mode ordinarily practiced.

Whatever be the form or nature of the conveyance, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is possessed of a particular estate in the premises, which estate the deed purports to convey, or if the possession is affirmed in the deed in express terms or by necessary implication, the grantor and persons in privity with him, are estopped from denying that he was so possessed. The estoppel works upon the estate, and binds an after-acquired title.[1] See ABANDON, 1; CONDITION; DEED, 2; DELIVERY, 4; ESTOPPEL; INFLUENCE; RECORD; TRANSFER; UNDER AND SUBJECT.

Fraudulent conveyance. In a general sense, any transfer of property, real or personal,[2] which is infected with fraud, actual or constructive; more specifically, such transfer of realty by a debtor as is intended or at least operates to defeat the rights of his creditors. **Voluntary conveyance.** A transfer without valuable consideration.

Celebrated statutes upon this subject, adopted by the States, are: (1) 13 Elizabeth (1571), c. 5, which declares void conveyances of lands, and also of goods, made to delay, hinder, or defraud *creditors;* unless "upon good [valuable] consideration, and *bona fide*," to a person not having notice of such fraud. (2) 27 Elizabeth (1585), c. 4, made perpetual by 39 Eliz. (1597), c. 18, s. 31, which provides that voluntary conveyances of any estate in lands, tenements, or other hereditaments, and conveyances of such estates with clause of revocation at the will of the grantor, are also void as against *subsequent purchasers* for value. The effect of the last statute is, that a person who has made a voluntary settlement of landed property, even on his own children, may afterward sell the property to any purchaser, who, even though he has notice of the settlement, will hold the property; but, otherwise, if the settlement is founded on a valuable consideration.[3] These statutes are to be liberally construed in suppression of fraud.[4]

The object of 13 Elizabeth was to protect creditors from frauds practiced under the pretense of discharging a moral obligation toward a wife, child, or other relative. It excepts the *bona fide* discharge of such obligation. Hence, a voluntary conveyance, as to creditors, is not necessarily void.[5] The object of 27 Elizabeth was to give protection to subsequent purchasers against mere volunteers under prior conveyances. As between the parties such conveyances are binding.[6]

In England, all voluntary conveyances are void as to subsequent purchasers, with or without notice, although the original conveyance was *bona fide*, upon the ground that the statute infers fraud.[1]

In New York, only voluntary conveyances, originally fraudulent, are held to be within the statute.[2] In Massachusetts, a conveyance, to be avoided, must have been fraudulent, not merely voluntary, at its inception.[3] In Pennsylvania, the grantor must have intended, by his voluntary conveyance, to withdraw his property from the reach of his future creditors;[4] any such creditor must prove that fraud on him was intended: a man need not provide for indebtedness he does not anticipate and which may never occur.[5] And the Supreme Court of the United States holds, what is the settled doctrine generally, that if a person, natural or artificial, solvent at the time, without actual intent to defraud creditors, disposes of his property for an inadequate consideration, or makes a voluntary conveyance of it, subsequent creditors are not injured;[6] that a conveyance for value (as for marriage) will be upheld, however fraudulent the purpose of the grantor, if the grantee had no knowledge thereof.[7]

A deed made to prevent a recovery of damages for a tort is fraudulent and void.[8]

Conveyances to defraud creditors are also indictable; expressly made so by 13 Elizabeth, c. 5, § 3.[9]

The conveyance to a wife, in payment of a debt owing by her husband, is not voluntary, nor fraudulent as to other creditors; but there must have been a previous agreement for repayment.[10]

See further DECLARATION, 1; FRAUD; HINDER; POSSESSION, Fraudulent; PREFERENCE; SETTLE, 4.

Mesne conveyance. A conveyance between others; an intermediate transfer.

Reconveyance. A transfer of realty back to the original or former grantor.

Conveyancer. One who makes a business of drawing deeds of conveyance of land, and, perhaps, of examining titles.

One whose business it is to draw deeds, bonds, mortgages, wills, writs, or other legal papers, or to examine titles to real estate.[11]

[1] Van Rensselaer *v.* Kearney, 11 How. 322 (1850), cases; French *v.* Spencer, 21 *id.* 240 (1858); Apgar *v.* Christophers, 33 F. R. 203 (1887), Wales, J.

[2] See Livermore *v.* Bagley, 3 Mass. *510–11 (1807).

[3] Williams, Real Prop. 76.

[4] 1 Story, Eq. §§ 352–58, 362; 4 Kent, 462–64.

[5] 1 Story, Eq. § 426.

[1] 1 Story, Eq. § 426.

[2] Sterry *v.* Arden, 1 Johns. Ch. *269–70 (1814): s. c. 12 Johns. *554 (1815); 6 Cowen, 603; 8 *id.* 406; 8 Paige, 165.

[3] Beal *v.* Warren, 2 Gray, 456, 451 (1854).

[4] McKibbin *v.* Martin, 64 Pa. 356 (1870).

[5] Harlan *v.* Maglaughlin, 90 Pa. 297–98 (1879), cases; Hoak's Appeal, 100 *id.* 62 (1882), cases.

[6] Graham *v.* La Crosse, &c. R. Co., 102 U. S. 153 (1880), cases, Bradley, J.

[7] Prewit *v.* Wilson, 103 U. S. 24 (1880), cases. See Barbour *v.* Priest, *ib.* 293 (1880); Clark *v.* Killian, *ib.* 766 (1880); 17 F. R. 425–28, cases; Sexton *v.* Wheaton, 8 Wheat. 242 (1823); 1 Am. L. C. *36, 55; Twyne's Case, 1 Sm. L. C. *33, 39; 18 Am. Law Reg. 137.

[8] Johnson *v.* Wagner, 76 Va. 590 (1882), cases.

[9] Regina *v.* Smith, 6 Cox, Cr. C. 31, 36 (1852).

[10] Bates *v.* McConnell, 31 F. R. 588 (1887); *ib.* 591, note. See generally 24 Am. Law Reg. 489–99 (1885), cases; 22 Cent. Law J. 124 (1886), cases,—remedy by execution.

[11] Revenue Act, 13 July, 1866, § 9: 14 St. L. 118.

Conveyancing. That branch of the law which treats of transfers of realty.

Includes the examinations of titles, and the preparation of instruments of transfer. In England, Scotland, and some of our larger cities, it is a highly artificial system of law, with a distinct class of practitioners.[1]

CONVICT.[2] 1, *v.* To find guilty of a criminal offense, by verdict of a jury.

2, *n.* One who has been found guilty of a crime; in particular, one who is serving a sentence for the commission of a crime.

Convicted. Found guilty of the crime whereof one stands indicted: which may accrue from his confessing the offense and pleading guilty, or by his being found so by verdict of his country.[3]

A man is "convicted" when he is found guilty or confesses the crime before judgment had.[4]

Incapable of holding office or testifying because "convicted of crime" intends a verdict of guilt *and* judgment thereon.[5]

Conviction. 1. Used to designate a particular stage of a criminal prosecution triable by a jury, the ordinary legal meaning is, the confession of the accused in court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt.[6]

"Judgment" or "sentence" is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained.[6] See SENTENCE.

The finding by the jury that the accused is guilty; but, in legal parlance, often denotes the final judgment of the court.[7]

The act of convicting or overcoming one; in criminal procedure, the overthrow of the defendant by the establishment of his guilt according to some known legal mode — a plea of guilty or verdict of a jury.[8]

The term may be used in such connection as to have a secondary or unusual meaning, which would include the final judgment of the court.[8]

In many cases refers to a finding of guilt by a verdict or plea of guilty, and not to the sentence in addition.[1]

Opposed, *acquit, acquitted, acquittal,* q. v.

Former conviction. A plea that the accused has already been tried and convicted of the offense charged. Opposed, former acquittal.

Second convictions, or even second trials, after legal conviction or acquittal, are not allowed. The pleas of *autrefois convict* and *autrefois acquit* are grounded upon the universal maxim of the common law that no man is to be brought into jeopardy of his life more than once for the same offense. The defense must be pleaded, and it must be alleged and proved by the former record that the conviction or acquittal was legal, and based on the verdict of a jury duly impaneled and sworn, else the plea will be subject to demurrer.[2]

A plea which shows that the former sentence has been reversed for error is not a good bar.[3] See further JEOPARDY. Compare ADJUDICATION, Former.

Summary conviction. (1) Such sentence as may be pronounced by a court without the intervention of a jury.

At common law, peculiar to punishment for contempts, *q. v.*

(2) A trial of an offense against the excise or revenue laws, determined by the commissioner of the particular department or by a justice of the peace.[4]

(3) A sentence pronounced by a committing magistrate, without a hearing and verdict by a jury.

This is what is generally meant. It is provided for by statute, for the punishment of the lighter offenses; and intended to secure the accused a speedy trial, as well as to relieve society and the higher courts of the annoyance of jury trials in petty cases. But the proceeding is in derogation of the constitutional right of trial by jury, and statutory directions are to be strictly pursued. Appeal to a court having a jury is allowed, within a short period, as five days; so that, in reality, these convictions are only submitted to by offenders. See further SUMMARY.

See also INDICTMENT; JURY, Trial by; VAGRANT.

2. Firm belief. See ABIDING; DOUBT, Reasonable.

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[1] Bouvier's Law Dict.

[2] L. *con-vincere*, to completely overcome.

[3] [4 Bl. Com. 362.

[4] Shepherd *v.* People, 25 N. Y. 406 (1862), cases; 1 Bish. Cr. L. § 223.

[5] Faunce *v.* People, 51 Ill. 313 (1869); Smith *v.* State, 6 Lea, 639 (1881).

[6] Commonwealth *v.* Lockwood, 109 Mass. 325–40 (1872), cases, Gray, J.; Dwar. Stat., 2 ed., 683.

[7] Blaufus *v.* People, 69 N. Y. 109 (1877), cases, Folger, J.; Schiffer *v.* Pruden, 64 *id.* 52 (1876); 5 Bush, 204; 48 Me. 127; 3 Mo. 602; 25 Gratt. 853; 12 Ct. Cl. 201.

[8] United States *v.* Watkinds, 7 Saw. 91–93 (1881), Deady, J.

[1] Quintard *v.* Knoedler, 53 Conn. 487–88 (1885); Bishop, Stat. Cr. § 348; Whart. Cr. Pr. & Pl. § 935. *Quære.* In a prosecution, alleging a "former conviction," do not these words denote "final judgment," and can they be predicated of a suspended judgment? — White *v.* Commonwealth, 79 Va. 611, 615 (1884).

[2] Coleman *v.* Tennessee, 97 U. S. 525–31 (1878), cases, Clifford, J.

[3] Cooley, Const. Lim. 326–28, cases; 1 Bish. Cr. L. §§ 651–80; Whart. Cr. Pl. § 435; Moore *v.* State, 71 Ala. 308 (1882), cases: 4 Cr. Law Mag. 429.

[4] See 4 Bl. Com. 280–83.

CONVINCE. To overcome or subdue: to satisfy the mind by proof.[1] See DOUBT, Reasonable.

COOLING TIME. Time for passion to subside and reason prevail; time for reflection.

A man, when assailed with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before he has had time for cool reflection. If, during that period, he attacks his assailant with a weapon likely to endanger his life, and death ensues, it is regarded as done through heat of blood or violence of anger, and not through malice.[2] See MALICE; PROVOCATION.

COOPER. See MANUFACTURER.

CO-OPERATIVE. See ASSOCIATION; TRADES-UNION.

CO-ORDINATE. See JURISDICTION, 2.

COPARCENARY. The estate held where lands of inheritance descend from the ancestor to two or more persons.[3]

Coparceners. Co-heirs are called coparceners, and parceners: they may be compelled to make "partition."

All parceners make but one heir. They have the unities of interest, title, and possession of joint-tenants. No unity of time is necessary; for the heir of a parcener and surviving parcener are coparceners. Parceners always claim by *descent;* joint-tenants by purchase. They sue and are to be sued jointly. They may not have an action for waste against each other: that can be prevented by partition. Each has a distinct moiety, with no survivorship. Possession being severed by partition, they become tenants in severalty; when one aliens his share they become tenants in common. Where they divide amicably each elects a share by seniority, which is a personal privilege. Under a writ in partition, the sheriff, by the verdict of a jury (or commissioners) divides and assigns the parts.[4]

In the old sense, includes males and females; in modern English usage, is limited to females.[4]

Of comparatively little practical importance at present. With us, heirs take as tenants in common.[5] See HOTCH-POT; PARTITION; TENANT.

COPARTNER. See PARTNER.

COPPERS. See COIN.

COPY. A true transcript of an original writing.[6]

A reproduction or transcript of language, written or printed, or of a design, device, picture, or work of art.[1] Compare TRANSCRIPT.

Certified or office copy. A copy made and attested by the officer who is intrusted with the custody of an original writing, and authorized to make copies.

Every document of a public nature, as to which inconvenience would be occasioned by a removal, and which the party has a right to inspect, may be proved by a duly authenticated copy.[8]

Examined copy. A copy compared with the original, or with an official record thereof.

Exemplified copy. A copy attested under the seal of the proper court; an exemplification (*q. v.*) of record.

An examined copy of a record is evidence where the removal of the original would inconvenience the public. Fraud or mistake therein can be readily detected.[8] See RECORD, Judicial.

A copy of a will may be received in probate.[4]

Where an original is lost, or withheld after notice to produce, a copy will be received.[8]

To be evidence, a copy must also be complete.[8]

In making examined copies, the comparing witnesses should change hands, so that the listening witness may in turn become the reading witness.[7]

Such copy should be proved by some one who has compared it with the original.[8]

The rule that a copy of a copy is not admissible evidence is correct in itself, when properly understood and limited to its true sense. The rule properly applies to cases where the copy is taken from a copy, the original being still in existence and capable of being compared with it, for then it is a second remove from the original; or where it is a copy of a copy of a record, the record being in existence, by law deemed as high evidence as the original, for then it is also a second remove from the record. But it is quite a difficult question whether it applies to cases of secondary evidence where the original is lost, or the record of it is not deemed as high evidence as the original, or where the copy of a copy is the highest proof in existence.[9]

A letter-press copy is receivable, the original being lost. While secondary at best, a copy from such a copy, the original being lost, has been allowed.[10]

[1] Evans *v.* Rugee, 57 Wis. 626 (1883).

[2] Commonwealth *v.* Webster, 5 Cush. 308 (1850), Shaw, C. J. See also Abernethy *v.* Commonwealth, 101 Pa. 322 (1882); 71 Ala. 485; 3 Gratt. 594; Whart. Hom. 448; 1 Russ. Cr. 667.

[3] 2 Bl. Com. 187-90; 3 *id.* 227.

[4] 4 Kent, 366.

[5] 1 Washb. R. P. 415.

[6] Dickinson *v.* Chesapeake, &c. R. Co., 7 W. Va. 412 (1874); Bouvier.

[1] Abbott's Law Dict.

[2] Stebbins *v.* Duncan, 108 U. S. 50 (1882), cases; Shutesbury *v.* Hadley, 133 Mass. 247 (1882), cases; Booth *v.* Tiernan, 109 U. S. 208 (1883).

[3] 1 Greenl. Ev. § 91.

[4] 1 Williams, Ex. 364.

[5] 1 Greenl. Ev. § 508.

[6] Commonwealth *v.* Trout, 76 Pa. 332 (1874).

[7] 1 Whart. Ev. § 94.

[8] McGinniss *v.* Sawyer, 63 Pa. 267 (1869).

[9] Winn *v.* Patterson, 9 Pet. *677 (1835), Story J.

[10] See Goodrich *v.* Weston, 102 Mass. 363 (1869), cases; 1 Cush. 189; 7 Allen, 561; 3 McCrary, 169; 37 Conn. 555; 57 Ga. 50; 73 Ill. 161; 18 Kan. 546; 19 La. An. 91; 35 Md. 123; 44 N. Y. 172; 1 Whart. Ev. §§ 90-109, cases.

COPYHOLD. Lords of manors, from time out of mind, having permitted villains to enjoy their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, gave the villains title to prescribe against the lords, and, on performance of the same services, to hold the lands under the lord's will, that being in conformity with the customs of the manor as preserved and evidenced by the rolls of the courts-baron.[1]

In England, to-day, a copyhold, in a general way, distinguishes a customary tenure from a freehold.

COPYRIGHT. An exclusive right to the multiplication of the copies of a production.[2]

The sole right of printing, publishing and selling one's literary composition or book.[3]

A copyright gives the author or the publisher the exclusive right of multiplying copies of what he has written or printed.[4]

The word may be understood in two senses. The author of a literary composition has an undoubted right at common law to the piece of paper on which his composition is written, and to the copies he chooses to make of it for himself or others. . . The other sense is, the exclusive right of multiplying copies: the right of preventing others from copying, by printing or otherwise, a literary work which the author has published; the exclusive right of printing a published work, that being the ordinary mode of multiplying copies.[5]

The word is used indifferently for **common-law copyright:** copyright before publication; and **statutory copyright:** copyright after publication. It is also made a synonym for "literary property" — the exclusive right of an owner publicly to read or exhibit his work; but this is not strictly correct.[6]

A copyright secures the proprietor against the copying by others of the original work, but does not confer upon him a monopoly in the intellectual conception which it expresses. The law originated in the recognition of an author's right to be protected in the manuscript which is the title of his literary property. It does not rest upon the theory that the author has an exclusive property in his ideas or in the words in which he has clothed them. . . No person, for example, can acquire an exclusive right to appropriate the information contained in a translation, chart, map or survey. . . Frequently, it is necessary to determine whether the defendant's work is the result of his own labor, skill, and use of materials common to all, or is an appropriation of the plaintiff's work, with colorable alterations and departures intended to disguise the piracy. He may work on the same original materials, but he cannot evasively use those already collected and embodied by the skill, industry, and expenditure of another.[1]

The earliest evidence of the recognition of copyright is found in the charter of the Stationers' Company, granted by Philip and Mary, and in the decrees of the court of star-chamber. The first statute was 8 Anne (1710), c. 19; passed for the protection and encouragement of learned men. This statute gave the author and his assigns the sole liberty to print his work for fourteen years; the *author* to be entitled to an extension for another like term. But, the better opinion is that the common law, before that statute, admitted the exclusive right in the author, and his assigns, to multiply copies of his own original literary composition, for injunctions to protect this right were granted in equity. At all events, it has long been settled that the common-law right was taken away by the statute, and, hence, that it has existed, if at all, by force of some subsequent statutory provision.[2]

With us, before the adoption of the Constitution, it may be doubted whether there was any copyright at common law. Some of the States had passed laws recognizing and securing the right. All power in the States to legislate upon the subject became vested in Congress. "The Congress shall have power . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the Exclusive Right to their respective Writings and Discoveries."[3] Under this authority various general acts have been passed, from that of May 31, 1790, to that of June 18, 1874; all which, as re-enacted, constitute §§ 4948 to 4971 of the Revised Statutes, known as the title or chapter on "Copyrights."

"Any citizen of the United States or resident therein, who shall be the author, inventor, designer, or proprietor of any *book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts*, and the executors, administrators, or the assigns of any such person shall, upon complying with the provision of this chapter, have the sole liberty of printing, re-

[1] 2 Bl. Com. 95, 90, 147; Williams, R. P. 333.

[2] [Stephens *v.* Cady, 14 How. 530 (1852), Nelson, J. See R. S. § 4952.

[3] [Stowe *v.* Thomas, 2 Wall. Jr. 567 (1853), Grier, J.

[4] Perris *v.* Hexamer, 99 U. S. 675 (1878), Waite, C. J.

[5] Jefferys *v.* Boosey, 4 H. L. C. 919-20 (1854), Parke, B.; Cappell *v.* Purday, 14 M. & W. 316 (1845), Pollock, C. B.

[6] See Drone, Copyr. 100.

[1] Johnson *v.* Donaldson, 18 Blatch. 289-90 (1880), cases, Wallace, J. See also *Re* Brosnahan, 18 F. R. 64-65 (1883).

[2] See 2 Bl. Com. 406-7; 2 Kent, 373; Millar *v.* Taylor, 4 Burr. 2408 (1769); Stevens *v.* Gladding, 17 How. 454 (1854); 18 *id.* 165; 2 Story, 100; 5 McLean, 32; 6 *id.* 128; 15 Alb. Law J. 445, 465 (1877); Drone, 1.

[3] Constitution, Art. I, sec. 8, cl. 8.

printing, publishing, completing, copying, executing, finishing, and vending the same; and, in case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others." R. S. § 4952.

"The printing, publishing, importation, or sale of any book, map, chart, dramatic or musical composition, print, cut, engraving, or photograph, written, composed, or made by any person *not a citizen* of the United States nor resident therein," is not to be construed as prohibited. R. S. § 4971. No mention being here made of paintings, drawings, chromos, statues, statuary, models, or designs, there would seem to be nothing to prevent a resident owner from copyrighting any such, although the work of a foreigner.[1] See further PROPRIETOR, 1.

"Engraving, cut, and print" (R. S. § 4952) apply only to pictorial illustrations or works connected with the fine arts; and no *prints* or *labels* designed to be used for any other article of manufacture shall be entered under the copyright law, but may be registered in the patent office.[2] See PRINT.

Manufacturers of designs for molded decorative articles, titles, plaques, or articles of pottery or metal, subject to copyright, may put the copyright mark upon the back or bottom of such articles, or in such other place upon them as it has heretofore been usual for manufacturers to employ.[3]

The period is twenty-eight years from the time of recording the title; with a right of renewal for fourteen years, in the author, inventor, or designer, or his widow or children, being still a citizen or resident. R. S. §§ 4953-54.

A printed copy of the title (not title-page) of the book, map, chart, etc., or a description of the painting, drawing, etc., or a model or design of the work of art, as the case may be, is to be deposited with or mailed to the Librarian of Congress; and, within ten days after publication, two complete copies of the best edition of each book or other article is also to be sent to him.[4]

The print of a type-writer will be accepted. See TITLE, 2, Book.

Notice of copyright must be given by some imprint on the title,— leaf, face, or front-piece. The shortest form is "Copyright, 1888, by A. B." The penalty for an unauthorized notice is one hundred dollars.

"Registered" is not the equivalent of "copyright."[5]

"Right of translation reserved," or "All rights reserved," secures the right to translate or to dramatize the production. See DRAMA; RESERVE, 2.

Assignments must be in writing, and recorded within sixty days.

A separate copyright must be taken out for each volume or number of a periodical, or variety, or description.

In the case of a painting, statue, model, or design, a photograph of "cabinet" size must accompany the description and application.

No affidavit or formal application is required.

At present, 1888, the fees are: fifty cents each for recording a title, description, etc., for a certificate, or a duplicate certificate; and one dollar for each assignment.[1]

The right is infringed when another person produces a substantial copy of the whole or of a material part of the thing copyrighted.[2]

To constitute an invasion of copyright it is not necessary that a large portion of a work be copied in form or in substance. If so much is taken that the value of the original is sensibly diminished, or the labors of the original author substantially, to an injurious extent, appropriated, that is an infringement. Courts look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale or diminish the profits, or supersede the object of the original work.[3]

Evidence of the coincidence of errors, the identity of inaccuracies, affords strong proof of copying; so does coincidence of citation, and identity in plan and arrangement. Equity may not relieve where the amount copied is small and of little value, where there is no bad motive, where there is a well-founded doubt as to the legal title, or long acquiescence or culpable neglect in seeking redress. A copyright thus differs from a patent-right, which admits of no use at all without license.[4]

Recent decisions afford more ample protection to copyright than the earlier ones; they restrict the privilege of subsequent writers within narrower limits.[4, 5]

A production, published under a *nom de plume*, and not copyrighted, becomes public property; and the use of the assumed name is not a trade-mark which will protect against republication.[6]

An action for the penalty for infringement, provided by R. S. § 4965, abates by the death of the defendant.[6]

See further ABRIDGE; ART, 2; BOOK, 1; CHART; COMPILE; COMPOSITION, 1; DEDICATION, 2; DIRECTORIES; IDENTITY, 2; LETTER, 3; MANUSCRIPT; PHOTOGRAPH; PIRACY, 2; REPORT, 1 (3); REVIEW, 3; SCIENCE; SECURE, 1; TRANSLATION; USUS, Ancipitis, Utile, etc. Compare PATENT, 2; TRADE-MARK.

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[1] Drone, Copyr. 232. But see Yuengling *v.* Schile, 20 Blatch. 458-63 (1882).

[2] Act 18 June, 1874: 1 Sup. R. S. 41.

[3] Act 1 Aug. 1882: 22 St. L. 181; amending R. S. §§ 4962, 969.

[4] See Merrell *v.* Tice, 104 U. S. 561 (1881); Donelly *v.* Ives, 13 Rep. 300 (S. D. N. Y., 1882); 1 Blatch. 618.

[5] Higgins *v.* Keuffel, 30 F. R. 627 (1887).

[1] Upon application to the Librarian of Congress, printed directions for securing a copyright will be furnished free of charge.

[2] Perris *v.* Hexamer, 99 U. S. 674 (1878).

[3] Folsom *v.* Marsh, 2 Story, 110 (1844); Lawrence *v.* Dana, 4 Cliff. 81-83 (1869), cases.

[4] Lawrence *v.* Dana, 4 Cliff. 74-75, 80 (1869), cases; R. S. §§ 4964-65.

[5] Clemens ("Mark Twain") *v.* Belford, 11 Biss. 461 (1883): 15 Rep. 227; 14 F. R. 720.

[6] Schreiber *v.* Sharpless, 17 F. R. 589 (1883). See generally *ib.* 593-603, cases. R. S. §§ 4964-67, providing penalties for infringements, explained,— Thornton *v.* Schreiber, 124 U. S. 613-16 (1888), Miller, J.

CORAM. L. Before; in the presence of.

Coram nobis. Before us. **Coram vobis.** Before you.

Designate, the first, a writ of error designed to review proceedings before the same court which is alleged to have committed the error; and the second, a writ for a review by a higher court. See further ERROR, 3.

Coram non judice. Before one not a judge; by a court without jurisdiction. See further JUDEX, Coram.

CORD. One hundred and twenty-eight cubic feet.

A contract for the sale of wood or bark by the cord calls for such number of cubic feet.[1]

CORDIALS. See LIQUOR.

CORN. See GRAIN.

CORNER. In the language of gambling speculation, when an article of commerce is so engrossed or manipulated as to make it scarce or plenty in the market at the will of the gamblers, and its price thus placed within their power.[2] See COMBINATION, 2.

CORNERS. See FOUR.

CORODY. See PENSION, 2.

CORONER.[3] 1. An officer who has principally to do with pleas of the crown, or such wherein the king is more immediately concerned.[4]

2. A county officer who inquires into the causes of sudden or violent deaths, while the facts are recent and the circumstances unchanged.[5]

The lord chief justice is the chief coroner of all England; and there are usually four coroners for each county. The office is of equal antiquity with that of sheriff; was ordained with his, to keep the peace, when the earls gave up the wardship of the county. Much honor formerly appertained to the office, which might be for life.

According to Blackstone, the duties of the office, which are principally judicial, are largely defined by 4 Edw. I (1276), and consist in inquiring (whence coroner's inquest) when any person is slain, or dies suddenly, or in prison, concerning the manner of his death.[6] This must appear upon view of the body, at the place where death happened, by a jury of four to six persons. If any person be found guilty of homicide the coroner is to commit him to prison for further trial, and to inquire as to his property, which is forfeited thereby; and he is also to certify the whole of the inquisition, with the evidence, to the court of king's bench or to the next assizes. Another branch of his office was to inquire generally concerning shipwrecks, and treasure-trove. His ministerial office is as the sheriff's substitute: when exception is taken to the sheriff, for suspicion of partiality, process is awarded to the coroner for execution.[1] See SHERIFF.

The object of an inquest is to seek information and secure evidence in case of death by violence or other undue means. It is the coroner's duty to act only when there is reasonable ground to suspect that a death was so caused; the power is not to be exercised capriciously, and arbitrarily against all reason.[2]

The welfare of society and the interests of public justice alike demand that an inquest should be thorough. Statutory provisions are, therefore, to be liberally construed, with a view to the accomplishment of the end desired. They are to be so construed that the coroner may be thereby authorized to employ such medical, surgical, or other scientific skill as may be necessary, in his judgment, in the particular case, and to charge his county with payment of the reasonable expense thereof.[3]

In Massachusetts, the office was abolished in 1877. The governor appoints as examiners "men learned in the science of medicine," who hold autopsies, and, in cases of death from violence, notify the district attorney and a justice of that fact.[4]

CORPORAL. 1. Relating to the body of a person; bodily: as, corporal punishment, *q. v.*; corporal seizure or touching. See ARREST, 2; CORPUS.

2. Affecting a thing externally; as, a corporal oath,—taken with the hand upon the Gospels. See OATH.

3. In person: as, a corporal appearance. Compare CORPOREAL.

CORPORATE. See CORPORATION, Corporate.

CORPORATION. A creature of the crown, created by letters-patent.[5]

An artificial being, indivisible, intangible, and existing only in contemplation of law.[6]

As all personal rights die with the person, and as the necessary forms of investing a

[1] Kennedy *v.* Oswego, &c. R. Co., 67 Barb. 167 (1867). See Buffalo *v.* O'Malley, 61 Wis. 258 (1884).

[2] Kirkpatrick *v.* Bonsall, 72 Pa. 158 (1872), Agnew, J.

[3] L. *coronator: corona*, a crown.

[4] 1 Bl. Com. 346.

[5] Commonwealth *v.* Gray, 5 Cush. 309 (1850), Shaw, Chief Justice.

[1] 1 Bl. Com. 346–48; 4 *id.* 274; 7 Q. B. D. 514; 20 Ga 336; 10 Humph. 346; 73 N. Y. 45.

[2] Lancaster County *v.* Mishler, 100 Pa. 627 (1882).

[3] Jameson *v.* Bartholomew County, 54 Ind. 530 (1878), Howk, C. J. See also Dearborn County *v.* Bond, 88 *id.* 102 (1882); Sandford *v.* Lee County, 49 Iowa, 148 (1878); Cook *v.* Multnomah County, 7 Oreg. 170 (1879); 6 Am. Law Reg. 385–400 (1858).

[4] Laws of 1877, c. 200.

[5] Kirk *v.* Nowill, 1 T. R. 124 (1786), Mansfield, C. J.

[6] Dartmouth College *v.* Woodward, 4 Wheat. 636 (1819), Marshall, C. J.; United States Bank *v.* Deveaux, 5 Cranch, 88 (1809); Bank of Augusta *v.* Earle, 13 Pet. 587 (1839); 1 Black, 295.

series of individuals, one after the other, with the same identical right, would be inconvenient, if not impracticable, it has been found necessary, when for the advantage of the public that particular rights should be continued, to constitute artificial persons who may maintain a perpetual succession. These artificial persons are called "bodies politic," "bodies corporate," or "corporations." [1]

The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.[2]

A private corporation is merely an association of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution.[3]

The privilege of exercising the particular right, by grant of the sovereign, is a franchise.[4] Compare *Corporation Aggregate*.

The constitutions of several States provide that the term corporation "shall be construed to include all associations and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships." [5]

In England, the tendency seems to have been to confine the term to its original sense as implying nonliability of members for corporate debts; and, if this exemption is not to be accorded, to call the body a "public company." . . The current of American decisions has been to the effect that the word embraces an association formed under general laws, with stockholders, directors, a president, etc.; and that such a body is not a *quasi* corporation (*q. v.*), nor a joint-stock company, nor a limited partnership.[6] See ASSOCIATION; COMPANY.

If the essential franchises of a corporation are conferred upon a joint-stock company, it is none the less a corporation for being called something else.[7]

Being the mere creature of law, each possesses only those properties which the charter of its creation confers upon it, expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality and individuality: "properties by which a perpetual succession of many members are considered as the same, and may act as a single individual." [1]

The members and their successors are as one person in law, with one will — that of the majority; and with prescribed rules which take the place of natural laws.[9]

The sovereign's consent is necessary to the erection of a corporation. With respect to corporations which exist by force of the common law, as, the king himself and bishops, this consent is implied; so, also, as to corporations, like the city of London, whose charter rests on prescription. His consent is expressly given by act of parliament or by charter. He may grant the power to a subject as his agent.[8]

The powers of a corporation aggregate are: to have perpetual succession; to sue and be sued; to hold lands; to have a common seal; to make by-laws; — with all the rights necessarily incident to these general powers.[4]

The duty of a corporation is to act up to the end or design for which it was created. To enforce this duty all corporations may be "visited" — by the founder or his representative in the case of a lay corporation; by the endower, his heirs or assigns, in the case of an eleemosynary corporation.[5]

A corporation is dissolved by a statute assented to; by the natural death of all its members; by surrender of its franchises; by forfeiture of its charter, through negligence or abuse of its franchises.[6]

The objects for which corporations are created are such as the government wishes to promote. They are deemed beneficial to the country; and it is this benefit that constitutes the consideration of the grant.[7]

The United States may be deemed a corporation; [8] so may a State; [9] and so, a county. All corporations were originally modeled upon a state or nation; whence they are still called "bodies politic." [10] See *Municipal* and *Public Corporation*.

The species of corporations are the following:

Aggregate corporation. Consists of many persons united together into one society, and is kept up by a perpetual succession of members, so as to continue forever.

Corporation sole. Consists of one person only and his successors, incorporated in order to give them legal capacities and advantages,

[1] 1 Bl Com. 467, 123.

[2] Providence Bank *v.* Billings, 4 Pet. *562 (1830), Marshall, C. J.

[3] [Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 189 (1888), Field, J.

[4] [2 Bl. Com. 37. See also 4 Ark. 351; 40 Ga. 637; 76 Ill. 573; 6 Kan. 253; 40 N. H. 578; 1 Ohio St. 642; 45 Wis. 392; 1 Hill, N. Y., 630.

[5] Const. N. Y., 1849, Art. 8, § 3; Cal., 1849, Art. 4, § 33; Mich., 1850, Art. 15, § 11; Kan., 1859, Art. 12, § 6; Minn., 1857-58, Art. 10, § 1.

[6] 1 Abbott, 291; Falconer *v.* Campbell, 2 McLean, 195 (1840); Oliver *v.* Liverpool, &c. Ins. Co., 100 Mass. 538 (1868); 10 Wall. 566 (1870).

[7] Fargo *v.* Louisville, &c. R. Co., 10 Biss. 277 (1881).

[1] Dartmouth College *v.* Woodward, 4 Wheat. 636 (1819); 97 U. S. 666; 101 *id.* 83; 1 Bl. Com. 468.

[2] 1 Bl. Com. 468.

[3] 1 Bl. Com. 472-74. As to names of corporations, see 23 Cent. Law J. 531 (1886), cases.

[4] 1 Bl. Com. 475-78.

[5] 1 Bl. Com. 480.

[6] 1 Bl. Com. 485.

[7] Dartmouth College *v.* Woodward, 4 Wheat. 637 (1819); 101 U. S. 83.

[8] United States *v.* Hillegas, 3 Wash. 73 (1811).

[9] Indiana *v.* Woram, 6 Hill, 38 (1843); 2 Johns. Cas. 58, 417; 1 Abb. U. S. 22; 35 Ga. 315.

[10] McIntosh, Hist. Eng. 31-32.

particularly that of perpetuity, which in their natural persons they could not have had; as, the king, by force of the common law, and a bishop or parson.[1]

A "corporation aggregate" is a collection of individuals united into one collective body, under a special name, and possessing certain immunities, privileges, and capacities in its collective character which do not belong to the natural persons composing it.[2]

A "corporation aggregate" consists of many persons united together into one society, and kept up by a perpetual succession of members, so as to continue forever.[3]

A "corporation sole" consists of a single person who is made a body corporate and politic in order to give him some legal capacities and advantages, especially that of perpetuity; as, a minister seized of lands in right of the parish.[3]

A "corporation aggregate" is a true corporation, but a "corporation sole" is one individual, being a member of a series of individuals, who is invested by a fiction with the qualities of a corporation. The capacity or office is here considered apart from the particular person who from time to time may occupy it.[4]

Ecclesiastical corporation. When the members composing the corporation are entirely spiritual persons, as, a bishop, a parson, and the like; for the furtherance of religion and perpetuating the rights of the church. **Lay corporation.** A corporation composed of secular persons; and in nature either civil or eleemosynary.

Civil corporation. Such corporation as is erected for a temporal purpose. **Eleemosynary corporation.** Such corporation as is constituted for the perpetual distribution of the free alms or bounty of the founder to such persons as he has directed.[5]

Of the "civil" sort are: those erected for the good government of a town or district; those for the advancement and regulation of manufacturers and commerce; those for special purposes — as for medical science, natural history, etc.[6] See *Municipal* and *Private Corporation*.

Of the "eleemosynary" kind are hospitals for the relief of the poor, the sick, the impotent; and colleges for the promotion of piety and learning.[6]

"Eleemosynary corporations" are incorporated for perpetuating the application of the bounty of the donor to the specified objects of that bounty[6] — the distribution of the free alms and bounty of the founder as he has directed.[1]

An "eleemosynary corporation" is a private charity, constituted for the perpetual distribution of the alms and bounty of the founder.[2]

A corporation for religious and charitable purposes, endowed solely by private benefactions, is a "private eleemosynary" corporation, although created by a charter from the government.[3]

Close corporation. In this the majority of the persons to whom the corporate powers have been granted, on the happening of vacancies among them, have the right of themselves to appoint others to fill such vacancies, without allowing the corporators in general any choice in the selection of such new officers. **Open corporation.** In which all the corporators have a vote in the election of officers.[4]

Commercial corporation. See BUSINESS, Corporation.

Foreign corporation. A corporation created by or under the laws of another State, government, or country.[5] **Domestic or home corporation.** A corporation created under the law of the place where it exists or exercises its powers.

A corporation exists only by force of law, and can have no legal existence beyond the bounds of the sovereignty by which it is created. It dwells in the place of its creation. It is not a "citizen," within the meaning of the Constitution, and cannot maintain a suit in a Federal court against a citizen of a different State from that by which it was created, unless the persons who compose the corporate body are all citizens of that State. The legal presumption is that its members are citizens of the State in which alone the body has a legal existence.[6]

By comity, if not forbidden by its charter nor by the laws of that State, a corporation may exercise its powers in another State.[7]

[1] 1 Bl. Com. 469.

[2] Dartmouth College *v.* Woodward, 4 Wheat. 667 (1819), Story, J.

[3] Overseers of the Poor *v.* Sears, 22 Pick. 125-28 (1839), Shaw, C. J.; 7 Mass. 447; 22 Wend. 70; 1 Hill, 690; 19 N. Y. 39; 2 Kent, 273.

[4] Maine Anc. Law, 181.

[5] 2 Bl. Com. 470-71.

[6] Dartmouth College *v.* Woodward, 4 Wheat. 640, 647, 660 (1819), Marshall, C. J.

[1] Dartmouth College *v.* Woodward, 4 Wheat. 668, 672-76 (1819), Story, J.

[2] Allen *v.* McKean, 1 Sumn. 299 (1833); 2 Kent, 274. See also 12 Mass. 557; 9 Barb. 90; 27 *id.* 306; 8 N. Y. 583; Ang. & A. Corp. § 39.

[3] Society for Propagating the Gospel *v.* New Haven. 8 Wheat. 480 (1823).

[4] McKim *v.* Odom, 2 Bland, Ch. 416, n. (1829).

[5] Daly *v.* National Life Ins. Co., 64 Ind. 6-8 (1878).

[6] Ohio & Mississippi R. Co. *v.* Wheeler, 1 Black, 295-96 (1861), cases, Taney, C. J.; Paul *v.* Virginia, 8 Wall. 177-82 (1868), cases; Chicago, &c. R. Co. *v.* Whitton, 13 *id.* 283 (1871); Sewing Machine Case, 18 *id.* 575 (1873); Doyle *v.* Continental Ins. Co., 94 U. S. 535 (1876); Cowell *v.* Colorado Springs Co., 100 *id.* 59 (1879); Memphis, &c. R. Co. *v.* Alabama, 107 *id.* 585 (1882); Philadelphia Fire Association *v.* New York, 119 *id.* 117-18 (1886), cases.

[7] Christian Union *v.* Yount, 101 U. S. 352 (1879); St. Louis *v.* Ferry Co., 11 Wall., 429 (1870).

No State need allow the corporations of another State to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation, the corporation comes in as it has been created.[1]

The State which recognizes foreign corporations can impose such conditions on its recognition as it chooses, not inconsistent with the Constitution and laws of the United States. If it permits them to do business without limitation, express or implied, they carry with them all their chartered rights, and may claim all their chartered privileges which can be used away from their legal home. By doing business away from home they do not change their citizenship; they simply extend their field of operation.[2]

But a State may not impose a limitation upon the power of a foreign corporation to make contracts within the State for carrying on commerce between the States. . . Doing a single act of business in a State, with no purpose of doing other acts there, does not bring a corporation within a statute requiring a foreign corporation, before it can carry on business in the State, to file a certificate showing places of business, agents, etc.[3]

Undoubtedly a corporation of one State, employed in the business of the general government, may do such business in other States without obtaining a license from them. . . It is not every corporation, lawful in the State of its creation, that other States may be willing to admit within their jurisdiction; such, for example, as a corporation for lotteries. And even when the business is not unlawful the State may wish to limit the number of corporations belonging to its class, or to subject their business to such contract as would be in accordance with the policy governing domestic corporations of a similar character. The States may, therefore, require for the admission within their limits of the corporations of other States such conditions as they may choose. . . The only limitation upon such power arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, inter-State or foreign.[4]

Moneyed corporation. Any corporation with banking powers, or power to make loans on pledges or deposits, or to make contracts of insurance.[5]

Quasi corporation. A phrase applied to a body which exercises certain functions of a corporate character, but which has not been created a corporation by any statute, general or special.[1]

Such auxiliaries of the State as a county, school-district, township, and other like involuntary corporations with liabilities not as great as those of municipal corporations.[2]

Of such are the inhabitants of a school district;[3] commissioners of schools,[4] and boards of education;[5] overseers of the poor:[6] the commissioners or supervisors of a county,[7] *q. v.*; commissioners of roads;[8] the governor of Tennessee;[9] a levee district organized by statute to reclaim land;[10]—any body invested with corporate powers *sub modo*, for a few specified purposes only, and which may sue and be sued.[11] See under *Public Corporation*, Quasi, etc.

Municipal corporation. A public corporation (*q. v.*) created by the government for political purposes and having subordinate and local powers of legislation; an incorporation of persons inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government. Merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government.[12]

Essentially a revocable agency — having no vested right to any of its powers or franchises — the charter or act of erection being in no sense a contract with the State — and therefore fully subject to the control of the legislature, which may enlarge or diminish its territorial extent or its functions, change or modify its internal arrangement, or destroy its very existence, with the mere breath of arbitrary discretion. While it thus exists in subjection to the will of the sovereign, it enjoys the rights and is subject to the liabilities of any other corporation, public or private. This is the very object of making it a body politic, giving it a legal entity and name, a seal by which to act in solemn form, a capacity to contract and be contracted with, to sue and be sued, a *persona standi in judicio*, to

[1] Relfe *v.* Rundle, 103 U. S. 225 (1880).

[2] Baltimore, &c. R. Co. *v.* Koontz, 104 U. S. 11-13 (1881), cases, Waite, C. J.; National Steamship Co. *v.* Tugman, 106 *id.* 120-21 (1882), cases; St. Clair *v.* Cox, *ib.* 355-56 (1882); Canada Southern R. Co. *v.* Gebhard, 109 *id.* 537 (1883).

[3] Cooper Manufacturing Co. *v.* Ferguson, 113 U. S. 727, 732 (1885).

[4] Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 186, 189-90 (1888), cases, Field, J.

[5] See 2 N. Y. Rev. St., 7 ed., 1871; Gillet *v.* Moody, 3 N. Y. 485 (1850); Hill *v.* Reed, 16 Barb. 287 (1853); 48 *id.* 464; 6 Paige, 497.

[1] School District *v.* Insurance Co., 103 U. S. 708 (1880), Miller, J.

[2] Levy Court *v.* Coroner, 2 Wall. 508 (1864); Barnes *v.* District of Columbia, 91 U. S. 552 (1875); 7 Mass. 169; 109 *id.* 213.

[3] 33 Conn. 298; 26 Ind. 310; 27 Iowa, 542; 32 Me. 564; 13 Mass. 193; 23 Mo. 418.

[4] 1 Miss. 328; 18 Johns. 407.

[5] 38 Ohio St. 54.

[6] 44 Ala. 566.

[7] 8 Johns. 422; 20 Barb. 294; 1 Cow. 670; 16 S. & R. 286.

[8] 1 Spears (S. C.), 218.

[9] 8 Humph. 176.

[10] 51 Cal. 406.

[11] 51 Cal. 406; 10 N. Y. 409; 18 Barb. 567; 4 Wheat. 531; Angell & A. Corp. § 24; Boone, Corp. § 10.

[12] Philadelphia *v.* Fox, 64 Pa. 180-81 (1870), Sharswood, J., quoting 2 Kent, 275; Glover, Munic. Corp. 1. See also 33 Cal. 142, 145; 69 Ga. 544; 37 Iowa, 544; 26 La. An. 481; 29 Minn. 450-51; 52 Mo. 311; 6 Barr. 171; 2 Utah, 403; 2 Kent, 268; Ang. & A. Corp. § 15.

hold and dispose of property, and thereby to acquire rights and incur responsibilities. These franchises were conferred upon it for the purpose of enabling it the better to effect the design of its institution, the exercise of certain of the powers of government, subordinate to the legislature, over a part of the territory of the State. But all this affects its relations to other persons, natural or artificial; it does not touch its relation to the State, its creator.[1]

In the exercise of its duties, including those most strictly local or internal, a municipal corporation is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality; or it may strip it of every power, leaving it a corporation in name only. . . The municipality may act through its mayor, its common council or legislative department, its supervisor of streets, commissioner of highways, board of public works, etc., provided it acts within the province committed to its charge. Whether its agents be appointed or elected is immaterial.[2]

What portions of a State shall be within the limits of a city is a proper subject of legislation — however thick or sparse the settlement.[3]

Property held for public uses — such as public buildings, streets, squares, parks, wharves, fire-engines, engineering instruments: whatever is held for governmental purposes — cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation. The obligation of its contracts survives dissolution. Equity will apply its property to the payment of its debts; after which, surplus realty may revert to the grantor, and personalty vest in the State. The private property of individuals cannot be taken for its debts, except through taxation. The doctrine of some States, that such can be reached directly on an execution against the municipality, has not been generally accepted.[4]

The general doctrine that, being the creature of the law, a municipal corporation can only act as provided by its organic law, and that if its agents fail to observe the forms and methods prescribed by that law, in any substantial particular, their acts are not the acts of the corporation,—has been greatly modified, by the decisions of the Supreme Court, in its application to bonds issued by agents when the rights of *bona fide* purchasers are involved.[5]

A municipal corporation can exercise such powers only as are granted in express words or are necessarily or fairly implied in or incident to those powers, and such as are essential to the declared objects of the corporation.[6]

The earliest form of corporation was, probably, the municipality or city, which necessity exacted for the control or local police of the marts or crowded places of the empire. These cities became a bulwark against despotism.[1] See CITY; ORDINANCE, 1; RIOT.

National corporation. A corporation created by Congress to assist in "carrying into execution" one or more of the powers vested by the Constitution in the government of the United States.

Of such are the national banking associations.[2] See GRANT, 3; LAND, Public.

Political corporation. See *Public Corporation.*

Private corporation. An association of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association.[3]

Its powers are such as are conferred by statute; and its charter is the measure thereof. The enumeration of these powers excludes all others.[4]

Its charter is a contract, not to be "impaired," *q. v.*

Public corporation. Such corporation as exists for political purposes only; as, a town, a city, a county. But, strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government.[5]

If, therefore, the foundation be "private," though under the charter of the government, the corporation is private, however extensive the uses to which it is devoted. . . A hospital or a college founded by a private benefactor is a private corporation, although dedicated by its charter to general charity.[6]

In popular meaning nearly every corporation is "public" inasmuch as they are created for the public benefit. Yet if the whole interest does not belong to the government, or if the corporation is not created for the administration of political or municipal power, it is a "private" corporation. Thus, all bank, bridge, turnpike, railroad, and canal companies are private corporations. In these and similar cases, in a certain sense, the uses may be called public, but the corporations are private, as much so as if the franchises were

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[1] Philadelphia *v.* Fox, *ante.*

[2] Barnes *v.* District of Columbia, 91 U. S. 544, 541 (1875), cases, Hunt, J. See also 108 *id.* 121; 109 *id.* 287.

On revoking powers of municipal corporations, see Supervisors *v.* Luck, 80 Va. 226-27 (1885), cases.

[3] Kelly *v.* Pittsburgh, 104 U. S. 80 (1881); 92 *id.* 310-12.

[4] Meriwether *v.* Garrett, 102 U. S. 501, 511-19 (1880), cases, Waite, C. J.; Broughton *v.* Pensacola, 93 *id.* 268 (1876); Claiborne Co. *v.* Brooks, 111 *id.* 410 (1884).

[5] Phelps *v.* Town of Yates, 16 Blatch. 193 (1879), Wallace, J.

[6] Dillon, Munic. Corp. 89, cases; Brenham *v.* Water Co., 67 Tex. 553 (1887). See generally 26 Cent. Law J. 179 (1888), cases.

[1] McIntosh, Hist. Eng. 31-32; 1 Bl. Com. 468, 472; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 574 (1870), Miller, J.

[2] See generally 21 Cent. Law J. 428-29 (1885), cases; 21 Am. Law Rev. 258-69 (1887), cases.

[3] Baltimore & Ohio R. Co. *v.* First Baptist Church, 108 U. S. 330 (1883), Field, J.; County of Santa Clara *v.* Southern Pac. R. Co., 18 F. R. 402 (1883); 8 Saw. 284; 15 Rep. 674.

[4] Thomas *v.* West Jersey R. Co., 101 U. S. 82 (1879).

[5] Dartmouth College *v.* Woodward, 4 Wheat. 668-69 (1819), Story, J.

vested in a single person. The delegation of the right of eminent domain, to be used for private emolument as well as for public benefit, does not clothe a corporation with the inviolability or immunity of public officers performing public functions.[1]

Public corporations are so called because they are but parts of the machinery employed in carrying on the affairs of the State; — auxiliaries of the State in the business of municipal rule; — political divisions of State, originating in the necessities and conveniences of the people. Their officers are local agents of the State.[2]

A public corporation is a mere instrumentality of the State for the better administration of the government in matters of local concern.[3] It is a local agency of the government creating it; its powers are such as belong to sovereignty. Property and revenue necessary for the exercise of these powers become part of the machinery of government. To permit a creditor to seize and sell these, in order to collect a debt, would be to permit him in a degree to destroy the government itself.[4]

A public corporation can exercise no power not given by its charter or some other statute of the State.[5]

It is now well settled that the charter of a public corporation may be changed, modified, or repealed, as the exigencies of the public service or the public welfare may demand; unless the organic law otherwise provides.[6]

Public and other municipal corporations represent the people, and are to be protected against the unauthorized acts of their officers and agents, when this can be done without injury to third parties. This is necessary in order to guard against fraud and peculation. Persons dealing with such officers or agents are chargeable with notice of the power the corporation possesses.[7]

Quasi public corporations: corporations technically private, but yet of a *quasi* public character having in view some general public enterprise, in which the public interests are directly involved to such an extent as to justify conferring upon them important governmental powers, such as an exercise of the right of eminent domain. Of this class are railroad, turnpike, and canal companies; and corporations strictly private, the direct object of which is to promote public interests, and in which the public have no concern, except the indirect benefits resulting from the promotion of trade, and the development of the resources of the country.[1]

It is a misnomer to attach the name "*quasi* public corporation" to a railroad company, for it has none of the features of such corporations, if we except its qualified right of eminent domain, which it has because of the right reserved to the public to use its way for travel and transportation. Its road may be a *quasi* public highway, but the company itself is a private corporation, and nothing more.[2]

Corporate. Relating to a corporation.

Corporate authorities. In the constitution of Illinois, Art. 9, § 5, municipal officers who are either directly elected by the people or are appointed in some mode to which they have given their assent.[3]

Corporate existence. Dates from the time when full authority to transact business is possessed by a corporation, as from the filing of articles with the secretary of State.[4]

Corporate purpose. In some States, as in Illinois, taxation by public corporations must be for corporate purposes. This means such purposes as are germane to the objects of the welfare of the municipality or at least have a legitimate connection with those objects and a manifest relation thereto.[5]

The reference is to a tax which is to be expended in a manner promoting the general prosperity and welfare of the municipality which levied it.[6]

The purpose must be germane to the general scope of the object for which the corporation was created.[7]

The expression will include money expended for a court-house, jail, poor-house; the opening and keeping of a common highway; the erection and maintenance of a bridge; a donation to secure the location of a school;[8] and, perhaps, also, money expended in developing the natural resources for manufacturing purposes.[9] Compare PURPOSE, Public.

Corporate rights. "Franchises or peculiar privileged grants" of the nature of corporeal property.[10]

[1] Miners' Ditch Co. *v.* Zellenbach, 37 Cal. 577 (1869), Sawyer, C. J.

[2] Pierce *v.* Commonwealth, 104 Pa. 155 (1883); 6 Col. 8; 11 Kan. 608; 3 Hill, 567, 570; 1 N. H. 273; 1 Wall. Jr. 275. See generally 22 Cent. Law J. 148 (1886), cases.

[3] Gage *v.* Graham, 57 Ill. 146-47 (1870), cases.

[4] Hurt *v.* Salisbury, 55 Mo. 314 (1874).

[5] People *v.* Dupuyt, 71 Ill. 651 (1874); Livingston County *v.* Wieder, 64 *id.* 432 (1872).

[6] Burr *v.* City of Carbondale, 76 Ill. 455 (1875).

[7] Wrightman *v.* Clark, 103 U. S. 260 (1880), cases; Ottawa *v.* Carey, 108 *id.* 121-22 (1883), cases.

[8] County of Livingston *v.* Darlington, 101 U. S. 411-13 (1879), cases.

[9] Hackett *v.* Ottawa, 99 U. S. 94 (1878), cases.

[10] Warner *v.* Beers, 23 Wend. 154 (1840); 7 Hill, 283; 2 Bl. Com. 37.

[1] Randle *v.* Delaware & Raritan Canal Co., 1 Wall. C. C. 390 (1849), Grier, J.; Sweatt *v.* Boston, &c. R. Co., 3 Cliff. 346 (1871).

[2] Commissioners of Laramie County *v.* Commissioners of Albany County, 92 U. S. 310-312 (1875), cases, Clifford, J.; 2 Kent, 305.

[3] United States *v.* New Orleans, 98 U. S. 393 (1878), Field, J.

[4] Klein *v.* New Orleans, 99 U. S. 150 (1878), Waite, C. J.

[5] Mt. Pleasant *v.* Beckwith, 100 U. S. 524 (1879).

[6] Thomas *v.* City of Richmond, 12 Wall. 356 (1870), Bradley, J.

On changes in public corporations affecting property and rights of creditors, see 21 Am. Law Rev. 14-40 (1887), cases.

Corporator. Usually, a member of a corporation, in which sense it includes a stockholder; also, one of the persons who are the original organizers or promoters of a new corporation.[1]

The corporators are not the corporation, for either may sue the other.[2]

Incorporate, *v.* To form into an artificial body; to create a corporation out of natural persons.

Incorporate, *adj.* The same as corporate, *q. v.*

Incorporated. United into one body; constituted a legal entity or person. *Unincorporated:* not existing as a corporation.

Incorporation. The act of uniting natural persons into a creature of the law; also, a body incorporated, that is, a corporation — a use not favored.

"Incorporation" is the act by which the political institution called a corporation is created.[3]

See further AGENT; AMOTION; BANK, 2 (2); BODY, 2; BOND; BY-LAW, 2; CAPITAL, 2; CHARITY, 2; CHARTER, 2; CONSOLIDATION; DIRECTOR; DISSOLVE, 2; DISTRINGAS; DIVIDEND, 3; DOMAIN, 1, Eminent; FIND, 2; FRANCHISE, 1; INSPECTION, 2; LEGISLATURE; MANAGER; MEETINGS; MINUTES, 2; MORTMAIN; ORGANIZE; PERPETUAL; PERSON; POLICE, 2; PROPERTY; PROSPECTUS; PROXY; RAILROAD; RECEIVER; RESIDENCE; SEAL, 1, Common; SOUL; STOCK, 3; SUCCESSION; TAKE, 8; TAX, 2; TORT, 2; ULTRA VIRES; VISIT, 2; VOTING, Cumulative; WARRANTUM.

CORPOREAL. Having a body: material in nature; substantial; palpable.

Incorporeal. Immaterial; intangible; insensible; existing in thought; ideal.

In the Roman law, *res corporales* were objects of property apprehensible by the senses; *res incorporales* objects apprehensible by the mind only. A right of way over another's land, an obligation to pay money, an undivided interest in land, were examples of the latter species of property; while the land itself and the money when paid were examples of the former species.[4]

Hereditaments are spoken of as corporeal and incorporeal. See HEREDITAMENT; CORPUS.

CORPSE. See BURIAL.

CORPUS. L. A body; also, the principal thing, the essential part, the substance.

In several phrases it means the body or person of an individual, as see under CAPERE; HABERE.

The *corpus* of an estate is the material object, or species of property, of which the estate is composed. It is this which, generally, is vested in a trustee, in distinction from the income of the estate, which is allotted to the beneficiary.[1]

The *corpus* of a railroad is the roadway, embankment, superstructure, and equipment.[2]

Corpus comitatus. The body of the county. See BODY, 8.

Corpus delicti. The essential element of an offense: the fact that the particular crime alleged has been actually committed.

To warrant a conviction for murder there must be direct proof either of the death, as by the finding and identification of the corpse, or of criminal violence adequate to produce death and exerted in such manas to account for the disappearance of the body. The *corpus delicti* in murder has two components: death as the result, and the criminal agency of another as the means. Where there is direct proof of the one, the other can be established by circumstantial evidence.[3]

The *corpus delicti* must be proved like any other fact, that is, beyond a reasonable doubt, and that doubt is for the jury. A confession alone is not regarded as sufficient proof. The State must first produce sufficient evidence to send the case to the jury, and the jury are first to be satisfied, from that evidence, that the crime has been committed.[4]

The doctrine applies to other crimes, as, larceny. The possession of the fruits of a crime may do away with direct proof of the *corpus delicti*.[5]

Corpus Juris Civilis. See PANDECTS.

CORRELATIVE OBLIGATIONS. See ASSENT.

CORRESPONDENCE. See COMMUNICATION, Privileged, 2; LETTER, 3.

CORROBORATING. See CIRCUMSTANCES; EVIDENCE.

CORRUPT. 1. To taint, vitiate: as, to corrupt the blood, *q. v.*

2. To do an act for unlawful gain.

Corruption. An act done with intent to gain an advantage not consistent with official duty and the rights of others; something forbidden by law:[6] as, certain acts by arbitra-

[1] [Gulliver *v.* Roelle, 100 Ill. 147 (1881).

[2] Memphis City *v.* Dean, 8 Wall. 73 (1868), cases; Davenport *v.* Downs, 18 *id.* 627 (1873), cases.

[3] Ang. & A. Corp. § 5; Toledo Bank *v.* Bond, 1 Ohio St. 612 (1853).

[4] See Hadley, Rom. Law, 158-61.

[1] See Kountz *v.* Omaha Hotel Co., 107 U. S. 395 (1882); 67 Pa. 476; 70 *id.* 501; 75 *id.* 119.

[2] Jackson *v.* Ludeling, 99 U. S. 521 (1878); 106 *id.* 311.

[3] Ruloff *v.* People, 18 N. Y. 179, 182 (1858).

[4] Gray *v.* Commonwealth, 101 Pa. 386 (1882); Udderzook *v.* Commonwealth, 76 *id.* 340 (1874); Pitts *v.* State, 43 Miss. 480-82 (1870), cases; United States *v.* Williams, 1 Cliff. 25 (1858); 4 Crim. Law Mag. 902-12 (1883).

[5] See examples, 20 Blatch. 236; 10 F. R. 470; 26 Miss. 157; 59 *id.* 545; 15 Wend. 147; 14 Tex. Ap. 560; 1 Greenl. Ev. § 214; Whart. Cr. Ev. § 324.

[6] [Bouvier's Law Dict.

tors, election or other officers, trustees; a champertous contract; a contract for usury.

In an indictment for corrupt misbehavior in office the act must be distinctly charged as done knowingly and with a corrupt motive.[1]

See AWARD, 2; BRIBERY.

COST.[2] Of an article purchased for exportation: the price given for it, with every incidental charge, paid or supposed to be paid, at the place where the article is exported.[3]

Cost price. The price actually paid for a thing.[4]

COSTS. The expenses of an action recoverable from the losing party.[5]

An allowance to a party for expenses incurred in conducting his suit.[6]

The sums prescribed by law as charges for services enumerated in the fee-bill.[7]

"Fees" are a compensation to an officer for services rendered in the progress of a cause. Originally, fees were demandable the instant the services were rendered; but indulgence, ripened into a custom, and which has received the sanction of judicial decision, provides that the party should not be called upon to pay them till after the determination of the cause; when, to avoid suit for a trifling demand, it became the practice to include them in the execution as if they were a part of the successful party's costs.[7]

When a party in a litigated proceeding is duly adjudged to pay costs, his liability is not restricted to the disbursements and expenses which the opposite party may be entitled to receive, but extends to the fees of the officers of the court for services rendered therein. When these united sums are taxable in the case they constitute "the costs" for which he is liable. If the successful party collects them, he is trustee of the fees. As against the paying party, all the items are costs.[8]

Includes all charges fixed by statutes, as compensation for services rendered by officers of the court in the progress of a cause.[9]

Bill of costs. A statement of the items of costs incurred in a suit,—presented for taxation to an officer of the court.

In this connection "costs" means taxable costs.[1] The statement gives the names of the witnesses, days in attendance, and mileage.

Carry costs. A verdict is said to carry costs when he for whom it is found becomes entitled to the payment of all costs as an incident to the verdict.

Certificate of costs. A memorandum signed by the judge who tries a cause, that, under the law, a party is entitled to costs.[2]

Cost-bond. The bond or other security required of a party to a proceeding for the payment of such costs, if any, as may be awarded against him.

Costs de incremento. Costs by increase; increased costs—adjudged by the court in addition to such as the jury assess.

Before the statute of Gloucester, costs were enrolled as increase of damages. After the statute, juries taxed the damages, and costs, separately. When the amount so taxed was not sufficient to pay the costs of the suit, the plaintiff prayed that the officer might tax the costs inserted in the judgment: this was the origin of costs *de incremento*.[3]

Costs of prosecution. Costs incurred in conducting a prosecution; not, expenses in resisting the prosecution.[4]

Costs of suit. The expenses incurred pending a suit, as allowed by the court.[5]

May include commissions upon money collected by execution.[6]

Costs of the day. Costs incurred in preparing for trial on a particular day,—according to notice of trial given by a party.[7]

Costs of the term. May include only the expense of travel and attendance of the party, the clerk's and witnesses' fees.[8]

Costs that have accrued. In the compromise of a suit, costs that would follow the judgment.[9]

Costs to abide event. If the event is the same to the party who had the verdict at the former trial, he gets his costs; otherwise, the costs of the first trial are lost.[10]

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[1] Boyd *v.* Commonwealth, 77 Va. 55-56 (1883), cases; 2 Whart. Cr. L. § 2518.

[2] L. *con-stare*, to "stand at."

[3] [Goodwin *v.* United States, 2 Wash. 499 (1811); 2 Mas. 398.

[4] [Buck *v.* Burk, 18 N. Y. 340 (1858).

[5] [Stanton County *v.* Madison County, 10 Neb. 308 (1880); State *v.* Dyches, 28 Tex. 542 (1866).

[6] Musser *v.* Good, 11 S. & R. *248 (1824), Gibson, J.

[7] Apperson *v.* Mut. Benefit Life Ins. Co., 38 N. J. L. 390 (1876), Depue, J.

[8] Janes's Appeal, 87 Pa. 431 (1878).

[9] Markham *v.* Ross, 73 Ga. 105 (1884): Davis *v.* State, 38 *id.* 533 (1868).

[1] Doe *v.* Thompson, 22 N. H. 219 (1850); Childs *v.* New Haven, &c. R. Co., 135 Mass. 572 (1883).

[2] See 3 Bl. Com. 214, 401.

[3] 3 Bl. Com. 399; Day *v.* Woodworth, 13 How. 372 (1851).

[4] State *v.* Wallin, 89 N. C. 578 (1883).

[5] [Norwich *v.* Hyde, 7 Conn. *534 (1829).

[6] Kitchen *v.* Woodfin, 1 Hughes, 340 (1877).

[7] See 3 Bl. Com. 357; Adams, Eq. 343.

[8] Thurston *v.* Mining Co., 1 R. I. 288 (1850).

[9] Tallassee Manuf. Co. *v.* Glenn, 50 Ala. 489 (1876).

[10] Jones *v.* Williams, L. R., 8 Q. B. 283 (1873); 2 Ex. Div. 267, 354; 3 *id.* 202.

Double costs; treble costs. 1. English practice. *Double costs:* common costs and half as much more. *Treble costs:* three times the amount of the costs incurred by a party in an action; common costs, half of these, and half of the latter.

"Double costs" were estimated by first allowing the prevailing party single costs, including witnesses' expenses, counsels' fees, etc., and then half the amount of the single costs, without deducting counsels' fees, etc. "Treble costs" consisted of single costs, half the single costs, and half of that half.[1]

Payment of treble costs was imposed for violation of certain statutes, as that of 29 Eliz. (1586), c. 4, against extortion by sheriffs on final process. Double and treble costs were repealed by 5 and 6 Vict. (1842), c. 97. Since then, only "party and party" costs, or reasonable costs, are taxable.

2. American practice. *Double costs:* in New York, and South Carolina, common costs and one-half more. *Treble costs:* common costs and three-fourths more.[2]

In Pennsylvania, double and treble costs mean double and treble the single costs.[3]

These additional costs seem to be given as compensation in cases of willful trespass or of vexatious litigation.

Interlocutory costs. Such costs as are given on various motions and proceedings in the course of a suit. **Final costs.** Such as depend upon the final event of the suit. To these the term "costs" generally applies.[4]

Security for costs. Security required of a plaintiff who is a non-resident of the State, that if he is defeated in his action he will pay all the costs thereof.

Until this is furnished he may not be allowed to proceed in his action. The defendant waives his right by taking any step in the cause after he has notice that the plaintiff is a non-resident. A general affidavit of defense may be first required. The law of the particular jurisdiction should be consulted for information as to details.[5]

Taxation of costs. Official adjustment of the amount of costs incurred in a case, or to which the prevailing party is entitled.

Costs are a necessary appendage to a judgment. The maxim is *victus victori in expensis condemnatus est*, the defeated, to the prevailing party, in the expenses is condemned. The common law allowed no costs to either party. If the plaintiff failed, he was "amerced;" if he recovered, the defendant was "at mercy" for detaining the amount of the debt. This in time was viewed as a hardship, and statute of 6 Edw. I (1277), c. 1, called the Statute of Gloucester, and which has been adopted in the States, was passed, giving costs in all cases where the plaintiff recovered damages. But no costs were allowed the defendant till the statute of 23 Hen. VIII (1531), c. 15, which, with later statutes, gave him, if he prevailed, such costs as the plaintiff would have received had he recovered.[1]

To prevent trifling and vexatious actions of trespass, it was enacted by 43 Eliz. (1600), c. 6, and 22 and 23 Car. (1670), c. 9, that where the jury awarded less damages than forty shillings the plaintiff should be allowed no more costs than damages, unless the judge certified that the freehold or title to the land chiefly camé in question. But 8 and 9 Wm. III (1696), c. 11, provided that in actions wherein it appeared that the trespass was willful and malicious, and so certified by the judge, the plaintiff should recover full costs. These statutes are in force in a few of the States.[2]

The statute of Charles is restricted to actions of trespass *quare clausum fregit*, and of assault and battery; for in no other case is it possible to give the certificate. Moreover, to entitle the plaintiff to full costs the judge's certificate must be made "at the trial of the cause;" that is, before final judgment.[3] In Pennsylvania currency, the forty shillings are equal to $5.33: the English shilling sterling not having been adopted.[4]

Costs are regulated entirely by statute, as to both item and amount. The Federal fee bill act of 1853, made section 983, Rev. St., provides that: "The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trial in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause."

In the Federal courts, the prevailing party in common-law actions recovers costs in all cases, except when otherwise provided by an act of Congress.[5]

Section 968, Rev. St., providing that the prevailing party shall not be allowed costs when the recovery is less than $500, is imperative; the court has no discretion to allow costs where the judgment is under that sum.[6] See MARSHAL, 1 (2); PREVAIL.

The government, at common law, neither pays nor

[1] [Wharton's Law Dict.; 1 Chitty, Pr. 27; Brightly, Costs, 298.

[2] Patchin *v.* Parkhurst, 9 Wend. 443 (1832); 1 Harp. L. (S. C.) 440.

[3] Welsh *v.* Anthony, 16 Pa. 256 (1851); 2 Rawle, 201. See 34 N. J. L. 530.

[4] See Goodyear *v.* Sawyer, 17 F. R. 8-9 (1883).

[5] See 1 Daniel, Ch. Pr. 30; 10 Ves. 237; 18 F. R. 105; 13 Rep. 114; 13 How. Pr. 462; 60 Md. 375; 9 Wend. 262.

[1] 3 Bl. Com. 399-400; Day *v.* Woodworth, 13 How. 372 (1851); Antoni *v.* Greenhow, 107 U. S. 781 (1882); 26 Am. Law Reg. 693-96 (1878), cases; 17 F. R. 10-11; 29 Minn. 430.

[2] 3 Bl. Com. 214, 401; Winger *v.* Rife, 101 Pa. 152 (1882).

[3] Simonds *v.* Barton, 76 Pa. 435-37 (1874), cases; Towers *v.* Vielie, 1 Johns. Cas. 221 (1799).

[4] Chapman *v.* Calder, 14 Pa. 358 (1850).

[5] United States *v.* Treadwell, 15 F. R. 534 (1883); R. S. §§ 823, 983.

[6] Gibson *v.* Memphis, &c. R. Co., 31 F. R. 553 (1887).

receives costs; under statute, it may.[1] In admiralty, costs are left to the discretion of the court.[2] In equity, they are largely within the discretion of the chancellor.[3] In criminal law, in cases of conviction of felony, the prisoner pays the costs if he has property, and, in cases of acquittal, the government pays them; while in misdemeanors the accused, if convicted, is sentenced to pay them; and if acquitted he may be required to pay them where there was *prima facie* evidence of guilt; or the prosecutor may have to pay them; or, again, they may be divided between the prosecutor and the accused; or there may be authority for the government alone defraying them. If the accused cannot pay them he may have to remain in prison until discharged under the insolvent laws of the State.

Costs do not bear interest.

See ATTORNEY; DAMAGES; DOCKET; FEE, 2.

COUNCIL. 1. An advisory body selected to assist the governor of a State in his official determinations.

King's councils. To assist him in the discharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law has assigned the sovereign a diversity of councils with which to advise, to wit: the high court of parliament; the peers of the realm assembled at call; the judges of the courts of law; but, principally, his *privy council* (by way of eminence *the* council), an assembly of the king and such as he wills, in his palace.[4]

A governor's council is still retained in a few States.[5]

2. The ordinance-making body in a municipal corporation.

Usually in the plural form "councils;" whereof *common* and *select* council are the branches.

The organization and powers of such bodies are determined by statute.[6]

The city council of Boston, for example, is not a "legislature." It has no power to make "laws," but merely to pass ordinances upon such local matters as the legislature may commit to its charge. Neither branch is vested with any judicial functions whatever. Nor are its members chosen with a view to their fitness for the exercise of such functions.[7] See further CITY; CONTEMPT, 2; ORDINANCE, 1; TRIBUNAL.

COUNSEL; COUNSELLOR. See ATTORNEY, 2.

CONSILIUM. See INOPS.

COUNT. 1, *v.* In the sense of to compute, see ACCOUNT; DISCOUNT.

2. In the sense of to refer to a statute, compare RECITE.

3, *n.* In the sense of earl or *comes*, see SHERIFF.

4. In pleading, a distinct statement of the cause of action or of the ground of accusation.

Peculiar, therefore, to a declaration or an indictment. From the French *conte:* a narrative.

(1) In civil procedure at common law, is sometimes synonymous with declaration, its original signification; but now is generally considered as a part of a declaration, wherein the plaintiff sets forth a distinct cause of action.[1]

Where the plaintiff's complaint embraces a single cause of action and he makes one statement of it that statement is called, indifferently, a "declaration" or a "count." But where his suit embraces two or more causes of action (each of which of course requires a different statement), or when he makes two or more different statements of one and the same cause of action, each statement is called a "count," and all of them, collectively, constitute the "declaration,"[2] *q. v.*

Common counts. Distinct statements of a cause of action so varied as to correspond with the possible state of the proof.

In the common action of *assumpsit*, q. v., they are, ordinarily, for money — had and received, paid, lent, or due upon an account stated; perhaps, also, for the worth of work done and materials furnished: whence called "money" counts.[3] See CONTRACT, Implied.

Special count. States the facts peculiar to the case in hand.[4]

One object in inserting two or more counts in a declaration, when there is in fact but one cause of action, is to guard against the danger of an insufficient statement of the cause, where a doubt exists as to the legal sufficiency of one or another of two or more different modes of declaring. But the more usual end proposed is to accommodate the statement of the cause, as far as may be, to the possible state of the proof exhibited on the trial.

In *assumpsit*, under a declaration containing a special count on a promissory note, and also the common counts, a note varying from the one specially pleaded is admissible under the common counts, as evidence of money had and received, in connection with evi-

[1] 3 Bl. Com. 400; 3 Cranch, 73; 2 Wheat. 395; 12 *id.* 546; 5 How. 29; 3 Pa. 153.

[2] The Scotland, 118 U. S. 519 (1886).

[3] See 2 Daniel, Ch. Pr. 1515-21; Goodyear *v.* Sawyer, 17 F. R. 6 (1883), cases.

[4] 1 Bl. Com. 227-32.

[5] See 70 Me. 570.

[6] See Dillon, Munic. Corp. 326.

[7] Whitcomb's Case, 120 Mass. 122 (1876), Gray, C. J.

[1] [Cheetham *v.* Tillotson, 5 Johns. 435 (1809).

[2] Gould, Pl. 158.

[3] See, as to money had and received, Barnett *v.* Warren, 82 Ala. 557 (1886); 20 Cent. Law J. 326-30 (1885), cases, as to *quantum meruit*.

[4] See Nash *v.* Towne, 5 Wall. 702 (1866).

dence that the defendant admitted his indebtedness on the note.[1]

Counts for contract and trespass, being dissimilar in kind, cannot be joined.[2] See BAD, 2; DUPLICITY; JOINDER.

(2) In criminal procedure, each count in an indictment imports a different offense; is, in effect, a separate indictment.[3]

When a verdict is silent as to one or more counts and finds guilt as to others, presumably the jury found the defendant not guilty as to the former counts.[4]

See INDICTMENT; SENTENCE.

COUNTER. Contrary, in opposition to. See CONTRA.

As a prefix, denotes that one thing is, or is placed, in antagonism to some other: as, a counter-affidavit, counter-bond, counter-claim, counter-evidence, counter-plea, counter-proof, counter-statement, counter-surety,— for each of which see the simple substantive. Compare CROSS, 3.

COUNTERFEIT, *v.* To make something falsely and fraudulently in the semblance of that which is true; also, the thing so made.

n. A spurious imitation intended to resemble something which is not.[5]

Refers, ordinarily, to imitations of money or of securities. But a trade-mark (*q. v.*) may be counterfeited.

The resemblance of the spurious to the genuine must be such, possibly, as to deceive a person using ordinary caution.[6]

"False, forged, and counterfeit," said of counterfeiting Treasury notes, necessarily imply that the instrument so characterized is not genuine, but only purports to be, or is in the similitude of the genuine instrument.[7]

It is not necessary in an indictment, under § 5457, Rev. St., to allege that the act of counterfeiting was done with intent to defraud; such intent, if an element of the crime, is implied in the allegation of "falsely" making.[8]

On counterfeiting the securities of the United States, see Rev. St. § 5413.[9]

Counterfeiting, passing, or possessing with intent to utter or pass, within the United States, the notes, or other securities of any foreign government, is punishable by fine and imprisonment at hard labor; and so is having in one's possession, without lawful authority, any plate therefor or printing from the same.[1]

Under the power "to define and punish offenses against the law of nations," and to "regulate commerce with foreign nations," Congress may provide for punishing as a crime the counterfeiting, within the United States, of the notes of foreign banks or corporations, although they be not the obligations of the foreign government.[2]

See FALSE; FORGE, 2; GENUINE; GUILT; OBLIGATION, 2; SIMILITUDE; SPURIOUS; UTTER.

COUNTERPART. One of the parts of an indenture which lay opposite or counter to each other.[3] A duplicate copy.

Indentures were originally written twice on the same sheet of parchment with a space in the middle — where it was afterward divided.[3]

When the several parts of an indenture are interchangeably executed by the parties that part or copy which is executed by the grantor is called the *original*, and the rest *counterparts*.[4]

COUNTERSIGN. 1. To sign on the opposite side.

2. To sign in addition to another, as the superior officer, and in attestation of authenticity.[5] See SIGN, Countersign.

COUNTERVAIL. To operate with equal effect: to deserve equal consideration.

An equitable right which is as important or well founded as another which is being pressed for the more favorable recognition, is spoken of as a "countervailing equity."

COUNTRY.[6] 1. In its primary meaning, signifies place; in a larger sense, the territory or dominions occupied by a community, or even waste and unpeopled sections or regions of the earth; but its metaphorical meaning (which is no less definite and well understood) in common parlance, in historical and geographical writings, in diplomacy, legislation, treaties, and international codes, denotes the population, the nation, the state, the government, having possession and dominion over the country.[7] See PLACE, 1.

As used in the revenue laws, embraces all the possessions of a foreign state, however widely separated,

[1] Hopkins *v.* Orr, 124 U. S. 513 (1888), cases.

[2] Gould, Pl. 159; 3 Bl. Com. 295; 58 N. H. 41.

[3] United States *v.* Malone, 20 Blatch. 140 (1881): R. S. § 1024; s. c. 13 Rep. 67.

[4] State *v.* McNaught, 36 Kan. 627 (1887), cases.

[5] Queen *v.* Hermann, 4 Q. B. D. 287 (1879). See 1 Stew., Ala., 386; 1 Ohio St. 187.

[6] United States *v.* Bogart, 9 Bened. 315 (1878).

[7] [United States *v.* Howell, 11 Wall. 432, 436 (1870), Miller, J. See 2 Flip. 557; 13 F. R. 96; Const. Art. I, sec. 8, cl. 6.

[8] United States *v.* Otey, 31 F. R. 68 (1887).

[9] See also United States *v.* Bennett, 17 Blatch. 358 (1879); 22 F. R. 390.

[1] Act 16 May, 1884: 23 St. L. 22.

[2] United States *v.* Arjona, 120 U. S. 479 (1887), Waite, Chief Justice.

[3] [Burrill's Law Dict.

[4] 2 Bl. Com. 296.

[5] See Smith, Eq. 212, 181; 101 U. S. 22.

[6] F. *contree:* L. *contra*, opposite: that which lies opposite to a city.

[7] United States *v.* "The Recorder," 1 Blatch. 228 (1847), Betts, J.

which are subject to the same supreme executive and legislative control.[1] See INDIAN, Country.

2. The inhabitants of a district from which a jury is to be summoned; a jury.

Trial by jury is also called trial *per pais*, or *per patrian*, by the country.[2]

By the policy of the ancient law the jury was to come *de vicineto*, from the neighborhood of the place where the cause of action was laid. For, living in the neighborhood, they were properly the very country, or *pais*, to which both parties had appealed, and were supposed to know beforehand the characters of the parties and their witnesses. But this convenience being overbalanced by the fact that jurors coming from the immediate neighborhood naturally intermixed their prejudices and partialities in the trial, the early practice became so far relinquished that the jury now comes from the body of the county at large, and not *de vicineto*, from the particular neighborhood.[3] See VENUE.

Conclude to the country. To tender an issue of fact for trial by a jury.

God and my country. The answer, at common law, of a prisoner arraigned for trial. See ARRAIGN.

Put upon the country. To submit a matter in dispute to a jury.

The full expression, on the part of the plaintiff, is, "And this the said A prays may be inquired of by the country;" on the part of the defendant, "And of this the said B puts himself upon the country."[4] Compare PAIS; PATRIA.

COUNTY. Originally, a province governed by a count,—the earl or alderman to whom the government of the shire was intrusted.[5]

A civil division of the territory of England.[6]

The terms "the county" and the "people of the county" may be convertible; so, too, "the county" and the "commissioners of the county."[7]

The city of St. Louis, under the constitution of Missouri of 1875, though not a county as that word is ordinarily used in the constitution, is in a qualified sense a county, being a "legal subdivision of the State" which bears county relations to the State, and having many important attributes of a county.[8]

A county is not a corporation, but a mere political organization of a certain portion of the territory within the State, particularly defined by geographical limits, for the more convenient administration of the laws and police power of the State, and for the convenience of the inhabitants.[1]

Such organization is invested with certain powers, delegated by the State, for the purpose of civil administration; and for the same purpose is clothed with many characteristics of a body corporate. It is a *quasi* corporation, for in many respects it is like a corporation. But the power to sue and be sued is expressly conferred by statute.[1]

In the Revised Statutes, or in any act or resolution of Congress, the word county shall include a "parish" or any other equivalent subdivision of a State or Territory.[2]

"Establishing" a county is setting apart certain territory to be in the future organized as a political community, or *quasi* corporation for political purposes; "organizing" a county is vesting in the people of the territory such corporate rights and powers.[3]

County corporate. A city or town, with more or less territory annexed, to which, out of special favor, the king has granted the privilege to be a county of itself, and not to be comprised within another county.[4]

Similar to this are the counties of Philadelphia, New York, and Boston.[5]

Foreign county. Another county than the one in which a matter arises or is drawn in question.

Body of a county. 1. The territorial limits of a county. See BODY, 3.

2. The people of a county collectively considered. See VENUE.

County bridge. See BRIDGE.

County court. 1. A name for a class of courts having civil jurisdiction in controversies of medium grade, varied powers in the charge and care of persons and estates within legal guardianship, a limited criminal jurisdiction, appellate jurisdiction over justices of the peace, and numerous powers and duties in the administration of county affairs.[6]

2. In England, a court of great antiquity,

[1] Stairs v. Peaslee, 18 How. 526 (1855), Taney, C. J. See Campbell v. Barney, 5 Blatch. 221 (1864).

[2] 3 Bl. Com. 349; 4 *id.* 343.

[3] 3 Bl. Com. 359-60.

[4] 3 Bl. Com. 313.

[5] [1 Bl. Com. 116; Eastman v. Clackamas Co., 32 F. R. 29 (1887).

[6] 1 Bl. Com. 113.

[7] County Court v. Sievert, 58 Mo. 201 (1874); Carder v. Fayette County, 16 Ohio St. 369 (1865).

[8] State v. Finn, 4 Mo. Ap. 350 (1877).

[1] Hunter v. Commissioners, 10 Ohio St. 520 (1860); Harris v. Supervisors, 105 Ill. 451 (1883); Washer v. Bullitt County, 110 U. S. 564 (1884); Faulkner v. Hyman 142 Mass. 54 (1886); Vincent v. Lincoln Co., 30 F. R 749-53 (1887), cases; 33 Ark. 497; 14 Fla. 321; 2 Kan 128; 50 Md. 245; 8 Minn. 504; 10 Nev. 552; 7 Ohio St 109; 10 F. R. 545.

As to suits by and against counties, see 19 Cent Law J. 185-88 (1884), cases.

[2] Act 13 July, 1866: R. S. §§ 1-2.

[3] State v. Parker, 25 Minn. 219 (1878); 23 *id.* 40.

[4] [1 Bl. Com. 120.

[5] See State v. Finn, 4 Mo. Ap. 347 (1877).

[6] [Abbott's Law Dict.

incident to the jurisdiction of the sheriff. It seems to have had cognizance of purely personal actions and of some real actions; but it was not a court of record.[1]

Since 1846, a tribunal, established under 9 and 10 Vict. c. 95, in upward of five hundred districts, none within the city of London; and at present invested with a common-law jurisdiction over demands not exceeding £50, an equity jurisdiction where the amount involved does not exceed £500, together with certain jurisdiction in probate, admiralty, and bankruptcy.[2]

County officer. One by whom a county performs its usual political functions,— its functions of government; who exercises "continuously, and as a part of the regular and permanent administration of government, its public powers, trusts, or duties."[3]

He may be the auditor, commissioner, supervisor, treasurer, or other functionary of the county. Local statutes usually designate who shall be considered county officers, and prescribe their duties.

County purpose. May include only the ordinary purposes, as the ordinary expenses, of a county.[4]

County seat. See PERMANENT.

Power of the county. The male inhabitants of a county, over fifteen years of age, whom the sheriff may command to aid him in preserving the peace, executing process, arresting felons, etc.; the *posse comitatus*.[5]

See SHERIFF; CORONER; WARRANT, 2 (2).

COUPLED. See INTEREST, 2 (2), Coupled.

COUPON.[6] Something "cut off" from another thing: a distinct part of a document or instrument, intended to be separated from the body thereof and used as evidence of something connected with it or mentioned in it.

Coupon bond. Ordinarily, by "coupon" is meant a part of a transferable bond or certificate of loan, designed to be separated therefrom and used as evidence of interest due by the terms thereof. The original or primary obligations are called *coupon bonds*.

An instrument complete in itself, and yet composed of several distinct instruments, each of which is in itself as complete as the whole together.[1]

Such coupons are merely interest-warrants or interest-certificates — written contracts for the payment of a definite sum of money on a given day.[2]

Most of the bonds of municipal bodies and private corporations are issued in order to raise funds for works of large extent and cost, and their payment is therefore made at distant periods. Coupons for the installments of interest are usually attached, in the expectation that they will be paid as they mature, however distant the period for the payment of the principal. These coupons, when severed from the bonds, are negotiable and pass by delivery. They then cease to be incidents, become in fact independent claims; and they do not lose their validity, if for any cause the bonds are canceled or paid before maturity, nor their negotiable character, nor their ability to support separate actions. Once severed from the bonds, and having matured, they are in effect equivalent to separate bonds for the different installments of interest.[3]

The holder is enabled to collect the interest at the time and place named, or to transfer the coupon to another who may collect it, without the trouble of presenting the bond itself. This is a convenience to the foreign holder. The device tends to enhance the marketableness of interest-bearing securities, and is favored by the courts.[4]

The form does not change their nature. That they are payable at a particular place does not make it necessary to aver or prove a presentation for payment there.[5]

Suit may be maintained upon a coupon without producing the bond; but the provisions in the bond must be recited in such a general way as to explain the relation the coupon originally held, and still holds, to it. Recovery may then be had for the face amount, with interest from the day when payment was unjustly refused, and exchange at the place of payment.[6]

When a coupon upon its face refers to the bond, the purchaser is chargeable with notice of all that the bond contains.[7]

These separable obligations bear interest after their maturity. An unpaid coupon left on a bond is not of itself evidence that the bond is dishonored.[7]

Interest coupons are instruments of a peculiar nature. Title to them passes by mere delivery. A

[1] See 3 Bl. Com. 35; 3 Law Quar. Rev. 1-13 (1887).

[2] See 1 Abbott, Law Dict. 299; 59 Law Times, 379 (1875).

[3] [Sheboygan County *v.* Barker, 3 Wall. 96 (1866), Grier, J. See *Re* Whiting, 2 Barb. 517 (1848); *Re* Carpenter, 7 *id.* 34 (1849); State, *ex rel. v.* Glenn, 7 Heisk. 472 (1872).

[4] McCormick *v.* Fitch, 14 Minn. 257 (1869). See also 23 Ohio St. 389; 1 Sneed, 637.

[5] 1 Bl. Com. 343; 4 *id.* 122; Regina *v.* Brown, 1 Carr. & M. *314 (1841).

[6] Koo'-pŏng. F. from *couper*, to cut, cut off.

[1] 2 Daniel, Neg. Inst. § 1488 (1879). See Myers *v.* York, &c. R. Co., 43 Me. 239-40 (1857); Ethoven *v.* Hoyle, 13 C. B. 372 (1853).

[2] Aurora City *v.* West, 7 Wall. 105 (1868), cases.

[3] Clark *v.* Iowa City, 20 Wall. 589 (1874), cases, Field, J.; Hartman *v.* Greenhow, 102 U. S. 684 (1880); Walnut *v.* Wade, 103 *id.* 696 (1880); Thompson *v.* Perrine, 106 *id.* 592 (1882); Kerr *v.* City of Corry, 105 Pa. 282 (1884).

[4] City of Kenosha *v.* Lamson, 9 Wall. 477, 483-85 (1869), Nelson, J.

[5] Walnut *v.* Wade, 103 U. S. 695 (1880).

[6] McLure *v.* Township of Oxford, 94 U. S. 432 (1876), Waite, C. J.

[7] Indiana & Illinois Central R. Co. *v.* Sprague, 103 U. S. 761-63 (1880), cases.

transfer of possession is presumptively a transfer of title.[1]

When issued by competent authority they pass into the hands of a *bona fide* purchaser for value before maturity, freed from any infirmity in their origin. As with other negotiable paper mere suspicion that there may be a defect of title in the holder, or knowledge of circumstances which would excite suspicion as to his title in the mind of any prudent man, is not sufficient to impair the title of the purchaser. That result will only follow where there has been bad faith on his part.[2]

Being complete instruments, capable of sustaining separate actions without reference to the maturity of the bond, the statute of limitations begins to run from the time when they respectively mature.[3] See BOND; EX. 3; IMPAIR.

Coupon note. A promissory note with coupons attached, which, in number, correspond to the payments of interest.

The original note may be secured by a mortgage. A form in Iowa reads thus:

$ —. —— —— 1889.

On the —— day of ——, 188—, I promise to pay to —— —— or order, —— dollars. Being semi-annual interest to that date on my note for —— dollars, due —— 188—. Payable at ——.

No. —. —— ——.

Coupon stamp. The Government furnishes collectors of its revenue books of stamps having coupons attached, to be used when taxes are paid on spirits.

There are nine coupons to each stamp representing a decimal, all printed between the stamp and the stub. Upon the receipt of a distiller's tax, for example, the officer detaches a stamp with such number of coupons attached as corresponds to the number of proof-gallons in the cask, as shown by the gauger's return. Unused coupons remain with the stub; if detached, they are of no value.[4]

Coupon ticket. Sets or books of tickets issued by carriers of passengers, providing that for each trip had, according to the terms of the contract, a ticket shall be detached or canceled, are called "coupon tickets" or tickets in the "coupon form."

When the carriage is confined to the issuing line, the ticket is a contract to carry according to its own terms; but when there is one ticket for carriage over that line and other tickets as passports over other lines, the first carrier is ordinarily only agent for the others, except in cases of express contract to the contrary.[1] See CARRIER, Common.

COURSE. 1. The direction of a line with reference to a meridian. See BOUNDARY; HEARSAY, 8; MONUMENT, 1.

2. Routine; practice; procedure. Compare CURSUS.

Course of an action. Progressive action in a suit or proceeding not yet determined.[2]

Due course or process of law. Law in its regular administration. See further PROCESS, 1.

"Due course" and "due process" of law mean the same thing.[3]

Of course. Said of a thing done in the common manner of proceeding, and which does not require special allowance of a judge of the court.

Many rules and citations are taken or had, as "of course," by application to the clerk or prothonotary of the court.

3. The usual way or mode; usage; custom.

Course of business, or of trade. The way ordinarily pursued in a particular calling. See BUSINESS; TRADE.

"Due course of trade," with respect to the negotiation of a note, is where the holder has given for it money, goods, or credit at the time of receiving it, or has on account of it sustained some loss or incurred some liability.[4]

Course of a voyage. The customary track between ports. See DEVIATION.

COURT.[5] 1. According to Cowel, the house where the king remains with his reti-

[1] Ketchum *v.* Duncan, 96 U. S. 662 (1877).

[2] Cromwell *v.* County of Sac, 96 U. S. 57 (1877), Field, J.; Murray *v.* Lardner, 2 Wall. 110–121 (1864), cases.

[3] Koshkonong *v.* Burton, 104 U. S. 668, 675 (1881). See Virginia Coupon Cases, 114 *id.* 269–340 (1885); generally, 1 Wall. 82, 175, 384; 3 *id.* 327; 10 *id.* 68; 11 *id.* 139; 14 *id.* 282; 15 *id.* 355; 19 *id.* 83; 21 *id.* 354; 92 U. S. 502, 509; 96 *id.* 502; 94 *id.* 351, 463, 741, 801; 96 *id.* 659; 97 *id.* 96, 272; 99 *id.* 112, 362, 434, 499, 686; 101 *id.* 87, 677; 104 *id.* 505; 105 *id.* 370, 733; 106 *id.* 663; 107 *id.* 529, 539, 568, 711, 769; 15 Blatch. 343–46; 16 *id.* 54; 17 *id.* 4; 18 *id.* 363; 26 Conn. 121; 53 Ind. 191; 109 Mass. 88; 112 *id.* 53; 69 Me. 507; 2 Nev. 199; 57 N. H. 397; 82 N. C. 382; 66 N. Y. 14; 44 Pa. 63; 22 Gratt. 833; 1 Daniel, Neg. Inst. Ch. XLVII.

[4] R. S. § 3313.

[1] See Baltimore, &c. R. Co. *v.* Harris, 12 Wall. 65 (1870); Hudson *v.* Kansas Pacific R. Co., 3 McCrary, 249 (1882); Keep *v.* Indianapolis, &c. R. Co., *ib.* 208, 214–19 (1882), cases; Quimby *v.* Vanderbilt, 17 N. Y. 313 (1858); Milnor *v.* New York & New Haven R. Co., 53 *id.* 363, 369–71 (1873), cases; Kessler *v.* New York & Hudson R. Co., 61 *id.* 541 (1875); Hartan *v.* Eastern R. Co., 114 Mass. 44 (1873); Wolff *v.* Central R. Co., 68 Ga. 653 (1882); 23 Conn. 457; 29 Vt. 421; 26 Ala. 733.

[2] Williams *v.* Ely, 14 Wis. *238 (1861), Dixon, C. J.

[3] Adler *v.* Whitbeck, 44 Ohio St. 569 (1886).

[4] [Kimbro *v.* Lytle, 10 Yerg. 428 (1837), Reese, J.; Merchants' Bank *v.* McClelland, 9 Col. 608 (1886).

[5] F. *cort, curt, court*, a court or yard; also, a tribunal: L. *cortis*, a court-yard, court, palace: L. *cors*, an inclosure: *co-*, together; *hort-us*, a garden, yard,—Skeat. Orig. from L. *cers*, a pen, a fortified place, a palace,—Müller, Science Lang. 269. Compare CURTILAGE.

nue; also, the place where justice is administered.

These two meanings, in the beginning, were closely connected. For, in early history, when the king was actually the fountain and dispenser of justice, nothing could be more natural than that subjects who had complaints of ill-treatment to make should use the expression "the court," in speaking of the journey to the place where the king was domiciled, and the application to him preferred, usually in the court of the palace, for interference and redress. Anciently, then, the "court," for judicial purposes, was the king and his attendants; later, those who sojourned or traveled with him, to whom he delegated authority to determine controversies and to dispense justice.[1]

The earlier courts were merely assemblages, in the court-yard of the baron or of the king himself, of those whose duty it was to appear at stated times, or upon summons. Traces of this constitution of courts remain in tribunals for the trial of impeachments, and in the control exercised by legislatures over the organization of courts of justice, as constituted in modern times. Indeed, parliament is still the "High Court of Parliament," and in Massachusetts the united legislative bodies are entitled the "General Court."[2]

A place wherein justice is judicially administered.[3]

The more effectually to accomplish the redress of private injuries, courts of justice are instituted to protect the weak from the insults of the strong, by expounding and enforcing those laws by which rights are defined and wrongs prohibited.[4]

As the executive power of the law is vested in the king, courts of justice, which are the medium by which he administers that law, originate with this power of the crown. . . He is represented by his judges.[5]

In every court there must be: an *actor*, plaintiff, who complains of an injury; a *reus*, defendant, who is called upon to make satisfaction; and a *judex*, judicial power to examine the truth of the fact, determine the law arising thereon, and, for injury done, by its officers to apply the remedy.[6]

A tribunal established for the public administration of justice, and composed of one or more judges, who sit for that purpose at fixed times and places, attended by proper officers.[7]

An organized body, with defined powers, meeting at certain times and places for the hearing and decision of causes and other matters brought before it, and aided in this by its officers, viz., attorneys and counsel to present and manage the business, clerks to record and attest its acts and decisions, and ministerial officers to execute its commands and secure order in its proceedings.[1]

Proceedings at another time and place or in another manner than that specified by law, though in the personal presence and under the direction of a judge, are *coram non judice*, and void.[2]

The definition given by Coke (and Blackstone) lacks fullness: it is limited to the *place* of a court. There must also be the presence of the officers constituting the court, the judge or judges certainly, and probably the clerk authorized to record the action taken; time must be regarded, too, for the officers of a court must be present at the place and time appointed by law. To give existence to a court, then, its officers, and the time and place of holding it, must be such as are prescribed by law. . . "Open court" conveys the idea that the court must be in session, organized for the transaction of judicial business. It may mean public, free to all.[3]

A permanent organization for the administration of justice; not a special tribunal provided for by law, occasionally called into existence and ceasing to exist with particular exigencies.[4] See further TRIBUNAL.

2. The judge charged with deciding the law in a given case; as opposed to the jury, who are triers of the fact.

The term "court" may mean the "judge" or "judges" of the court, or the judge and the jury, according to the connection, and the object of its use.[5] See JUDGE; JUDICIARY.

For the speedy, universal, and impartial administration of justice the law has appointed a variety of courts, some with a more limited, others with a more extensive, jurisdiction; some to determine in the first instance, others upon appeal and by way of review. Of these the most important are:

Civil court. A court instituted for the enforcement of private rights and the redress of private wrongs; any court which administers civil law. **Criminal court.** Any tribunal for the redress of public wrongs — crimes and misdemeanors. **Ecclesiastical court.** Such judicatory as enforces law made by a religious body for its own government. See CHURCH.

Court of law, or court of common law. Any court which administers justice according to the principles and forms of the com-

[1] [Abbott's Law Dict.

[2] [Bouvier's Law Dict.

[3] 3 Bl. Com. 23: Coke, Litt. 58.

[4] 3 Bl. Com. 2.

[5] 3 Bl. Com. 23-24; 1 *id.* 270.

[6] 3 Bl. Com. 25; 34 Ill. 360; 14 F. R. 178.

[7] Mason v. Woerner, 18 Mo. 570 (1853), Gamble, J.

[1] [Burrill's Law Dict.

[2] See Wightman v. Karsner, 20 Ala. 451 (1852); Brumley v. State, 20 Ark. 78 (1859).

[3] Hobart v. Hobart, 45 Iowa, 508 (1877), Beck, J. See Lewis v. Hoboken, 42 N. J. L. 379 (1880).

[4] [Shurburn v. Hooper, 40 Mich. 505 (1879); Streeter v. Paton, 7 *id.* 348 (1859), Manning, J.

[5] See Gold v. Vermont Central R. Co., 19 Vt. 482 (1847); Michigan Central R. Co. v. Northern Indiana R. Co., 8 Ind. 245 (1851); 13 R. I. 401.

mon law. **Court of chancery, or of equity.** A court which proceeds wholly according to the principles of equity, *q. v.*

Court of original jurisdiction. Such court as is to exercise jurisdiction over a matter in the first instance. **Court of appellate jurisdiction.** Is organized to review causes removed from another court or courts. **Court of general jurisdiction.** Takes cognizance of all causes, civil or criminal, of a particular nature. **Court of limited or special jurisdiction.** May have cognizance over a few matters only.

Inferior court. A court subordinate to another; or, a court of limited jurisdiction. **Superior court.** A court with controlling authority over some other court or courts, and with certain original jurisdiction of its own. **Supreme court.** A court of the highest jurisdiction; also, a court higher than some other court or courts, but not necessarily of last resort.

Inferior courts. All courts from which an appeal lies are "inferior" to the court to which their judgments may be carried — as are the circuit and district courts of the United States, but they are not, therefore, "inferior courts" in the technical sense as applying to courts of a special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must *show* their jurisdiction.[1] See further APPARERE, De non, etc.

Superior courts. Courts in Connecticut, Delaware, Georgia, Massachusetts, and North Carolina, whose jurisdiction extends throughout the whole of a defined district or of the whole State. In a few other States, the title of a court or courts organized in a particular city or county, additional to the general system; as in one or more counties of Illinois, Indiana, Maine, Maryland, and Michigan.

Supreme courts. The supreme courts of New Hampshire, Pennsylvania, and Vermont, the "supreme courts of appeal" of Virginia and West Virginia, and the "supreme judicial courts" of Maine and Massachusetts, in addition to their appellate powers, exercise an additional jurisdiction, more or less general, in the issuing of the prerogative writs of *mandamus*, prohibition, *quo warranto*, etc. In New Jersey the supreme court is the highest court of law of original jurisdiction; and in New York a court, next to the court of appeals, with certain general original jurisdiction coupled with some appellate powers. In Connecticut the court of last resort is called the "supreme court of errors." In most, if not quite all, of the other States, the name supreme court, for a court possessing the general characteristics above described, is applied to the court of last resort.[1] As to the Supreme Court of the United States, see page 278.

Court of record. A court in which the acts and judicial proceedings are enrolled on parchment for a perpetual memorial and testimony. . . . All such are the king's courts; no other has authority to fine and imprison: so that the erection of a new jurisdiction with this power makes it instantly a court of record. **Court not of record.** Originally, the court of a private man, whom the law would not intrust with discretionary power over the fortune or liberty of his fellow-subjects: as, the courts-baron and other inferior jurisdictions where the proceedings were not enrolled or recorded, and which could hold no plea of a matter cognizable by the common law, unless under the value of forty shillings, nor of any forcible injury, not having process of arrest.[2]

The existence or truth of what is done in a court not of record can, if disputed, be tried and determined by a jury; but nothing can be averred against a "record," [2] *q. v.*

A court of record is a judicial, organized tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law.[3]

The power to fine and imprison was not an indispensable attribute of a court of record. In modern law, the fact that a permanent record is kept may not stamp this character upon a court; since numerous courts of limited or special jurisdiction are obliged to keep records and yet are held to be courts not of record.[4]

Courts of record are sometimes distinguished by the possession and use of a *seal*.

There is high authority for making the fact that a court is a court of record the test which confers upon its proceedings, in a particular case (falling within the general scope of its jurisdiction), the presumption of jurisdiction, rather than the fact that it is a superior court of general common-law powers.[5]

[1] [Kempe *v.* Kennedy, 5 Cranch, 185 (1809), Marshall, C. J. See M'Cormick *v.* Sullivant, 10 Wheat. 199 (1825); *Exp.* Watkins, 3 Pet. *205 (1830); Grignon *v.* Astor, 2 How. 341 (1844); Kennedy *v.* Georgia State Bank, 8 *id.* 611 (1850); *Exp.* Lathrop, 118 U. S. 113 (1886); Cooley, Const. Lim. 508-9. cases.

[1] See 2 Abbott's Law Dict.

[2] [3 Bl. Com. 24-25, 331. See 10 Watts, 94; 34 Cal. 422; 23 Wend. 377; 37 Mo. 29.

[3] See *Exp.* Gladhill, 8 Metc. 170 (1844), Shaw, C. J

[4] See 1 Bouvier's Law Dict. 426.

[5] Davis *v.* Hudson, 29 Minn. 25 (1881); Freeman, Judgm. § 122, cases.

Minor terms descriptive of courts are: **Court above** or **ad quem.** To which a cause is taken from another and inferior court. Opposed, **court below** or **a quo:** such lower court, from which the cause is removed. **Local court.** For the trial of causes within comparatively narrow territorial limits; also, the court of a State, as opposed to the court of the United States to which a cause may be removed. **Full court.** A session of a court at which all the members are present.

Other terms descriptive of special courts will be found explained in their alphabetical places, as see, in addition to the entries following, APPEAL; ARBITRATION; ERROR, 2 (3); IMPEACH, 4; MOOT; MARTIAL; NISI PRIUS; OYER AND TERMINER; PROBATE.

See also phrases beginning BREAST; BY; DAY; FRIEND; LEAVE; OUT; OPEN.

And see related terms, such as ATTORNEY; BENCH; CHAMBER; CLERK; COMITY; CONSTITUTION; CONTEMPT, 1; COSTS; CRIER; DEPOSITION; DISCRETION, 3-5; JUDGE; JUDGMENT; JUDICIAL; JUDICIARY; JURISDICTION, 2; JURY; LAW; NEWSPAPER; NOTICE, 1, Judicial; PAYMENT; PLEADING; PRÆSUMPTIO; PROCEDURE; RECORD, 2; RULE, 2; SESSION; TERM, 4; VACATION.

Compare CURIA; FORUM.

COURTS OF ENGLAND. Statutes of 36 and 37 Vict. c. 66, and 38 and 39 Vict. c. 77, both of which went into effect November 1, 1875, consolidated into one supreme court of judicature the high court of chancery, and the courts of queen's bench, common pleas, exchequer, admiralty, probate, and divorce and matrimonial causes. The supreme court has two divisions: the high court of justice and the court of appeal; the former of which has original and some appellate jurisdiction, and the latter appellate and some original jurisdiction. The lord chief justice is president of the former court, the lord chancellor of the latter.

To the high court of justice there are five *divisions:* chancery; queen's bench; common pleas; exchequer; probate, divorce, and admiralty. To each of these divisions are assigned the judges of the old courts similarly named, and the jurisdictions of those courts. Each division has its series of reports; another series comprises the decisions of the court of appeal — "appeal cases."

Besides these courts of superior jurisdiction are numerous others of inferior or local jurisdiction, and also ecclesiastical courts.[1] See JUDICATURE, Acts.

As to the older English courts, see[2] ADMIRALTY; AULA; CHANCERY; CORONER; COUNTRY, 2; COUNTY, Court, 2; EXCHEQUER; FEUDS; KING; ORDINARY, 2; OYER; PLEA, 1; STAR-CHAMBER.

COURTS OF SCOTLAND. The court of session, the supreme civil court, consists of two divisions of four judges each, who together form the *inner house*, and of five judges (lords ordinary) who form the *outer house.* The judges of the outer house are judges of the first instance, with co-ordinate authority, except as to certain classes of cases appropriated to the junior, the second junior, and the third junior lord ordinary, respectively. The inner house, which is mainly a court of review, consists of the first division, presided over by the lord president, and the second division, presided over by the lord justice clerk. No action can be brought in the court of session for an amount under twenty-five pounds.[1]

COURTS OF THE STATES. There is no uniformity among our States as to the number, name, or organization of their courts. Each State has some tribunal of last resort, with numerous subordinate tribunals; but the mode in which they are created, the extent of their jurisdiction, the selection of the judges and their terms of office and duties, are matters upon which each State legislates for itself. By name these courts are: a supreme court, court of appeals, or court of errors and appeals; courts of common pleas, county courts, or circuit courts for one or more counties; orphans', probate, or surrogates' courts; courts of sessions; recorders' courts; city courts; superior courts; district courts; aldermen's or justices' courts.

For an account of which, see those titles, and the names or titles and references on page 275.

COURTS OF THE UNITED STATES. "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[2]

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and

[1] See Preface to 15 Moak's Reports, i-xv; 2 Law Q. Rev. 1-11 (1886).

[2] 3 Bl. Com. Ch. III-VI.

[1] See 37 Alb. Law J. 4-7 (1888)

[2] Constitution, Art. III, sec. 1.

maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." [1] See POWER, 3.

The judges are appointed by the President, by and with the advice and consent of the Senate; and they hold office during good behavior.[2]

The oath taken by justices of the Supreme Court, the circuit and the district judges, is as follows:

"I, —— ——, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as justice of the Supreme Court of the United States, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God." [3]

The organization of the system of courts (except as to the Supreme Court) was commenced by the act of September 24, 1789, known as the Judiciary Act, *q. v.*

The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise provide, are to be regarded as "rules of decision in trials at common law" in the courts of the United States, in cases where they apply.[4]

This includes the rules of evidence prescribed by the laws of the States in which the United States courts sit.[5] See further DECISION, Rules of.

August 8, 1791, Chief Justice Jay, in answer to an interrogation by the attorney-general, announced that "this court consider the practice of the king's bench, and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary." [6]

Remedies at common law and in equity are not according to the practice of the State courts, but according to the principles of common law and equity as distinguished in England, whence we derive our knowledge of those principles.[7]

The blending of equitable and legal causes of action in one suit is not permissible. But in suits in equity in the circuit and district courts the forms and modes of proceeding shall be according to the principles, rules and usages belonging to courts of equity. This requirement is obligatory.[1]

In the following cases and proceedings jurisdiction is exclusive in the courts of the United States:[2] 1. Of all crimes and offenses cognizable under the authority of the United States.[3] 2. Of all suits for penalties and forfeitures incurred under the laws thereof.[4] 3. Of all civil causes of admiralty or maritime jurisdiction, saving to suitors the right of such remedy as the common law is competent to give. 4. Of all seizures under Federal law not within admiralty and maritime jurisdiction. 5. Of all cases arising under patent-right[5] or copyright laws.[6] 6. Of all matters in bankruptcy.[7] 7. Of all controversies of a civil nature where a State is a party, except between a State and its own citizens, citizens of other States or aliens.[8]

The courts mentioned have power to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.[9]

A re-examination, by writ of error, may be had in the Supreme Court, of a final judgment or decree in any suit in the highest court of a State, where there is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or the validity of a statute of, or an authority exercised under, a State, on the ground of repugnance to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, a treaty or a statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, etc., specially set up or claimed.[10]

The record from the State court of last resort must present a "Federal question," that is, the Constitution, a law, or a treaty, of the United States must have been drawn in question and its authority denied or evaded.[11]

It is not enough that a Federal question was presented for decision. It must affirmatively appear that the decision was necessary to the determination of the cause, and that the judgment rendered could not have been given without deciding it.[12]

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[1] Constitution, Art. III, sec. 2. See 2 Bancroft, Const. 195-206.

[2] Constitution, Art. II, sec. 2, cl. 2.

[3] R. S. § 712: Act 24 Sept. 1789.

[4] R. S. § 721, cases.

[5] Potter *v.* Third Nat. Bank of Chicago, 102 U. S. 165 (1880), cases.

[6] Rules and Orders, Supreme Court, 1 Cranch, xvi.

[7] Thompson *v.* Central Ohio, &c. R. Cos., 6 Wall. 137 (1867), cases.

[1] R. S. § 913, cases; Hurt *v.* Hollingsworth, 100 U. S. 103 (1879), cases; Herklotz *v.* Chase, 32 F. R. 433 (1887).

[2] R. S. § 711: various Acts, and cases.

[3] See 2 Dall. 393; 4 Saw. 634; 53 Pa. 112; 2 Woods, 428.

[4] See 47 Md. 242; 74 Ill. 217; 95 Mass. 301.

[5] See 7 Johns. *145; 66 N. Y. 459; 34 Iowa, 221; 108 Mass. 501; 40 Me. 430; 15 Mich. 265.

[6] See 47 N. Y. 535.

[7] See 119 Mass. 434; 3 Neb. 437; 72 N. Y. 159; 69 N. C. 464.

[8] See 29 Ark. 649; 27 La. An. 329; 2 Hill, N. Y., 159.

[9] R. S. § 716; Rosenbaum *v.* Bauer, 120 U. S. 450 (1887), cases; 10 Wheat. 51; 15 Wall. 427; 21 *id.* 289; 94 U. S. 672; 5 Blatch. 303.

[10] R. S. § 709, cases; 1 Sup. R. S. p. 188.

[11] Williams *v.* Bruffy, 102 U. S. 255 (1880).

[12] Brown *v.* Atwell, 92 U. S. 329 (1875); Home Ins. Co. *v.* City Council, 93 *id.* 121 (1876); Gold-Washing, &c.

Writs of error to the State courts have never been allowed as of right, that is, as of course. It is the duty of the justice to whom application is made, under Rev. St. § 709, to ascertain, from the record of the State court, whether any question, cognizable on appeal, was decided in the State court, and whether the case, on the face of the record, will justify re-examination. When the case is urgent the motion for the writ may be permitted to be made in open court. But if it appears that the decision of the Federal question was so plainly right as not to require argument, and especially if it accords with well-considered judgments in similar cases, the writ will not be awarded.[1]

At the trial some title, right, privilege, or immunity must have been "specially set up or claimed" under the Constitution, laws, or treaties of the United States.[2]

The "inferior courts" (which phrase see, page 275) established are: Circuit courts, District courts, Territorial courts, the Supreme Court of the District of Columbia, and the Court of Claims.

Congress can vest no part of its power in a State court;[3] nor in a military commission.[4] During the rebellion the President had power to establish provisional courts at the seat of war, as an incident to military occupation.[5] See WAR.

By consent of a State, Congress may impose duties upon the tribunals of a State, not incompatible with State duties.[6]

Supreme Court of the United States. This court, as seen, was established by the Constitution itself.[7]

"In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned [page 276], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make."[8]

Congress cannot extend this original jurisdiction, since in all other cases the Court's jurisdiction must be appellate.[9]

But the extent of the appellate jurisdiction is not limited by the Constitution to any particular form or mode; and the appellate is broader than the original jurisdiction.[10]

In view of the practical construction put upon the Constitution by Congress and the courts, the Supreme Court has expressed an unwillingness to say that it is not within the power of Congress to grant to the inferior courts jurisdiction in cases where that Court has been vested by the Constitution with original jurisdiction.[11]

The Court has power to issue a writ of prohibition to a district court proceeding as a court of admiralty and maritime jurisdiction; also, a writ of *mandamus*, in a case warranted by the principles and usages of law, to an inferior Federal court or to a person holding a Federal office; where a State, a public minister, a consul or vice-consul is a party;[12] also, to issue writs of *habeas corpus*;[13] writs of *scire facias*, and all other writs not especially provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the principles and usages of law.[14] The justices, individually, may grant writs of *habeas corpus*, of *ne exeat*, and of injunction,[15] *qq. v.*

The Court exercises *appellate jurisdiction* as follows: (1) By writ of error from the final judgment of a circuit court, or of any district court exercising the powers of a circuit court, in civil actions brought there by original process, or removed there from the court of a State, and in final judgments of any circuit court in civil actions brought from the district court, where the matter in dispute, exclusive of costs, exceeds $5,000.[16] (2) Upon appeal from the decree of a circuit court in cases of equity and of admiralty, where the sum in controversy, exclusive of costs, exceeds $5,000.[17] (3) And in certain other cases in admiralty, for which see act of February, 1875, 18 St. L. 315. (4) Upon appeal, or error upon a certificate of differ-

Co. *v.* Keyes, 96 *id.* 208 (1877); Daniels *v.* Tearney, 102 *id.* 417 (1880); Brown *v.* Colorado, 106 *id.* 96 (1882); New Orleans Waterworks Co. *v.* Louisiana Sugar Refining Co., 125 *id.* 29 (1888), cases; 99 *id.* 71, 99; 107 *id.* 319; 111 *id.* 361; 112 *id.* 127; 114 *id.* 133; 116 *id.* 548; 21 Wall. 639.

[1] Spies *v.* Illinois (The Anarchists' Case), 123 U. S. 163 (Nov. 2, 1887), Waite, C. J.; Twitchell *v.* Pennsylvania, 7 Wall. 324 (1868), Chase, C. J. Anarchists' Case commented on, 27 Am. Law Reg. 38-47 (1888), cases; 1 Harv. Law Rev. 306-26 (1888).

[2] Brooks *v.* Missouri, 124 U. S. 394 (Jan. 23, 1888), Waite, C. J.; French *v.* Hopkins, *ib.* 524 (1888).

[3] Martin *v.* Hunter's Lessee, 1 Wheat. 330 (1816); 7 Conn. 342; 17 Johns. 9.

[4] *Exp.* Milligan, 4 Wall. 121 (1866).

[5] The Grapeshot, 9 Wall. 132 (1869). As to criminal jurisdiction generally, see United States *v.* Clark, 26 Am. Law Reg. 708-9 (1887), cases; also, Circuit, etc., Courts, *post*.

[6] United States *v.* Jones, 109 U. S. 520 (1883); 1 Kent, 400.

[7] To be the "bulwark of a limited Constitution against legislative encroachment," — Federalist, lxxviii.

[8] Constitution, Art. III, sec. 2, cl. 2. See Act of 1789, s. 13: R. S. § 687.

[9] *Exp.* Vallandigham, 1 Wall. 252 (1863), cases.

[10] *Exp.* Virginia, 100 U. S. 341-42 (1879), cases.

[11] Ames *v.* Kansas, 111 U. S. 469 (1884).

[12] R. S. § 688, cases.

[13] R. S. § 751, cases.

[14] R. S. § 716, cases.

[15] R. S. §§ 717, 719, 752, cases.

[16] R. S. § 691, cases: Act 16 Feb. 1875: 1 Sup. R. S. p. 136.

[17] R. S. § 692, cases; Act 16 Feb. 1875. See CIRCUIT COURT, p. 280.

ences of opinion between the judges of a circuit court.[1] (5) Upon appeals in prize cases.[2] (6) In patent and copyright cases; in revenue cases; in alleged abridgment of the rights of citizenship.[3] (7) In cases from the judgment or decree of the supreme court of the District of Columbia or of any Territory, when the matter in dispute, exclusive of costs, exceeds $1,000 and as to the supreme court of the said District $2,500,[4] and of Washington Territory, $2,000;[5] except in cases involving the validity of a patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, in which cases appeal or error lies regardless of the sum or value in dispute.[6] In cases in the court of claims, decided for the plaintiff, the sum being over $3,000 or his claim forfeited.[7] (8) In capital cases and cases of bigamy or polygamy from Utah Territory.[8] (9) In cases involving a Federal question, as see page 277.] (10) Where a court dismisses or remands a cause to a State court.

Its criminal jurisdiction includes such proceedings against public ministers or their domestic servants as a court of law can have consistently with the law of nations.[9]

The judges of the Supreme Court consist of a chief justice and eight associate justices, any six of whom constitute a quorum;[10] the latter have precedence according to the dates of their commissions, or, where the dates are the same, according to age.[11]

The number of members was originally five; in 1807, it was made six; in 1837, eight; and in 1863, nine.

The Court holds one term, annually, at Washington City, commencing on the second Monday of October, and such special terms as it may find necessary.[12] Provision is made for adjournments when a quorum does not attend.[13]

The Court appoints a clerk, a marshal, and a reporter of its decisions.[14]

The ceremony observed in opening and closing the Court is as follows: When the marshal appears, at twelve o'clock noon (in advance of the justices), at the north door of the court room, the crier raps on the desk three times, for the audience to come to order and to rise from their seats. When the chief justice enters the door the crier announces "The honorable, the chief justice and associate justices of the Supreme Court of the United States!" As the justices seat themselves, after ascending the platform, the crier proclaims: "O yes! O yes! O yes! All persons having business before the honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this honorable Court!" At four o'clock P. M., on intimation (usually a gesture) from the chief justice, or at such other time as he may indicate, the crier announces: "This honorable Court is now adjourned until to-morrow at twelve o'clock," or until "Monday, at twelve o'clock."

Circuit courts of the United States. These are courts of the "circuits" into which the country is divided; each circuit being composed of at least three "judicial districts." In number and territorial jurisdiction the courts correspond with the following circuits:

First.— Maine, New Hampshire, Massachusetts, and Rhode Island.

Second.— Vermont, Connecticut, and New York.

Third.— New Jersey, Pennsylvania, and Delaware.

Fourth.— Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

Fifth.— Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.

Sixth.— Ohio, Michigan, Kentucky, and Tennessee.

Seventh.— Indiana, Illinois, and Wisconsin.

Eighth. — Minnesota, Iowa, Nebraska, Missouri, Kansas, Arkansas, and Colorado.

Ninth.— California, Oregon, and Nevada.[1]

For the second circuit an additional judgeship was created by the act of March 3, 1887 (24 St. L. 492). The "senior judge" sits in election proceedings (R. S. §§ 2011-14), unless absent or unable to serve, in which event the "junior judge" may act.

There are also courts called "circuit courts" for particular districts within Alabama, Arkansas, and Mississippi.[2]

A circuit court consists of a justice of the Supreme Court, called the "circuit justice," a "circuit judge" for the circuit having the same powers as the circuit justice, and the "district judge" of the district where the circuit court is held. Any two of these officials may hold court. The "circuit justice," sitting apart, may try cases; during every two years he must attend

[1] R. S. §§ 698, 697, cases.
[2] R. S. §§ 695-96, cases.
[3] R. S. § 699, cases.
[4] Act 25 Feb. 1879: 1 Sup. R. S. p. 149.
[5] R. S. §§ 702, 706, cases.
[6] R. S. §§ 702, 706, cases.
[7] R. S. § 707, cases.
[8] Act 23 June, 1874: 1 Sup. R. S. p. 103.
[9] R. S. § 4063, cases.
[10] R. S. § 673: Act 10 April, 1869.
[11] R. S. §§ 674-75: Acts 24 Sept. 1789, 25 June, 1868.
[12] R. S. § 684: Acts 23 July, 1866, 24 Jan. 1873.
[13] R. S. § 685: Acts 29 April, 1802, 21 Jan. 1889.
[14] R. S. § 677: various Acts, 1789 to 1867.

[1] R. S. § 604: various Acts, 1789 to 1878.
[2] See R. S. § 608; 1 Sup. R. S. p. 87.

at least one term of court in the district.[1] By consent of the parties the district judge may vote on an appeal from his own decision; but judgment is to be rendered in conformity with the opinion of the presiding judge.[2] When a circuit justice, or all the judges, are disqualified from any cause, a case may be certified to the most convenient circuit, or the judge thereof may be requested to hold the court.[3]

Each court appoints its own clerks and their deputies.[4]

Each court also appoints as "commissioners" as many discreet persons, none of them being a marshal or his deputy, as may be deemed necessary;[5] but they are not considered officers of the court.[6] They are authorized to hold persons to security of the peace, and for good behavior in cases arising under Federal law,[7] to take bail and affidavits required in another circuit or a district court.[8] They may imprison or bail offenders;[9] discharge poor convicts;[10] administer oaths and take acknowledgments;[11] apprehend fugitives from justice.[12] They are required to conform their proceedings in criminal cases to the practice in the State courts as far as practicable.[13] They are impliedly authorized to keep a docket, and entitled to docket fees.[14]

The jurisdiction of the circuit courts is such as Congress confers.[15] A general description of the *original jurisdiction* is, that it extends (subject to some limitations founded upon residence) to civil suits involving more than $2,000,—(by act of March 3, 1887,—prior thereto $500) exclusive of costs, and arising under the Constitution, laws, or treaties of the United States, or in which the United States are plaintiffs, or in which the controversy is between different States, or citizens of a State and foreign States, citizens, and subjects; also of crimes under the laws of the United States. They have no *appellate jurisdiction* over the district courts.[16] By act of March 3, 1875,[17] a new definition was given of the jurisdiction, which is very comprehensive, and has been held to be a substitute for and implied repeal of the provisions of the Revision of 1873.[1] See further act of March 3, 1887, page 281.

The $2,000 provision relates to the amount "in dispute," not to the amount claimed.[2] The Supreme Court has power of review where the matter in dispute exceeds the sum or value of $5,000, exclusive of costs.[3]

The matter in dispute may be made up of distinct demands each less than $2,000, and although title be acquired by assignment.[4]

The jurisdiction is co-extensive with the limits of the State.[5] Where there are two districts in a State, a citizen of such State is liable to suit in either district, if served with process.[6]

The fact that a nominal or immaterial party resides in the same State with one of the actual parties will not defeat the jurisdiction.[7]

The court, not being a foreign court, adopts and applies the law of the State.[8]

The facts on which jurisdiction rests must, in some form, appear on the face of the record of each suit; as, for example, the fact of citizenship.[9]

More specifically, the *original jurisdiction* includes: cases arising under—laws providing internal revenue, postal laws, patent laws, copyright laws; proceedings for penalties incurred by a merchant vessel in carrying passengers; suits by or against a national banking association; matters involving the elective franchise and other civil rights belonging to citizens of the United States; also, *exclusive jurisdiction* of all crimes and offenses cognizable under the authority of the United States, except when otherwise provided, and *concurrent jurisdiction* with the district courts of offenses cognizable therein.[10]

In an admiralty cause by consent, and in a patent cause in equity under rules made by the Supreme Court, the court may impanel a jury of five to twelve persons to determine the issue of fact.[11] But except

[1] R. S. § 610: Act 10 April, 1869.

[2] R. S. § 614: Acts 24 Sept. 1789, 29 April, 1802, 2 March, 1867.

[3] R. S. §§ 615, 617: various Acts, and cases; Supervisors v. Rogers, 7 Wall. 175 (1868).

[4] R. S. §§ 619, 624: various Acts.

[5] R. S. §§ 627-28: various Acts.

[6] *Exp.* Van Orden, 3 Blatch. 167 (1854).

[7] R. S. § 727: various Acts.

[8] R. S. § 945: various Acts.

[9] R. S. §§ 1014-15: various Acts.

[10] R. S. § 1042: Act 1 June, 1872.

[11] R. S. § 1778: various Acts.

[12] R. S. § 5270: Acts and cases.

[13] R. S. § 1014; United States v. Harden, 4 Hughes, 456 (1881).

[14] Phillips v. United States, 33 F. R. 164 (1887).

[15] Sewing Machine Cases, 18 Wall. 577 (1877).

[16] See R. S. § 699: various Acts and cases.

[17] 18 St. L. 470: 1 Sup. R. S. p. 173.

[1] Osgood v. Chicago, &c. R. Co., 6 Biss. 332 (1875).

[2] Brooks v. Phœnix Mut. Life Ins. Co., 16 Blatch. 188 (1879).

[3] 1 Sup. R. S. p. 136; R. S. §§ 691-92; 100 U. S. 6, 147, 158, 444, 457; 101 *id.* 231; 102 *id.* 177; 103 *id.* 673, 755; 106 *id.* 579.

[4] Bernheim v. Birnbaum, 30 F. R. 885 (1887).

[5] Shrew v. Jones, 2 McLean, 78 (1840).

[6] M'Micken v. Webb, 11 Pet. *38 (1837); Vore v. Fowler, 2 Bond, 294 (1869); 10 Blatch. 307.

[7] Walden v. Skinner, 101 U. S. 589 (1879).

[8] Tennessee v. Davis, 100 U. S. 271 (1879).

[9] Continental Life Ins. Co. v. Rhoads, 119 U. S. 239 (1886), cases; Menard v. Goggan, 121 *id.* 253 (1887).

[10] R. S. § 629: Act 3 March, 1875: 18 St. L. 470.

[11] Act 16 Feb. 1875, c. 77: 18 St. L. 315. See 96 U. S. 440; 101 *id.* 6, 247; 102 *id.* 218.

ing these cases, reference to referees, and some exceptions in bankruptcy, the trial of all issues of fact is by jury.[1] By stipulation filed, the court may find the facts in the nature of a general or special verdict,[2] *q. v.*

This court has power to issue writs of error to the district courts on final judgments in civil cases at common law. An appeal may be had to it from a final decree of a district court of equity, admiralty, or maritime jurisdiction, except prize causes where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs;[3] the writ of error or appeal being taken out within one year from the removal of any disability.[4] Provision is made for the removal of causes into this court when the district judge is disqualified by interest, etc.[5] The court is always open for interlocutory proceedings in equity causes.[6] The opinion of the presiding judge or justice prevails, in cases of difference;[7] and in criminal proceedings, upon request, the point of difference is to be certified to the Supreme Court, but the cause may proceed, if that can be done without prejudice to the merits.[8] In cases of non-attendance of the judges, the marshal, or the clerk, may adjourn the court.[9] See OPINION, 3, Difference of.

Jurisdiction of writs of error in criminal cases comprises sentences of imprisonment and fines in excess of $300. Within a year thereafter, a petition to the circuit court for a writ of error may be presented; the writ, if allowed, to be accompanied with a bond to prosecute the suit and abide the judgment.[10]

The circuit courts are co-ordinate tribunals, constituting a single system, and the decision of any one of them ought to be regarded as decisive of the question involved, until otherwise determined by the Supreme Court.[11]

The act approved March 3, 1887 (24 St. L. 552), provides that the first section of the act of March 3, 1875 (18 St. L. 470), be amended to read as follows:

That the circuit courts of the United States shall have *original cognisance*, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have *exclusive cognizance* of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and *concurrent jurisdiction* with the district courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process of [or] proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any circuit or district court have cognizance of any suit except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder of [if[1]] such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the circuit courts shall also have appellate jurisdiction from the district courts, under the regulations and restrictions prescribed by law.

Sec. 2. That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be *removed* by the defendant or defendants therein to the circuit court of the United States for the proper district[;] any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein being non-residents of that State; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be

[1] R. S. § 648; 1 Sup. R. S. p. 175; 100 U. S. 208.

[2] R. S. § 649; 12 Wall. 275; 19 *id.* 81; 101 U. S. 569; 20 Blatch. 206.

[3] R. S. §§ 631, 633, 636: Acts and cases.

[4] R. S. § 635: Act 1 June, 1872.

[5] R. S. § 637: several Acts.

[6] R. S. § 638: several Acts.

[7] R. S. § 650: Act 1 June, 1872.

[8] R. S. § 651: Act 1 June, 1872.

[9] R. S. §§ 671-72: several Acts.

[10] Act 3 March, 1879: 20 St. L. 354.

[11] Welles *v.* Oregon R. & N. Co., 8 Saw. 612 (1883); 1 Flip 382.

[1] Newgass *v.* New Orleans, 33 F. R. 196 (1888).

made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.

That section 3 of said act shall read as follows:

Sec. 3. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State court to the circuit court of the United States, he may make and file a petition in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner, as if it had been originally commenced in the said circuit court; and if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.

Sec. 2. That whenever in any cause pending in any court of the United States there shall be a *receiver* or *manager* in possession of any property such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated in the same manner the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall on conviction thereof be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

Sec. 4. That all *national banking associations* established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

Sec. 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections 641, or in 642,

or in 643, or in 722, or in title 24 of the Revised Statutes of the United States, or mentioned in section 8 of the act of Congress of which this act is an amendment, or in the act of Congress approved March 1st, 1875, entitled "An act to protect all citizens in their civil or legal rights."

Sec. 6. That the last paragraph of section 5 of the act of Congress, approved March 3d, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," and section 640 of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be, and the same are hereby repealed: *Provided*, That this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof except as otherwise expressly provided in this act.

Sec. 7. That no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge to or employed by such court or judge in any office or duty in any court of which such justice or judge may be a member.[1] See ADDENDA.

Section 1 of the act of March 3, 1887, does not apply in determining a question of jurisdiction on an application for the removal of a cause.[2]

The circuit court cannot take cognizance of a suit against a party in a district of which he is not a resident.[3]

Before the act of 1887, a controversy between citizens of different States could be brought in any Federal court where the defendant could be served with process. That act confines the plaintiff to the district of which the defendant is an inhabitant, and that wherein the plaintiff himself resides.[4]

In a case involving a single controversy, where the jurisdiction depends upon citizenship, the right of removal is governed by clause 2 of section 2 of the act of 1887, and can be exercised only by non-resident defendants. Clause 3 of that section, like clause 2 of section 2 of the act of 1875, governs that class of cases only where there are two or more controversies involved in the same suit and one of them is wholly between citizens of different States. Under the act of 1887, the right of removal in the latter cases is limited to one or more of the defendants actually interested in such separable controversy, and does not extend to the plaintiff.[5]

Section 2 of the act of 1887, does not change the practice as to defendants seeking a removal on the ground of prejudice or local influence.[6]

A formal affidavit by the defendant that he believes that he cannot obtain justice because of prejudice or local influence is not sufficient: the fact must be shown by oral testimony or by affidavit. The affidavit may be filed in the State court and a certified copy be sent to the circuit court.[1]

Only when the court can plainly see that its jurisdiction is being fraudulently invoked will it deny the privilege of increasing the *ad damnum* by amendment.[2]

The Supreme Court cannot review an order remanding a suit removed under the act of 1887, begun, removed, and remanded after that act went into effect.[3] Nor has the court jurisdiction where the suit was removed before the approval of that act, but not remanded until thereafter;[4] nor where the order to remand was made while the act of 1875 was in force, and the writ of error not brought until after the passage of the act of 1887. Until the act of 1875 there was no such jurisdiction; and the provision in that act was repealed by the act of 1887, without reservation as to pending cases, the proviso in the repealing section having reference "only to the jurisdiction of the circuit court and the disposition of the suit on its merits."[5] See further REMOVE, 4.

District courts of the United States. Each State consists of one or more "districts" for the convenient administration of United States law. Each district has its "district court" held by a resident judge.[6]

The judge appoints a clerk of the court, with one or more deputies.[7] A deputy may do any act permissible in the clerk.[8]

The court has jurisdiction over all admiralty and maritime causes, all proceedings in bankruptcy, and all penal and criminal matters cognizable under the laws of the United States, exclusive jurisdiction over which is not vested in the circuit or Supreme Court.

More specifically, this jurisdiction comprises: non-capital crimes committed within the district or upon the high seas, except the cases mentioned in Revised Statutes, Title "Crimes," section 5412; cases of piracy, when no circuit court is held in the district; suits for penalties and forfeitures, in general; suits at common law brought by the United States or any officer thereof; suits in equity to subject realty to the payment of internal revenue

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See acts of 1877 and 1875 compared, 21 Am. Law Rev. 810-16 (1887).

[1] Fales v. Chicago, &c. R. Co., 32 F. R. 679 (1887).

[2] County of Yuba v. Pioneer Gold Mining Co., 32 F. R. 188 (1887), Sawyer, J. *Contra*, *ib.* 675, 84.

[3] Gavin v. Vance, 13 F. R. 85 (1887), Hammond, J.

[4] Western Union Tel. Co. v. Brown, 32 F. R. 312 (1887), Brewer, J.

[5] Hills v. Richmond, &c. R. Co., 33 F. R. 81 (1887), Newman, J

[1] Short v. Chicago, &c. R. Co., 33 F. R. 114 (1887), Brewer, J.

[2] Davis v. Kansas City, &c. R. Co., 32 F. R. 863 (1887).

[3] Morey v. Lockhart, 123 U. S. 56 (1887).

[4] Wilkinson v. Nebraska, 123 U. S. 286 (1888).

[5] Sherman v. Grinnell, 123 U. S. 679 (1887), Waite, C. J.

[6] R. S. § 551: various Acts.

[7] R. S. §§ 555, 558: various Acts.

[8] Confiscation Cases, 20 Wall. 111 (1873). See 1 Woods, 213.

tax; suits for forfeitures or damages as debts due to the United States by Rev. St., section 3490; causes arising under the postal laws; civil causes in admiralty and maritime law; some offenses against civil rights — Rev. St., Title XXIV; suits by or against any national bank within the district; suits by aliens for torts in violation of the law of nations or of a treaty; certain suits against consuls or vice-consuls; and original bankruptcy proceedings.[1]

Trial of issues of fact, except in equity, admiralty and maritime proceedings, is by jury.[2] (See page 277, column 1, page 280, column 2.)

The time for holding the sessions of the various courts is provided for;[3] also, the circumstances under which special terms may be held;[4] also, adjournments by the marshal;[5] and certifying cases into the circuit court, in case of disability or disqualification in the district judge.[6] The judge of one district may be designated to hold court in another district within the same circuit.[7] In cases of vacancy all processes are to be continued to the next stated term after the qualification of a successor; except that in States having two or more districts the judge of any such district may hold court.[8]

Territorial courts of the United States. The Territories are legislative governments, and their courts legislative courts. Congress, in the exercise of its powers in the organization and government of the Territories, combines the powers of both the Federal and State authorities.[9] The phrase "courts of the United States" is sometimes used to include these courts in the Territories, but not so in the Constitution itself.[10]

In Arizona the judicial power is vested in a supreme court and such inferior courts as the legislative council may provide. In the other organized Territories the power is vested in a supreme court, district courts, probate courts, and in justices of the peace.[11]

The supreme court, which consists of a chief justice and two associate justices, appointed for four years, holds an annual term at the seat of government of the Territory.

Each Territory is divided into three districts, and a district court is to be held by a justice of the supreme court as prescribed by law. Terms for causes in which the United States are not a party are held in the counties designated by the laws of the Territory. The supreme and district courts possess chancery and common-law powers. Review of a final decision in a district court by the supreme court is regulated by the territorial legislature. The district courts have the same jurisdiction, in cases arising under the Constitution and laws, as is vested in the Federal circuit and district courts. A marshal and attorney are appointed by the President and Senate; and a clerk, by each supreme court judge in his district.

An appeal or writ of error to the Supreme Court at Washington is allowed where the Constitution, an act of Congress, or a treaty is brought in question. There is also an appeal where the value in dispute exceeds $1,000; except in Washington Territory, as to which this limit is $2,000.[1]

Justices of the peace are not given jurisdiction where the title to land may be in dispute, or where the claims exceed one hundred dollars. See further TERRITORY, 2.

Supreme Court of the District of Columbia. This court, which may be embraced in the expression "courts of the United States,"[2] was established by the act of March 3, 1863, consists of six justices appointed by the President and the Senate, and has the same jurisdiction as circuit and district courts, with cognizance in divorce cases.

Actions are maintainable against inhabitants of the District, or persons found therein. It has common-law and chancery jurisdiction according to the laws of Maryland of May 3, 1802. It has appellate jurisdiction from the police court of the District, from justices of the peace in cases involving less than fifty dollars, and from the decisions of the commissioner of patents.[3] Any final judgment or decree, involving over $2,500 in value, may be re-examined in the Supreme Court of the United States; and so too, by special allowance, as to cases involving a less amount, where the questions of law are of great importance.[4]

Court of Claims of the United States. The court in which the United States consents to be sued.

Consists of a chief justice and four judges, appointed by the President and the Senate; holds an annual session at Washington, beginning on the first Monday in December. Members of Congress are forbidden to practice in the court. A quorum consists of three judges; and the concurrence of three is necessary to a judgment.[5]

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[1] R. S. § 563: various Acts.
[2] R. S. § 566: various Acts.
[3] R. S. § 572: various Acts.
[4] R. S. § 581: various Acts.
[5] R. S. § 583: various Acts.
[6] R. S. §§ 587–89, 601: several Acts; 1 Gall. 338; 97 U. S. 146.
[7] R. S. §§ 592–97: various Acts.
[8] R. S. §§ 602–3: various Acts.
[9] Scott *v.* Jones, 5 How. 374 (1847); Benner *v.* Potter, 9 *id.* 241 (1850).
[10] United States *v.* Haskins, 3 Saw. 271 (1875); 1 Fla. 498.
[11] R. S. § 1907: various Acts.

[1] R. S. §§ 702, 706: various Acts, and cases.
[2] Embry *v.* Palmer, 107 U. S. 9–10 (1882); Noerr *v.* Brewer, 1 MacArthur, 507 (1874).
[3] See generally R. S., Index.
[4] Act 25 Feb. 1879: 1 Supl. R. S. p. 149; R. S. § 706.
[5] R. S. §§ 1049–58: Act 23 June, 1874; 1 Ct. Cl. 3–8.

Its jurisdiction extends to all claims founded upon any law of Congress, any regulation of an executive department, any contract, express or implied, with the Government; to claims referred to it by either House of Congress; to set-offs, counter-claims, claims for damages, and other claims on the part of the United States against plaintiffs in said court.[1]

Its jurisdiction is limited to *contracts*. To constitute an implied contract there must have been a consideration moving to the United States, or they must have received the money charged with a duty to pay it over, or the claimant must have had a lawful right to it when received.[2]

The court has no equitable jurisdiction.[3]

For torts committed by an officer or agent of the United States, whether a remedy should be furnished, Congress has reserved for its own determination.[4]

The court may enter a judgment on a set-off against the claimant.[5]

An alien may sue, provided the like right is accorded an American citizen to prosecute claims against his government.[6]

The common-law rule which excludes interested parties as witnesses is observed; but, at the instance of the solicitor of the United States, a claimant may be required to testify.[7]

The court may appoint commissioners to take testimony.[8]

Suits in this court are not suits at common law; hence, trial by jury is not a right in a claimant.[9]

The court has never felt bound by the strict rules of pleading incident to actions in courts of common law or in equity. It seeks to administer justice by simple and convenient forms, and makes such interlocutory orders as will lead to the doing of complete justice without prolonged litigation.[10]

The limitation of writs is six years after the claim has accrued, with the usual allowance in cases of disability.[11]

Prior to 1855 claimants were heard by Congress. This court was established, in that year, to relieve Congress, to protect the government by regular investigation, and to benefit claimants by affording them a certain mode of examining and adjudicating claims. Originally it was a court in name, for its power extended only to the preparation of bills to be submitted to Congress. In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and it was authorized to render final judgment, subject to appeal to the Supreme Court and to an estimate by the secretary of the treasury of the amount required to pay each claimant. Congress repealed this provision for an estimate — as inconsistent with the finality essential to judicial decisions; since which time the court has exercised all the functions of a court. It is one of those "inferior courts" which Congress may establish.[1]

As at first organized, the court was an auditing board authorized to pass upon claims submitted to it, and to report to the secretary of the treasury. He submitted to Congress, for an appropriation, such confirmed claims as he approved, with no right of appeal in the claimant. The jurisdiction of the court has received frequent additions by the reference of cases to it under special statutes, and by other changes in the general law; but the principle originally adopted of limiting its general jurisdiction to cases of contract, remains.[2]

Appeal lies from it to the Supreme Court in the exercise of the general jurisdiction of the latter. And an appeal taken before the right therefor has expired is not vacated by an appropriation by Congress of the amount necessary to pay the judgment.[3]

The act approved March 3, 1887 (24 St. L. 505), provides, That the court of claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court: *Provided*, That no suit

[1] R. S. § 1059: several Acts, and cases.

[2] Knote *v.* United States, 95 U. S. 156 (1877).

[3] Bonner *v.* United States, 9 Wall. 160 (1869).

[4] Langford *v.* United States, 101 U. S. 344 (1879); Nichols *v.* United States, 7 Wall. 126 (1868); Gordon *v.* United States, 2 *id.* 561 (1864); 8 *id.* 269.

[5] R. S. § 1061. See 17 Wall. 209; 12 Ct. Cl. 317.

[6] R. S. § 1068. See 6 Ct. Cl. 171, 192; 9 *id.* 254; 11 Wall. 178.

[7] R. S. §§ 1079-80. See United States *v.* Clark, 96 U. S. 37 (1877).

[8] R. S. §§ 1071, 1080.

[9] M'Elrath *v.* United States, 12 Ct. Cl. 317 (1876).

[10] Brown *v.* District of Columbia, 17 Ct. Cl. 310 (1881), cases.

[11] R. S. § 1069. See 107 U. S. 194.

[1] United States *v.* Klein, 13 Wall. 144 (1871), Chase, Chief Justice.

[2] Langford *v.* United States, 101 U. S. 344-45 (1879), Miller, J.; Gordon *v.* United States, 117 *id.* 697 (1864), Taney, C. J.; 1 Dev. Ct. Cl. 41-53; 17 Ct. Cl. 1-29; 7 South. Law Rev. 781-811 (1882).

[3] United States *v.* Jones, 119 U. S. 477 (1886), Waite, C. J. Explains Gordon *v.* United States, and other cases.

against the government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

Sec. 2. That the district courts of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

Sec. 3. That whenever any person shall present his petition to the court of claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer, or agent, or contractor so indebted, or that he, or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States has arisen and exists, and that he or the person he represents has applied to the proper department of the government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said department and to the attorney-general of the United States, proceed to hear the parties and ascertain the amount, if any, due the United States on said account. The attorney-general shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court. Unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred.

Sec. 4. That the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt.

Sec. 5. That the plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law.

Sec. 6. That the plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the attorney-general of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case, to file a plea, answer, or demurrer on the part of the government, and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever of the government in the premises: *Provided*, That should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.

Sec. 7. That it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts.

Sec. 8. That in the trial of any suit brought under any of the provisions of this act, no person shall be excluded as a witness because he is a party to or interested in said suit; and any plaintiff or party in interest may be examined as a witness on the part of the government.

Section 1079 of the Revised Statutes is hereby repealed. The provisions of section 1080 of the Revised Statutes shall apply to cases under this act.

Sec. 9. That the plaintiff or the United States, in any suit brought under the provisions of this act shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes.

Sec. 10. That when the findings of fact and the law applicable thereto have been filed in any case as provided in section six of this act, and the judgment or decree is adverse to the government, it shall be the

duty of the district attorney to transmit to the attorney-general of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the attorney-general shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same: *Provided*, That no appeal or writ of error shall be allowed after six months from the judgment or decree in such suit. From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree.

Sec. 11. That the attorney-general shall report to Congress, and at the beginning of each session of Congress, the suits under this act in which a final judgment or decree has been rendered giving the date of each, and a statement of the costs taxed in each case.

Sec. 12. That when any claim or matter may be pending in any of the executive departments which involves controverted questions of fact or law, the head of such department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court of claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted.

Sec. 13. That in every case which shall come before the court of claims, or is now pending therein, under the provisions of an act entitled "An act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the government," approved March 3, 1883, if it shall appear to the satisfaction of the court, upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either House of Congress or to the department by which the same was referred to said court.

Sec. 14. That whenever any bill, except for a pension, shall be pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may refer the same to the court of claims, who shall proceed with the same in accordance with the provisions of the act approved March 3, 1883, entitled an "Act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the government," and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy.

Sec. 15. If the government of the United States shall put in issue the right of the plaintiff to recover the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court.

Sec. 16. That all laws and parts of laws inconsistent with this act are hereby repealed.

For additional information as to the powers and practice of the United States courts see particular terms, such as ADMIRALTY; BANKRUPTCY; CITIZEN; COMITY; CONSTITUTION; CONTEMPT, 1; COSTS; DEPOSITION; DISCRETION, 3-5; GOWN, 1; JURISDICTION, 2; LAW, Common, Supreme; MARSHAL, 1 (2); PROCEDURE; REMOVAL, 2; RES, 2; STATE, 3 (2); SUIT, 3; VENUE; WITNESS.

COURT-MARTIAL. See MARTIAL.

COURT-YARD. See COURT, 1; CURTILAGE.

COUSIN. Sometimes means a cousin by marriage.

A similar usage obtains as to the words "nephew" and "niece." A person speaking of another by his name and relationship is likely to be most accurate as to the name.[1] See CONSANGUINITY.

COVENANT.[2] 1. A promise under seal: as, a covenant to pay rent.[3]

May be used not in its limited, technical sense of a promise evidenced by a sealed instrument, but in the wider sense of any contract in general.[4]

Although words of proviso and condition may be construed as words of covenant, if such be the apparent intent and meaning of the parties, covenant will not arise unless it can be collected from the whole instrument that, on the part of the person sought to be charged, there was an agreement, or an engagement, to do or not to do some particular act.[5]

A covenant or convention is a clause of agreement in a deed, whereby either party may stipulate for the truth of certain facts, or bind himself to perform, or give, something to or for the other.[6]

Thus, the grantor of land may covenant that he has a right to convey, or for the grantee's quiet enjoyment, or the like; the grantee may covenant to pay rent, or to keep the premises in repair,[6] etc.

[1] Cloak *v.* Hammond, 82 Law Times, 134, 97 (1886): 35 Alb. Law J. 66.

[2] F. *covenant, convenant*, agreement: L. *convenire*, to come together, agree.

[3] [Greenleaf *v.* Allen, 127 Mass. 253 (1879).

[4] Riddle *v.* McKinney, 67 Tex. 32 (1886), Gaines, A. J.

[5] Hale *v.* Finch, 104 U. S. 268-69 (1881), cases, Harlan, J.; 52 Tex. 236.

[6] [2 Bl. Com. 304.

Covenantor. He who makes a covenant. **Covenantee.** He in whose favor a covenant is made.

Express covenant. A covenant explicitly stated in words. **Implied covenant.** Such covenant as is inferred or imputed in law from words used.[1]

Express covenants are also called covenants *in deed;* and implied covenants, covenants *in law.* Any words, such as "I covenant," "I agree," "I bind myself," plainly showing an intent to be bound, raise an express covenant; while a covenant may be implied from the use of such words as "grant," "bargain and sell," "give," "demise,"[2] *q. v.*

Joint covenant. A covenant that binds all the covenantors together as one person. **Several covenant.** Such as binds each covenantor separately. **Joint and several covenant.** Binds all covenantors together, or each singly.

When the legal interest in a covenant and in the cause of action thereon is joint, the covenant is joint, although in its terms it may be several, or joint and several.[3] See further JOINT.

Dependent covenant. A covenant in which the obligation for performance is conditioned upon performance of another covenant, made prior or at the same time. **Independent covenant.** In this the duty of performance rests solely upon the terms of the covenant in itself considered, irrespective of the performance or non-performance of any other covenant.

A "dependent covenant" rests upon the prior performance of some act or condition, and until the condition is performed the other party is not liable to an action on his covenant. Under an "independent covenant" either party may recover damages from the other for injuries received by a breach of the covenants in his favor; and it is no excuse for the defendant to allege a breach of covenants on the part of the plaintiff.[4]

If the whole is to be performed on one side, before anything else is to be done on the other side, the covenants are dependent, and performance is a condition precedent. But if something is to be done one side, before the whole can be performed on the other, the covenants are independent. . . A dependent stipulation is a condition, performance of which must be averred and proved in order to a recovery. Mutual and independent stipulations are not conditions, but each party has a remedy by action for non-performance by the other, by showing performance on his own part.[1]

Whether a covenant is dependent or independent is determined, in each case, by the intention of the parties as it appears on the instrument, and by the application of common sense; to which intention, when once discovered, all technical forms of expression must give way.[2]

Mutual covenants. Covenants as to which the thing to be done by one party is the consideration of the thing to be done by the other.

When a specified thing is to be done by one party as the consideration of the thing to be done by the other party, the covenants are mutual, and also dependent, if they are to be performed at the same time; and if, by the terms or nature of the contract, one is first to be performed as the condition of the obligation of the other, that which is first must be done or tendered before the party who is entitled to its performance can sustain a suit against the other party. If a day is fixed for the performance of a mutual covenant, the party whose duty it is to perform or tender performance first must do it on that day, or show his readiness to do it, else he cannot recover for non-performance by the other party. But both at common law and in chancery there are exceptions, growing out of the nature of the thing to be done and the conduct of the parties. The case of part performance, possession, etc., in chancery, where time is not of the essence of the contract, or has been waived by acquiescence, is an example of the latter; and the case of contracts for building houses, railroads, etc., in which the means of the builder and his labor become combined and affixed to the soil, or mixed with materials and money of the owner, afford examples at law.[3]

When mutual covenants go to the whole consideration on both sides they are mutual conditions, the one precedent to the other; where they go to a part only, a remedy lies on one covenant to recover damages for a breach of it, but it is not a condition precedent.[3]

Real covenant. Such a covenant as affects realty, binding it in the hands of the covenantor, his grantee or devisee. **Personal covenant.** A covenant obligatory upon the maker only, or to the extent of his personalty.

If the covenantor covenants for himself and his "heirs," his covenant is real, and descends upon the heirs, who are bound to perform it, provided they have assets by descent; if he covenants also for his

[1] See Conrad *v.* Morehead, 89 N. C. 34 (1883).

[2] See 4 Kent, 468, 473.

[3] Capen *v.* Barrows, 1 Gray, 379 (1854), cases, Metcalf, J. See Calvert *v.* Bradley, 16 How. 596 (1853).

[4] Bailey *v.* White, 3 Ala. 331 (1842), Collier, C. J.

[1] White *v.* Atkins, 8 Cush. 370 (1851), cases, Shaw, C. J.; Matthews *v.* Jenkins, 80 Va. 467-68 (1885), cases.

[2] Lowber *v.* Bangs, 2 Wall. 736 (1864), cases; Lewis *v.* Chisolm, 68 Ga. 44-45 (1883), cases; Neis *v.* Yocum, 16 F. R. 170 (1883), cases; The Tornado, 108 U. S. 351 (1883) Cutter *v.* Powell, 2 Sm. L. C. 22-66, cases.

[3] Phillips, &c. Construction Co. *v.* Seymour, 91 U. S. 650 (1875), Miller, J.

"executors" and "administrators," both his personal and real assets stand pledged for the performance.[1]

A real covenant has for its object something annexed to, or inherent in, or connected with, land or other real property; and runs with the land, so that the grantee is invested with it, and may sue upon it for any breach happening in his time.[2]

Of covenants real the most important are *covenants for title*, which assure the full enjoyment of whatever the deed purports to convey: the covenants — of seisin, of a right to convey, for quiet enjoyment, against incumbrances, for further assurance, and of warranty, *qq. v.* In the United States they are sometimes called "full covenants."[3]

Other covenants relating to realty are: a covenant to convey; against nuisances or a particular use; to renew a lease.[4]

An article of agreement for the sale of land is a covenant to convey the land.[5] A covenant of a right to convey means that the covenantor has the capacity and a right to transfer the land in question: the same as a covenant of seisin,[6] *q. v.*

A covenant "runs with the land" when either the liability to perform it, that is, its burden, or the right to take advantage of it; that is, its benefit, passes to the assignee of the land.[7]

Covenants running with the land are: those annexed to the estate, such as the ancient warranty, now represented by the usual covenants of title; and those which are attached to the land itself, such as the rights of common or easements. Species of the latter class, to be enforceable against the assignees of the covenantor, must "touch and concern" or "extend to the support of" the land conveyed.[8]

On covenants to stand seized to uses, see Uses, 3.

Other terms by which covenants are distinguished are: *affirmative*, that a thing has been or shall be done, and opposed to *negative*, not to do a thing; *alternative* or *disjunctive*, affording an election between things to be done; *auxiliary*, relating to another covenant as the principal, and discharged with it; *collateral*, connected with a grant, but not relating immediately to the thing, and opposed to *inherent*, affecting the particular property immediately; *concurrent*, to be performed at the same time with another; *declaratory*, limiting or directing a use; *executed*, performed, and opposed to *executory*, to be performed in the future; *general*, relating to lands generally and placing the covenantee in the position of a specialty creditor, and opposed to *special*, relating to particular land and giving the covenantee a lien thereon; *transitive*, passing over to the representatives of the maker, and opposed to *intransitive*, limited to the covenantor himself.

A grantor, conveying by deed of bargain and sale, by way of release or quitclaim of all his right and title to a tract of land, if made in good faith, without fraudulent representation, is not responsible for the goodness of the title beyond the covenants in his deed. He conveys nothing more than the estate of which he is possessed at the time; his deed does not pass an interest not then in existence. If the vendee has contracted for a particular estate, or for an estate in fee, he must take the precaution to secure himself by proper covenants of title. This principle is applicable to a deed of bargain and sale by release or quitclaim, in the strict sense of that species of conveyance. If the deed bears on its face evidence that the grantor intended to convey and that the grantee expected to become invested with an estate of a particular description or quality, and that the bargain had proceeded upon that footing, then, although it may not contain covenants of title in the technical sense, still the legal effect of the instrument will be as binding upon the grantor in respect to the estate thus described as if a formal covenant to that effect had been inserted; at least so far as to estop him from ever afterward denying that he was seized of the particular estate at the time of conveyance.[1]

In the absence of a recital estopping the grantor as to the character of his title or the quantum of interest to be conveyed, a covenant of general warranty, where the estate conveyed is the present interest of the grantor, does not operate as an estoppel to pass a title subsequently acquired.[2]

2. An action, or a form of action, at common law to recover damages for the breach of a contract under seal.

A covenant to do or to omit a direct act is a species of express contract, the breach of which is a civil injury. The remedy for any disadvantage or loss is by a *writ of covenant*, which directs the sheriff to command the defendant generally to keep his covenant with the plaintiff or to show good cause to the contrary. If the defendant continues refractory, or the covenant is already so broken that it cannot be specifically performed, the subsequent proceedings set forth with precision the covenant, the breach, and the loss

[1] 2 Bl. Com. 304.

[2] Davis *v.* Lyman, 6 Conn. 255 (1826), Hosmer, C. J.

[3] Rawle, Cov. Title, 24-27, 318.

[4] See 4 Kent, 473.

[5] See Espy *v.* Anderson, 14 Pa. 308 (1850); 11 Ill. 194; 19 Ohio, 347; 4 Md. 498; 19 Barb. 639.

[6] 2 Wash. R. P. 648; 10 Me. 91; 10 Cush. 184.

[7] Savage *v.* Mason, 3 Cush. 505 (1849); Shaber *v.* St. Paul Water Co., 15 Rep. 389 (1883); Spencer's Case, 1 Sm. L. C. *120-83, cases.

[8] Norcross *v.* James, 140 Mass. 189 (1885), cases, Holmes, J.: 25 Am. Law Reg. 64.

[1] Van Rennselaer *v.* Kearney, 11 How. 322-23 (1850), cases, Nelson, J.

[2] Hanrick *v.* Patrick, 119 U. S. 175-76 (1886), cases, Matthews, J.; Rawle, Cov. Tit. 398.

which has happened thereby; whereupon the jury will give damages in proportion to the injury sustained.[1]

Performance of a condition precedent (*q. v.*), if there is any such condition, must be averred.[2]

"Debt" will lie where the damages are liquidated.

Under the plea of *non est factum* (he did not make it), the defendant may show any fact contradicting the making of the instrument; as, personal incapacity, or that the deed was fraudulent, was not executed by all the parties, or was not delivered.

In Pennsylvania the defendant may plead "covenants performed with leave, etc.," that is, with leave, after notice to the plaintiff, to offer in evidence anything that amounts to a lawful defense. "Covenants performed, *absque hoc*" (without this) admits the execution, but puts the plaintiff to proof of performance. . . . "Covenants performed," although in substance a denial of the breach alleged, is an affirmative plea, and does not put the execution of the instrument in issue. "*Absque hoc*" puts in issue the performance on the part of the plaintiff as alleged by him. "With leave, etc.," implies an equitable defense, such as arises out of special circumstances, which the defendant intimates he means to offer in evidence.[3]

See CONDITION; CONTRACT; FACTUM, Non est; POSSIBILITY; PROVIDED; SEIZIN; WARRANTY, 1.

COVER. See COVERT; DISCOVERY.

COVERT.[4] 1. Covered, protected: as, a pound covert. See POUND, 2.

2. Implied, inferred: as, a covert condition.

3. Under the disability of marriage; married. **Discovert.** Unmarried, whether said of a widow or of a spinster.

Covert baron. A wife: under the protection of her husband or baron,[5] *q. v.*

Feme covert. A married woman: under the wing, protection or cover of her husband.[5]

Coverture. The condition of a woman during marriage. **Discoverture.** Not subject to the disability of being married.

Used as pleas in abatement, *q. v.*, and in speaking of the rights and liabilities of married women generally. See further DISABILITY; FEME, Covert; HUSBAND.

COVIN.[6] "A contrivance between two to defraud or cheat a third."[7]

"A secret assent determined in the hearts of two or more to the prejudice of another."[8]

Covinous. Collusive, fraudulent.

An example is where a tenant for life or tail secretly conspires with another that he shall recover the land held by such tenant to the prejudice of the reversioner.

COW. See ANIMAL; CRUELTY, 3.

A distinction between cow and heifer may or may not be intended in penal statutes,[1] and in a statute exempting a cow from sale on execution.[2] See HEIFER.

CR. Criminal; crown.

CRAFT. See VESSEL.

CRANK. Has no necessary defamatory meaning, any more than to say of one that he is capricious or subject to vagaries or whims.[3]

Does not necessarily imply that a man has been guilty of a crime, nor tend to subject him to ridicule or contempt. If the word has such import it should at least be averred and proven.[3]

CRAVE. See OYER.

CREATE. See CHARTER, 2.

CREDIBLE.[4] 1. Worthy of belief; deserving of confidence. See CREDIT, 1.

2. Entitled to be heard as a witness; competent. Competent to give evidence, and worthy of belief.

The English statute as to the execution of wills prior to 1838 required witnesses to be "credible." This was held to mean such persons as were not disqualified from giving testimony by imbecility, interest, or crime.[5]

This rule has been followed in Connecticut, Kentucky, Massachusetts, Mississippi, South Carolina, and several other States.[6]

As used in a statute requiring that a will disposing of realty shall be attested by credible witnesses, is equivalent to competent; not as meaning, in the loose popular sense, a person of good moral character and reputation in fact, and personally worthy of belief, but a person entitled to be examined in a court of justice, though subject to have his actual credit weighed and considered by the court or jury; and to be examined upon the question whether the will was duly executed, and by a person of disposing mind.[7]

Credibility. Being entitled to be believed; worthiness of belief.

In deciding upon the credibility of a witness it is usual to inquire whether he is capable of knowing a

[1] 3 Bl. Com. 156-57.

[2] 1 Chitty, Pl. 116.

[3] Farmers', &c. Turnpike Co. *v.* McCullough, 25 Pa. 304 (1855); 4 Dall. 439; 5 Pa. 189; 8 *id.* 272; 25 *id.* 303; 38 *id.* 75; 70 *id.* 194; 79 *id.* 336; 96 *id.* 239-40. See Act 25 May, 1887: P. L. 271.

[4] Kŭv'-ert. F. *couvrir*, to cover.

[5] [1 Bl. Com. 442.

[6] F. *couvenir*, to agree, covenant.

[7] Mix *v.* Muzzy, 28 Conn. 191 (1859): Ld. Ellenborough.

[8] Girdlestone *v.* Brighton Aquarium, 3 Ex. Div. 142 (1878): Termes de la Ley (1708, 1721).

[1] King *v.* Cook, 1 Leach, Cr. C. 123 (1774); 2 East, P. C. 616.

[2] Carruth *v.* Grassie, 11 Gray, 211 (1858); Pomeroy *v.* Trimper, 8 Allen, 400 (1864).

[3] Walker *v.* Chicago Tribune Co., 29 F. R. 887 (1887), Blodgett, J.

[4] L. *credere*, to believe, trust; also, to lend.

[5] 1 Jarman, Wills, 124.

[6] Fuller *v.* Fuller, 83 Ky. 350 (1885), cases.

[7] [Haven *v.* Hilliard, 23 Pick. 18 (1839), Shaw, C. J.; Amory *v.* Fellows, 5 Mass. 298 (1809), Parsons, C. J.; Jones *v.* Larrabee, 47 Me. 476 (1860), Appleton, J.; 38 Md. 424; 26 Conn. 416; 18 Ga. 40; 58 N. H. 8; 14 Tex. Ap. 72.

thing, and the particular thing, thoroughly; whether he was actually present: what attention he gave to the occurrence; and whether he honestly relates the affair as he remembers it.[1]

Credibility depends upon veracity and capacity to observe.[2] Literal coincidence of oral statements may afford ground for suspicion.[3] Affirmative testimony is the strongest.[4] When the credit due to witnesses is equal, preponderance is to be given to number.[5] Credibility is for the jury.[6] See further CHARACTER; COMPETENCY; IMPEACH, 3; WITNESS.

CREDIT. 1. In its primary sense, as a noun and a verb, imports reliance upon something said or done as the truth: belief or faith in testimony.

Discredit. To diminish the reliance to be placed upon testimony on any account whatever, and not necessarily for want of veracity in a person or for want of genuineness in a document. Compare IMPEACH, 2; INFAMY.

General credit. The general credit of a witness is his character as a credit-worthy man. **Particular credit.** Credit as a witness in a particular action.[7] See CREDIBLE.

2. The capacity of being trusted.[8]

The trust reposed in an individual, by those who deal with him, that he is able to meet his engagements.[9]

In an enlarged commercial sense, implies reputation and confidence; a basis on which the possessor may trade without immediate payment.[10]

The term also comprehends what is due to another person; and, again, time given in which to pay for a thing bought.

Credit is, strictly, a benefit as a means to procure property, and is not in itself recognised as property. Its whole office is to obtain trust. It is available to another by gift, sale, etc. Given gratuitously, it is a *loan;* given for a consideration, a *sale* of credit.[8]

Every contract for labor, not paid for in advance, is a contract upon credit; because the labor, when once performed, cannot be recalled. It is otherwise where property is to be paid for on delivery, for a delivery need not be made.[11]

Credit, bill of. "No State . . shall emit Bills of Credit,"[1] that is, issue paper intended to circulate through the community, for its ordinary purposes as *money*, and redeemable at a future day.[2]

A paper issued by the sovereign power, containing a pledge of faith, and designed to circulate as money.[3]

The term may cover certificates of indebtedness, bearing interest;[3] but not bills of a bank chartered by a State, even though the State be the sole stockholder,[3] nor, even if it pledges its credit for their payment, in case the bank fails to redeem them.[4]

Credit, letter of. A letter written by one merchant or correspondent to another requesting him to credit the bearer with a sum of money.[5] See LETTER, 3, Of credit.

Mutual credits. In laws of set-off, "a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on and trusting to such debt, as a means of discharging it."[6] See ACCOUNTS, Mutual; DEBTS, Mutual.

Creditor. In a strict literal sense, he who voluntarily trusts or gives credit to another, upon bond, bill, note, book, or simple contract, for money or other property. In a liberal sense, he who has a legal demand for money or other property which has come to the hands of another, without the consent of the former, but by mistake or accident, and to the payment or possession of which, or to compensation in damages therefor, he is entitled upon the ground of an implied promise. In a still more general sense, he who has a right by law to demand and recover of another a sum of money on any account whatever.[7]

Not simply a person to whom a debt is due, but a person to whom any obligation is due,— the last not being the usual meaning.[8]

[1] See 1 Greenl. Ev. §§ 2, 49, 431; 3 Bl. Com. 369.
[2] 1 Whart. Ev. § 404.
[3] 1 Whart. Ev. § 413.
[4] 1 Whart. Ev. § 415.
[5] 1 Whart. Ev. § 416.
[6] 1 Whart. Ev. §§ 391, 417.
[7] Bemis v. Kyle, 5 Abb. Pr. 283 (1857).
[8] Dry Dock Bank v. American Ins. Co., 3 N. Y. 356 (1850).
[Owen v. Branch Bank at Mobile, 3 Ala. 207 (1842).
[9] [Bridge v. Judson, 24 N. Y. 71 (1861).
[10] Ketchum v. City of Buffalo, 14 N. Y. 365 (1856).

[1] Constitution, Art. I, sec. 10, cl. 1.
[2] Craig v. Missouri, 4 Pet. 431 (1830), Marshall, C. J.
[3] Briscoe v. Bank of Kentucky, 11 Pet. 314 (1837), McLean, J.
[4] Darrington v. Bank of Alabama, 13 How. 16 (1851). See Legal Tender Case, 110 U. S. 443 (1883); Virginia Coupon Cases, 114 *id.* 283 (1885); 2 Story, Const. §§ 1369-64; 4 Kent, 408.
[5] Mechanics' Bank v. N. Y. & New Haven R. Co., 4 Duer, 586 (1855): McCulloch's Commercial Dict.
[6] 2 Story, Eq. § 1435; Munger v. Albany City Nat. Bank, 85 N. Y. 590 (1881), Folger, C. J.
[7] [Stanley v. Ogden, 2 Root, 261 (1795).]
[8] [New Jersey Ins. Co. v. Meeker, 37 N. J. L. 309 (1875), Beasley, C. J.

One who has the right to require the fulfillment of an obligation or contract.[1] Compare DEBTOR.

The term may merely designate a person. Thus, although the relation of debtor and creditor has been dissolved, the person who was the "debtor" in a contract for usurious interest may testify against him who was the "creditor."[2]

No one, unsolicited, may make himself the creditor of another.[3] See NEGOTIABLE.

Domestic creditor. A creditor resident within the county or the State of the debtor's domicil, or where his property is situated. *Foreign creditor.* One who resides within another jurisdiction.[4]

Execution creditor. A creditor who has obtained a levy upon property belonging to his debtor.

Existing creditor. A person who becomes the creditor of another after the latter has made an invalid transfer of his property, and before the invalidity has been removed.[5]

General creditors, or *creditors at large.* Creditors of an insolvent whose claims are to be satisfied *pro rata* out of any balance left after the claims of secured or favored creditors have been paid.

Judgment creditor. He whose claim has been merged into a judgment against his debtor, and under which, generally, execution may be had.

Junior creditor. A person who becomes a creditor after some other has become a creditor; also termed a "younger," "later," or "subsequent" creditor, and particularly used with reference to the validity of the liens of judgment creditors.

Lien creditor. A creditor who has for evidence of his claim a judgment, mortgage, or other lien regularly entered of record.

Preferred creditor. A creditor who the law, or the debtor, has directed shall be paid before others. See PREFER, 2.

Secured creditor. A creditor who has the possession of, or a lien upon, property of his debtor, as security for the payment of his claim. Opposed, *unsecured creditor.*

Subsequent or *future creditors; existing creditors; prior creditors.* See ASSIGN; CONVEYANCE, Fraudulent; RECEIVER; STOCK, 3 (2); SUFFER.

Creditor's bill. A bill in equity filed by one or more creditors of a deceased person, for an account of the assets and a settlement of the estate of the decedent.

A single creditor may file his bill for payment of his own debt, and seek a recovery of assets for this purpose only. But the more usual course is for one or more creditors to file a bill by and on behalf of himself or themselves, and all other creditors who shall come under the decree, for an account of the assets, and a due settlement of the estate. The principle is that as equality is equity the assets should be distributed without that preference allowed at common law. The usual decree is, *quod computet:* that the master take the accounts between the deceased and all his creditors; and an account of all the personal estate of the deceased in the hands of the executor or administrator, the same to be applied in payment of the debts and other charges, in a due course of administration. Thereafter, a creditor may not carry on a suit at law except as the court of equity may allow.[1]

Such a bill lies for a discovery of assets. The court will proceed to a final decree on the merits. The usual decree is for an account; but where the representative of the deceased admits assets, the decree is for immediate payment.[2]

It is no doubt generally true that a creditor's bill, to subject his debtor's interests in property to the payment of the debt, must show that all remedy at law had been exhausted. And, generally, it must be averred that judgment has been recovered for the debt, that execution has been issued, and that it has been returned *nulla bona.* The reason is, until such a showing is made, it does not appear, in most cases, that resort to a court of equity is necessary, in other words that the creditor is remediless at law. But a fruitless execution is not necessary to show that the creditor has no adequate legal remedy. Thus, when the debtor's estate is a mere equitable one, which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal processes.[3]

In Illinois a creditor's bill is defined to be a bill by which a creditor seeks to satisfy his debt out of some equitable estate of the defendant which is not liable to a levy and sale under an execution at law.[4]

CREDIT-MOBILIER.[5] A company or bank formed for advancing money on personal estate, generally with the declared ob-

[1] Hardy *v.* Norfolk Manuf. Co., 80 Va. 428 (1885), Lacy, J.

[2] Gifford *v.* Whitcomb, 9 Cush. 483 (1852), cases, Bigelow, J.; 28 Minn. 153.

[3] Gurnee *v.* Bausemer, 80 Va. 872 (1885), cases.

[4] On enjoining creditors from proceeding in a foreign jurisdiction, see 28 Cent. Law J. 268 (1886), cases.

[5] McAfee *v.* Busby, 69 Iowa, 331 (1886); 36 *id.* 215.

[1] 1 Story, Eq. §§ 546-49; Richmond *v.* Irons, 121 U. S. 44 (1887), cases.

[2] Kennedy *v.* Creswell, 101 U. S. 645-46 (1879), cases.

[3] Case *v.* Beauregard, 101 U. S. 690-91 (1879), cases, Strong, J.

[4] Newman *v.* Willetts, 52 Ill. 98 (1869): Chancery Code, §§ 36-37.

[5] Krā'-dē-mō-bē-le-ā'. F. *crédit,* credit; *mobilier,* movable, personal: L. *mobilis,* movable.

ject of promoting industrial enterprises, such as the construction of railways, the sinking of mines, and the like.[1]

CREW. See REVOLT; SHIP.

Whenever, in a statute, the words "master" and "crew" occur in connection with each other, "crew" embraces all the officers as well as the common seamen — the ship's company; as, in the act of March 3, 1835, § 2, which punishes cruelty by a master or other officer, toward the crew.[2]

CRIER. One who proclaims: an officer of a court whose duty it is to announce the opening and adjournment of the court; to call the names of suitors, jurors, and witnesses; to proclaim that the acknowledgment of a sheriff's deed is about to be taken, or a special return received of the distribution made of the proceeds of a sale by the sheriff; and to make various other proclamations of a public nature, under the directions of the judges of the court.[3]

On the assembling of the Supreme Court the proclamation made by the marshal is in these words: "The honorable the chief justice and associate justices of the Supreme Court of the United States. Oyez! oyez! oyez! all persons having business before the honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the court is now sitting. God save the United States and this honorable Court."

"Let the cryer make proclamation and say, O yes, O yes, O yes, Silence is commanded in the Court, While the Justices are sitting, upon pain of imprisonment. After silence is Commanded, The Cryer shall make a proclamation saying: All manner of persons that have anything to doe, at this Court, Draw Nigh and give your attendance, and if any person shall have any Complaint to enter, or suit to prosecute, Let them Draw near, and they shall be heard."[4]

CRIM. CON. See CONVERSATION, 1.

CRIME. An act committed or omitted in violation of a public law either forbidding or commanding it.[5] See CRIMEN.

A wrong of which the law takes cognizance as injurious to the public, and punishes in what is called a criminal proceeding prosecuted by the State in its own name or in the name of the people or the sovereign.[6]

A crime is a breach and violation of the public rights and duties due to the whole community in its social aggregate capacity; a public wrong. Distinguished from a private wrong, which is a civil injury or tort.[1]

Crime and misdemeanor are synonymous terms; though, in common usage, "crimes" denotes such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of "misdemeanors."[1] See MISDEMEANOR, 2.

In short, the term "crime" embraces any and every indictable offense.[2]

Yet it is not synonymous with "felony."[2]

Capital crime. A crime punishable with death. See PUNISHMENT, Capital.

High crime. Used, with no definite meaning, in prosecutions by impeachment; merely serves to give greater solemnity to the charge.

High crimes and misdemeanors are such immoral and unlawful acts as are nearly allied and equal in guilt to felony, yet, owing to some technical circumstance, do not fall within the definition of felony.[4]

Infamous crime. Offenses which rendered the perpetrator infamous at common law were treason, felony, and the *crimen falsi*.[5] See further INFAMY.

Statutory crime. An act which has been made a criminal offense by enactment of a legislature. **Common-law crime,** or **crime at common law.** Any indictable offense at common law.

All offenses against the government of the United States are of statutory origin: no common-law offense can be committed against it.[6] See LAW, Common.

Crimes may be classified as offenses against the sovereignty of the state; against the public — peace, health, justice, trade, policy, property; against the lives and persons of individuals; against private property; against the currency, and public and private securities; against religion, decency, and morality; against the law of nations, *qq. v.*

Established principles are: That the trial of all crimes, except in cases of impeachment, shall be by jury, and in the State where the same was committed; but when not committed within any State, the trial shall be at such place as Congress may have directed.[7] No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, nor be subject for the

[1] [Worcester's Dict.

[2] United States *v.* Winn, 3 Sumn. 212 (1838), Story, J.

[3] See R. S. § 715.

[4] Laws of Province of Penn. (1682): Linn, 128.

[5] 4 Bl. Com. 5.

[6] *Re* Bergin, 31 Wis. 396 (1872). See 1 Bish. Cr. L. § 32.

[1] [4 Bl. Com. 5; 3 *id.* 2.

[2] See People *v.* Police Commissioners, 39 Hun, 510 (1886); 7 Conn. 185; 60 Ill. 168; 32 N. J. L. 144; 9 Wend. 212; 9 Tex. 340; 24 How. 102; 26 Vt. 208; 41 *id.* 511; 2 N. Y. Rev. St. 70, § 22.

[3] County of Lehigh *v.* Schock, 113 Pa. 379 (1886).

[4] State *v.* Knapp, 6 Conn. 417 (1827): 1 Russ. Cr. 61. See Const. Art. II, sec. 4; 24 How. 102.

[5] People *v.* Toynbee, 20 Barb. 189 (1855).

[6] United States *v.* Britton, 108 U. S. 206 (1883); United States *v.* Walsh, 5 Dill. 60 (1878).

[7] See Constitution, Art. III, sec. 2, cl. 3.

same offense to be twice put in jeopardy of life and limb; nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.[1] In all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[2] No *ex post facto* law shall be passed — by Congress or by any State.[3]

The foregoing principles restrict the power of the United States government, and do not affect State legislation. But the same principles, expressed in identically or substantially the same language, are also found in the constitutions of the States, as part of the rights which are declared to be excepted out of the general powers of government, and not delegated to the law-enacting department.

See in detail the names of particular crimes; also ACCESSARY; ACCIDENT; AID, 2; ATTEMPT; BAIL, 2; CAUSE, 2; CHARACTER; COMMIT, 3; COMPACT, Social; COMPOUND, 4; CONFESSION, 2; CONFRONT; CONVICT; COSTS; DAMAGES; DECEIT, 2; DECOY; DEGREE, 2; DELIBERATION, 3; DRUNKENNESS; DUEL; DOUBT, Reasonable; EQUITY; EVIDENCE; EXTRADITION; FACTUM, Ex post; FELONY; FINE, 2; FORFEITURE; GUILTY; IGNORANCE; INDICTMENT; INFAMY; INNOCENT, 2; INSANITY, 2 (6); INTENT; JEOPARDY; JURY, Trial; MERGER, 3; OBSCENE; PARDON; POLICE, 2, 3; PREMEDITATE; PRESENT, 1; PROCESS, 1; PUNISH; RATIFICATION; REVOLT; REWARD, 1; SENTENCE; WAIVER; WILL, 1; WITNESS; WRONG. Compare CRIMEN; DELICTUM.

Criminal. 1, *adj.* Involving the commission of an offense against the public; also, pertaining to the law upon the subject of public wrongs or crimes. Opposed to *civil*, q. v.

As, criminal or a criminal — act, action, case, contempt, conversation, court, information, intent, jurisdiction, law, libel, offense, procedure, process, prosecution, *qq. v.*

2, *n.* A person who has committed an indictable offense against the public. Compare CONVICT, 2.

Criminate. To exhibit evidence of the commission of an indictable offense; to show or prove to be guilty of crime.

No person "shall be compelled in any Criminal Case to be a witness against himself."[4]

A witness cannot be compelled to answer a question which may expose him to a penalty or punishment.[1] A statement made under compulsion cannot be used to show guilt: confessions (*q. v.*) are to be free and voluntary.[2] But a party cannot claim this privilege. The danger to prosecution must be real. Exposure to civil liability, or to police prosecution, will not excuse. The court determines as to the reasonableness of the objection. Waiver of part of the privilege waives all. Pardon and statutes of indemnity do away with protection.[3]

If an accused person offers himself as a witness in his own behalf to disprove the charge he thereby waives his privilege as to all matters connected with the offense.[4]

An accused may be cross-questioned as to whether he has not been convicted of other charges of crime.[5]

A party on trial for violating an election law who testifies that he did not write names unlawfully entered in a registration book may be compelled, on cross-examination, to write the names in the presence of the jury, as evidence in rebuttal.[6]

Excriminate. To free from a charge or suspicion of crime; to exculpate. Whence excriminatory.

Incriminate. To charge with crime; to criminate; to inculpate. Whence incriminatory.

Recriminate. To charge crime back upon an accuser; particularly, for the respondent in divorce proceedings to acknowledge the offense charged and to make a counter-accusation against the libelant. Whence recrimination, recriminative, recriminatory.

Recrimination as a bar to divorce is not limited to a charge of the same nature as that alleged in the libel. It is sufficient if the counter-charge is a cause for divorce of equal grade. Thus, in Massachusetts, a respondent charged with adultery may reply that the libelant was at the time serving a sentence in the State prison.[7]

CRIMEN. L. A crime, a fault; literally, a judicial decision, or that which is subjected to a judicial decision; an accusation of wrong.

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[1] See Constitution, Amd. V.

[2] See Constitution, Amd. VI.

[3] See Constitution, Art. I. sec. 9, cl. 3; sec. 10, par. 1. As to criminal jurisdiction in the Federal courts see under COURTS, United States, and 26 Am. Law Reg. 708–9 (1887), cases.

[4] Constitution, Amd. V.

[1] 1 Greenl. Ev. § 451.

[2] Emery's Case, 107 Mass. 180 (1871); United States v. Prescott, 2 Dill. 405 (1872); 1 Den. Cr. Cas. 236.

[3] See United States v. M'Carthy, 18 F. R. 87 (1883); Youngs v. Youngs, 5 Redf. 505, 509–11 (1882), cases; *Exp.* Reynolds, 20 Ch. D. 294 (1882); 1 Whart. Ev. §§ 533–40; 2 Crim. Law Mag. 318. That court to decide, see also *Exp.* Stice, 70 Cal. 53 (1886).

[4] Spies *et al.* v. People, 122 Ill. 235 (1887); Whart. Cr. Ev. § 432.

[5] State v. Pfefferle, 36 Kan. 92–96 (1886), cases: 35 Alb. Law J. 63.

[6] United States v. Mullaney, 32 F. R. 370 (1887), Brewer, J.

[7] Morrison v. Morrison, 142 Mass. 362 (1886), cases: Handy v. Handy, 124 *id.* 395 (1878), cases.

Crimen falsi. The crime of deceiving or falsifying. At common law, any offense involving falsehood, and which might injuriously affect the administration of justice by the introduction of falsehood and fraud.[1]

The exact extent and meaning of the expression is nowhere stated with precision. In the Roman law it included every species of fraud and deceit.[1]

Offenses included, at common law, are: forgery, perjury, subornation of perjury, suppression of testimony by bribery or by conspiracy to procure the nonattendance of witnesses, conspiracy to accuse an innocent person of crime, barratry, counterfeiting money or an official seal, making or dealing by false weights or measures, falsification of records. To this list others have been added by statute.

The effect of a conviction for a crime of this class is infamy,[2] *q. v.*

Crimen læsæ majestatis. The crime of wounding majesty: treason, *q. v.*

Flagrans crimen. A crime being committed. *Flagrante crimine.* While a criminal act is being committed; literally, a crime in its very heat.

Locus criminis. The place of a crime — where committed.

Particeps criminis. One who takes part in a crime; an accomplice. See PARTICEPS.

CRIMINAL; CRIMINATE. See under CRIME, p. 294.

CRITICISM. See REVIEW, 3.

CROP. That which is cropped, cut, or gathered;[3] the valuable part of what is planted in the earth; fruit; harvest. Compare CULTIVATION; FRUCTUS.

Crop-time. That portion of the year which is occupied in making and gathering the crops.[4]

Away-going crop. A crop sown by a tenant who will be no longer tenant at harvest-time; that is, a crop which is sown before but ripens after the end of the tenant's term.

Where the term of a tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop, which is not cut before the end of his term, the landlord shall have the crop; for the tenant knew the expiration of his term, and it was his own folly to sow what he could never reap the profit of. Otherwise, however, where the lease depends upon an uncertainty, as, the life of some one, or an act of God.[1]

But now, generally, where the lease ends in the spring, the tenant has the crop of *winter* grain sown the autumn before; and the straw is part of the crop. See EMBLEMENTS.

Growing crop. Any annual crop raised by cultivation.

In some States, regarded as personalty, and leviable with a right to harvest it; in a few States, realty.

Whether a contract for the sale of a growing crop is for "an interest in or concerning lands," to be in writing under the Statute of Frauds, seems to be answered in conformity with the intention of the parties. And so as to growing grass, growing trees, and fruits; although, according to some cases, emblements only are to be considered as chattels, while the spontaneous growth of the land remains a part of it, at least, until ripe and ready for removal. Whenever the parties connect the land and its growth together the growth comes within the statute.[2]

"The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor." Such lien is not lost by a tortious removal by a person having constructive notice of the lien; and the mortgagee may maintain an action for the conversion.[3]

Outstanding crop. A crop in the field — not gathered and housed, without regard to its state. It is "outstanding" from the day it commences to grow until gathered and taken away.[4] See FAIR; HARVEST.

Cropper. One who, having no interest in the land, works it in consideration of receiving a portion of the crop for his labor.[5]

One hired to work land and to be compensated by a share of the produce.[6]

He has no estate in the land; his possession is that of the landlord, who must divide off to the cropper his share of the crops. A "tenant" has an estate in the land, and a right of property in the crops. Until division, the right of property and of possession in the whole crop is the tenant's.[7]

Where the contract is that the land-owner shall give the cropper a part of the produce after paying all advances, and the crop has been divided, the cropper is not a tenant, but a mere employee; the ownership of the entire crop is in the land-owner, and if the cropper

[1] [1 Greenl. Ev. § 373. See also Barbour *v.* Commonwealth, 80 Va. 288 (1885).

[2] See United States *v.* Block, 4 Saw. 212-18 (1877), cases; Barker *v.* People, 20 Johns. *460 (1823); Webb *v.* State, 29 Ohio St. 358 (1876).

[3] [Webster's Dict.

[4] Martin *v.* Chapman, 6 Port. 351 (Ala., 1838).

[1] 2 Bl. Com. 145.

[2] 3 Pars. Contr. 81; 3 Kent, 477; 4 *id.* 73; 1 Wash. R. P., 4 ed. p. 9; 3 Bl. Com. 10; Freeman, Exec. 118, cases; Benj. Sales, 120; 59 Tex. 637.

[3] Wilson *v.* Prouty, 70 Cal. 197 (1886); Cal. Civ. Code, § 2972.

[4] Sullins *v.* State, 53 Ala. 476 (1875), Brickell, C. J.

[5] [Frye *v.* Jones, 2 Rawle, *12 (1829).

[6] Steel *v.* Frick, 56 Pa. 175 (1867); Adams *v.* McKesson, 53 *id.* 83 (1866).

[7] Harrison *v.* Ricks, 71 N. C 10 (1874), cases.

forcibly, or against consent, takes the crop from the possession of the owner, the taking constitutes larceny, robbery, or other offense, according to the circumstances.[1] See DISTRESS, 4, 5.

CROSS. 1, *v.* To intersect, *q. v.*

Crossing. Before a person enters upon a railroad crossing he must use all his senses, take all the precaution he reasonably can, to ascertain that he may cross in safety.[2]

Cross-walk. See SIDEWALK.

2, *n.* (1) A mark, instead of his name, made by a person who cannot write, or is disabled from writing. See SIGNATURE.

(2) The character × is sometimes used to indicate "cross-examination."[3]

3, *adj.* In the inverse order; counter; made by the opposite party.

Applied to things which are connected in subject-matter, but run counter to each other.[4]

As, a cross — action, appeal, bill, demand, error, examination or question, interrogatory, remainder, *qq. v.*

CROWN. The sovereign; the royal power; also, that which concerns or pertains to the ruling power — the king or queen.

In use, similar to our terms State, Commonwealth, Government, People.[5]

Crown case. A criminal prosecution.

Crown debt. A debt due to the government.

Crown law. Criminal law.

Crown office, or side. The criminal side of the court of King's or Queen's bench.

Crown paper. A list of criminal cases awaiting hearing or decision.

Crown pleas, or pleas of the crown. Criminal causes. Opposed, *common pleas:* civil actions between subject and subject.

The king, in whom centers the majesty of the whole people, is the person supposed to be injured by every infraction of public rights, and is the proper prosecutor.[6] See KING.

CRUEL. See CRUELTY; PUNISHMENT.

CRUELTY. Ill-treatment; maltreatment; abuse; unnecessary infliction of pain, generally physical; immoderate, unrestrained chastisement; violence; inhuman conduct.

Not usually employed in speaking of a battery, malicious mischief, mayhem, or other like act with respect to which the parties are viewed as members of the community; but in cases where they sustain a special relation, as, that of husband and wife, parent and child, guardian and ward, teacher and pupil.

1. Cruelty as between Husband and Wife. Such cruelty as causes injury to life, limb, or health, or creates danger of such injury, or a reasonable apprehension of such danger.[1]

Actual personal violence or the reasonable apprehension of it; such course of treatment as endangers life or health, and renders cohabitation unsafe.[2]

The last definition, which accords with the present doctrine of the English courts,[3] has been frequently approved.[4]

Anything that tends to bodily harm and thus renders cohabitation unsafe; or, as expressed in the older decisions, that involves danger of life, limb, or health.[5]

Not, mere austerity of temper, petulance of manner, rudeness of language, want of civil attention and accommodation, or even occasional sallies of passion that do not threaten harm,—which merely wound the feelings without being accompanied by bodily injury or actual menace.[6]

Extreme cruelty. Any conduct, in one of the married parties, which furnishes reasonable apprehension that the continuance of cohabitation would be attended with bodily harm to the other.[6]

It is now generally held that any unjustifiable conduct, on the part of either the husband or the wife, which so grievously wounds the mental feelings or so destroys the peace of mind as to seriously impair the bodily health or endanger the life, or such as in any other manner endangers the life, or such as destroys the legitimate objects of matrimony, constitutes "extreme cruelty" under statutes, although no personal or physical violence be inflicted or even threatened.[7] Compare INDIGNITY. See DIVORCE.

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[1] Parrish *v.* Commonwealth, 81 Va. 1, 7, 12 (1884), cases; Taylor, Landl. & T. 21. See also Hammock *v.* Creekmore, 48 Ark. 265 (1886).

[2] Ormsbee *v.* Boston, &c. R. Co., 14 R. I. 103-8 (1883), cases.

[3] 18 S. C. 60-64.

[4] [Abbott's Law Dict.

[5] See 106 U. S. 208.

[6] 4 Bl. Com. 2, 3 *id.* 40.

[1] [Bailey *v.* Bailey, 97 Mass. 378 (1867), cases, Chapman, J.; Peabody *v.* Peabody, 104 *id.* 197 (1870).

[2] [Butler *v.* Butler, 1 Pars. Eq. Cas. 344, 339-44 (Pa., 1849), cases, King, J.

[3] Gordon *v.* Gordon, 48 Pa. 228 (1865), Strong, J.

[4] Jones *v.* Jones, 66 Pa. 498 (1871), Agnew, J.; May *v.* May, 69 *id.* 210-11 (1869); 76 *id.* 357.

[5] Latham *v.* Latham, 30 Gratt. 321 (Va., 1878), Staples, J.

[6] Morris *v.* Morris, 14 Cal. 279 (1859), Cope, J.

[7] Carpenter *v.* Carpenter, 30 Kan. 744 (1883), cases Valentine, J. See also Holyoke *v.* Holyoke, 78 Me. 410-11 (1886), cases; Powelson *v.* Powelson, 29 Cal. 361 (1863); generally, 19 Ala. 307; 36 Ga. 296; 88 Ill. 248; 57

2. Cruelty to Children. Inordinate chastisement of children of tender years — under fourteen.

Beginning with New York in 1875 (under the act of April 21, of that year), societies for the prevention of cruelty to children have been very generally formed. These societies, by statute, are authorized to prosecute persons who maltreat children, or employ them at hard labor in mines, mills, and factories, beyond a certain number of hours a day, or who sell or employ their services as acrobats or as beggars, or as servants about drinking saloons, places of low amusements, houses of prostitution, and like resorts. Abuses which had been characterized as misdemeanors are thus, in effect, brought within the category of acts of cruelty.[1]

3. Cruelty to Animals. The infliction of pain upon dumb animals, without just cause.

Until within recent years ill-usage of a dumb animal was viewed merely as a wrong to the owner's property; no degree of ill-treatment amounted to a misdemeanor unless so inhuman as to shock, and, indirectly, to demoralize beholders: in which case the act became indictable as a public nuisance.[2]

The present view is that, for its own sake, all sentient life is to be protected from the wanton and unnecessary infliction of pain.[3]

To protect animals from cruelty, societies, similar in scope and power to those for children, have been organized in the United States and Europe.

Under the Great Law of the Province of Pennsylvania, ordained in 1682, those who frequented "such rude and riotous sports and practices as . . bull-baitings, cock-fightings, with such like . . shall be reputed and fined as breakers of the peace, and suffer at least ten days' imprisonment at hard labor in the house of correction, or forfeit twenty shillings."[4]

Severe pain inflicted for the mere purpose of causing pain or of indulging vindictive passion is "cruel;" and so is pain inflicted without justifiable cause, but with reasonable cause to know that it is produced by wanton or reckless conduct.[5]

"Cruelty" includes both the willfulness and cruel temper of mind with which the act is done and the pain inflicted. An act merely accidental, or not giving pain, is not cruel in the ordinary sense.[6]

The distinction is between the infliction of such chastisement as is necessary for the training or discipline by which animals are made useful, and the beating or needless infliction of pain which is dictated by a cruel disposition, by violent passions, a spirit of revenge, or reckless indifference to the sufferings of others.[1]

In the statute of 12 and 13 Vict. (1849) c. 92, cruelty means the unnecessary abuse of any animal — domestic bird or quadruped;[2] and in 45 Vict. (1881) c. 712, the intentional infliction upon any animal of pain that in its kind, degree, object or circumstances, is unreasonable.

Under 12 and 13 Vict. c. 92, § 2, dishorning cattle is not an offense, the operation being skillfully performed.[3]

In the New York act of 1874, c. 12, § 8, cruelty includes every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted.

By the California act of 1874 cruelty includes every act, omission, or neglect whereby unnecessary or unjustifiable physical pain or suffering is caused or permitted.

The Pennsylvania act of 1869 forbids wantonly or cruelly ill-treating, overloading, beating, or otherwise abusing any animal, or being interested in any place kept for the purpose of fighting or baiting any bull, bear, dog, cock, or other creature.

In the Arkansas act of 1879 "needlessly killing" an animal refers to an act done without any useful motive, in a spirit of wanton cruelty, or for the mere pleasure of destruction.[4]

The Tennessee statute of 1881 is designed to protect animals from willful or wanton abuse, neglect, or cruel treatment; not from the incidental pain or suffering that may be casually or incidentally inflicted by the use of lawful means of protection against particular animals.[5]

Letting loose a captive fox to be hunted (and which is captured) by dogs is cruelty, within Mass. Pub. Sts. c. 207, § 58. There is nothing in the general purpose of the statute that prevents it from including all animals, whether wild and noxious or tame and useful, within the common meaning of the word "animal." The statute does not define an offense against the rights of property in animals, nor against the rights of the animals protected by it, but against public morals, which the commission of cruel and barbarous acts tends to corrupt.[6] See MALICE; MAIM, 2; NEEDLESS; TORTURE; WANTON; WOUND.

Ind. 568; 10 Iowa, 133; 13 *id.* 266; 32 *id.* 511; 16 Kan. 371, 419; 24 Mich. 482; 26 *id.* 417; 37 *id.* 604; 40 *id.* 498; 45 *id.* 151; 49 *id.* 417; 56 *id.* 543; 8 N. H. 315; 56 *id.* 144; 24 N. J. E. 388; 30 *id.* 119, 215; 73 N. Y. 369; 14 Tex. 356; 30 Wis. 254; 26 Alb. L. J. 63.

[1] See Delafield Children (1876); Washington Humane Society Act, 13 Feb. 1885: 28 St. L. 302.

[2] United States v. Jackson, 4 Cranch, C. C. 483 (1834); Grise v. State, 37 Ark. 458 (1881).

[3] State v. Avery, 44 N. H. 394 (1862).

[4] Laws of Prov. of Penn. Ch. XXVI; Linn, 114.

[5] Commonwealth v. Lufkin, 7 Allen, 581 (1863), Hoar, J.

[6] Commonwealth v. McClellan, 101 Mass. 35 (1869), Chapman, C. J.

[1] [State v. Avery, 44 N. H. 394 (1862), Bellows, J.

[2] Bridge v. Parsons, 3 Best & S. 382 (1863): 32 Law J. 95. See Bates v. M'Cormick, 9 Law T. R. 175 (1863); Morrow's Case, 9 Pitts. Law J. 86 (1879).

[3] Callaghan v. Society for Prevention of Cruelty, 37 Eng. R. 818 (1885), cases: 16 Cox's Cr. Cas. 101.

[4] Grise v. State, 37 Ark. 456 (1881).

[5] Hodge v. State, 11 Lea, 582 (1883). See also R. S. Wis. § 4445.

[6] Commonwealth v. Turner, 145 Mass. 300 (1887).

The Massachusetts Society for the Prevention of Cruelty to Animals is a "charity." There is no pecuniary benefit in it for any of its members; its work in the education of mankind in the proper treatment of domestic animals is instruction in a duty incumbent on us as human beings. Its hospital for animals, if established by a bequest or other gift, would be treated as a charity. It has a humane, legal, and public or general purpose; and, whether expressed or not in the Statute of 43 Elizabeth, comes within the equity of that statute. . . An institution is both benevolent and charitable which educates men in the diseases of the domestic animals, and the proper means of dealing with them, even if it also inculcates the duty of kindness and humanity to them, and provides appropriate means of discharging it.[1]

Common carriers, by land or water, from one State to another, may not confine cattle, sheep, swine, or other animals, for a longer period than twenty-eight consecutive hours, without unloading them for rest, water, and feeding, for at least five consecutive hours, unless prevented from unloading by storm or other accidental cause. The hours in transit on connecting roads are to be taken into the account. If such unloaded animals are not properly fed and watered by their owner, the transporter shall care for them, and have a lien for the service. Willful failure to comply with the foregoing provisions exposes the offender to a penalty of $100 to $500. An exception is made in favor of cars and boats in which the animals have proper food, water, space, and opportunity to rest. Penalties are recoverable by civil action in the name of the United States, in the circuit or district court held within the district where the violation was committed, or the person or corporation resides or carries on business.[2]

The lien is enforceable by petition filed in the district court within the district where it attached, or the owner or custodian of the property resides. The court is to issue process suited to the case for the collection of the debt, costs, penalties, and charges.[3]

CRUISE. Any voyage for a given purpose. Imports a definite place, as well as time of commencement and termination.[4]

CRY. See AUCTION; CRIER; PAIS.

CUCKING-STOOL. See SCOLD.

CUILIBET. See ARS, Cuilibet, etc.

CUJUS. See SOLUM, Cujus, etc.

CUL DE SAC. Fr. The bottom of a bag. A street open at one end; a blind alley.

CULPA. L. A fault; negligence; guilt. **Lata culpa.** Gross negligence. **Levis culpa.** Ordinary negligence. **Levissima culpa.** Slight negligence.[1] Compare DELICTUM; DOLUS.

Whence exculpatory, inculpatory, exculpation.

Culpabilis. Guilty. **Non culpabilis.** Not guilty.

Non culpabilis was abbreviated upon the minutes "non cul." To this plea the clerk, on behalf of the sovereign, replied that the prisoner was guilty, as he was ready to prove. The formula for this reply was **cul. prit.**, i. e., *culpabilis partus verificare.*[2]

Whence "culprit." But that word may come from *culped*, which is from *culpe*, to charge with a crime;[3] or it may be a corruption of *culpate*, an accused person.[4]

The expression **non cul et de hoc**, still used in the records of a few criminal courts of general jurisdiction, is an abridgment of the sentence *non culpabilis et de hoc se ponit supra Deum et patriam*, not guilty and of this he puts himself upon God and his country. See ARRAIGN; CULPABLE.

CULPABLE. Censurable; criminal. See CULPA.

Applied to an omission to preserve the means of enforcing a right, "censurable" is more nearly an equivalent than "criminal."[5] See NEGLIGENCE, Culpable.

CULTIVATION. See AGRICULTURE; BETTERMENT; CROP; IMPROVE.

Being in a state of cultivation is the converse of being in a state of nature. Whenever lands have been wrought with a view to the production of a crop they must be considered as becoming and continuing in "a state of cultivation" until abandoned for every purpose of agriculture and designedly permitted to revert to a condition similar to the original one.[6]

"Fit for cultivation" refers to that condition of soil which will enable a farmer, with a reasonable amount of skill, to raise regularly and annually by tillage grain or other staple crops.[7]

CULVERT. A water-way or passage, whether of wood or stone, square or arched.[8]

CUM. L. With, together with; along with; in connection with; wholly.

In compounding words, the *m* remains before *b*, *p*, *m*; assimilates before *l*, *n*, *r*; changes into *n* before other consonants; is rejected before a vowel or *h*.

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[1] Massachusetts Society, &c. *v.* Boston, 142 Mass. 27-28 (1886), Devens, J.

[2] Act 3 March, 1873: R. S. §§ 4386-89.

[3] Act 27 Feb. 1877: R. S. § 4390.

[4] [The Brutus, 2 Gall. 526, 539, 268 (1815); Marsh. Ins. 196, 199, 520.

[1] Jones, Bailm. 8; Story, Bailm. § 18; 8 Barb. 378; 34 La. An. 1129.

[2] 4 Bl. Com. 339; 6 Cal. 282; 2 Sumn. 67.

[3] Webster's Dict.

[4] Skeat's Etym. Dict.

[5] Waltham Bank *v.* Wright, 8 Allen, 122 (1864).

[6] Johnson *v.* Perley, 2 N. H. 57 (1819).

[7] Keeran *v.* Griffith, 34 Cal. 581 (1868); 13 Ired. L. 37; 29 Kan. 596.

[8] Ourler *v.* Baltimore, &c. R. Co., 60 Md. 367 (1883).

Designates a being or bringing together of several objects; also, completeness, perfection of an act,— intensifies the signification of the simple word. See CON, 1.

Cum copula. With connection; with intercourse.

A promise to marry in the future, *cum copula*, did not, at common law, constitute a valid marriage; otherwise, for some purposes, by the canon law.[1]

Cum onere. With the charge or incumbrance. See further ONUS, Cum, etc.

Cum testamento annexo. With the will attached. See ADMINISTER, 4.

CUMULATIVE.[2] More of the same kind; superadded to other of the same nature; additional.

As, a cumulative or cumulative — evidence or testimony, legacy, offense, remedy, sentence or judgment, statute, voting, *qq. v.*

CUR. See CURIA.

CURABLE. See CURE, 2.

CURATOR. L. A guardian; a committee, *q. v.*

The guardian of the estate of a ward, as distinguished from the guardian of his person.[3]

Curator ad hoc. A guardian for this — special purpose.

Curator ad litem. A guardian for the suit; a guardian *ad litem*, q. v.

CURE.[4] 1. In the original sense of taking care or charge of, instead of the later sense of healing, is used in the sea-law which requires that a seaman is to be "cured" at the expense of the ship of sickness or injury sustained in the ship's service, to the end of the voyage.[5]

The obligation to "cure," as the old cases say, or to give "medical treatment," as the later cases term it, continues only to the end of the particular voyage.[6]

2. To remedy, correct, remove.

Want of authority in an agent is cured by the principal when he adopts the agent's act.

A general appearance cures antecedent irregularity of process, a defective service, etc.[7]

Formal defects in pleading are cured by pleading over without demurrer.[1]

A verdict cures a defective statement of a title or cause of action.[2] See AID, 2; BAD, 2; CERTAINTY.

Curable. Admitting of remedy or rectification. **Incurable.** Said of ambiguities, defects in pleading, defects in powers, etc.

Curative. Designed to correct an error or defect.

As, an act passed to relieve from some hardship or inconvenience caused by the careless use of language in a former statute.

An invalid public contract may be confirmed and made binding by curative statutes.[3]

CURED-MEAT. Was given the meaning at the residence (Memphis, Tenn.) of a purchaser, when that differed from the meaning at the residence (Atchison, Kan.) of the seller.[4]

CURIA. L. A court of justice; a court, or the court. Compare FORUM.

Curia advisari vult. The court desires to deliberate — over the matter: the court reserves its decision, for the present. Abbreviated *cur. ad. vult.*, and *c. a. v.*

Originally, an entry upon the record of a cause, just argued, indicating that a decision would be rendered by and by. Later, it denoted a suspension of judgment until the court could examine the matter fully.

Curia regis. The king's court.

Per curiam. By the court.

A formula by which a judge may express the assent of the court to a thing asked, or by which a court may make any order whatever.

Prefixed to a decision, may imply that the law in the case is too well settled to require either argument or elucidation.[5]

Rectus in curia. Right (unimpeached) in court, or before a court.

The condition of a person who stands before a court with no charge of misconduct preferred against him, or cleared or purged of a charge.

See under ACTUS; AMICUS; CURSUS.

CURRENT.[6] 1. Now running or passing; now present; now being created or received; existing in present time.

As, a current — account, balance, earnings, motion, value, year, *qq. v.*

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[1] Cheney *v.* Arnold, 15 N. Y. 345 (1857); 2 Para. Contr. 79.

[2] L. *cumulus*, a heap.

[3] Duncan *v.* Crook, 49 Mo. 117 (1871); 21 Pa. 333; 1 Bl. Com. 460.

[4] L. *cura*, care, charge.

[5] See Reed *v.* Canfield, 1 Sumn. 202 (1833); The City of Alexandria, 17 F. R. 898-95 (1883), cases.

[6] The John B. Lyon, 33 F. R. 187 (1887), Blodgett, J.

[7] Creighton *v.* Kerr, 20 Wall. 12 (1873).

[1] United States *v.* Noelke, 17 Blatch. 559, 561 (1880).

[2] Lincoln Township *v.* Cambria Iron Co., 103 U. S. 415 (1880); 7 How. 721; 53 Ind. 283; 87 *id.* 37; 3 Monta. 452.

[3] Randall *v.* Kreiger, 23 Wall. 147 (1874), cases; Ritchie *v.* Franklin County, 23 *id.* 75 (1874).

[4] Treadwell *v.* Anglo-American Packing Co., 13 F. R. 22 (1882). And see Featherston *v.* Rounsaville, 73 Ga. 617 (1884).

[5] Letzkus *v.* Butler, 69 Pa. 281 (1871).

[6] L. *currere*, to run, flow, move.

2. Circulating as money; received as money; lawful as money.

Current funds. Current money; par funds, or money circulating without any discount.

A bill of exchange drawn for "current funds" entitles the holder to coin or its equivalent.[1]

Gold, silver, or anything equivalent thereto, and convertible at pleasure into the same.[2]

"In current funds," as used in a bank-check, means in money; and the insertion of the words does not impair negotiability.[3]

Commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice for makers of commercial bills, checks, and notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term "current funds" has been used to designate any of these, all being current and declared to be legal tender. It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin.[3]

Current money. Money received as such in common business transactions; the common medium in barter and exchange.[4]

Current notes. Bank-notes convertible into specie, or redeemable in gold, silver, or an equivalent.[5]

Current price or *value.* See VALUE.

Currency. Primarily, a passing or flowing — something which passes from hand to hand. In monetary affairs, not necessarily cash; it is equally applicable to anything used as a circulating medium, and generally accepted as a representative of values of property.[6]

Bank-notes, or other paper money, issued by authority, and continually passing, as and for coin.[7]

The money which passes at a fixed value, from hand to hand; money which is authorized by law.[8]

Includes both coined and paper *money;* not all bank-notes in circulation, for all such are not necessarily money. Whatever is at a discount is not money nor currency. National bank-notes, although not legal tender, are as much currency as treasury notes, which are legal tender. Therefore, a certificate of deposit promising repayment "in currency" may be deemed negotiable,— it is payable in money.[1]

In an indictment, the words "of the currency current" are equivalent to "current as money."[2] See PAR, 2; TENDER, 2, Legal.

CURSE. See BLASPHEMY.

CURSUS. L. A running: way, mode, practice. See DE, Cursu.

Cursus curiæ lex curiæ. The practice of a court is the law of the court.

Established, inveterate practice will be adhered to: it is supposed to be based upon principles of justice and public convenience. But a court of error does not generally notice the practice of another court. In short, every court, especially every court of equity, makes its own practice.[3] Compare ERROR, 1, Communis.

CURTESY.[4] 1. Where a man marries a woman seized of an estate of an inheritance (that is, of land and tenements in fee-simple or fee-tail), and has by her issue, born alive, capable of inheriting the estate, on her death he holds the land for life as tenant by the curtesy of England.[5]

An estate by the curtesy is the interest to which the husband is entitled upon the death of the wife, in the lands or tenements of which she was seized in possession, in fee-simple or in tail, during their coverture, provided they had lawful issue born alive which might by possibility inherit the estate as heir to the wife.[6]

When a man marries a woman, seized at any time during the coverture of an estate of inheritance, in severalty, in coparcenary, or in common, and has issue by her, born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the life-time of the husband, he holds the land during his life "by the curtesy of England."[7]

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[1] Galena Ins. Co. *v.* Kupfer, 28 Ill. 335 (1862).

[2] [Lacy *v.* Holbrook, 4 Ala. 90 (1842); 9 *id.* 239; 34 Ill. 292; 9 Ind. 135; 47 Iowa, 672; 44 Pa. 457.

[3] Bull *v.* First Nat. Bank of Kasson, 123 U. S. 112 (1887), Field, J.

[4] [Stalworth *v.* Blum, 41 Ala. 321 (1867); 3 T. B. Mon. 166; 21 La. An. 624; 5 Lea, 96; 1 Dall. 124; 9 Mo. 697.

[5] Pierson *v.* Wallace, 7 Ark. 298 (1847); Fleming *v.* Nall, 1 Tex. 247 (1846); Moore *v.* Gooch, 6 Heisk. 105 (1871); 64 N. C. 381; 5 Cow. 187; 5 Humph. 485.

[6] [Chicago Fire, &c. Ins. Co. *v.* Keiron, 27 Ill. 507 (1862), Caton, C. J.

[7] [Same *v.* Same, *ib.* 506, Walker, J.: Wharton.

[8] Butler *v.* Paine, 8 Minn. 329 (1863): Bouvier.

[1] Klauber *v.* Biggerstaff, 47 Wis. 560-61 (1879), cases, Ryan, C. J. See also 30 Ill. 399; 32 *id.* 77; 35 *id.* 163; 14 Mich. 379; 27 *id.* 197; 61 N. C. 28; 1 Ohio, 115, 119.

[2] Commonwealth *v.* Griffiths, 126 Mass. 252 (1879).

[3] Broom, Max. 133, 135; 7 Ct. Cl. 332.

[4] L. *curialitas,* attendance upon the lord's court or *curtis; i. e.,* being his vassal or tenant. Or, "by the courts of England,"— 2 Bl. Com. 126. From F. *courtesie,* favor (to the husband),— 28 Barb. 345.

[5] [2 Bl. Com. 126.

[6] Westcott *v.* Miller, 42 Wis. 465 (1877), Cole, J.

[7] Billings *v.* Baker, 28 Barb. 344 (1859); 4 Kent, 27. See also 7 How. 54; 1 Sumn. 271; 1 McLean, 478; 2

Under old common law, as soon as a child was born the father began to have a permanent interest in the lands, he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy "initiate." He could do many acts to charge the land, but his estate was not "consummate" till the death of the wife.[1]

The requisites are: a legal marriage; an actual seisin or possession in the wife — wherefore no curtesy can be had in a remainder or a reversion; issue born alive, during the life of the mother, capable of inheriting the estate; and, the death of the wife.[1]

Adopted as a common-law estate in all of the older States, though somewhat modified in some of them. The right is expressly created by statute in Delaware, Kentucky, Maine, Massachusetts, Minnesota, New Hampshire, Rhode Island, Vermont, and Wisconsin. In Alabama, Connecticut, Illinois, Maryland, Mississippi, Missouri, New Jersey, North Carolina, Tennessee, and Virginia it is recognized by the courts as an existing estate. In California it is not allowed; realty being there held in common, and the survivor taking one-half in severalty. In Georgia the husband takes an absolute estate in all the property. In Kansas he takes one-half absolutely, upon her decease without a will; and if without issue, he takes all absolutely. In Louisiana their relation to their property does not admit of curtesy. In Nebraska the estate is given, unless she had issue by a former husband who would take the estate. In New York it would seem that she may defeat a right by conveyance. In Ohio, Oregon, and Pennsylvania issue is not necessary. In South Carolina he takes his share in fee. In Texas any property is the common property of both. In Dakota, Indiana, Michigan, and Nevada the estate seems to be abolished.

In many of the States curtesy is given, by statute, in equitable estates of which the wife is seized. The right extends to equities of redemption, contingent uses, and moneys directed to be laid out in lands for the benefit of the wife.[2]

In the absence of fraud, a husband who is embarrassed may convey his curtesy to a trustee for the benefit of his wife and children, for a consideration valuable in equity.[3] Compare DOWER.

2. A voluntary act of kindness.

An act of kindness toward another person, of the free will of the doer, without previous request or promise of reward, has sometimes been called a "voluntary curtesy."

From such act the law implies no promise for remuneration. If it were otherwise, one man might impose a legal obligation upon another against his will. Hence the phrases "a voluntary curtesy will not support an *assumpsit*," but that "a curtesy moved by a previous request will."[4] See PROTEST, 2.

MacA. 63; 15 Ark. 483; 43 Miss. 633; 8 Neb. 525; 14 S. C. 907; 8 Baxt. 361; 6 Mo. Ap. 416, 549.

[1] 2 Bl. Com. 127.

[2] See 1 Washburn, Real Prop., 4 ed., 164, 166 (1876).

[3] Hitz *v.* Nat. Metropolitan Bank, 111 U. S. 722 (1884).

[4] See Lampleigh *v.* Brathwait, 1 Sm. L. C. *222; Holthouse.

CURTILAGE. 1. Originally, the land with the castle and out-houses, inclosed often with high walls, where the old barons sometimes held court in the open air. Whence *court-yard*.[1]

2. The court-yard in the front or rear of a house, or at its side; any piece of ground lying near, inclosed, used with, and necessary for the convenient occupation of the house.[2]

A fence or inclosure of a small piece of land around a dwelling-house, usually including the buildings occupied in connection with the dwelling-house, the inclosure consisting either of a separate fence or partly of a fence and partly of the exterior of buildings so within this inclosure.[3]

If a barn, stable, or warehouse be parcel of the mansion-house, and within the same common fence, though not under the same roof nor contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the same curtilage or homestall.[4]

It is perhaps unfortunate that this term, which is found in English statutes, and which is descriptive of the common arrangement of dwellings, and the yards surrounding them, in England, should have been perpetuated in our statutes. It is not strictly applicable to the common disposition of inclosures and buildings constituting the homestead of the inhabitants of this country. In England dwellings and out-houses of all kinds are usually surrounded by a fence or stone-wall, inclosing a small piece of land embracing the yards and out-buildings near the house constituting what is called the court. Such precautionary arrangements have not been necessary in this country.[5]

Nothing is implied as to the size of the parcel of land.[6]

In Michigan, includes more than an inclosure near the house.[6]

In § 4347, code of Alabama, defining arson in the second degree, includes the yard or space near a dwelling-house, within the same inclosure, and used in connection with it by the household; as, a barn which opens into such yard, in part separating it from another inclosure.[7]

Under a mechanics' lien law, a jury may determine the necessary curtilage to which a lien extends.[8]

[1] Coddington *v.* Dry Dock Co., 31 N. J. L. 485 (1863).

[2] [People *v.* Gedney, 10 Hun, 154 (1877): Bac. Abr.

[3] Commonwealth *v.* Barney, 10 Cush. 481, 483 (1852), Dewey, J. Approved, 140 Mass. 280.

[4] 4 Bl. Com. 225; 1 Hale, P. C. 558; 61 Ala. 58; 31 Me. 523.

[5] People *v.* Taylor, 2 Mich. 251 (1851).

[6] Edwards *v.* Derrickson, 28 N. J. L. 45 (1859); Same *v.* Same, 29 *id.* 474 (1861).

[7] Washington *v.* State, 82 Ala. 32 (1886).

[8] Keppel *v.* Jackson, 3 W. & S. 330 (1842); 5 Rawle, 291.

CURVES. See RAILROAD.

CUSTODIA. L. Keeping, custody; literally, watch, guard, care.

In custodia legis. In the custody of the law. See CUSTODY.

CUSTODY. See CUSTODIA. 1. Care, possession, charge: as, the custody of a child, of a lunatic, of a ward;[1] the custody of a deposit, or of funds.

Custody of property, as contradistinguished from legal possession, is that charge to keep and care for the owner, subject to his direction, and without any adverse right, which every servant possesses with regard to goods confided to his care.[2]

2. Detention by lawful authority.

Custody of the law. Property lawfully taken by virtue of legal process is in the custody of the law.[3]

In this category are goods lawfully levied upon by a marshal, sheriff, or constable; goods impounded;[4] property in the hands of a receiver, *q. v.*; money paid into court.

Such property, for the time being, is not liable to be again seized in execution by the officer of any other court.[5]

But the court of a State cannot by this device prevent the collection of Federal taxes.[6]

3. A person under lawful arrest is said to be in custody or in the custody of the law. See RESCUE.

A sentence that a prisoner "be in custody till his sentence is complied with," imports actual imprisonment.[7]

CUSTOM.[8] That length of usage which has become law; a usage which has acquired the force of law. Often used synonymously with "usage."[9]

A law established by long usage. A universal custom becomes common law.[10]

"The law or rule which is not written, and which men have used for a long time, supporting themselves by it in the things and reasons with respect to which they have exercised it."[1]

"Usage," strictly speaking, is the evidence of a "custom."[2]

"Custom" is the making of a law; "prescription," the making of a right.[3]

Customary. Originating in long usage: as, customary incidents or rights; customary dispatch, *q. v.*; customary estate, freehold,[4] service,[5] tenant;[4] customary law: common law.

General customs. The universal rule of the whole kingdom, forming the common law, in its stricter and more usual signification. **Particular customs.** Such as, for the most part, affect only the inhabitants of particular districts;[6] a local or special custom.

A general custom is a general law.[7]

"General" customs are such as prevail throughout a country and become the law of the country. "Particular" customs are such as prevail in some county, city, town, or other place.[8]

The chief corner-stone of the laws of England is general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among the public records, explained in the reports, and digested for general use by the sages of the law. . . Our practice is to make custom of equal authority with the written law,— when it is not contradicted by that law. "For, where is the difference, whether the people declare their assent to a law by suffrage, or by a uniform course of acting accordingly?" . . It is one of the marks of English liberty that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.[9] See LAW, Common.

Particular customs are doubtless the remains of that multitude of local customs out of which the common law was collected, at first by Alfred. For reasons that have been long forgotten, particular counties, cities, towns, and manors were indulged with the privilege of abiding by their own customs. Such, for example, are the customs of London. These particular customs must be proved to exist, and appear to be: legal, that is, be immemorial; continued — the right uninterrupted; peaceable — acquiesced in; reason-

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[1] 1 Bl. Com. 308; 3 *id.* 427.

[2] [People *v.* Burr, 41 How. Pr. 296 (1871).

[3] [Gilman *v.* Williams, 7 Wis. *334 (1859).

[4] 3 Bl. Com. 12, 146.

[5] Buck *v.* Colbath, 3 Wall. 341 (1865), cases.

[6] Keely *v.* Sanders, 99 U. S. 442 (1878).

[7] Smith *v.* Commonwealth, 59 Pa. 324 (1868).

[8] F. *custume:* L. L. *costuma: con*, together, very; *suere*, to make one's own — have it one's own way,— Skeat. Compare CUSTOMS; CONSUETUDO.

[9] Walls *v.* Bailey, 49 N. Y. 471 (1872), Folger, J.; Hursh *v.* North, 40 Pa. 243 (1861); Bishop, Contr. § 444.

[10] Wilcox *v.* Wood, 9 Wend. 349 (1832), Savage, C. J.

[1] Strother *v.* Lucas, 12 Pet. *446 (1838).

[2] See 3 Pars. Contr. 239.

[3] Lawson, Usages & Customs, 15, n. 2.

[4] 2 Bl. Com. 149.

[5] 3 Bl. Com. 234.

[6] 1 Bl. Com. 67.

[7] United States *v.* Arredondo, 6 Pet. 715 (1832).

[8] Bodfish *v.* Fox, 23 Me. 95 (1843); 12 Pet. *446.

[9] 1 Bl. Com. 73-74.

able — no sufficient legal reason be assignable against the custom; certain — ascertained or ascertainable; compulsory — not left to one's option, to use or not to use; and consistent — with each other, if not, then they could never have been assented to. Customs in derogation of the common law are strictly construed.[1]

In few States do any purely local customs, such as have just been explained, exist. And such customs are to be carefully distinguished from "usages of trade or business." These are everywhere allowed their just influence and operation. A usage of trade and business clearly proved to exist, to be ancient, notorious, reasonable, and consistent with law, is permitted to explain the meaning of ambiguous words in written contracts, and to control the mode and extent of their rights where the parties have been silent. But it is never admitted against the expressed agreement of the parties, nor in violation of any statute or well-established rule of law. The current of decisions of late years has been to restrain and limit the allowance and influence of special usages.[2]

The courts take judicial notice of general customs. Particular or special customs are to be alleged and proved.[3]

Evidence of a temporary custom of which the party to be affected has no knowledge is not admissible against him.[4]

Where the object is to interpret a contract it is not necessary to prove all the elements of a custom necessary to make a law.[5]

To establish the validity of a custom the usage must have existed so long as to become generally known, and it must be clearly and distinctly proved. The concurrent testimony of a large number of witnesses increases the probability of its being generally known. This is illustrated in the case of a custom which authorizes the captain of a steamboat to insure it for the benefit of the owner without his express direction.[6]

Evidence of a custom or usage of trade is resorted to in order to ascertain and explain the meaning and intention of the parties to a contract: on the theory that they knew of its existence and contracted with reference to it. It is never received if it is inconsistent with the contract, if it contradicts or varies directly or by necessary implication express stipulations, if it would subvert a settled rule of law, or if there is no contract in reality.[7] See RINGING UP.

The uncontradicted testimony of one witness may be sufficient to establish a custom.[1]

Customary rights and incidents are such as universally attach to the subject-matter of a contract in the place where the contract is made. These also are impliedly annexed to the terms of a contract unless expressly excluded.[2] See USE, 2, Usage; USUS, Malus usus, etc.

Custom of merchants. A system of customs, originating among merchants, and allowed for the benefit of trade as part of the common law.

Of such are certain rules relating to bills of exchange (as, that of allowing days of grace), to mercantile contracts, to the sale, purchase, and barter of goods, to freight, insurance, shipping, partnerships.[3] Constitutes the *lex mercatoria* or law merchant. See MERCHANT, LAW.

Customs of London. Particular customs relating chiefly to trade, apprentices, widows, orphans, and local government.

Good only by special usage; and tried by the certificate of the mayor and alderman, by the mouth of their recorder.[4]

CUSTOMERS. See BOYCOTTING; GOOD WILL.

CUSTOMS. Taxes upon goods or merchandise imported or exported.[5]

The duties, toll, tribute, or tariff payable upon merchandise exported or imported.[6]

They are the inheritance of the king from almost immemorial time. Denominated, in ancient records, *costuma*, from the French *coustom* or *coutom*, toll or tribute; which in turn is from *coust*, price, charge, cost.[6]

Customs were exactions maintained by the crown or lords upon the grounds of immemorial usage. In time, only duties upon merchandise, and as regulated by law, remained.

Common phrases are: customs appraiser, customs collector, customs commissioner, customs laws. See DUTIES, 2; REFUNDS; SMUGGLE.

CUT. 1. A wound made with an instrument having an edge.[7] See BATTERY; MAYHEM; STAB; WOUND.

2. An impression made upon paper or cloth from an engraved block or plate. See COPYRIGHT.

Compare COUPON; TAIL. See TIMBER; WASTE.

[1] 1 Bl. Com. 76-79; Lindsay *v.* Cusimano, 12 F. R. 506 (1882); 110 U. S. 499.

[2] 1 Shars. Bl. Com. 78; Coxe *v.* Heisley, 19 Pa. 246-48 (1852), cases, Black, C. J.

[3] 1 Greenl. Ev. § 5; 1 Whart. Ev. §§ 296, 331.

[4] Wootters *v.* Kauffman, 67 Tex. 493 (1887), cases.

[5] Carter *v.* Philadelphia Coal Co., 77 Pa. 290 (1875); Morningstar *v.* Cunningham, 110 Ind. 333-35 (1886), cases; 1 Cooley, Bl. Com. 76, note.

[6] Adams *v.* Pittsburgh Ins. Co., 95 Pa. 355-56 (1880), cases.

[7] Bliven *v.* Screw Company, 23 How. 431 (1859); Insurance Companies *v.* Wright, 1 Wall. 470-72 (1863); Thompson *v.* Riggs, 5 *id.* 679 (1866); Barnard *v.* Kellogg, 10 *id.* 390 (1870); Robinson *v.* United States, 13 *id.* 365 (1871); Tilley *v.* County of Cook, 103 U. S. 162 (1880), cases; The Dora Mathews, 31 F. R. 620 (1887), cases.

[1] Wootters *v.* Kauffman, *ante*.

[2] 1 Greenl. Ev. § 405; 1 Whart. Ev. § 969. See generally Wigglesworth *v.* Dallison, Dougl. 190 (1779); Sm. L. C., 8 ed., vol. I, pt. II, 928-65, cases.

[3] 2 Pars. Contr. 539; 1 Bl. Com. 75.

[4] 1 Bl. Com. 75, 76; 3 *id.* 334.

[5] See 1 Story, Const. § 949.

[6] 1 Bl. Com. 313-14, note (v).

[7] State *v.* Patza, 3 La. An. 514 (1848), cases.

CUTLERY. A generic term, often used to describe razors, scissors, and shears, as well as knives for table, pocket, and other uses.[1]

"Sheep shears" are included within the word, as used in Schedule C of the Tariff Act of March 3, 1883.[1]

The name of an imported article is not the sole guide by which to classify it for duty; its uses, especially when new and a substitute for other articles, should be considered. Thus "hair clippers" should be rated as "cutlery."[2] See DUTIES.

CY PRES.[3] As near; as near as; as near as can be.

The rule of construction that the intention of a testator, who seeks to create a charity, is to be given effect as far as is consistent with the rules of law[4] is known as the *cy près* doctrine.

Refers to the judicial power of substituting a charity which approaches another, the original, charity, in nature and character.[5]

Where the particular intention cannot be given effect, the words will be construed so as to give effect to the general intention evinced, and that as near to the particular intention as the law permits.

The doctrine modifies the strictness of the common law, as to a condition precedent to the enjoyment of a personal legacy. When a literal compliance with the condition becomes impossible from unavoidable circumstances, and without default in the legatee, it is sufficient that the condition is complied with as near as it practically can be.[6]

Borrowed from the Roman law, by which donations for public purposes were applied, when illegal *cy près*, to other and legal purposes.[7] Or, originated in the indulgence shown to the ignorance of testators who devised to the unborn son of an unborn son.[8]

A leading and illustrative case is that of *Jackson* v. *Phillips*,[9] decided in Massachusetts in 1867. The will created a trust "for the preparation and circulation of books and newspapers, the delivery of speeches, lectures, and such other means as in their [the trustees'] judgment will create a public sentiment that will put an end to negro slavery in this country," and "for the benefit of fugitive slaves escaping from the slave-holding States." While litigation upon the will was in progress, the Thirteenth Amendment, abolishing slavery, was adopted (1865); and the fund in question was ultimately applied to the New England Branch of the American Freedman's Union Commission.

The general doctrine has been approved in all of the New England States except Connecticut, in Illinois, and in Mississippi. In some States the doctrine has not been decided; in Pennsylvania it obtains where a designated class of beneficiaries become extinct;[1] in Alabama, Indiana, Iowa, Maryland, New York, North Carolina, South Carolina, and Virginia, it seems to be repudiated.[2, 3]

The Supreme Court of the United States, in its latest decisions, favors the doctrine.[3] See CHARITY, 2.

D.

D. 1. As an abbreviation may signify, in addition to the words noted below, dictionary, *dictum*, digest, division.

2. In the old action of ejectment stood for *demissione*, by demise, *q. v.*

3. In the apportionment of jurisdiction to the United States courts is used for "District:" as, E. D., M. D., N. D., S. D., and W. D.,—eastern, middle, northern, southern, and western district.

D. B. E. *De bene esse*, conditionally. See DE, Bene, etc.

D. B. N. *De bonis non*, of effects unadministered. See ADMINISTER, 4.

D. C. District court; District of Columbia.

D. C. L. Doctor of the civil law. See DOCTOR.

D. J. District judge.

D. P. *Domus procerum*, House of Lords.

D. R. Declaration of Rights.

D. S. Deputy sheriff.

D. S. B. *Debitum sine brevi*, debt without a writ. See DEBET, Debitum, etc.

DAILY. See DAY.

DAKOTA. See TERRITORY, 2.

DAM. The work or structure raised to obstruct the flow of water in a stream; also,

[1] Simmons Hardware Co. *v.* Lancaster, 31 F. R. 445 (1887).

[2] Koch *v.* Seeberger, 30 F. R. 424 (1887).

[3] *Cy prés;* pronounced, ci-prā'. Law Fr. *cy*, contracted from *icy*, now *ici*, here.

[4] See Coster *v.* Lorillard, 14 Wend. 308 (1835), Savage, C. J.

[5] [4 Kent, 508 (*b*) 1; 2 *id.* 288 (*a*).

[6] [1 Story, Eq. § 291. See *Re* Brown's Will, 18 Ch. Div. 65 (1881).

[7] See 1 Story, Eq. § 1169.

[8] Williams, Real Prop. 264.

[9] 14 Allen, 539, 549, 574-96, cases, Gray, J.

[1] Act 26 May, 1876: P. L. 211.

[2] See Bispham, Eq. § 130 (1882); 1 Col. Law T. 8-14 (1887), cases.

[3] See Loring *v.* Marsh, 6 Wall. 337 (1867); Perin *v.* Carey, 24 How. 465 (1860); Fontain *v.* Ravenel, 17 *id.* 369 (1854); Vidal *v.* Girard, 2 *id.* 127 (1844); Jackson *v.* Phillips, 14 Allen, 588 (1867).

See generally 38 Ala. 305; 22 Conn. 54; 30 *id.* 113; 4 Ga. 404; 25 *id.* 420; 16 Ill. 231; 35 Ind. 198; 46 *id.* 172; 18 B. Mon. 635; 49 Me. 302; 50 Mo. 167; 33 N. H. 296; 20 N. J. E. 522; 23 N. Y. 308; 34 *id.* 584; 17 S. & R. 88; 45 Pa. 27; 63 *id.* 465; 4 R. I. 439; 7 *id.* 252; 3 S. C. 509; 27 Tex. 173; 2 W. Va. 310.

the pond of water created by the obstruction.[1] See AQUA, Currit, etc.; MILL, 1; NAVIGABLE; RIPARIAN; TAKE, 8.

DAMAGE. Detriment; deprivation; injury; loss.

Etymologically, a thing taken away; the lost thing, which a party is entitled to have restored, that he may be made whole again.[2] See DAMNUM; LOSS.

Loss caused by malice or negligence in another person, or from inevitable accident. Interchanged with "injury," *q. v.*

Referring to a collision between vessels, the injury directly and necessarily resulting from the collision.[3]

When a bill of lading recites that the goods are received in good order and that the carrier will "not be accountable for weight, contents, packing, and damage," "damage" refers to injuries to the goods at the time of receipt.[4]

Damage-feasant.[5] Doing damage.

Said of animals trespassing upon land. To insure identification, the injured person may distrain them.[6]

A person is not justified in killing animals or fowls found trespassing upon his land. He should impound them, or sue for the damage they do. They are valuable property, the destruction of which is not necessary to the protection of his rights. A notice of an intention to kill the animals or fowls, if not shut up, is a threat to do an illegal act.[7]

DAMAGES. The compensation which the law will award for an injury done.[8]

A species of property given to a man by a jury as a compensation and satisfaction for some injury sustained.[9]

The plaintiff has no certain demand till after verdict; but when the jury has assessed his damages and judgment is given thereon, he instantly acquires, and the defendant loses, a right to that specific sum. . . The verdict and judgment fix and ascertain the plaintiff's inchoate title; they do not give, they define, his right.[9]

The recompense that is given by a jury to the plaintiff for the wrong the defendant hath done unto him.[10]

A compensation, recompense, or satisfaction to the plaintiff for an injury actually received by him from the defendant.[1]

The legal injury is the standard by which the compensation is to be measured: the injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.[2]

When it is said that a person is or will be responsible (or be required to respond) or liable or answerable "in damages," the meaning is, he may or will be required by law to furnish a money equivalent for the injury he has done.

Actual or single damages. Compensation for the real loss or injury. **Increased, double, or treble damages.** Single damages, as found by a jury, enhanced by the court.[3]

The statutes of nearly every State provide for the increase of damages where the injury complained of results from neglect of duties imposed for the better security of life and property, and make that increase, in some cases, even quadruple the actual damages. Experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress, if the private injury were not supported by the imposition of punitive damages.[4] See FENCE.

Civil damages. Injuries sustained either to one's rights as a citizen of a State and of the United States, or else to his relative rights as a member of a family, and aside from any view of the act complained of as an offense to the public and punishable in the criminal tribunals.

Civil Damage Laws. (1) Statutes which confer upon colored persons individual rights of action in the civil courts for any discrimination against them and in favor of white persons on account of race, color, or previous condition of servitude. See RIGHT, Civil Rights Act.

(2) Statutes which confer a right of action in a civil court upon the wife, family, or a near

[1] [Colwell *v.* Water Power Co., 19 N. J. E. 248 (1868).

[2] [Fay *v.* Parker, 53 N. H. 342 (1873).

[3] Memphis, &c. Packet Co. *v.* Gaeger Transportation Co., 10 F. R. 396 (1882).

[4] The Tommy, 16 F. R. 601, 608 (1883).

[5] Făz'-ant.

[6] 3 Bl. Com. 6-7; 50 Mich. 32.

[7] Clark *v.* Keliher, 107 Mass. 409 (1871); Johnson *v.* Patterson, 14 Conn. 3-12 (1840), cases; Matthews *v.* Fiestel, 2 E. D. S. 90 (N. Y., 1853).

[8] Kansas City, &c. R. Co. *v.* Hicks, 30 Kan. 393 (1883), Brewer, J.

[9] 2 Bl. Com. 438; 3 *id.* 158.

[10] Coke, Litt. 257 *a*: Rosenfield *v.* Express Co., 1 Woods, 137 (1871); 17 N. J. L. 482.

[1] 2 Greenl. Ev. § 253; Dow *v.* Humbert, 91 U. S. 299 (1875), Miller, J. See also Shugart *v.* Egan, 83 Ill. 57 (1876); Tetzner *v.* Naughton, 18 Bradw. 153 (1882); Scripps *v.* Reilly, 38 Mich. 23 (1878); 9 Heisk. 850; 26 Ga. 271; 16 Johns. 143; 55 Vt. 164.

[2] Wicker *v.* Hoppock, 6 Wall. 99 (1867), Swayne, J.

[3] See Berry *v.* Fletcher, 1 Dill. 71 (1870), Dillon, Circ. J.; Lobdell *v.* New Bedford, 1 Mass. 153 (1804); Welsh *v.* Anthony, 16 Pa. 256 (1851); 10 Oreg. 342.

[4] Missouri Pacific R. Co. *v.* Humes, 115 U. S. 512 (1885), Field, J.

relative of a person who lost his life or who has sustained injuries in consequence of intoxicating liquor having been sold or given to him in violation of law.[1]

The Massachusetts statute contemplates that the habitual drunkenness of a husband or wife, parent or child, is a substantial injury to those bound together in domestic relations, and gives the right to recover damages in the nature of a penalty, not only for any injury to the person or property, but for the shame and disgrace brought upon them. Hence, the right of a son to recover damages does not depend upon the question whether he is dependent upon the father for support or not, but solely upon the relation.[2] See POLICY, 1, Public.

Compensatory damages. Such damages as measure the actual loss, and are allowed as amends therefor. **Exemplary, punitive, or vindictive damages.** Such damages as are in excess of the actual loss, and allowed, in theory, where a tort is aggravated by evil motive — actual malice, deliberate violence or oppression, or fraud.

Exemplary damages are sometimes called "smart money."[3]

All rules of damages are referred to compensation or punishment. Compensation is to make the injured party whole; exemplary damages are something beyond this, and are inflicted with a view to punishing the defendant.[4]

It is undoubtedly true that the allowance of any thing more than an adequate pecuniary indemnity for a wrong suffered is a departure from the principle upon which damages in civil suits are awarded. But although, as a rule, the plaintiff recovers merely such indemnity, yet the doctrine is too well settled now to be shaken that exemplary damages may in certain cases be assessed. As the question of intention is always material in an action of tort, and as the circumstances which characterize the transaction are, therefore, proper to be weighed by the jury in fixing the compensation of the injured party, it may well be considered whether the doctrine of exemplary damages cannot be reconciled with the idea that compensation alone is the true measure of redress. But jurists have chosen to place the doctrine on the ground, not that the sufferer is to be recompensed, but that the offender is to be punished; and, although some text-writers and courts have questioned its soundness, it has been accepted as the rule in England and in most of the States of this country. It has also received the sanction of the Supreme Court. Discussed and recognized in *Day* v. *Woodworth*, 13 How. 371 (1851), it was more accurately stated in *The Philadelphia, Wilmington & Baltimore Railroad Co.* v. *Quigley*, 21 How. 213 (1858): Mr. Justice Campbell, who delivered the opinion of the court, saying — "whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. The malice spoken of in this rule is not merely the doing of an unlawful or injurious act: the word implies that the wrong complained of was conceived in the spirit of mischief, or criminal indifference to civil obligations." Although this rule was announced in an action for libel it is equally applicable to suits for personal injuries received from the negligence of others. Redress commensurate with such injuries should be afforded. In ascertaining its extent the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go further, unless it was done willfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. In that case the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages.[1]

"Exemplary," "punitive," and "vindictive" damages are synonymous terms. In cases of personal torts, such as assault and battery, slander, libel, seduction, criminal conversation, malicious arrests and prosecutions, seizure of goods, where the element of fraud, malice, gross negligence, cruelty, oppression, brutality, or wantonness intervened, exemplary or punitive damages may be recovered. And, since what would be a severe verdict to one of limited means might be but a trifle to one of large means, and the reason of the rule fail, evidence of the defendant's ability to respond in damages may always be given in evidence.[2]

Constructive damages. Such damages as are imputed in law from an act of wrong to another person.

Contingent damages. Such damages as may or may not occur or be suffered; such

[1] See Bertholf v. O'Reilly, 74 N. Y. 511-30 (1878), cases; 84 Ill. 195; 57 Ind. 171; 48 Iowa, 588; 50 *id.* 34; 29 Kan. 109; 130 Mass. 366; 133 *id.* 54-55; 67 Me. 517; 41 Mich. 475; 20 Alb. Law J. 204-5 (1879), cases; 19 Cent. Law J. 208-10 (1884), cases.

[2] Taylor v. Carroll, 145 Mass. 96 (1887).

[3] See 36 Conn. 185.

[4] Berry v. Fletcher, 1 Dill. 71 (1870).

[1] Milwaukee & St. Paul R. Co. v. Arms, 91 U. S. 492-93 (1875), Davis, J. See also Missouri Pacific R. Co. v. Humes, 115 *id.* 521 (1885); Barry v. Edmunds, 116 *id.* 562-64 (1886), cases; Denver, &c. R. Co. v. Harris, 122 *id.* 609-10 (1887), cases; 1 Kan. Law J. 74, 118-22 (1886), cases; 3 *id.* 369-75 (1886).

[2] Brown v. Evans, 8 Saw. 490 (1883), cases, Sabin, J.: s. c., 17 F. R. 912. See also Nagle v. Mullison, 34 Pa. 53 (1859), cases; Chicago, &c. R. Co. v. Scurr, 59 Miss. 461 (1882); Louisville, &c. R. Co. v. Guinan, 11 Lea, 103-5 (1883), cases; 71 Ala. 293; 50 Conn. 583; 76 Ill. 228; 92 *id.* 97; 63 Ind. 57; 89 Mich. 211; 36 Mo. 230; 58 N. H. 342; 56 *id.* 456; 35 N. Y. 25; 76 Va. 137; 44 Wis. 284; 1 Kent, 630; 2 Sedgw. Dam. 332; 2 Greenl. Ev. § 253; 23 Alb. Law J. 44 (1881), cases; 18 Cent. Law J. 143-46 (1884), cases.

as depend upon an event which may or may not happen.

Continuing damages. Damages incurred or suffered between two dates, as the beginning and the end of an act, and more or less separated in time. See CONTINUANDO.

Direct or immediate damages. Such damages as result from an act without the intervention of any intermediate controlling or self-efficient cause. **Consequential or resulting, indirect or remote damages.** Not produced without the concurrence of some other event attributable to the same origin or cause.

"Direct damages" include the damages for all such injurious consequences as proceed immediately from the cause which is the basis of the action, not merely for the consequences which invariably or necessarily result and which are always provable under the general allegation of damages in the declaration; but also other direct effects which have in the particular instance naturally ensued, and, to be recovered for, must be alleged specially. "Consequential damages" are those which the cause in question naturally but indirectly produced.[1]

All "remote damages" are consequential, but all "consequential damages" are by no means remote.[2]

Excessive damages. Damages awarded by a jury, so much larger in amount than what are justly due as to indicate that the jurors must have been influenced by partiality, prejudice, passion, or ignorance; also called *inordinate* and *unreasonable* damages. **Inadequate damages.** Damages which, for some such reason, are grossly less than the sum actually due; also called *insufficient* damages.

Verdicts for excessive or inadequate damages are set aside by the courts — the evidence of misapprehension or disregard of duty, on the part of the jury being clear beyond question.[3]

General damages. Such damages as by implication of law result from an act, and are awarded in the sound discretion of the jury, without evidence of particular loss.[4] **Special damages.** Losses which are the natual, but not the necessary, consequence of the act; a loss which is peculiar to the particular case.

Special damages must be particularly averred in the declaration, — for notice to the defendant, and thereby to prevent surprise at the trial. They result as the natural but not as the necessary consequence of the act complained of.[1] See PER, QUOD.

Liquidated damages. Damages definitely ascertained by agreement of the parties or by the judgment of a court. **Unliquidated damages.** Such damages as are not so determined.

Care must be taken to distinguish between cases of "penalties," strictly so called, and cases of "liquidated damages." The latter properly occur when the parties have agreed that, in case one party shall do a stipulated act or omit to do it, the other party shall receive a certain sum as the just, appropriate and conventional amount of the damages sustained by such act or omission. In cases of this sort courts of equity do not interfere to grant relief, but deem the parties entitled to fix their own measure of damages; provided always that the damages do not assume the character of extravagance, or of wanton and unreasonable disproportion to the nature or extent of the injury. On the other hand, those courts will not suffer their jurisdiction [to grant relief in the case of a penalty, if compensation can be made] to be evaded merely by the fact that the parties have called a sum damages which is, in fact and in intent, a penalty.[2] See further PENALTY.

Nominal damages. A trivial sum awarded where a mere breach of duty or infraction of right is shown, with no serious loss sustained. **Substantial damages.** A sum awarded as compensation for injury actually suffered; compensatory damages, *q. v.*

Whenever a right is invaded the law infers damage, and will award, *pro forma*, some small sum at least; as, one cent, six and one-quarter cents — half of an American shilling, etc.[3]

Failure to show actual damages, and the inference that none have been sustained, do not necessarily render a case trivial.[4]

A judgment for one cent, damages for trespass upon a mining claim, entered upon a special verdict for "nominal damages," if in other respects proper, will not be set aside for uncertainty in the verdict. "Nominal damages" refers to some trifling sum. In such a case the doctrine of *de minimis* should be invoked.[5]

Prospective damages. A loss which, in all probability, will be sustained by a plaint-

[1] 1 Sutherland, Damages, 19, 20; 50 N. H. 518.

[2] Sedgwick, Damages, 7 ed., 90, 101.

[3] Barry *v.* Edmunds, 116 U. S. 565 (1886); 2 Story, 670; Borland *v.* Barrett, 76 Va. 137 (1882); Phillips *v.* London, &c. R. Co., 5 Q. B. D. 78 (1879); 21 Alb. Law J. 62; 86 Ind. 389; 59 Tex. 250; 2 Sedgw. Dam. 334.

[4] See Smith *v.* St. Paul, &c. R. Co., 30 Minn. 172 (1883).

[1] See 1 Sutherl. Dam. 763; Roberts *v.* Graham, 6 Wall. 579 (1867); Mitchell *v.* Clark, 71 Cal. 167, 168 (1886); Atchison, &c. R. Co. *v.* Rice, 36 Kan. 602-3 (1887); 38 Cal. 689; 43 Conn. 567; 84 Ill. 195; 121 Mass. 393; 78 Pa. 73; 1 Chitty, Pl. 395; 2 Sedgw. Dam. 606.

[2] 2 Story, Eq. § 1318. See 1 Am. Dec. 331; 30 Am. R. 6; 12 Am. Law Rev. 286-300 (1878), cases; 19 Cent. Law J. 282-90, 302-5 (1884), cases.

[3] Mayne, Damages, 5; Sedgwick, Dam. 47.

[4] Paterson *v.* Dakin, 31 F. R. 685 (1887).

[5] Davidson *v.* Devine, 70 Cal. 519 (1886).

iff; indemnity for losses which will "almost to a certainty happen."[1] Termed **speculative damages** when the probability that a circumstance will exist as an element for compensation becomes conjectural.

The lack of certainty in the measurement of damages is no reason for refusing compensation. The law is full of instances where there is the same uncertainty, and where the jury determine what is reasonable compensation. All that is necessary is that there be certainty of damage as a direct result, and not a case of *damnum absque injuria*.[2]

On a *contract* to pay money at stipulated periods there may be as many suits as there are installments. On a *tort* there is but one action, and in that the party must have full justice: hence the courts anticipate a loss likely to occur in the future.[3]

When one party enters upon the performance of a contract, incurs expense therein, and, being willing to perform, is, without fault of his own, prevented by the other party, his loss will consist of two distinct items of damage: his outlay and expenses, less the value of materials on hand; and the profits he might have realized by performance. The first item he may recover in all cases; and the second (the profits), when they are the direct fruit of the contract, and not too remote or speculative. . . If the party injured by the stoppage of a contract elects to rescind the contract he cannot recover for outlay or for loss of profits; only for the value of services actually performed, as upon a *quantum meruit*.[4]

Damages for the breach of a contract are limited to such as are the natural and proximate consequences of the breach, such as may fairly be supposed to enter into the contemplation of the parties when they made the contract, and such as might naturally be expected to result from its violation.[5] See further under CONTRACT.

But if a party can save himself from loss arising from a breach of contract at trifling expense or with reasonable exertion, it is his duty to do so.[6] See INDEMNITY, 1.

The right to compensation for damages to the person or for *personal injuries* is well recognized at common law. Any limitation by the legislature to a sum less than the actual damages is in conflict with the right of remedy by due course of law reserved to the individual for injury to his person, in the constitution of each State.[1]

In an action for a personal injury the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning, by the wrongful act of the defendant. To assist the jury in making such an estimate, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence, but not absolute guides.[2]

In a statute providing that actions for tort for assault, battery, imprisonment, or other "damage to the person," shall survive to the representative, the tort must affect the person directly — not the feelings or the reputation, as in cases of breach of promise, slander, and malicious prosecution. The substantial cause of action must be a bodily injury, or damage of a physical character, whether trespass or case lie.[3]

At common law no damages were recoverable for the loss of a human *life*. The reason was: life transcended all moneyed value; or, because, under feudal law, the property of a felon was forfeited to the crown, so that nothing remained wherewith to satisfy private demands. The life of a subject, as far as capable of proprietorship, was the property of the government; the justice which was to be satisfied was public justice; the deceased and his family were only regarded as members of the state; the public, through the government, inflicted the punishment and received the amercement, and, as far as necessity existed, provided for the family, and, therefore, private redress or satisfaction was excluded. The effect of the action now allowed by statute (as to which see below) is, *pro tanto*, to relieve the state of a public charge; the suit for damages becomes a private action.[4]

The common-law rule has been changed in most of the States by statutes which follow closely 9 and 10 Vict. (1846), known as "Lord Campbell's Act." Proceeding upon the theory that the widow, the children, and perhaps the parents, have a pecuniary interest in the life of the deceased, these statutes provide that for the benefit of such relatives an action for damages may be maintained against the person by whose wrongful act the deceased lost his life, the act being of such a nature that the deceased, had he survived, could himself have had an action for the personal injury.

The right of recovery, then, being purely statutory, the amount recoverable for a death rests with the dis-

[1] See 2 Addison, Torts, 1391. To realty, see 26 Am. Law Reg. 281-92, 345-59 (1887), cases. As to future damages, see 36 Alb. Law J. 84-89, 104-9 (1887), cases.

[2] Omaha Horse R'y Co. *v.* Cable Tram-Way Co., 32 F. R. 733-34 (1887), Brewer, J.

[3] Miller *v.* Wilson, 24 Pa. 120 (1854), Black, C. J.; Stilson *v.* Gibbs, 53 Mich. 283-84 (1884), Cooley, C. J.; 2 Bing. 340.

[4] United States *v.* Behan, 110 U. S. 338, 344-46 (1884), cases, Bradley, J. Approved, Lovell *v.* St. Louis Mut. Life Ins. Co., 111 *id.* 274 (1884).

[5] Murdock *v.* Boston & Albany R. Co., 133 Mass. 15 (1882), Morton, C. J.

[6] Miller *v.* Mariners' Church, 7 Greenl. 55-56 (1830); Walker *v.* Hoppock, 6 Wall. 99 (1867), cases.

[1] Cleveland, &c. R. Co. *v.* Rowan, 66 Pa. 400 (1870); Thirteenth Street R'y Co. *v.* Boudrou, 92 Pa. 481 (1880).

[2] Vicksburg & Meridian R. Co. *v.* Putnam, 118 U. S. 554-56 (1886), cases, Gray, J.

[3] Norton *v.* Sewall, 106 Mass. 145 (1870), cases, Gray, J.

[4] The E. B. Ward, 4 Woods, 149 (1883), Billings, J.; s. c. 17 F. R. 259. See generally Grosso *v.* Delaware, &c. R. Co., Sup. Ct. N. J. (1888), cases; 25 Am. Law Reg. 307-9 (1886), cases.

cretion of the legislature. In the District of Columbia this amount is $10,000;[1] in some States, as in Massachusetts, Connecticut, New York, and Pennsylvania, $5,000; but the amount recoverable for personal injuries generally remains unlimited,[2] — in Massachusetts it is $4,000.[3]

In the absence of an act of Congress or a statute of a State giving a right of action therefor, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the sea, which was caused by negligence.[4]

Where the death is caused by negligence the only damages recoverable are for the injury to the relative rights of the surviving members of the family, and are compensatory in nature. Where, therefore, a child is free, lives apart from his parents, and in no way contributes to their support, they cannot maintain an action to recover damages for his death. When the child is not free the parents can recover only the value of his services during minority, and the expenses caused by the injury and death.[5]

In all cases the amount of damages must depend very much on the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case. If the suit is brought by the party there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body. So when the suit is brought by the representative the pecuniary injury resulting from the death to the next of kin is equally uncertain and indefinite.[6]

In some States statutes provide that no action will lie for a wrong committed elsewhere, without proof of the existence of a similar right in the place where the wrong was committed.[7]

See also ACTIO, Personalis; AGGRAVATION; COMMENCE, Action; CONDEMNATION; COSTS; INDEMNITY; INJURY, 2; INNOCENT, 1; INSPECTION, 2; INTEREST, 3; LAY, 2; MALICE; MEASURE; NEGLIGENCE; PROFIT, 2; RECOUP; REMIT, 3; ROAD; SOLATIUM; SOUND, 1; RESTITUTIO; TAKE, 8; TIMBER; TORT; TRESPASS; TROUBLE.

[1] Act of Congress, 17 Feb., 1885: 23 St. L. 307.

[2] See *Exp.* Gordon, 104 U. S. 517 (1881); Dennick *v.* Central Railroad of New Jersey, 103 *id.* 17 (1880); Mobile Life Ins. Co. *v.* Brame, 95 *id.* 759 (1877); The Charles Morgan, 2 Flip. 275 (1878); Davies *v.* Lathrop, 12 F. R. 356 (1882); Barrett *v.* Dolan, 130 Mass. 366 (1881); Laws Conn., 1877, c. 78, s. 1; 24 Conn. 575; 45 Me. 209; 9 Cush. 108; 18 Mo. 162; 16 Barb. 54; 15 N. Y. 432; 44 Pa. 175.

[3] Act of 1887.

[4] The Harrisburg, 119 U. S. 199, 204-12 (1886), cases, Waite, C. J.

[5] Lehigh Iron Co. *v.* Rupp, 100 Pa. 95, 98 (1882).

[6] Illinois Central R. Co. *v.* Barron, 5 Wall. 105-6 (1866), cases, Nelson, J.; The City of Panama, 101 U. S. 454 (1879); 18 N. Y. 543.

[7] McDonald *v.* Mallory, 77 N. Y. 550 (1879), cases; Leonard *v.* Columbia Steam Nav. Co., 84 *id.* 53 (1881), cases. See Richardson *v.* N. Y. Central R. Co., 98 Mass. 89 (1867), cases; Woodard *v.* Michigan, &c. R. Co., 10 Ohio St. 122 (1859); Bruce's Adm. *v.* Cincinnati R. Co., 83 Ky. 174, 180 (1885); Burns *v.* Grand Rapids, &c. R. Co., Sup. Ct. Ind. (1888), cases: 37 Alb. Law J. 228.

DAMNUM. L. That which is taken away: loss; damage; legal hurt or harm. Plural, *damna:* legal losses. *Damnificatus*, injured. *Damnosa*, hurtful.

Ad damnum. To the loss; "to the damage of plaintiff (so many) dollars."

The clause, at the end of a common-law declaration, in which the plaintiff sets out the money amount of the loss he has suffered in consequence of the act he complains of; also, the amount itself so set out.[1]

Ad quod damnum. To what damage.

A writ, at common law, by which the sheriff was to inquire by a jury what damage it would be to the sovereign, or to a subject, to grant a fair, market, highway, or other like franchise.[2]

An inquisition *ad quod damnum* designates the remedy given by statute for the assessment of damages suffered from an exercise of the right of eminent domain, or in consequence of some public improvement.

Damnificatus. Injured, damaged, damnified.

Quantum damnificatus. How much he is injured.

The name of an issue by which damages, to be awarded in equity, may be ascertained by a jury.

This was the course in former times, and may still be the practice in cases of a complicated nature; but the same inquiry may now generally be made by a master.[3] See PENALTY.

Non damnificatus. He is not injured.

The plea in the case of an action on a covenant to indemnify and save harmless, — in the nature of a plea of performance.

If there was any injury the plaintiff must reply to such plea. Not the plea when the condition is to "discharge and acquit."[4]

Damnosa hæreditas. A hurtful or burdensome inheritance; an expensive asset.

By the Roman law the heir was liable to the full extent of his ancestor's liabilities.

The term has been applied to property of a bankrupt which is a charge or an expense to the creditors.

The assignee need not regard such property as an asset; he may, instead, leave the creditor to prove his claim; or, possibly, he may assign the burden to

[1] 2 Greenl. Ev. § 260; 108 U. S. 176; 9 Bened. 241

[2] See 2 Bl. Com. 271.

[3] 2 Story, Eq. § 795.

[4] Wicker *v.* Hoppock, 6 Wall. 99 (1867), cases; Steph. Pl. 388.

another, as, a pauper; but not so in insolvency, in which case the process is voluntary.[1]

Damnum absque injuria. A loss without injury: deprivation without legal injury; a loss for which the law provides no remedy. Opposed, *injuria absque damno:* injury without legal damage.

There are many cases of loss for which no relief or equivalent in money can be afforded. Examples: unintended hurt, while due care is being exercised;[2] harm done from taking a medicine prescribed by a person known not to be a physician; patronage drawn off by competition in business;[3] an improvement in a machine, which does not infringe the rights of a prior patentee;[4] waste by a tenant in fee, as affecting the interest of the heir; defamatory words proven to be true.[5]

Every public improvement, while adding to the convenience of the people at large, affects more or less injuriously the interests of some individuals.[6]

When the exercise of a right, conferred by law for the benefit of the public, is attended with temporary inconvenience to private parties, in common with the public in general, they are not entitled to damages therefor.[6]

Damnum fatale. A fated loss; a loss ordained by fate — beyond the control of man.

In the civil law, a loss for which a bailee was not liable: as, a loss by shipwreck, lightning, or other like casualty; also, a loss from fire or from pirates.[7]

Included all accidents occasioned by an "act of God or public enemy," and, perhaps, also, others which would not now be considered as due to "irresistible force."[8] See ACCIDENT, Inevitable; ACT, 1, Of God.

See DE MELIORIBUS, Damnis; REMITTITUR, Damnum.

DANGER. In the law of self-defense "apparent danger" means such overt, actual demonstration, by conduct and acts, of a design to take life or to do some great personal injury, as makes killing apparently necessary for self-preservation.[9] See IMMEDIATE.

[1] 3 Pars. Contr. 466, 492; American File Co. v. Garrett, 110 U. S. 295 (1884), cases.

[2] 3 Bl. Com. 294.

[3] Burr v. Duryee, 1 Wall. 574 (1863).

[4] 3 Bl. Com. 219, 125.

[5] Miller v. Mayor of New York, 109 U. S. 395 (1883). See Broom, Max. 1; 1 Sm. L. C. 244; Sedg. Dam. 29, 111; 20 How. 148; 108 U. S. 331; 109 *id.* 329; 119 *id.* 284; 29 F. R. 568; 17 Conn. 302; 88 Ky. 218; 97 N. C. 432; 94 N. Y. 129; 86 Pa. 401; 98 *id.* 84; 113 *id.* 126; 16 Op. Att.-Gen. 480; 66 Ga. 69, 308; 71 *id.* 734; 34 La. An. 312, 496, 506, 857, 974, 996; 74 Me. 171; 133 Mass. 489; 11 Lea, 737; 59 Tex. 517; 25 Vt. 49.

[6] Hamilton v. Vicksburg, &c. R. Co., 119 U. S. 285 (1886).

[7] See Story, Bailm. 471; 2 Kent, 594.

[8] Thickstun v. Howard, 8 Blackf. 536 (1847).

[9] Evans v. State, 44 Miss. 773 (1870).

Dangerous. Said of a weapon, means such as is likely to cause death or to produce great bodily harm. See further WEAPON.

Dangers of navigation. The ordinary perils which attend navigation.[1]

Includes dangers arising from shallow waters at the entrance of harbors;[1] also, unavoidable dangers from a bridge across a river.[2]

Dangers of the river. The natural accidents incident to river navigation; not, such accidents as may be avoided by the exercise of that skill, judgment, or foresight which are demanded from persons in the particular occupation.[3]

Includes dangers from unknown reefs, suddenly formed in the channel, and not discoverable by the use of care.[4]

Dangers of the sea or *seas.* Stress of weather, winds and waves, lightning, tempests, and other extraordinary occurrences, as understood in a marine policy; not, the ordinary perils which every vessel must encounter.[5]

Accidents, peculiar to navigation, of an extraordinary nature, or arising from an irresistible force or overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence.[6]

All unavoidable accidents from which common carriers, by the general law, are not excused unless they arise from the act of God.[7]

The phrases "dangers of the sea," "dangers of navigation," and "perils of the seas," employed in bills of lading, are convertible expressions.[8] See further ACT, 1, Of God; PERIL.

DARE. L. To give; to transfer. See DEDIMUS.

Nemo dat qui non habet. No one gives who does not have.

Nemo dat quod non habet. No one can give what he does not own.

[1] [Western Transportation Co. v. Downer, 11 Wall. 133 (1870).

[2] The Morning Mail, 17 F. R. 549 (1883).

[3] Hill v. Sturgeon, 35 Mo. 213 (1864); 28 *id.* 323.

[4] Hibernia Ins. Co. v. St. Louis, &c. Transportation Co., 17 F. R. 478 (1883).

[5] Hazard v. New England Marine Ins. Co., 8 Pet. 585 (1834), M'Lean, J.

[6] [Tuckerman v. Stephens, &c. Transportation Co., 32 N. J. L. 328 (1867); 33 *id.* 565.

[7] Dibble v. Morgan, 1 Woods, 411 (1873).

[8] Baxter v. Leland, 1 Abb. Adm. 352 (1848), cases; 3 Ware, 215; 2 Curtis, 8; 56 Barb. 442; 3 Kent, 300.

Qui non habet, ille non dat. He who does not own, cannot transfer.[1] See TRANSFERRE; REDDARE.

DARRAIGN. See DERAIGN.

DARREIN. See CONTINUANCE, Puis, etc.

DARTMOUTH COLLEGE CASE. See CHARTER, 2; CORPORATION.

DATE.[2] The primary signification is time "given" or specified,— in some way ascertained and fixed.[3]

The time when an instrument was made, acknowledged, delivered, or recorded; the clause or memorandum which specifies that fact; and the time from which its operation is to be reckoned.[4]

In the ancient form the clause ran: *datum apud*, etc., specifying the place and time; thence called the *datum* clause, afterward shortened to "date."

False date. Implies a date purposely incorrect.

Misdate. An erroneous date, made so intentionally or unintentionally.

A date is not a necessary part of a document. Another day than that named may be shown to be the true date, except where there is collusion.[5]

A deed is considered as executed on the nominal date, unless the contrary be made to appear; it speaks from the day of delivery; and it is valid whether it bears no date, or has a false or an impossible date, provided the real day when it was given can be established.[6]

The purpose of a date in a bill or note is to fix the day of payment; if such day is indicated, that is sufficient.[7] See DESCRIPTION; RELATION, 1.

DAY. 1. The time between one midnight and the next succeeding midnight.[8] See NIGHT.

The civil day begins and ends at 12 o'clock P. M. The word "day," used alone in a statute or contract, means, unless restricted to a shorter period, the twenty-four hours.[9]

2. The time between sunrise and sunset; day-time, *q. v.*

3. The business hours of a day.

Artificial day; solar day. From the rising to the setting of the sun. **Natural day.** The whole twenty-four hours; midnight to midnight.[1]

Daily. "Advertisement in a daily newspaper" (*q. v.*) may refer to a paper issued every day of the week but one.[2]

Day in court. A day set for appearing in a court; a day on which a person may be heard as to a matter affecting his rights.

It is an old maxim that every one is entitled to his day in court. This means that day on which the cause is reached for trial in pursuance of the forms and methods prescribed by law.[3] See CONTINUANCE; NOTICE, 1.

Days of grace. Three additional days in which to pay a negotiable bill or note after its maturity. See further GRACE, Days of.

Day's work. See SERVICE, 1.

Day-time. That portion of the twenty-four hours during which a man's person and countenance are discernible.[4] See BURGLARY.

Judicial day; juridical day. A day for judicial proceedings; a day for exercising judicial power; a court day. Opposed, *non-judicial, non-juridical day.*

Non-judicial days are legal holidays and Sundays. Judicial proceedings in civil matters on such days are generally void. See DIES, Dominicus, etc.; HOLIDAY; SUNDAY.

Peremptory day. A day assigned for a hearing without further postponement.

See APPEARANCE, 3; LAW-DAY; RETURN-DAY; RUNNING DAY. Compare DIES.

"In the space of a day all the twenty-four hours are usually reckoned, the law generally rejecting all fractions of a day, in order to avoid disputes."[5]

Common sense and common justice equally sustain the propriety of allowing "fractions of a day" whenever it will promote the purposes of substantial justice.[6]

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[1] See 16 Wall. 550; 23 *id.* 128; 4 Cliff. 311, 360; 71 Ala. 288; 100 Mass. 24; 4 Wend. 619.

[2] L. *datum*, a thing given.

[3] Bement *v.* Trenton Locomotive Co., 38 N. J. L. 515 (1866); 2 Bl. Com. 304.

[4] See Orcutt *v.* Moore, 134 Mass. 48 (1883).

[5] 1 Whart. Ev. §§ 976-78, cases; 2 Greenl. Ev. §§ 12-13, cases.

[6] 2 Bl. Com. 304, 307; Raines *v.* Walker, 77 Va. 92 (1883), cases; 19 How. 73; 33 Me. 446.

[7] Daniel, Neg. Inst. §§ 83-85, cases; 1 Ames, Bills, etc., 145.

[8] Pulling *v.* People, 8 Barb. 385 (1850); Kane *v.* Commonwealth, 89 Pa. 522 (1879); Haines *v.* State, 7 Tex. Ap. 33 (1879).

[9] Benson *v.* Adams, 69 Ind. 354 (1879), cases; Helphenstein *v.* Vincennes Nat. Bank, 65 *id.* 589 (1879); 2 Bl. Com. 141.

[1] See People *v.* Hatch, 33 Ill. 137 (1863).

[2] Richardson *v.* Tobin, 45 Cal. 30, 33 (1873).

[3] Ketchum *v.* Breed, 66 Wis. 92 (1886), Cassoday, J.; 31 Va. 759.

[4] Trull *v.* Wilson, 9 Mass. 154 (1812); 4 Bl. Com. 224.

[5] 2 Bl. Com. 141.

[6] *Re* Richardson, 2 Story, 577 (1843); Lapeyre *v.* United States, 17 Wall. 198 (1872); United States *v.* Norton, 97 U. S. 170 (1877); Burgess *v.* Salmon, *ib.* 383 (1878); First Nat. Bank of Cincinnati *v.* Burkhardt, 100 *id.* 689 (1879); Louisville *v.* Portsmouth Savings Bank, 104 *id.* 474-79 (1881), cases; 11 F. R. 214; 87 Ill. 239; 69 Ind. 353; 98 Pa. 518.

The maxim is now chiefly known by its exceptions. When private rights depend upon it, the courts inquire into the hour at which an act was done, a decree entered, an attachment laid, or a title accrued.[1]

When an officer has neglected to note upon a writ of execution the hour and minute at which the writ was delivered to him, the precise time may be established by evidence.[2]

It has become the rule in the construction of a contract, when the time to be computed is one or more days, weeks or years, to exclude the day of the date or event, whether by the contract the time is to be reckoned from date, from the day of the date, or from some act or event. The day is not divided, because not only is a day a natural unit of time, but it is a fair presumption that the parties did not intend to divide a day, since the time to be computed is made up of days as units of time; and the day is excluded because to include it would require an act, which, by the contract, was to be done in one day from date, to be done on the day of the date, which is against the apparent intention of the parties. But whenever it is necessary to divide a day in order to carry into effect the intention of the parties, this may be done; and the rule of excluding the day is not applied when a different intention appears on the face of the contract; and no such general rule obtains when acts are to be done within one or more hours, for example, after the date of the contract.[3]

In computing time, days are counted according to the following rules:

1. When a contract, a statute, or a rule of court prescribes a definite number of days within which an act must be done (as, make a payment, take an appeal, file a plea or pleading, serve a notice), the first day is excluded and the last day included: the first and last days are never both included.[4]

2. An intervening Sunday is frequently omitted, especially when the days are less than a week.[5]

3. When the last day is Sunday, or a legal holiday, the act may be done on the day following — except as to days of grace.[6, 5] See further under TIME.

See AFTER; AFTERNOON; AT; BETWEEN; BY; FOR; FROM; ON OR BEFORE; WHEN; WITHIN; — MONTH; TIME; YEAR.

DE. A Latin preposition denoting: away from, out of, arising from; of, about, concerning, with regard to; for, on account of, because of, by.

With adjectives, forms adverbial expressions; as, *de novo*, anew.

In compounds, denotes separation, departure, removal: cessation or negation of the fundamental idea; sometimes, a strengthening of that idea.

[1] Maine *v.* Gilman, 11 F. R. 216 (1882), cases.

[2] Hale's Appeal, 44 Pa. 439 (1863).

[3] Hitchings *v.* Edmands, 132 Mass. 339 (1882), Field, J.; Ward *v.* Walters, 63 Wis. 44 (1885), cases.

[4] See 2 Pars. Contr. 364; 19 Conn. 376; 12 Iowa, 186; 9 N. H. 304; 37 Mo. 574; 28 Barb. 284; 16 Pa. 14.

[5] See 31 Cal. 240, 271; 12 Ga. 93; 53 Ill. 87; 46 Mo. 17; 99 Pa. 522; 40 *id.* 372; 17 Gratt. 109.

[6] See 3 Cush. 137; 27 N. J. L. 68; 20 Wend. 205.

De bene esse. For the well being: provisionally, conditionally. Abbreviated *d. b. e.*

Characterizes an act or proceeding viewed as sufficient for the time being.

The entry of record of the name of an attorney as counsel for a defendant is termed an appearance *de bene esse*, when such appearance is not to be conclusive unless subsequently ratified.

The examination of a witness *de bene esse* may be had when he is an important witness, and there is danger of losing his testimony from death or absence. His deposition (*q. v.*) may be taken, but not used at trial unless he has since died, or is abroad or beyond reach of process.[1]

De bonis. Of, for, or concerning goods or property. See phrases under BONA.

De cursu. Of course; as a matter of course.

De donis. Concerning grants. See under DONUM.

De facto. In fact; as a matter of fact. Opposed, *de jure:* by right, by legal right or title. See FACTUM; GOVERNMENT.

De gratia. From favor, indulgence. Opposed, *de jure:* of right.

De homine replegiando. For replevying a man. See REPLEVIN, 2.

De incremento. Of the increase. See COSTS.

De injuria. Of wrong. See REPLICATION.

De jure. Of or by right. See *De facto; De gratia.*

De lunatico inquirendo. For inquiry as to lunacy, *q. v.*

De medietate linguæ. Of half tongue: half of each language or nationality. See MEDIETAS.

De melioribus damnis. Of the better damages; of the abler ones the damages.

Where a loss is assessed against several defendants the plaintiff may elect to claim satisfaction of those most able to pay. See CONTRIBUTION.

De mercatoribus. Concerning merchants, *q. v.*

De minimis. See LEX, De minimis, etc.

De non apparentibus. See APPARERE, De non, etc.

De novo. From the first; anew. See VENIRE, De novo.

De partitione facienda. For division to be made. See PARTITIO.

De retorno habendo. For having return; to have a return, *q. v.*

[1] See 2 Daniel, Ch. Pr. 111; 25 Cent. Law J. 244, 579 (1887), cases.

De son tort. F. Of his own wrong. See TORT, 1.

De terris. Out of the lands.

As, a judgment *de terris*, for arrears of dower.[1]

De una parte. Of one part or party. See PARS.

De ventre. See VENTER.

De vicineto. From the vicinage or country. See COUNTY, 2; VICINITY.

DEAD. See ALIVE; ANIMAL; BURIAL; DEATH; FREIGHT; PLEDGE.

Dead-head. A person other than an officer, agent, or employee, of a railroad or other company, who is permitted to travel without paying fare.[2] See COMMERCE, Act of 1887, sec. 22, p. 206.

Dead-letter law. See OBSOLETE.

Deadly. See WEAPON.

DEAF. See INFLUENCE; WILL, 2; WITNESS.

A deaf mute who does not and cannot be made to understand any matter of business, except of the most simple character, cannot manage his own affairs or select an agent to transact them.[3]

A statute required that a stationary bell be rung or a whistle sounded at a railroad crossing, before a train passed. A deaf mute who saw a train approaching, as to which no warning was given, attempted to cross the track and was injured. *Held*, that he could not recover damages.[4]

DEAL. To traffic; to transact business; to trade.[5]

Said of a bank, may mean to buy and sell for gain, and include sales on commission.[6]

Dealer. One who trades, buys or sells;[7] one who buys to sell again;[8] one who makes successive sales a business.[9]

One who slaughters animals and sells the meat as food is not a "dealer" within the meaning of a statute requiring dealers who buy and sell merchandise to take out a license.[10] See PEDDLER; RETAIL.

Dealer's talk. See COMMENDATIO, Simplex, etc.

[1] Haven *v.* Bartholomew, 57 Pa. 126 (1868).

[2] [Gardner *v.* Hall, 61 N. C. 23 (1866).

[3] Perrine's Case, 41 N. J. E. 410-12 (1886), cases, Runyon, Ch.: 95 Am. Law Reg. 776 (1886); *ib.* 778-80.

[4] Ormsbee *v.* Boston, &c. R. Co., 14 R. I. 102 (1883).

[5] Vernon *v.* Manhattan Co., 17 Wend. 526 (1837).

[6] Bates *v.* State Bank, 2 Ala. 465-68 (1841); Fleckner *v.* United States Bank, 8 Wheat. 349, 351 (1823); 11 Wis. 294.

[7] Berks County *v.* Bertolet, 13 Pa. 394 (1850).

[8] Norris *v.* Commonwealth, 27 Pa. 495 (1856); 33 *id.* 331.

[9] Overall *v.* Bezeau, 57 Mich. 507 (1877), Cooley, C. J.

[10] State *v.* Yearby, 82 N. C. 561 (1880); 80 *id.* 479. See also 44 Ala. 29; 79 Ill. 178; 65 Me. 284; 12 Lea, 262; 21 Vt. 484.

DEATH. Cessation of life; extinction of political existence. See LIFE.

Civil death. Extinction of civil rights.

A bankrupt is regarded as civilly dead;[1] so is an insolvent corporation, to the extent that its property may be administered as a trust fund for creditors and stockholders.[2]

Formerly, if a man was banished or abjured the realm, or entered a monastery, before the law he was civilly dead — *civiliter mortuus*. Then, a monk, like a dying man, could make a will, or leave his next of kin to administer as if he had died intestate. Since, also, the act determined a lease for life, conveyances for life were usually made for the term of one's "natural life."[3]

A convict, in the penitentiary, is civilly dead, and cannot be sued.[4]

Natural death. Death from the unassisted operation of natural causes; death by visitation of the Creator. **Violent death.** Death caused by human agency. See CORONER.

A person who for seven years has not been heard of by those who would naturally have heard of him, had he been alive, is presumed to be dead; but the law raises no presumption as to the precise time of death. That he died before the end of that period may be presumed, it appearing that he encountered a special peril or came within the range of some impending or immediate danger which might reasonably be expected to destroy life.[5] See DIE, Without children.

Death by the hands of justice. The execution of a person convicted of crime in any form allowed by law.[6] See under DIE.

Death penalty. Punishment by deprivation of life; capital punishment. **Death sentence.** A sentence involving death. **Death warrant.** An order for the execution of a person who has been sentenced to punishment by death.

The manner of inflicting the punishment of death shall be by hanging.[7]

The language of a death-sentence is believed to be substantially as follows: "A B, having been convicted of the felony with which you stand charged, and of the crime of murder in the first degree [or other capi-

[1] International Bank *v.* Sherman, 101 U. S. 406 (1879).

[2] Graham *v.* La Crosse, &c. R. Co., 102 U. S. 161 (1880).

[3] 1 Bl. Com. 132; 2 *id.* 257; 6 Johns. 118; Mo. R. S. 1855, p. 642.

[4] Rice County *v.* Lawrence, 29 Kan. 161 (1883).

[5] Davis *v.* Briggs, 97 U. S. 633-34 (1878), cases; Newell *v.* Nichols, 75 N. Y. 86-90 (1878), cases; Evans *v.* Stewart, 81 Va. 733-38 (1886), cases; Doe *v.* Nepean, 2 Sm. L. C. 510; 1 Greenl. Ev. § 41; 2 Whart. Ev. §§ 1274-78, cases; 92 Am. Dec. 704-8, cases.

[6] Breasted *v.* Farmers' Life & Trust Co., 8 N. Y. 302 (1853).

[7] R. S. § 5394.

tal offense], the sentence of the law is, that for this offense you be taken hence to the jail of the county, whence you came, and thence, at such time as the governor of the State [or, the President of the United States] may, by his warrant, appoint, to the place of execution, and that you be then and there hanged by the neck until you be dead. And may God have mercy upon your soul."

The wording of a recent death-warrant was:

Commonwealth of Pennsylvania, —— ——, governor of said commonwealth, to —— ——, high sheriff of the county of Allegheny, sends greeting:

Whereas, At a court of oyer and terminer and general jail delivery held at Pittsburgh in and for the county of Allegheny at September session, 1885, a certain —— —— was tried upon a certain indictment charging him with the crime of murder, and was, on the 18th day of November, 1885, found guilty of murder in the first degree, and was thereupon, to wit, November 19, 1885, sentenced by the said court, that he, the said —— ——, be taken thence to the jail of Allegheny county, whence he came, and thence to the place of execution at such time as the governor of this commonwealth by his warrant may appoint, and there and then he be hanged by the neck until he be dead. Now, therefore, this is to authorize and require you, the said —— ——, high sheriff of the county of Allegheny as aforesaid, or your successor in office, to cause the sentence of the said court to be executed upon the said —— —— between the hours of 10 A. M. and 3 P. M., on Thursday, the 23d day of February, Anno Domini, one thousand eight hundred and eighty-eight, in the manner directed in the seventy-sixth section of the act of general assembly of this commonwealth, approved the 31st day of March, A. D., 1860, entitled an act to consolidate, revise and amend the laws of this commonwealth relating to penal proceedings and pleadings, and for so doing this shall be your sufficient warrant.

Given under my hand and the great seal of the State at Harrisburg this 20th day of January, in the year of our Lord one thousand eight hundred and eighty-eight, and of the commonwealth the one hundred and twelfth.

—— ——,
Secretary of the commonwealth.

Punishment by death is known as "the extreme penalty of the law." It is not viewed as an equivalent, even in murder, nor as retaliation, but as the highest penalty man can inflict, and tending most to personal security.[1] See further CAP; EXECUTION, 3; PUNISHMENT, Capital.

Death watch. Special guard appointed, a few days (perhaps eight to fourteen) before execution, to observe the actions of a prisoner under sentence of death, in order to discover and defeat any plan formed or attempt made to effect his escape, and to prevent him from committing suicide; also, the occasion for taking such extra precaution, and, the number of days during which the precaution is exercised.

The persons who actually perform the service may be designated as the "day" and the "night" watch.

See also ACCIDENT, Insurance; DIE; ABATEMENT, 4; ACTIO, Personalis; AGENT; BURIAL; CONCEAL, 1; DAMAGES; DECEDENT; DECLARATION, 1, Dying; DEODAND; DONATIO; HOMICIDE; INSURANCE; MORTALITY; POISON, 2; REVIVE; SURVIVE. Compare MORS.

DEBAR. See BAR, 3.

DEBATE. See LIBERTY, 1, Of speech; PRIVILEGE, 4.

DEBAUCH. In French, *debauche*, from the shop: to entice away from work or duty; to entice and corrupt. Referring to a woman, at first meant to seduce, then to seduce and violate: in which twofold sense it is used in law.[1]

DEBENTURE. 1. A custom-house certificate that an importer is entitled to a drawback.[2]

2. A bond in the nature of a charge on government stock, or on the stock of a public company.[3] See DEBET.

A security issued by a public (usually, a railway) company, and may be a mortgage of its lands and stock. It is in the form of a promissory note, subject to strict regulations as to transfers, and has coupons attached for the payments of interest.[4]

The word does not admit of accurate definition. . . It expresses an acknowledgment of a debt by either a corporate body or a large partnership.[5]

"You may have mortgage debentures, which are charges of some kind upon property; or you may have debentures which are bonds. . . You may also have a debenture which is nothing more than an acknowledgment of debt, or you may have an instrument like this in question, which is a statement by two directors that a company will pay."[6]

DEBET. L. He owes; from *debere: de habere*, to have a thing of some one. Compare ASSUMPSIT.

Debet et detinet. He owes and withholds.

The form of the writ of debt is sometimes in the *debet* and *detinet*, and sometimes in the *detinet* only: that is, the writ states, either that the defendant owes and unjustly detains the debt or thing in question, or only that he unjustly detains it. The writ is brought in the *debet* as well as in the *detinet*, when sued by one of the original contracting parties who personally

[1] 4 Bl. Com. 13, 376.

[1] [Koenig v. Nott, 2 Hilt. 329 (N. Y., 1859), Daly, F. J.: 8 Abb. Pr., o. s., 389.

[2] Act of Congress, 2 March, 1799, s. 60.

[3] [Mozley & Whiteley's Law Dict.

[4] [Brown's Law Dict.]

[5] British India Steam Navigation Co. v. Commissioners of Internal Revenue, 44 L. T. 378 (1881), Grove, J. See also *Re* Rogers' Trusts, 1 Drew. & S. 341 (1860).

[6] 44 L. T. 381, *supra*, Lindley, J. See Jones, Ry. Sec. § 72.

gave the credit, against the other who personally incurred the debt, or against his heirs, if they are bound to the payment; as, by the obligee against the obligor. But if brought by or against an executor for a debt due to or from the testator, this, not being his own debt, shall be sued for in the *detinet* only. So, also, if the action be for goods, or corn, or a horse, the writ shall be in the *detinet* only, for nothing but a sum of money, for which I (or my ancestor in my name) have personally contracted, is properly considered my debt.[1]

Debit. He owes. See under DEBT, 2.

Debitum. A thing due or owing; an obligation; a debt, *q. v.*

Debitum in præsenti, solvendum in futuro. An obligation existing in the present, dischargeable in the future.

Describes any class of obligations complete at the present day, though payable in the future.[2]

Debitum sine brevi. Debt without a writ or declaration. Written also *debitum*, and *debit, sans breve;* and abbreviated *d. s. b.*

1. When an action at common law was begun by original bill, the allegations in which resembled the allegations in a modern declaration, the action was said to be by bill, or by bill without a writ,— other actions being founded upon an original writ.

2. In the practice of several States, a debt confessed by warrant of attorney and entered of record, either with or without a declaration accompanying it. See further ATTORNEY, Warrant of.

Nihil, or nil, debet. He owes nothing. The plea which forms the general issue in an action of debt upon a parol contract.[3]

DEBRIS. See AQUA, Currit, etc.

DEBT. Whatever one owes.[4] See DEBET.

1. A liquidated demand.

A sum of money due by certain and express agreement.[5]

As, by a bond for a determinate sum, by a bill or note, by a special bargain, or as rent reserved on a lease: in which cases the amount is fixed, specific, does not depend upon subsequent valuation to settle it.[6]

Frequently, a sum of money reduced to a certainty, and distinguished from a claim for uncertain damages.

As, in statutes of set-off, where there are mutual debts between plaintiff and defendant. . . If we regard the original, *debitum*, a thing due or owing, there is no reason why compensation for a breach of contract may not be "due," although not reduced to a certain sum. This enlarged sense, at least, may best answer the intent of the legislature.[1]

A sum of money due by contract.

It is not essential that the contract be express, nor that it fix the precise amount to be paid.[2]

That for which an action of debt will lie — a sum of money due by certain and express agreement. In a less technical sense, any claim for money; in a more enlarged sense, any kind of a just demand.[3]

In its most general sense, that which is due from one person to another, whether money, goods, or services; that which one is bound to pay to or perform for another.[4]

Standing alone, is as applicable to a sum of money promised at a future day as to a sum now due and payable. The former is a debt *owing*, the latter a debt *due*. . . A sum in all events payable is a debt, without regard to the time of payment. A sum payable upon a contingency is not a debt.[5] See DUE, 1.

Liability in a borrower to be sued is not essential.[6]

The idea is that one has bound himself to pay money which he may be compelled to pay.[7]

"Whatever is due to a man under any form of obligation or promise." Coke says that *debitum* signifies not only a debt for which an action of debt lies, but, generally, any duty to be yielded or paid.[8]

A fixed and certain obligation to pay money or some other valuable thing, in the present or in the future.[9]

Any contract whereby a determinate sum of money becomes due and is not paid, but remains in action, is a "contract of debt."

In this light the word comprehends a variety of acquisitions, usually divided into debts — of record, by special contract, and by simple contract.

A *debt of record* is a sum of money which appears to be due by evidence of a court of record; a *debt by specialty*, a sum acknowledged to be due by an instrument under seal; a *debt by simple contract* is evidenced

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[1] 3 Bl. Com. 156.

[2] 13 Pet. 494; 11 Mass. 270; 30 Minn. 7; 29 Pa. 151.

[3] 3 Bl. Com. 305; Steph. Pl. 174.

[4] Rodman *v.* Munson, 13 Barb. 197 (1852).

[5] 3 Bl. Com. 154; McElfresh *v.* Kirkendall, 36 Iowa, 226 (1872).

[1] Frazer *v.* Tunis, 1 Binn. 262 (1808), Tilghman, C. J.

[2] United States *v.* Colt, 1 Pet. C. C. 146 (1815), Washington, J.

[3] New Haven Saw Mill Co. *v.* Fowler, 28 Conn. 103 (1859).

[4] Kimpton *v.* Bronson, 45 Barb. 626 (1866), cases; 7 N. Y. 197; 24 *id.* 290.

[5] People *v.* Arguello, 37 Cal. 525 (1869).

[6] Mayor of Baltimore *v.* Gill, 31 Md. 390 (1869).

[7] Scott *v.* City of Davenport, 34 Iowa, 213 (1872).

[8] New Jersey Ins. Co. *v.* Meeker, 37 N. J. L. 301 (1875); Burrill; Bowen *v.* Hoxie, 137 Mass. 531 (1884); 3 Metc. 526; 113 U. S. 463.

[9] [Appeal of City of Erie, 91 Pa. 402 (1879).

by mere oral testimony or by an unsealed note.[1]

Antecedent debt. See SECURITY (3), Collateral.

Mutual debts. Moneys due or owing by two persons to each other; debts reciprocally due.

"Mutual debts," "dealing together," and "indebted to each other," in statutes of set-off, are of the same import.[2]

"Mutual debts" and "mutual credits," in § 5013, Rev. St., are correlative expressions. What is a debt on one side is a credit on the other. In case of bankruptcy only such credits as must in their nature terminate in debts are the subject-matter of set-off,[3] *q. v.* Compare CREDIT, Mutual.

Present or existing, prior, and future or subsequent debts. See CONVEYANCE, 2, Fraudulent; SECURITY, 1.

Privileged debt. A debt payable before other debts — in the event of insolvency.

Results from the character of the creditor, as, a State or the United States; or form the nature of the debt, as, funeral expenses.

Priority of payment of debts due to the government is founded upon motives of public policy, to secure revenue.[4]

Public debt. A national or State obligation; a public security; rarely, if ever, the obligation of a town.[5]

"The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void."[6]

2. The non-payment of any such definite sum of money being regarded as an injury, the remedy afforded is known as the action of debt or simply "debt:" the form of action to compel the performance of the contract.

This is the shortest and surest remedy, particularly where the debt arises upon a specialty. But if A verbally agrees to pay B a certain price for a certain parcel of goods, and fails in the performance, an action of debt will lie against A; for this is also a determinate contract: but if he agrees for no settled price, he is liable upon a special "action on the case," according to the nature of the contract.[1]

The action lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty — a sum requiring no future valuation to settle its amount:[2] a sum which can be ascertained from fixed data by computation.[3]

It is not material in what manner the obligation was incurred or by what it is evidenced, if the sum is capable of being definitely ascertained. Nor is it necessarily founded upon a contract.[3]

The action lies for *money* only. On an obligation to pay or deliver any other article, covenant is the remedy, and the recovery is of a compensation in damages.[4] See ASSUMPSIT; COVENANT, 2.

Debit. To charge as due or owing; also the sum so charged.

Debtor. One who owes another anything, or is under obligation, arising from express agreement, implication of law, or the principles of natural justice, to render and pay a sum of money to another.[5]

The correlative *debtee* has been in use.[6]

One who is under obligation to discharge some duty, or to pay damages for its non-performance, is a debtor, as really as one who is under obligation by bond to pay a sum of money.[7]

Joint debtor. One of several persons who jointly owe a sum of money; a co-obligor. See JOINT.

As to "absconding" and "absent" debtors, see those terms; also, CONCEAL, 2.

A person, without request or assent, cannot make another his debtor by paying his debt, as, taxes;[8] otherwise, as to honoring commercial paper, as see ACCEPT, 2.

The rule is that "the debtor must seek the creditor," and pay or tender payment of the debt when due.[9]

Indebted. The state of being in debt, absolutely, and not conditionally — as is a surety or an indorser.[10]

Implies a debt presently payable; as, in an affidavit for an attachment.[11]

[1] [2 Bl. Com. 464-66;*3 *id.* 154, 166. See 2 Story, 450; 2 Wash. 385; 11 Ark. 355; 15 Ind. 282; 1 Nev. 589; 40 N. J. E. 178; 13 Barb. 77; 38 Ohio St. 570; 51 Vt. 86.

[2] Pate *v.* Gray, 1 Hempst. 157 (1831).

[3] Libby *v.* Hopkins, 104 U. S. 307-8 (1881), cases.

[4] United States *v.* State Bank, 6 Pet. *35 (1832).

[5] Morgan *v.* Cree, 46 Vt. 786 (1861).

[6] Constitution, Amd. XIV, sec. 4.

[1] 3 Bl. Com. 155.

[2] Stockwell *v.* United States, 13 Wall. 542 (1871).

[3] Mills *v.* Scott, 99 U. S. 29 (1878); 7 Wall. 79, 80.

[4] Minnick *v.* Williams, 77 Va. 760 (1883); Story, Contr. § 969.

[5] Stanly *v.* Ogden, 2 Root, 262 (1795).

[6] 3 Bl. Com. 18.

[7] New Haven Saw Mill Co. *v.* Fowler, 28 Conn. 103 (1859); 34 Iowa. 218.

[8] Homestead Co. *v.* Valley R. Co. 17 Wall. 167 (1873); Gurnee *v.* Bausemer, 80 Va. 872 (1885), cases.

[9] Johnston *v.* Hargrove, 81 Va. 121 (1885).

[10] See St. Louis Perpetual Ins. Co. *v.* Goodfellow, 9 Mo. 153 (1845).

[11] Trowbridge *v.* Sickler, 42 Wis. 420 (1877), cases.

Indebtedness. The condition of owing money; also, the amount owed; indebtment.

May include an obligation for future payment equally with that presently due;[1] and may be by contract or tort.[2]

The "indebtedness" that may be created by a city in excess of a certain percentage on its taxable property includes an agreement of any kind to pay money where no suitable provision has been made for the prompt discharge of the obligation.[3]

See ACCORD; ACCOUNT, 1; ACKNOWLEDGMENT, 1; ADMINISTER, 4; BANKRUPTCY; CERTUM; CHARGE, 2 (2); CLAIM; COMPOSITION, 3; CONTRACT; DEMAND; EXEMPTION; EXTINGUISH; FLOATING; FUND; GUARANTY, 2; INCUR; INSOLVENCY; LIABILITY; LIEN; MERGER, 2; NOVATION; PAY; PENALTY; PRE-EXISTING; PREFERENCE; PRIOR; PRISON; RECOGNIZANCE; RECOVERY; RELEASE; RESCISSION; SUBROGATION; TAKE, 8; TAX, 2; TENDER, 2.

DECAPITATION. See CAPITAL, 1.

DECAY. See PERISHABLE; SOUND, 2 (1).

DECEDENT.[4] A deceased person whose estate is being settled. See ADMINISTER, 4; CREDITOR, Bill; DISTRIBUTION, 2; PART, 1; PROBATE; RESIDUE; WILL, 2.

DECEIT. Any device or false representation by which one man misleads another to his injury.

A fraudulent misrepresentation, by which one man deceives another, to the injury of the latter.[5]

Deceit practiced to induce one to enter into a contract may be *active*, as where falsehood and misrepresentation are actually used by one party to deceive the other; or *passive*, as where a vendor knows that a purchaser is under a delusion influencing his judgment in favor of purchasing, and yet suffers him to complete his purchase.[6]

Other examples are: where one sells what is not his own, or sells unwholesome provisions;[7] or falsely represents his credit to a mercantile agency.[8]

While every deceit comprehends a lie, it is more than a lie — on account of the view with which it is practiced, of its being coupled with some dealing, and of the injury it is calculated to occasion, and does occasion. But a mere lie thrown out at random without intention to hurt anybody, and which a plaintiff was foolish enough to believe, will not support an action.[1]

Formerly the remedy was by a "writ of deceit;" now, unless otherwise provided by statute, it is by an action of trespass on the case.

Besides the special action on the case there is also an "action of deceit," which gives damages in particular cases of fraud, principally where one man does anything in the name of another, by which he is deceived or injured. But an action on the "case" for damages, in the nature of a writ of deceit, is the usual remedy.[2]

To a recovery it is essential that the *defendant:* (1) actually made a false representation of a material fact, by words or acts unambiguous in import;[3] (2) knew the falsity, or did not know the truth, of the representation[4] — the word "deceit" of itself imports this;[5] (3) intended that the plaintiff should act upon the representation — the essence of the injury;[1, 6] and that the *plaintiff:* (1) acted upon the representation; (2) to his actual damage;[7] (3) because he was ignorant of the falsity of the representation, and believed it to be true.[7]

The defendant or his agent must have been guilty of some moral wrong; legal fraud alone will not support the action.[8]

The plaintiff must prove representations of material facts which are false, and which induced him to act; and either that the defendant knew the representations to be false, or that, the facts being susceptible of knowledge, he represented, as of his own knowledge, that they were true, when he had no such knowledge.[9]

It is not only necessary to establish the telling of an untruth, knowing it to be such, with intent to induce the person to whom told to act upon it, but also that he altered his condition in consequence, and suffered damage thereby. If it appears affirmatively that although he altered his condition, after hearing the untruth, he was not induced to do it as a consequence, but did it independently, the action fails.[10]

In a recent case the plaintiff averred that he had been induced to purchase the lease, good-will, and fixtures of a livery-stable, upon false, fraudulent, and deceitful representations by the defendant that he owned the lease, was in peaceable possession, etc.

[1] Pittsburgh, &c. R. Co. *v* Clarke, 29 Pa. 151 (1857); Law *v.* People, 87 Ill. 393 (1877).

[2] Mattingly *v.* Wulke, 2 Bradw. 172 (1878), cases.

[3] Sackett *v.* New Albany, 88 Ind. 479 (1883); Valparaiso *v.* Gardner, 97 *id.* 6-7 (1884).

[4] De-ce'-dent.

[5] Farwell *v.* Metcalf, 61 Ill. 374 (1871), Thornton, J.

[6] [Smith, Contr. 206.

[7] 3 Bl. Com. 166.

[8] Eaton *v.* Avery, 18 Hun, 44 (1879).

[1] Pasley *v.* Freeman, 3 T. R. 56 (1789), Buller, J.; *ib.* 63, Ashhurst, J.

[2] 3 Bl. Com. 165.

[3] Halls *v.* Thompson, 1 Smedes & Mar. 481 (1843), cases.

[4] Gibbs *v.* Odell, 2 Coldw. 133 (1865), cases; Stone *v.* Covell, 29 Mich. 363 (1874).

[5] Farwell *v.* Metcalf, 61 Ill. 374-75 (1871), cases.

[6] Lord *v.* Goddard, 13 How. 210 (1851), cases; Farwell *v.* Metcalf, 61 Ill. 375 (1871), cases; Bigelow, Torts, 31.

[7] Cases *supra* and *infra*.

[8] Erie City Iron Works *v.* Barber, 106 Pa. 135, 138, 140 (1884), cases.

[9] Cole *v.* Cassidy, 138 Mass. 439 (1885), Morton, C. J.; 117 *id.* 195; 108 *id.* 382.

[10] Ming *v.* Woolfolk, 116 U. S. 599, 602-3 (1886), cases, Woods, J.; Southern Development Co. *v.* Silva, 125 *id.* 250 (1888); Patterson *v.* Wright, 64 Wis. 289 (1885).

To support an action of tort, it was held that the plaintiff must show: that the representations were untrue, were known by the defendant to be untrue, were calculated to induce him to act, and he, believing them, was induced to act accordingly; that the representations must have been both false and fraudulent; that a positive statement of a falsehood, or the suppression of a material fact which the defendant ought to have known, would constitute the falsity; that if any essential point, requisite to maintaining the action, was wanting, recovery could not be had; and that the defendant, after judgment against him, was not entitled to an exemption of his property from execution for debt.[1]

Where the fraudulent concealment or misrepresentation is made by the vendor of land, as to its nature, quality, quantity, situation, or title, the representation must be in reference to a material thing unknown to the vendee from want of examination, or from want of opportunity to be informed. And if the buyer trusts to representations not calculated to impose upon a man of ordinary prudence, or if he neglects means of information easily within his reach, he must suffer the consequences of his own folly and credulity. The vendee must show, further, that some deceit was practiced for the purpose of putting him off his guard, or that special confidence was reposed in the representations of the vendor, and that the contract was made upon the strength of that confidence. To support the action there must be fraud as distinguished from mere mistake.[2]

Where the question is as to misrepresentation of facts peculiarly within the defendant's knowledge, "the mere fact that the person deceived to his hurt had means of learning the truth, had he made diligent inquiry, is not necessarily fatal to the right to recover."[3]

Thus, a distinct statement by the seller of a patent-right that he owned the right, knowing it to be false, and with intent to deceive the buyer, and on which statement the buyer acted to his injury, will sustain an action, even if the buyer might have discovered the fraud by searching the records of the patent office.[4]

See AGE, Full; CAVEAT, Emptor; CONCEAL, 5; CONSPIRACY; ESTOPPEL; PROSPECTUS; WARRANTY, 2. Compare DOLUS; FRAUD; PRETENSE.

DECEM. See TALES.

DECENT. See INDECENT.

DECEPTION. 1. In the sense of a false representation to induce credit or confidence, see DECEIT; ESTOPPEL; FRAUD, Actual.

2. In the sense of stratagem to discover crime, see COMMUNICATION, Privileged, 1; DECOY.

[1] Cox v. Highley, 100 Pa. 249, 252 (1882). See also 1 Chitty, Pr. 832; Bigelow, Torts, 9; Cooley, Torts.

[2] Clark v. Edgar, 12 Mo. Ap. 352 (1882).

[3] Arthur v. Wheeler & Wilson Manuf. Co., 12 Mo. Ap. 340 (1882).

[4] David v. Park, 108 Mass. 502 (1870), cases; Watson v. Atwood, 25 Conn. 320 (1856).

DECISION. The result of the deliberations of one or more persons, official or unofficial; the judicial determination of a question.

Somewhat more abstract or more extensive than "judgment" or "decree,"[1] *qq. v.*

The "decision" of a court is its judgment; its "opinion" is the reason given therefor. The former is recorded upon its rendition, and can be changed only through an application to the court. The latter is the property of the judges, subject to modification until transcribed in the records.[2]

Decide. Includes the power and right to deliberate, to weigh the reasons for and against, to see which preponderate, and to be governed by that preponderance.[3]

Judicial decision. The determination of a court, in a cause. **Extra-judicial decision.** A determination beyond the limits of authority; a ruling which transcends jurisdiction.

A decision determines no more than what is necessary to the case in hand,—does not go beyond the limits of what is required by the exigencies of the case.[4]

At most, decisions are only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever found to be defective, ill-founded, or otherwise incorrect. The laws of a State are understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of law.[5]

Decision, rules of. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.[6]

This embraces the statute and common law of a State, including statutes relating to the law of evidence in civil cases at common law.[7] In criminal cases the laws of the State in existence in September 24, 1789, are the rules of decision.[8]

[1] See Abbott, Law Dict.; 26 Moak, 449; 55 Vt. 582.

[2] [Houston v. Williams, 13 Cal. 27 (1859), Field, J.

[3] Commonwealth v. Anthes, 5 Gray, 253 (1855). See 43 Md. 629; 16 Moak, 86.

[4] Hauenstein v. Lynham, 100 U. S. 490 (1879); Trade-Mark Cases, *ib.* 96 (1879); Wright v. Nagle, 101 *id.* 796 (1879); State v. Baughman, 38 Ohio St. 459 (1882); 10 Oreg. 114.

[5] Swift v. Tyson, 16 Pet. 18 (1842), Story, J.; Nat. Bank of the Republic v. Brooklyn City, &c. R. Co., 102 U. S. 29 (1880); 1 Bl. Com. 69.

[6] R. S. § 721: Act 24 Sept. 1789, § 34.

[7] M'Niel v. Holbrook, 12 Pet. *89 (1838).

[8] United States v. Reid, 12 How. 361 (1851).

Rules of State practice acted upon by the Federal courts, as obligatory upon them, are also included — they have the efficacy of rules adopted by express order of those courts.[1]

Not included are decisions upon general principles of law, for the reasons already given.[2]

The provision does not apply to proceedings in equity, or in admiralty, or to criminal offenses against the United States. The Federal courts follow the decisions of the highest court of a State on questions which concern merely the constitution or laws of that State; also, a course of those decisions, whether founded on statutes or not, which has become a rule of property within the State; also in regard to rules of evidence in actions at law; also in reference to the common law of the State, and its laws and customs of a local character when established by repeated decisions.[3] See COMITY, Judicial; PROCEDURE.

English decisions. See at end of STATUTE, 2.

Compare DECISUM. See COMITY, Judicial; DICTUM, 2; IMPAIR; OPINION, 1 (2); REPORT, 1 (2).

DECISORY. See OATH, Decisory.

DECISUM. L. Cut off, settled, decided; a decision, a precedent.

Stare decisis, et non quieta movere. To stand by precedents and not to disturb what is settled: follow decided cases; adhere to precedents. Shortened to *stare decisis*.

Once a point of law is firmly settled by a decision, that decision rules like cases subsequently arising.

When a court has once laid down a principle of law as applicable to a certain state of facts, for the sake of the stability and certainty of the law it will apply that principle to all future cases where the facts are substantially the same.[4]

Stability and certainty in the law are of the first importance. The certainty of a rule is often of more importance than the reason of it.[5]

Where there has been a series of decisions by the highest tribunal, the rule *stare decisis* is regarded as impregnable — except by legislative enactment.[6] This is true in a special sense where the law has become settled as a rule of property, and titles have been acquired on the strength thereof.[7]

The maxim contemplates points actually involved and argued. The results established, not the reasons assigned, make the case an authority. In considering the soundness of the doctrine enunciated courts of concurrent or of foreign jurisdiction pay regard to the thoroughness of the arguments of counsel, the ability, learning, and jurisdictional authority of the court, and the care and research bestowed in preparing the opinion. The meaning, moreover, is to be drawn from the opinion as a whole.

The maxim is not applied to a case decided contrary to principle, nor to a decision considered merely as a judgment between the immediate parties, nor to decisions upon scientific theories, as, of insanity.[1]

See COMITY, Judicial; COURTS, United States, "Federal question," page 277.

DECLARANT. See DECLARE, 4.

DECLARATION. 1. An assertion or statement explicitly made.

Any statement of material matters of fact sworn to and subscribed is a written declaration.[2]

A declaration which accompanies and qualifies an act is part of it; but when made of a thing that is past it is mere hearsay.[3]

Made contemporaneously, and by a person interested in the matter, a declaration is admissible as original evidence: (1) when the fact of the making is in question; (2) when the inquiry is as to expressions of bodily feelings — their existence or nature;[4] (3) in cases of pedigree,[5] *q. v.*; (4) when part of the *res gestæ*.[6]

The declarations of an injured party, made *after* the injury has happened or the cause of suffering occurred, with regard to the facts of the injury or the cause of the suffering, may not be shown, in an action for damages by such person; nor may his declarations with regard to past suffering or pain, or past conditions of body or mind, be shown. Some authorities seem to oppose the last proposition, especially where the declarations are made to a physician or surgeon while examining the party as a patient. Declarations, however, with regard to present suffering or present condition of the body or mind may generally be shown by any person who heard them; but there are authorities also seemingly opposed to this proposition.[7]

[1] United States *v.* Douglass, 2 Blatch. 214 (1851); The Mayor *v.* Lord, 9 Wall. 413 (1869).

[2] Swift *v.* Tyson, *ante*. See generally Watson *v.* Tarpley, 18 How. 520 (1855); Thompson *v.* Phillips, Baldw. 246 (1830); Sonstiby *v.* Keeley, 11 F. R. 580–81 (1882), cases; Burt *v.* Keyes, 1 Flip. 61 (1861); 112 U. S. 255.

[3] Bucher *v.* Cheshire R. Co., 125 U. S. 555 (1888), cases, Miller, J.

[4] Moore *v.* Albany, 98 N. Y. 410 (1885), Earl, J.

[5] N. W. Forwarding Co. *v.* Mahaffey, 36 Kan. 157 (1887): White *v.* Denman, 1 Ohio St. 115 (1853).

[6] Harrow *v.* Meyers, 29 Ind. 470 (1868); 88 *id.* 566.

[7] Reed *v.* Ownby, 44 Mo. 206 (1869); Hihn *v.* Courtis, 31 Cal. 402 (1866); Pioche *v.* Paul, 28 *id.* 110 (1863).

[1] See generally 25 Am. Law Reg. 745–57 (1886), cases; 77 Va. 24–25; 68 Ga. 797; 100 Ind. 422; 41 N. J. E. 479; 5 Johns. 258; 22 Barb. 97, 106; 9 Oreg. 470; 10 *id.* 66; 78 Pa. 500; 87 *id.* 286; 62 Wis. 138, 151, 194; 63 *id.* 138, 151, 194; 1 Bl. Com. 69; 1 Kent, 477; Cooley, Const. 57; Wells, Res. Adj., &c. 527, 583.

[2] United States *v.* Ambrose, 108 U. S. 340 (1883), Miller, J.: R. S. § 5392.

[3] Long *v.* Colton, 116 Mass. 416 (1876); Bender *v.* Pitzer, 27 Pa. 335 (1856).

[4] Travelers' Ins. Co. *v.* Mosley, 8 Wall. 404 (1869); Roosa *v.* Boston Loan Co., 132 Mass. 439 (1882), cases; Commonwealth *v.* Felch, *ib.* 23 (1882); 1 Greenl. Ev. § 102; 1 Whart. Ev. § 268.

[5] 1 Greenl. Ev. §§ 103–4; 1 Whart. Ev. §§ 202–25.

[6] 1 Greenl. Ev. §§ 108–9, 111–14; 1 Whart. Ev. §§ 258–63.

[7] Atchison, &c. R. Co. *v.* Johns, 36 Kan. 781–83 (1887),

After one's death his former declarations are admissible as secondary evidence when on a matter: (1) of general interest;[1] (2) of ancient possession;[2] (3) against interest — before the controversy arose, and it was the deceased's duty to know the facts;[3] (4) when in the nature of a dying declaration.

A declaration by an agent binds his principal, and by a partner binds his copartner, when made during the continuance of the relation and while the particular transaction is pending.[4]

After a person has made a sale of personalty he stands as a stranger to the title, and his declaration respecting the title is not binding on the vendee. Such declaration is admissible only when it appears from independent evidence that both vendor and vendee were engaged in a common purpose to defraud the creditors of the vendor, and that the admission had such relation to the execution of the purpose as to constitute part of the *res gestæ*.[5]

The declaration of a conspirator, to bind his fellows, must be made while acting in furtherance of the common design.[6] See CONSPIRACY.

Declaration of intention. A formal, solemn asseveration by an alien that it is his *bona fide* intention to become a citizen. See NATURALIZATION.

Declaration of Rights. See RIGHT, 2, Declaration, etc.

Declaration of trust. An acknowledgment that property, the title to which the declarant holds, belongs, in whole or in part, to another; also, the writing in which such acknowledgment is made. See TRUST, 1.

Dying declaration. A statement of a material fact concerning the cause and circumstances of a homicide, made by the victim under the solemn belief of impending death.[7]

Such declaration as is made by the party, relating to the facts of the injury of which he afterward dies, under the fixed belief and moral conviction that his death is impending and certain to follow almost immediately, without opportunity of repentance, and in the absence of all hope of avoidance; when he has despaired of life and looks to death as inevitable and at hand.[1]

An exception to the rule rejecting hearsay evidence is made in the case of dying declarations. The general principle on which they are admitted is, they are declarations made in extremity, when the party is at the point of death, when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn is considered as creating an obligation equal to that imposed by a positive oath administered in a court of justice.[2]

The person must have been qualified to testify, and the declaration must be complete. The competency of the evidence is to be determined by the court; its weight by the jury. If resting in memory, the substance of all that was stated may be given. The declaration may be by signs.[3]

Declarations of the deceased are admissible upon a trial for murder only as to those things as to which he would have been competent to testify if sworn as a witness in the cause: they must relate to facts only, not to mere matters of opinion. It is essential to the admissibility of such declarations, and it is a primary fact to be proved by the party offering them, that they were made under a sense of impending death. But it is not necessary that they be stated at the time to be so made; it is enough if it satisfactorily appears in any mode that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, from the opinions of the medical or other attendants expressed to him, or from his conduct or other circumstances of the case. Such declarations must relate to the circumstances of the death; they cannot be received as proof when not connected as *res gestæ* with the death.[4]

See further ADMISSION, 2; ESTOPPEL; HEARSAY; PAROL, 2, Evidence; RES, Gestæ.

2. A statement in legal form of the plaintiff's cause of action.[5]

The plea by which a plaintiff in a suit at law sets out his cause of action, as the word "complaint" is in the same sense the technical name of a bill in chancery.[6]

The first pleading filed in a suit is the declaration, *narratio*, count; anciently called the "tale." In this the plaintiff sets forth his cause of complaint at length;

cases, Valentine, J. See generally 22 Cent. Law J. 509 (1886), cases.

[1] 1 Greenl. Ev. §§ 128-40; 1 Whart. Ev. §§ 185-200, 252.

[2] 1 Greenl. Ev. §§ 131-46; 1 Whart. Ev. § 201.

[3] 1 Greenl. Ev. §§ 147-55; 1 Whart. Ev. §§ 226-37.

[4] 1 Greenl. Ev. §§ 112-14, 174-76; 2 Whart. Ev. § 1192.

[5] Winchester Manuf. Co. *v.* Creary, 116 U. S. 165 (1885); Jones *v.* Simpson, *ib.* 611 (1886); Robertson *v.* Pickrell, 109 *id.* 616 (1883); Moses *v.* Dunham, 71 Ala. 177 (1881); Roberts *v.* Medbery, 132 Mass. 101 (1882), cases; Scheble *v.* Jordon, 30 Kan. 354 (1883); Barbour *v.* Duncanson, 77 Va. 76 (1883); Frink *v.* Roe, 70 Cal. 316-19 (1886).

[6] 1 Greenl. Ev. § 111; 2 Whart. Ev. §§ 1205-6.

[7] People *v.* Olmstead, 30 Mich. 435 (1874).

[1] Starkey *v.* People, 17 Ill. 21 (1855), cases.

[2] Rex *v.* Woodcock, 2 Leach, Cr. Cas. 567 (1789), Eyre, Ch. B.; 1 Greenl. Ev. § 156.

[3] 1 Greenl. Ev. §§ 151-61 *b*; Whart. Cr. Ev. § 293; People *v.* Shaw, 63 N. Y. 40 (1875); Walker *v.* State, 39 Ark. 226 (1882).

[4] People *v.* Taylor, 59 Cal. 640, 645 (1881), cases. See generally 19 Cent. Law J. 128-39 (1884), cases; 1 Kan. Law J. 134 (1885), cases.

[5] Smith *v.* Fowle, 12 Wend. 10 (1834), Savage, C. J.

[6] United States *v.* Ambrose, 108 U. S. 340 (1883), Miller, J.

it being, indeed, only an amplification of the original writ (*q. v.*) upon which his action is founded, with the additional circumstances of time and place when and where the injury was committed.[1]

A declaration contains a succinct statement of the plaintiff's case, and generally comprises the following parts: (1) The title and the date — the court, day and year, term, and number of the case; (2) the venue — State and county; (3) the commencement — A B, by his attorney or in person, complains of C D, for that, heretofore, etc.; (4) the body — which consists of: (a) the inducement (*q. v.*) — introductory matter; (b) the averments — allegations of performance of precedents by the plaintiff; (c) the counts — statements of injuries by the defendant; (5) the conclusion — "to the damage of plaintiff —— dollars; and thereupon (or wherefore) he brings suit."[2]

See further AMENDMENT, 1; CONSOLIDATE, Actions; COUNT, 4; CURE, 2; DAMAGES, General; DESCRIPTION, 4; PLEADING; SUIT, 1.

Declaratory. Rendering clear what was before obscure: giving a clear statement; making certain what might remain in doubt; explanatory; elucidatory: as, a declaratory covenant, act, statute, law.

The "declaratory part of the law" is that portion whereby the rights to be observed and the wrongs to be eschewed are clearly defined and laid down.[3]

A "statute declaratory" of the common law states what that law is, as where a custom has almost fallen into disuse or become disputable.[4]

A declaratory statute removes uncertainty as to the rule of law when decisions or prior enactments conflict. It may elucidate existing common or statute law.

Magna Charta was for the most part declaratory of the principal grounds of the fundamental laws of England.[5]

A large portion of our modern codes is but declaratory of the common law as expounded by the courts.[6]

Statutes declaratory of the meaning of former acts are not uncommon. By the courts they are regarded with respect, as expressive of the legislative opinion, and, so far as they can act upon subsequent transactions, they are of binding force. But they cannot operate to disturb rights acquired before their enactment, or to impose penalties for lawful acts done before their passage. The construction of an existing statute is a judicial function.[7] See DECLARE.

[1] 3 Bl. Com. 293; 5 Johns. 435.

[2] See 1 Chitty, Pl. 356; 7 Ark. 289; 12 Wend. 10.

[3] 1 Bl. Com. 54.

[4] 1 Bl. Com. 86.

[5] 1 Bl. Com. 127.

[6] Cincinnati City v. Morgan, 3 Wall. 298 (1865).

[7] Stockdale v. Atlantic Ins. Co., 20 Wall. 340 (1873); Koshkonong v. Burton, 104 U. S. 678 (1881); Salters v. Tobias, 3 Paige, 344 (1832).

Declare.[1] To announce clearly as fact or truth.

1. To aver, affirm, allege in express terms: as, to declare a person innocent or guilty.

2. To announce, pronounce, decide: as, to declare a contract illegal or void, or a statute unconstitutional.

3. To state or set forth as a cause of action.

4. To proclaim as due: as to declare a dividend, *q. v.*

"In no part of the application did the assured promise that he would not practice any pernicious habit. He 'declared' that he would not. To 'declare' is to state, assert, publish, utter, announce, announce clearly some opinion or resolution; while to 'promise' is to agree, 'pledge one's self, engage, assure or make sure, pledge by contract.' The assured declared, as a matter of intention, that he would not practice any pernicious habit. Was this declaration of future intention false? There is no allegation, much less proof, that it was so. The assured might well have intended to adhere to his declaration in the most perfect good faith, and yet in a moment of temptation have been overcome by this insidious enemy"[2] — intoxicating liquor, from the use of which the assured was attacked with *delirium tremens* and died.

"Declare and affirm" may be equivalent to promise and affirm.[3]

For a judge to "declare the law," is for him to charge the law arising upon the evidence.[4]

5. To determine what shall constitute; to define.

Declaring that a certain act shall constitute an offense, is "defining" that offense.[5]

Declarant. 1. One who states a thing as a fact; he who asserts a thing for the truth.

2. One who avers the truth of a matter as the basis of a cause of action. See DECLARATION, 2.

DECORATION DAY. See HOLIDAY.

DECOY. "Decoy letters" are, ordinarily, letters prepared and mailed for the purpose of detecting criminals.

It is no objection to a conviction upon evidence produced by means of a decoy letter that the prohibited act was discovered by such a letter addressed to a person who had no actual existence. There is a class of cases in respect to larceny and robbery in which it is held that when one person procures, or originally induces, the commission of the act the doer cannot be convicted — because the taking was not against the will of the owner. Many frauds upon the postal,

[1] L. *declarare*, to make clear.

[2] Knecht v. Mutual Life Ins. Co., 90 Pa. 121 (1879), Paxson, J.

[3] Bassett v. Denn, 17 N. J. L. 433 (1840).

[4] Crabtree v. State, 1 Lea, 270 (1878).

[5] United States v. Arjona, 120 U. S. 486 (1887).

revenue, and other laws, can effectually be discovered only by means of decoys.[1]

Where the guilty intent to commit crime has been formed, any one may furnish opportunities or even lend assistance to the criminal, to expose him. . . But no court will countenance a violation of positive law or contrivances for inducing a person to commit a crime.[2]

Exceptions to the principle exist in two cases: (1) Where it is a condition to an offense that it should be "against the will" of the party injured, as in prosecutions for rape, highway robbery, and assaults not offenses against the public peace, there must be an acquittal when it appears that the party alleged to be injured invited the commission of the offense. (2) Where there are physical conditions of an offense inconsistent with a trap, so that these conditions cannot exist where there is a trap, the defendant must be acquitted; as when the door of a house is opened by its owner to give a burglar entrance.

Judge Benedict, in *United States* v. *Bott*, 11 Blatch. 346 (1873), and Judge Drummond, in *Bates* v. *United States*, 10 F. R. 92 (1881), decided that it is no defense to an indictment under Revised Statutes, sec. 3893 (act of July 12, 1876), for sending an obscene book by mail, that the book was sent to a detective who gave a fictitious name. Contra, *United States* v. *Whittier*, supra.[3]

A "decoy" or "test" letter should get into the mail in some of the ordinary ways provided by the postal authorities, and as part of the "mail matter."[4]

DECREE.[5] The decision, judgment, or sentence of a court of equity, admiralty, probate, or divorce jurisdiction.

A sentence or order of a court of equity, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit, according to equity and good conscience.[6]

A judgment in a suit, equitable in nature, rendered by a court exercising equitable powers.[7]

Like a judgment at law, it is the sentence pronounced by the court upon the matter of right between the parties, and is founded on the pleadings and proofs in the cause.[1] See JUDGMENT.

A draft of a decree made by the judge for convenience, that counsel might see in a general way what decree he was prepared to enter, cannot be considered a decree; and in such case the word "decree" on the clerk's docket cannot amount to an entry of the paper as a decree. The word may mean "decree to be entered," or "stands for decree," as well as decree "entered."[2]

Decrees in equity operate only upon the person.[3]

Decretal. In the nature of a final decree.

When an "order" (which is interlocutory, and made on motion or petition), in an event resulting from a direction contained in it, may lead to the termination of the suit in like manner as a decree at the hearing, it is called a "decretal" order.[4]

Interlocutory decree. A decree which directs an inquiry as to a matter of law or fact preparatory to a final decision. **Final decree.** A decree which finally decides and disposes of the merits of the whole cause, and reserves no further question or direction for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for decision.[5]

A decree is "interlocutory" when it finds the general equities, and the cause is retained for reference, feigned issue, or consideration, to ascertain some matter of fact or law when it again comes under the consideration of the court for final disposition.[6]

A decree is "interlocutory" which leaves anything to be done to afford completely the relief contemplated. Such a decree may always, in a pending cause, on a rehearing, be altered at the sound discretion of the chancellor, however great the lapse of time.[7]

A decree is "final" which finally disposes of the subject of litigation so far as the court making it is concerned. . . It is the last decree necessary to give the parties the full and entire benefit of the judgment. . . A decree is not the less final because some further order may become necessary to carry it into effect.[8]

When the decree decides the right to the property in contest, and directs it to be delivered up, or to be

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[1] United States v. Whittier, 5 Dill. 39-41 (1878), cases, Dillon, Cir. J.

[2] *Ibid.*, 45. Treat, J.

[3] Note by Francis Wharton, Bates's Case, 10 F. R. 97-100, cases. See also note to Speiden v. State, 3 Tex. Ap. 156 (1871), in 30 Am. Rep. 129, cases; Saunders v. People, 38 Mich. 222 (1878); People v. Collins, 53 Cal. 185 (1878); State v. Jansen, 22 Kan. 498 (1879), cases; Commonwealth v. Cohen, 127 Mass. 282 (1879); Wright v. State, 7 Tex. Ap. 574 (1880); People v. Noelke, 94 N. Y. 137 (1883); 19 F. R. 89; 1 Bish. Cr. L. § 262; 25 Alb. Law J. 184 (1882); 15 Irish L. T. 583.

[4] United States v. Rapp, 30 F. R. 822 (1887), Neuman, J.

[5] L. *decretum: de cernere*, to decide literally, to separate.

[6] 2 Daniel, Ch. Pr. 986.

[7] See McGarrahan v. Maxwell, 28 Cal. 65 (1865); 3 Bl. Com. 451.

[1] Rowley v. Van Benthuysen, 16 Wend. 368 (1836).

[2] Fairbanks v. Amoskeag Nat. Bank, 32 F. R. 573 (1887), Colt, J.

[3] Wilson v. Joseph, 107 Ind. 491 (1886), cases: 26 Am. Law Reg. 48 (1887); *ib.* 50-54, cases.

[4] [Brown, Law Dict.: 22 Mich. 201.

[5] [Beebe v. Russell, 19 How. 285 (1856), Wayne, J.; Whiting v. Bank of United States, 13 Pet. 15 (1839).

[6] Kelley v. Stanberry, 13 Ohio, 421 (1844).

[7] Wright v. Strother, 76 Va. 857, 859 (1882); *ib.* 69, 169; 77 *id.* 806.

[8] Mills v. Hoag, 7 Paige, 19 (1837), Walworth, Ch. Cited, 19 How. 285; 10 Wall. 567. See 10 Paige, 181.

sole, or that the defendant pay a sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a "final" one to that extent.[1]

"The current of decisions fully sustains the rule laid down by the late Chief Justice," [2] in the foregoing case.

It is not unusual in courts of equity to enter decrees determining the rights of parties, and the extent of the liability of one party to another, giving at the same time a right to apply to the court for modification and directions. It has never been doubted that such decrees are "final." They are all that is necessary to give to the successful party the full benefit of the judgment.[3]

A "final decree" conclusively settles all the legal rights of the parties involved in the pleadings.[4] See further FINAL, 3.

A final decree in equity may be modified or set aside: by an appeal within the time prescribed by law; by a bill of review, filed within such time, charging error apparent upon the record; and by an original bill charging fraud or newly discovered evidence.[5]

Decrees are also classified as: *decrees by default*, against parties who do not appear, in which case the plaintiff takes such decree as he can stand by; *decrees by consent*, in which the form depends upon agreement; *decrees pro confesso*, by admission, in which the form depends upon the case made by the bill — as see below; and *decrees on the hearing*, which vary with the nature of the suit and the relief prayed for.[6]

A bill to "suspend a decree" seeks to avoid or suspend the operation of the decree. A bill to "carry a decree into execution" lies when, from any cause, without further aid, a decree cannot be executed.

A decree taking a bill *pro confesso*, or in default of an answer, is intended to prepare the case for final decree. Its effect is like that of a default at common law, by which the defendant is deemed to have admitted all that is well pleaded in the declaration. The matters in the bill do not pass *in rem judicatam* until the final decree is made — which may be against the plaintiff.[1]

The court will decree what is proper upon the statements in the bill assumed to be true.[2]

When a bill contains a joint charge against several defendants one of whom makes default, the correct mode of proceeding is to enter a default and a formal decree *pro confesso* against such one, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has lost his standing in court: he is not entitled to service of notices; nor to adduce evidence, nor to be heard at the final hearing — he cannot appear in any way. If the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike — the defaulter included; but if in the complainant's favor he will be entitled to a final decree against all. A final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal.[3]

A final decree affirmed by the highest court is conclusive as between the parties,[4] and as binding as a judgment at law.[5] When there are no words of qualification indicating a privilege to take further proceedings, it will be presumed to have been rendered upon the merits.[6]

The language of a decree is construed with reference to the issue put forward by the prayer for relief and the other pleadings, and which these show it was meant to decide.[7] See EQUITY; RELIEF, 2; REVIEW, 2; TERM, 4.

DECREPIT. A "decrepit person" may mean one who is disabled, incapable or incompetent, from physical or mental weakness or defects produced by age or other cause, to such an extent as to render him comparatively helpless in a personal conflict with one possessed of ordinary health and strength.[8]

DEDICATION.[9] Appropriation to public uses of some right or property: as, the dedication of a highway, landing, square, park, land for school purposes; the dedication of an invention, or of a literary or musical composition.

[1] Forgay *v.* Conrad, 6 How. 204 (1848), Taney, C. J.; Winthrop Iron Co. *v.* Meeker, 109 U. S. 183 (1883); District of Columbia *v.* Washington Market Co., 108 *id.* 242 (1883); Parsons *v.* Robinson, 122 *id.* 114-15 (1887).

[2] Thomson *v.* Dean, 7 Wall. 346 (1868), cases, Chase, Chief Justice.

[3] Stovall *v.* Banks, 10 Wall. 587 (1870), Strong, J.; 2 Daniel, Ch. Pr. 641.

[4] French *v.* Shoemaker, 12 Wall. 98 (1870). See also 70 Ala. 577; 34 Ark. 130; 9 Fla. 47; 105 Ill. 26; 3 Md. 505; 32 Mich. 201; 2 Miss. 326; 10 Nev. 405; 12 Johns. 508; 14 Wend. 542; 1 Ohio St. 520; 1 Heisk. 526; 1 Wash. T. 174.

[5] Huntington *v.* Little Rock, &c. R. Co., 3 McCrary, 585 (1883).

[6] [Abbott's Law Dict.]

[1] Russell *v.* Lathrop, 122 Mass. 302-3 (1877), cases; Attorney-General *v.* Young, 3 Ves. Jr. 209 (1796), cases; Rose *v.* Woodruff, 4 Johns. Ch. *547 (1820), cases.

[2] Thomson *v.* Wooster, 114 U. S. 104, 110-14, 118 (1885), cases.

[3] Frow *v.* De La Vega, 15 Wall. 554 (1872), Bradley, J.

[4] *Re* Howard, 9 Wall. 175, 182 (1869); Lyon *v.* Perin, 125 U. S. 702 (1888), cases.

[5] Pennington *v.* Gibson, 16 How. 76 (1853).

[6] Durant *v.* Essex Company, 7 Wall. 109 (1868), cases.

[7] Graham *v.* La Crosse R. Co., 3 Wall. 704 (1865); Carneal *v.* Banks, 10 Wheat. 181 (1825); 1 Story, Eq. §§ 28, 437, 439.

[8] Hall *v.* State, 16 Tex. Ap. 11 (1884), Willson, J.; Penal Code, Art. 496.

[9] L. *dedicare*, to devote: *dicare*, to declare.

1. The act of giving or devoting property to some public use.[1] Whence dedicator.

An appropriation of realty by the owner to the use of the public, and the adoption thereof by the public; as, the dedication of soil for a highway.[2]

Has respect to the possession of the land, not to the permanent estate.[3]

Express, when explicitly made by oral declaration, deed, or vote; *implied*, when there is acquiescence in a public use.[4]

Made according to the common law or in pursuance of statute. A statutory dedication operates by way of a grant; a common-law dedication, by way of estoppel *in pais*. May also be made *in præsenti* to be accepted *in futuro*.[5]

Is a conclusion of fact, from all the circumstances of each case.[6]

An appropriation of land to some public use, made by the owner of the fee, and accepted for such use by or on behalf of the public.[7]

The vital principle is the *animus dedicandi*. Time, though often a material ingredient, is not indispensable. A dedication is a conclusion of fact to be drawn by the jury from the circumstances of each case.[7]

At common law no special form of ceremony is necessary — simply assent in the owner, a public use, and acceptance by the public, which last may be evidenced by user. The assent, which must be clear, is provable by a writing, by parol, or by acts irreconcilable with any other construction; as, where a man makes a plan of lots, with streets, and sells lots by such plan. A use, from which a dedication may be presumed, may be much less than thirty years' continuance.[8]

Acceptance may be presumed where the gift is beneficial; use is evidence that it is beneficial.[9]

An act of Congress which merely "reserves" sections of public lands for school purposes does not work a dedication, in the strict sense.[1]

See EASEMENT; LICENSE, 1; SQUARE; USE, 2, User; WATER-MARK.

2. On dedicating an invention to public use, see PATENT, 2: USE, 2, Public.

3. Publishing an uncopyrighted work is a dedication of such work to the public.[2] See COPYRIGHT; DRAMA.

DEDIMUS. L. We have given. See DARE.

A commission to take testimony, the full name of which is **dedimus potestatem**, we have given power.

In English practice the writ issues out of chancery, and empowers the person named to perform designated judicial acts: as, to administer oaths, take answers in equity suits, examine witnesses.[3]

With us the term is seldom, if ever, used in any other sense than that of a commission to take testimony by deposition, *q. v.*

"In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage."[4]

"Common usage" here refers to the usage prevailing in the courts of the State in which the Federal court may be sitting.

Whether the writ is necessary to prevent a "failure or delay of justice" is for the court to determine upon the facts presented. "In any case" includes criminal as well as civil proceedings.[5]

The admissibility of the testimony will be reserved till the time of trial. The testimony may be considered by the court in imposing sentence.[6]

DEDUCTION. See DRAWBACK; REPRISES; SET-OFF.

DEED. 1. A thing done; an act; a matter of fact, as opposed to a matter of law: as, a condition, an estoppel, a seisin *in deed*. Corresponds to the French *pais*, q. v.

2. A writing sealed and delivered by the maker — the most solemn and authentic act a man can perform with relation to the disposal of property.[7]

A writing, sealed and delivered; to be duly executed, must be on paper or parchment.[8]

[1] Rees *v.* Chicago, 38 Ill. 335 (1865).

[2] [Hobbs *v.* Lowell, 19 Pick. 407-10 (1837), cases, Shaw, C. J.; Brakken *v.* Minneapolis, &c. R. Co., 29 Minn. 42 (1881).

[3] Benn *v.* Hatcher, 81 Va. 29 (1884), cases.

[4] See 30 Kan. 637-38, 642; 69 Ga. 546.

[5] City of Denver *v.* Clements, 3 Col. 479-83 (1877), cases; *ib.* 485-86.

[6] Quinn *v.* Anderson, 70 Cal. 456 (1886), cases.

[7] Ward *v.* Farwell, 6 Col. 69 (1881), Elbert, C. J.; Steele *v.* Sullivan, 70 Ala. 593-94 (1881), cases; Angell, Highw. 142.

[8] See Cincinnati *v.* White, 6 Pet. 440 (1832); Irwin *v.* Dixion, 9 How. 30-31 (1850), cases; Boston *v.* Lecraw, 17 *id.* 435-36 (1854); 1 Bond, 81; 11 Ala. 63; 4 Cal. 114; 25 Conn. 235; 12 Ga. 244; 76 Ind. 254; 21 La. An. 244; 34 *id.* 618; 124 Mass. 64; 27 Mo. 211; 77 *id.* 561; 33 N. J. L. 18; 22 Wend. 444, 450; 6 Hill, 411; 19 Barb. 193; 26 Pa. 187; 22 Tex. 100; 9 Wis. 244; 23 *id.* 420; 3 Kent, 451; Angell, Highw. 111.

[9] Abbott *v.* Cottage City, 143 Mass. 592-96 (1887), cases.

[1] Minnesota *v.* Bachelder, 1 Wall. 114 (1863).

[2] Bartlett *v.* Crittenden, 5 McLean, 32 (1849); Pulte *v* Derby, *ib.* 328 (1853); Thompkins *v.* Halleck, 133 Mass. 32 (1882).

[3] See 3 Bl. Com. 447; 1 *id.* 352; 2 *id.* 351.

[4] R. S. § 866: Judiciary Act, 1789, sec. 30.

[5] United States *v.* Cameron, 15 F. R. 794 (1883); Warren *v.* Younger, 18 *id.* 862 (1884); 20 Blatch. 232.

[6] United States *v.* Wilder, 4 Woods, 475 (1882): 14 F. R. 393.

[7] 2 Bl. Com. 295; Wood *v.* Owings, 1 Cranch, 351 (1808); 3 How. 645.

[8] 4 Kent, 450.

The word in itself imports a written instrument;[1] — a written instrument under seal, containing a contract of agreement which has been delivered by the party to be bound and accepted by the obligee or covenantee.[2]

An instrument or agreement under seal.[3]

This comprehensive meaning includes any writing under seal; as, a bond, lease, mortgage, agreement to convey realty, bill of sale, policy of insurance.

In common use often limited to a writing, under seal, transferring *real estate;* a deed of conveyance of realty. See CONVEYANCE, 2; TITLE, 1.

In its largest sense includes a mortgage,[4] *q. v.*

A "good deed" to land means, in a covenant, a conveyance sufficient to pass whatever right a party has in the land, without warranty or personal covenant; it does not imply the conveyance of a good title.[5]

A "good and perfect deed" to land may intend the conveyance of a perfect title clear of all incumbrances, including a right of dower.[6]

A "good and sufficient deed" may refer either to the form of the conveyance or to the interest or title.[7] A "good and sufficient deed of warranty," or "with covenant of warranty," may also refer to the kind of deed or to the quality of the title.[8]

A deed for a "sufficient title" means for a good title — with the usual covenants of warranty.[9] So as to a "good and sufficient conveyance."[10]

A "lawful deed" means a deed conveying a lawful and good title.[11]

Collateral deed. A defeasance, *q. v.*

Deed poll. A deed not indented, but cut even; a deed made by one party only: as, a sheriff's deed. See POLL, 1.

Deeds under the statute of uses. See USE, 8.

[1] Pierson *v.* Townsend, 2 Hill, 551 (1842).

[2] McMurty *v.* Brown, 6 Neb. 376 (1877).

[3] Master *v.* Miller, 4 T. R. 345 (1791). See 1 Ark. 112; 42 N. J. E. 385; 25 Hun, 294; 5 Saw. 603.

[4] Hellman *v.* Howard, 44 Cal. 104 (1872); People *v.* Caton, 25 Mich. 391 (1872).

[5] Barrow *v.* Bispham, 11 N. J. L. 110, 119 (1829).

[6] Greenwood *v.* Ligon, 18 Miss. 617 (1848); 21 *id.* 275, 582, 677.

[7] Brown *v.* Covilland, 6 Cal. 573 (1856); Brown *v.* Gammon, 14 Me. 279 (1837); Parker *v.* McAllister, 14 Ind. 16 (1859).

[8] Tindall *v.* Conover, 20 N. J. L. 215–17 (1843); Joslyn *v.* Taylor, 33 Vt. 474 (1860); 36 Ill. 69; 5 Mass. 494; 11 N. J. L. 119; 2 Johns. 595; 14 *id.* 294; 16 *id.* 269; 20 *id.* 130; 11 Vt. 47, 549.

[9] Ware *v.* Starkey, 80 Va. 196 (1885).

[10] Gates *v.* McLean, 70 Cal. 45, 50 (1886).

[11] Dearth *v.* Williamson, 2 S. & R. 499 (1816); Withers *v.* Baird, 7 Watts, 229 (1838). On void deeds, see McArthur *v.* Johnson, Phillips' Law, 317 (1867): 98 Am. Dec. 592, 596–98, cases.

Title deed. Any sealed evidence of title, *q. v.*

Trust deed. An instrument that creates a trust, *q. v.;* also, a mortgage.

See also COMPOSITION, 3; INSPECTION, 3; SEPARATION; SETTLEMENT, 3.

At common law, the general requisites of a deed are: 1. Persons able to contract and to be contracted with for the purposes intended, and a thing or subject-matter to be contracted for,—all expressed by sufficient names. 2. A sufficient consideration. 3. Writing or printing upon paper or parchment. 4. The matter must be legally and orderly set forth: there must be words sufficient to specify the agreement and bind the parties, which sufficiency the courts decide. The formal parts of a deed conveying realty are: (a) the *premises* — the names of the parties, recitals explanatory of the transaction, the consideration, the thing granted; (b) the *habendum* and *tenedum* (to have and to hold) — defining the nature of the grant; (c) the terms of stipulation upon which the grant is made — the *reddendum* or reservation; (d) the *condition* or contingency upon the happening of which the estate will be defeated; (e) the *warranty* securing the estate; (f) the *covenants* — stipulating for the truth of facts, or that a thing will be done; (g) the *conclusion* — mentioning the execution and the time thereof. 5. Reading — when desired. 6. Sealing, and signing. 7. Delivery — absolute or conditional. 8. Attestation — for preserving evidence of the transaction.[1]

The construction of a deed must be favorable, and as near the intent of the parties as the rules of law admit; also reasonable, and agreeable to common understanding. Where the intention is clear too minute a stress is not to be laid upon the strict, precise signification of words. False English will not vitiate. The construction is to be made upon the entire deed. When all other rules fail, the language will be taken most strongly against the party who proposes it. If the words bear different senses, that is preferred which is most agreeable to law. Of two repugnant clauses the first will be received.[2]

A deed is to be so construed, when possible, as to give effect to the intention of the parties. That this may be done, the court will place itself in the situation of the grantor at the date of the transaction with his knowledge of the surrounding circumstances and of the import of the words used.[3]

See further ACKNOWLEDGMENT, 2; ALTER, 2; BOND; CANCEL; CHARTER, 1; CONDITION; CONSIDERATION, 2; COVENANT; DELIBERATION, 1; DELIVERY, 3; DESCRIPTION, 1; DURESS; ESCROW; EXCEPTION, 1; GRANT, 2; INDENTURE; INFLUENCE; INSANITY, 2 (4); INSTRUMENT, 3; PARCHMENT; PARTY, 2; POSSESSION, Adverse; PREMISES; PRESENTS, (1); PROFERT; PROVIDED; READING; RECITAL; RECORDING; REGISTRY, 2; RELATION, 1; RESERVE, 4; SEAL, 1; SIGN; SPECIALTY; THENCE; WARRANTY, 1; WILL, 2; WRITING.

[1] 2 Bl. Com. 296–309.

[2] 2 Bl. Com. 379–81; 3 Kent, 432.

[3] Cilley *v.* Childs, 78 Me. 133 (1886), cases; Moses *v.* Morse, 74 *id.* 475 (1883); Moran *v.* Lezotte, 54 Mich. 86 (1884), cases; 87 Ind. 179; 77 Va. 492. By corporate officers, 26 Cent. Law J. 444–45 (1888), cases.

DEEM. When by enactment certain acts are "deemed" to be a crime of a particular nature they constitute such crime, and are not a semblance or a fanciful approximation of it.[1]

"Deemed" and "adjudged," in a penal statute, have the same meaning.[2]

DEFACE. See ALTER, 2; CANCEL.

DEFALCATION.[3] 1. Reduction of a claim by allowance of a counter-claim.

Setting off another account or another contract.[4]

Defalcation was unknown at common law, according to which mutual debts were distinct and inextinguishable except by actual payment or release.[5] See RECOUP; SET-OFF.

"Defalcate" is the verb; "defalk" is obsolete.[6]

2. Misappropriation of trust funds — by a public or corporate officer.

Defaulter. One whose peculations have brought him within the cognizance of the law, to the extent, at least, of excluding him from a public trust.

To apply the epithet to a person who is free from that stigma is defamatory.[7]

DEFAMATORY. Words which produce perceptible injury to the reputation of another are described as defamatory. Whence defamation.

Defamatory words, if false, are actionable. False defamatory words, if written and published, constitute a libel; if spoken, a slander.[8]

A defamatory publication is a false publication calculated to bring the person into disrepute, but it is not necessarily malicious.[9] See FAME; LIBEL, 5; OBLOQUY; SLANDER.

DEFAULT.[10] 1, *n.* (1) Something wrongful; some omission to do that which ought to have been done.[11]

Non-performance of a duty; as, the non-payment of money due.[12]

In an accountable receipt executed by a person to whom property levied upon was delivered, he promising to deliver the articles whenever demanded, or "in default thereof" to pay the amount of the debt called for in the writ, *held*, that the reference was to a breach of legal duty.[1]

There can be no default where the omission to do the thing, as to make a payment on a mortgage, has the concurrence of the other party.[2]

A special promise to answer for the default of another must be in writing and signed, as see FRAUDS, Statute of.

A defaulting purchaser is one who fails to complete his purchase at a public sale. See AUCTION.

(2) An omission, neglect or failure to do something required by law, or by a court administering the law.

When a defendant omits to plead within the time allowed for that purpose, or fails to appear at the trial, he "makes default," and the judgment entered in the former case is "a judgment by default."[3]

To "suffer a default" is to let a case go by neglect or inattention, usually designed.

When the plaintiff makes default he may be nonsuited; but a default, in either party, for cause shown, may be "excused" or "saved."

A witness, a juror, and an officer of court, is said to make default when remiss in his attention to duty.

A judgment by default, for the purpose of the particular action, admits the legality of the demand in suit: it does not make the allegations of the declaration or complaint evidence in an action upon a different claim.[4] See INQUIRY, Writ of; NOTICE, 1, Judicial.

2, *v.* To have judgment entered against one on account of some default: as, that a defendant "shall be defaulted unless he files an affidavit of defense."

Defaulted, *adj.* Due, but not paid; past due: as, defaulted — interest, coupons, bonds, payment.[5]

DEFAULTER. See DEFALCATION, 2.

DEFEASANCE. A defeating: undoing, overthrow, avoidance, destruction, deprivation. See FEASANCE.

Defeasible. Capable of avoidance or destruction. **Indefeasible.** Not admitting of abolition or impairment.

Many constitutional rights are spoken of as indefeasible.

Two uses of defeasance are recognized:

1. A collateral deed, made at the same

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[1] Commonwealth *v.* Pratt, 132 Mass. 247 (1882).

[2] Blaufus *v.* People, 69 N. Y. 111 (1877); State *v.* Price, 11 N. J. L. 218 (1830).

[3] A in -făl- as in fan. L. *diffalcare*, to abate, deduct, take away.

[4] Houk *v.* Foley, 2 P. & W. 260 (1830).

[5] Commonwealth *v.* Clarkson, 1 Rawle, 298 (1829); 6 Mo. 266.

[6] Webster's Dict.

[7] State *v.* Kounts, 12 Mo. Ap. 513 (1882).

[8] Odgers, Libel & Slander, 1.

[9] Marks *v.* Baker, 28 Minn. 166 (1881).

[10] F. *de-faulte*, to want, fail.

[11] Union Trust Co. *v.* St. Louis, &c. R. Co., 5 Dill. 22 (1878); Albert *v.* Grosvenor Investment Co., L. R. 3 Q. B. *128-29 (1867).

[12] Williams *v.* Stern, 5 Q. B. D. 413 (1879).

[1] Mason *v.* Aldrich, 36 Minn. 286 (1886), cases.

[2] Union Trust Co. *v.* St. Louis, &c. R. Co., *ante*.

[3] Page *v.* Sutton, 29 Ark. 306 (1874): Burrill. See also 54 Ala. 430; 5 Iowa, 265; 29 *id.* 245; 11 Neb. 398.

[4] Cromwell *v.* County of Sac, 94 U. S. 356 (1876). See also 3 Col. 277; 6 *id.* 485; 3 Bl. Com. 397; 24 Cent. Law J. 27 (1887), cases; as against non-residents, 21 Am. Law Rev. 715-31 (1887), cases.

[5] See Foster *v.* Morse, 132 Mass. 355 (1882).

time with another conveyance, containing conditions upon the performance of which the estate created may be "defeated" or totally undone.[1]

A bond for a reconveyance upon the payment of a specific sum, at a specified time, made at the same time and of the same date as a deed of conveyance.[2]

Formerly, every mortgagor enfeoffed the mortgagee who simultaneously executed a deed of defeasance, considered a part of the mortgage, whereby the feoffment was rendered void on repayment of the money at a certain day. But things that were merely executory, or to be completed by matters subsequent, could always be recalled by defeasances made subsequent to the time of their creation.[1]

It is not of the essence of a mortgage that there should be a defeasance; and there may be a defeasance of a deed of conveyance without constituting it a mortgage. The essence of a defeasance is to defeat the principal deed and make it void *ab initio*, if the condition be performed.[3]

A defeasance made subsequently to an executed contract must be part of the original transaction. At law, the instrument must be of as high a nature as the principal deed. Defeasances of deeds conveying realty are subject to the same rules as such deeds themselves, as to record and notice to purchasers; but in some States notice of the existence of a defeasance, to be binding, must be derived from the public records.[4]

When an absolute deed is shown to have been originally made as security for a loan of money, a court of equity will treat it as a *mortgage*, and allow the grantor to redeem the estate, on the ground that the defeasance was omitted from the deed by fraud or mistake.[5]

But to reduce a conveyance to a mortgage the defeasance may be required by statute to be in writing, duly acknowledged and recorded.[6]

2. A defeasance to a bond, recognizance, or judgment recovered is a condition which, when performed, defeats or undoes it, in the same manner as a defeasance to an estate.

The "condition" of a bond is always inserted in the bond or deed itself; a "defeasance" is made by a separate, and frequently by a subsequent, deed. This, like the condition of a bond, when performed, disincumbers the obligor's estate.[7] See CONDITION.

DEFEAT. See DEFEASANCE; CONDITION.

[1] [2 Bl. Com. 327.

[2] [Butman *v.* James, 34 Minn. 550 (1885), Berry, J.; 4 Pick. 352.

[3] Flagg *v.* Mann, 2 Sumn. 540 (1837), Story, J.

[4] See 21 Ala. 9; 3 Mich. 432; 7 Watts, 261, 401; 13 Mass. 443; 40 Me. 381; 43 *id.* 206; 14 Wend. 63; 17 S. & R. 70; 8 Washb. R. P. 489.

[5] 2 Kent, 142; Butman *v.* James, 34 Minn. 550 (1886).

[6] See Penn. Act 8 June, 1881; Mich. R. S. 261; Minn. St. L., 1873, 34, § 23.

[7] 2 Bl. Com. 342; 43 Me. 371; 14 N. J. L. 364.

DEFECT. Under the covenant in a charter-party that the vessel is "tight, staunch, and strong," the owner is answerable for latent as well as for visible defects, whereby the cargo is damaged.[1]

See CAVEAT; CHALLENGE; CURE, 2.

DEFENCE. See DEFENSE.

DEFENDANT. One who is called upon in a court to make satisfaction for an injury done or complained of.[2]

A person sued or prosecuted; a respondent.

In the rules in admiralty, framed by the Supreme Court, "defendant" is used indifferently for a respondent in a suit *in personam* and for a claimant in a suit *in rem*.[3]

Co-defendant. A joint or fellow defendant.

Defendant above or defendant in error. The party against whom a writ of error is taken.

Material defendant. In equity, a defendant against whom relief is sought; opposed to *nominal* defendant.

Where a code provided that a bill in equity should be filed in the district where the defendants or a material defendant resides, it was held that the object was to discriminate between defendants whose attitude to the case does and does not, make them real participants in the litigation, that a material defendant was one who is really interested in the suit, and against whom a decree is sought.[4-6]

As employed in sections of a code relating to jurisdiction, the word "defendants" was held to mean not nominal defendants merely, but parties who had a real and substantial interest adverse to the plaintiff, and against whom substantial relief was sought; and that to decide otherwise would encourage colorable practices for defeating jurisdiction in the particular class of cases.[5]

In a judgment, "defendant" may be a collective term, embracing all who by the record are liable under the judgment.[6]

A garnishee is a "defendant in the action," who, in pursuance of a statute, may be restrained from disposing of property to the injury of the attaching creditor.[7]

In the Massachusetts Gen. Sts. c. 146, § 38, providing that, if an execution has not been satisfied, the court, "upon petition of the defendant," may order a stay, if the petitioner gives the adverse party security for the prosecution of the review, refers to the party

[1] Hubert *v.* Recknagel, 13 F. R. 912 (1882).

[2] [3 Bl. Com. 25.]

[3] Atlantic Mutual Marine Ins. Co. *v.* Alexander, 16 F. R. 281 (1883).

[4] Lewis *v.* Elrod, 38 Ala. 21 (1861), Walker, C. J.

[5] Allen *v.* Miller, 11 Ohio St. 378 (1860).

[6] Claggett *v.* Blanchard, 8 Dana, 243 (1839).

[7] Almy *v.* Platt, 16 Wis. 169 (1862).

against whom the judgment sought to be reversed is rendered, not to the defendant in the original action.[1]

Ordinarily, a municipal corporation is not affected by a law which speaks in general terms of defendants, unless expressly brought within the provisions.[2]

Compare LITIGANT; PARTY; PLAINTIFF; RESPONDENT; SUITOR. See DELICTUM, In pari, etc.

DEFENSE, or DEFENCE.[3] 1. Resistance of an attack; resistance with force of an attack made with force or violence.

Self-defense. Protection of person or property from injury.

The defense of one's self, or the mutual and reciprocal defense of such as stand in the relation of husband and wife, parent and child, master and servant, is a species of redress of private injury which arises from the act of the injured party. In these cases, if the party himself, or a person in one of these relations, be forcibly attacked in his person or property, it is lawful for him to repel force with force. . . The law in this case respects the passions of the human mind and makes it lawful in a man to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of the law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried unless it were permitted a man immediately to oppose one violence with another. "Self-defense," therefore, as it is, justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. . . Care must be taken that the resistance does not exceed the bounds of mere defense and prevention: for then the defender would himself become an aggressor.[4]

Homicide in self-defense, upon a sudden affray, is also excusable. This species of self-defense must be distinguished from such as is calculated to hinder the perpetration of a capital crime. This is that whereby a man may protect himself from an assault or the like, in the course of a sudden broil or quarrel, by killing him who assaults him. . . The right of natural defense does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defense but in sudden and violent cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defense it must appear that the slayer had no other possible (or at least probable) means of escaping from his assailant.[5] . . The law requires that the person who kills another in his own defense should have retreated as far as he safely can to avoid the violence of the assault before he turns upon his assailant; . . he must flee as far as he conveniently can, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit, for it may be so fierce as not to allow him to yield a step without manifest danger of his life or enormous bodily harm, and then in his defense he may kill his assailant instantly.[1]

But no one may *revenge* himself by striking an unnecessary blow, as, when all danger is passed, nor strike when the assault is technical and trivial.[1]

The principles of the law of self-defense may be stated in three propositions: (1) A person who, in the lawful pursuit of his business, is attacked by another under circumstances which denote an intention to take his life, or to do him some enormous bodily harm, may lawfully kill the assailant, provided he uses all the means in his power, otherwise, to save his own life, or prevent the intended harm,—such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power. (2) When the attack upon him is so sudden, fierce, and violent that retreat would not diminish but increase his danger, he may instantly kill his adversary without retreating at all. (3) When, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life or commit any felony upon his person, killing the assailant will be excusable homicide, although it should afterward appear that no felony was intended.[2]

The law of self-defense is a law of necessity, real or apparently real. A party may act upon appearances, though they turn out to have been false. Whether they were real or apparently real is for the jury, in a criminal case, to decide upon consideration of all the circumstances out of which the necessity springs. If the jury should find from the evidence that the circumstances were such as to excite the fear of a reasonable man, and that the defendant, acting under the influence of such fear, killed the aggressor to prevent the commission of a felony upon his person or property, he would not be criminally responsible for his death, although the circumstances might be insufficient to prove, by a preponderance of evidence, that the aggressor was actually about to commit a felony.[3]

The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought or induced by the party himself. On the other hand, to justify killing an adversary on this ground it is not necessary that the danger apprehended should be real or actually impending. It is only necessary that the defendant should have had reasonable cause to apprehend that there was an immediate design to kill or to do him some great bodily harm, and that there should have been reasonable

[1] Leavitt *v.* Lyons, 118 Mass. 470 (1875).

[2] Schuyler County *v.* Mercer County, 9 Ill. 24 (1847).

[3] F. *défense:* L. *defensa: defendere*, to strike down or away, ward off, repel. Mid. Eng. defence.

[4] 3 Bl. Com. 3; 4 *id.* 186; 1 *id.* 130.

[5] 4 Bl. Com. 183–84.

[1] 4 Bl. Com. 184–85.

[2] Commonwealth *v.* Selfridge, Sup. Ct. Mass. (1806), Parker, J. Same case, Whart. Homicide, App. No 1; Hor. & T., Cases on Self-Defense, 17; 2 Am. Cr R (Hawley), 259.

[3] People *v.* Flanagan, 60 Cal. 4 (1881), McKee, J; 42 *id.* 208, 307; 59 *id.* 251; United States *v.* Wiltenberger, 3 Wash. 521 (1819).

sense to apprehend immediate danger of such design being accomplished.[1]

Adjudicated cases hold that among the slayer's acts which abrogate or abridge his right of self-defense are the following: 1. Devices to provoke the deceased to make an assault which will furnish a pretext for taking his life or inflicting serious bodily injury upon him. 2. Provocation of the deceased into a quarrel, causing the fatal affray; but mere words or libelous publications do not amount to such provocation. 3. Preconcert with the deceased to fight him with deadly weapons. 4. Commencing an attack, assault, or a battery upon the deceased. 5. Going with a deadly weapon where the deceased is, for the purpose of provoking a difficulty or bringing on an affray, and by words or acts making some demonstration of such purpose calculated to provoke them.[2]

See ARMS; ASSAULT; BATTERY; FORCE; HOMICIDE; IMMEDIATE; RETREAT; THREAT.

2. That which is offered by a defendant as sufficient to defeat a suit — by denying, justifying, or confessing and avoiding, the cause of action.

A term of art used in common-law pleading in the sense merely of "denial."[3]

When the plaintiff hath stated his case in the declaration, it is incumbent on the defendant within a reasonable time to make his "defense," and to put in a plea; else the plaintiff will recover judgment by default, *q. v.* . . . Defense, in its true legal sense, signifies not a justification, protection, or guard, which is its popular signification, but an opposing or denial (French, *defender*) of the truth or validity of the complaint. It is the *contestatio litis* of the civilians, a general assertion that the plaintiff hath no ground of action, which assertion is afterward extended and maintained in the plea.[4] Compare TRAVERSE.

The right possessed by a defendant, arising out of the facts alleged in his pleadings, which either partially or wholly defeats the plaintiff's claim.[5]

Defenses, in civil procedure, are stated with fullness and particularity in answers to bills and libels, and in affidavits of defense filed to affidavits of claim.

Defense, affidavit of. A sworn written statement of the facts which constitute the defense in a civil action; also called "affidavit of merits." Opposed, *affidavit of claim.*

The practice which requires affidavits of claims and defense has been systemized in Pennsylvania to a degree of completeness scarcely known elsewhere. The subject is usually discussed in connection with the inquiry, What are the essentials of a "sufficient" affidavit of defense. In that State the practice originated in an agreement between members of the bar at Philadelphia, signed September 11, 1795.[1] After that, statutes extended the practice, until it became general.[2] Yet the courts, by mere rule, could have required defendants to file a statement of defense.[3]

The practice does not conflict with the right of trial by jury. If a defendant presents no defense to be tried by a jury he cannot claim that privilege is denied him. The affidavit is nothing more than a special plea under oath — by which the defendant states the facts of his case for the consideration of the court. Trial by jury in civil cases has never involved the right of the jury to decide the *law* of the case. That the defendant is obliged to state his plea, or his defense, under oath, is merely a means to prevent delay, by falsehood and fraud. Nor can it be objected, when all the facts have been stated by the defendant which he either knows or is informed of, believes and expects to be able to prove, that the court decides the law arising upon the facts as stated. This is no more than the court does upon a demurrer, a special verdict, a nonsuit or an issue in equity. The affidavit is only a modern mode of making up the issue for the jury. And when, upon a statement of all the facts a defendant can conscientiously swear to, the court finds that the law upon those facts is against him, clearly he has no right to go before a jury. The court has then done no more than it would have a right to do by instruction to the jury when all the evidence is in, with the advantage to the defendant that by his affidavit he has made the evidence to support his own case.[4]

The object is to prevent delay of justice through false defenses.[5] At the same time, the practice being in derogation of the right of trial by jury, regulations are to receive a strict construction.[6]

The procedure, being somewhat summary, the plaintiff, in his affidavit, must have complied with every requirement of the law;[7] otherwise, a judgment given him, for "insufficiency" in the matter relied upon by the defendant, will be reversed, although that matter is really insufficient.[8]

[1] State *v.* Johnson, 76 Mo. 122, 126 (1882), Norton, J.; State *v.* Umfried, *ib.* 408 (1882); 69 *id.* 469.

[2] Cartwright *v.* State, 14 Tex. Ap. 486, 499 (1883), cases, Hart, J.; Reed *v.* State, 11 *id.* 517 (1882); 70 Ala. 7; 71 *id.* 336-37; 32 Conn. 83; 64 Ind. 340; 89 *id.* 195; 80 Ky. 36; 14 B. Mon. 108, 614; 38 Mich. 270, 732; 55 Miss. 498; 13 Johns. 12; 89 N. C. 481; 29 Ohio St. 186; 38 Pa. 267-68; 101 *id.* 393; 45 Vt. 308; 2 Bish. Cr. L. 677; 12 Rep. 268.

[3] United States *v.* Ordway, 30 F. R. 32 (1887).

[4] Bl. Com. 296. See 33 Ind. 449; 8 How. Pr. 442; 10 M. 148; 24 Barb. 631.

[5] [Utah, &c. R. Co. *v.* Crawford, 1 Idaho, 773 (1880).

[1] Sellers *v.* Burk, 47 Pa. 344 (1864); Clark *v.* Dotter, 54 *id.* 215 (1867); Detmold *v.* Gate Vein Coal Co., 3 W. N. C. 567 (U. S. D. C., E. D. Pa., 1876).

[2] 2 Brightly, Purd. Dig. 1356, 1357, pl. 24, note *d.*

[3] Hogg *v.* Charlton, 25 Pa. 200 (1855); Harres *v.* Commonwealth, 35 *id.* 416 (1860).

[4] Lawrence *v.* Borm, 86 Pa. 226 (1878), Per Curiam; 19 *id.* 57; 20 *id.* 384; Hunt *v.* Lucas, 99 Mass. 409 (1868), Chapman, C. J.

[5] Wilson *v.* Hayes, 18 Pa. 354 (1852); Bloomer *v.* Reed, 22 *id.* 51 (1853).

[6] Yates *v.* Burrough of Meadville, 56 Pa. 21 (1867); Wall *v.* Dovey, 60 *id.* 212 (1869); Boas *v.* Nagle, 3 S. & R. 250 (1817).

[7] Knapp *v.* Duck Creek Valley Oil Co., 53 Pa. 185 (1866).

[8] Gottman *v.* Shoemaker, 86 Pa. 21 (1877).

The question of insufficiency is brought directly before the court by a rule on the defendant "to show cause why judgment should not be entered against him for want of a sufficient affidavit of defense" — the particulars of the alleged insufficiency being at the same time specified in writing and filed with the rule.

The court considers the facts set out in the affidavit and passes upon their legal sufficiency.[1] For this purpose it takes the facts as true, not to be contradicted even by a record.[2]

It is sufficient to set forth, in the affidavit — facts showing a valid defense which can properly be established;[3] — specifically, and at length, such facts as will warrant the inference of a complete legal defense;[4] — a substantially good defense;[5] — a *prima facie* good and valid defense.[6]

The defendant must state the grounds and nature of his defense, so that the court may judge how far it will avail against the plaintiff's demand, if established by proof.[7]

The facts are to be averred with reasonable precision; but the evidence by which the defendant will prove them need not be stated.[8] Nor need he meet every objection which fine critical skill may deduce.[9] While an allegation doubtfully stated or clearly evasive is to be disregarded, the defendant is not to be held to a rigor of statement so severe as to catch him in a mere net of form.[9]

The facts are to be averred with reasonable precision, and with certainty to a common intent. Toward sustaining the affidavit a reasonable intendment will be given the language.[10]

But no essential fact is to be left to inference;[11] what is not said is taken as not existing.[12] Furthermore, inasmuch as a party swearing in his own cause is presumed to swear as hard as he can with a good conscience,[13] inferences, when justifiable, are not to be pressed beyond the ordinary meaning of the terms employed.[14]

A material fact which, if it actually exists, would readily and naturally be expressly averred, must be averred.[15]

The practice which requires affidavits of defense is limited to obligations for the payment of a certain sum of *money*. Hence, it does not apply in actions for torts, nor in actions upon contracts for the payment of an uncertain sum, or where there is no standard by which to liquidate the judgment.[1]

The defendant is to make the affidavit, unless cause, such as sickness or necessary absence, is shown why he cannot make it. Then an agent, and perhaps even a stranger to the transaction, may make it.[2]

When defendant avers facts on information and belief he must add that he expects to be able to prove them or else set out specifically the source of his information or the facts themselves upon which his belief rests.[3] This affords a presumption that proof can be made.[4] Positive averment of truth is enough.[5]

The practice does not permit the filing of a *supplementary* affidavit of claim to obtain a judgment for an insufficient defense. Such affidavit may be filed for use as evidence at the trial; so, too, as to a supplemental affidavit of defense in reply to a supplemental affidavit of claim. But the court will not consider the sufficiency of either affidavit.[6]

Should the court deem the defense set out in the original affidavit to be probably good but obscurely or otherwise defectively stated, it may allow a supplemental affidavit of defense to be filed.[7] Notice thereof is to be given, to prevent surprise and delay at the time for trial.

There is no rule that such supplemental affidavit must be confined to an explanation of the original defense, and cannot set up a new and different defense; such a course, however, is suspicious, and requires that the new defense be closely scrutinized.[8]

Where judgment has been entered for want of a sufficient affidavit of defense and the record shows it to be according to law, a motion to take it off is addressed to the discretion of the court, and, in the absence of statutory provision to the contrary, is not the subject of a writ of error.[9]

It would seem that an affidavit of defense, to become part of the record, should be offered in evidence.[10]

Dilatory defense. A defense designed to dismiss, suspend, or obstruct the prosecution of a claim, without touching upon the defendant's "meritorious defense." See MERITS.

[1] Stitt *v.* Garrett, 3 Whart. 281 (1837); Comly *v.* Bryan, 5 *id.* 261 (1839); Marsh *v.* Marshall, 53 Pa. 396 (1866).

[2] Feust *v.* Fell, 6 W. N. C. 43 (1878); Kirkpatrick *v.* Wensell, 2 Leg. Chron. 308 (1874).

[3] Leibersperger *v.* Reading Bank, 30 Pa. 531 (1858).

[4] Bryar *v.* Harrison, 37 Pa. 238 (1860).

[5] Thompson *v.* Clark, 56 Pa. 33 (1867).

[6] Chartiers R. Co. *v.* Hodgens, 77 Pa. 187 (1874).

[7] Walker *v.* Geisse, 4 Whart. 256 (1838).

[8] Bronson *v.* Silverman, 77 Pa. 94 (1874).

[9] Lawrence *v.* Smedley, 6 W. N. C. 42 (Sup. Ct., 1878).

[10] Markley *v.* Stevens, 89 Pa. 281 (1879); 77 *id.* 283; 89 *id.* 281.

[11] Peck *v.* Jones, 70 Pa. 83 (1871).

[12] Lord *v.* Ocean Bank, 20 Pa. 384 (1853).

[13] Selden *v.* Neemes, 43 Pa. 421 (1862).

[14] Marsh *v.* Marshall, 53 Pa. 396 (1866).

[15] Markley *v.* Stevens, 89 Pa. 281 (1879).

[1] Borlin *v.* Commonwealth, 99 Pa. 46 (1881). See 89 *id.* 26; 90 *id.* 276.

[2] See City *v.* Devine, 1 W. N. C. 358 (1875); Clymer *v.* Fitler, *ib.* 626 (1875); Blew *v.* Schock, *ib.* 612 (1875); Crine *v.* Wallace, *ib.* 293 (1875); Burkhart *v.* Parker, 6 W. & S. 480 (1843); Hunter *v.* Reilly, 36 Pa. 509 (1860).

[3] Black *v.* Halstead, 39 Pa. 64 (1861); Thompson *v.* Clark, 56 *id.* 33 (1867).

[4] Clarion Bank *v.* Gregg, 79 Pa. 384 (1875); Rensor *v.* Supplee, 81 *id.* 180 (1876).

[5] Eyre *v.* Yohe, 67 Pa. 477 (1871); Moeck *v.* Littell, 89 *id.* 354 (1876).

[6] Anderson *v.* Nichols, 12 Pitts. Leg. J. 281 (1882).

[7] Laird *v.* Campbell, 92 Pa. 475 (1880).

[8] Callan *v.* Lukens, 89 Pa. 134 (1879), Per Curiam.

[9] White *v.* Leeds, 51 Pa. 187 (1865). See Act 18 April, 1874: P. L. 64; 2 W. N. C. 707.

[10] Maynard *v.* National Bank, 99 Pa. 280 (1881).

Equitable defense. A defense, in a common-law action, which rests upon equitable or legal and equitable grounds.

Equitable defenses, though admissible under State practice, are not admissible in the United States courts.[1] If a defendant has equitable grounds for relief he must seek to enforce them by a separate suit in equity.[2] See PROCEDURE.

Full defense. In common-law practice, a defense made by the formula he "comes and defends the force and injury when and where it shall behoove him, the damages, and whatever else he ought to defend." Shortened into he "defends the force and injury, when," etc. Opposed, **half-defense:** made by the words he "comes and defends the force and injury, and says," etc.[3]

General defense. A general denial of the material allegations of a claim.

A general denial is not equivalent to a general issue at common law. It only puts the plaintiff to proof of his substantial allegations. If the defendant has an affirmative defense in the nature of an avoidance he should plead it.[4]

Good, legal, sufficient, or valid defense. A defense which is ample or adequate in law as against the particular demand. *Legal defense* often stands opposed to *equitable defense*, q. v.

No defense. Certificates are frequently required by proposed purchasers of mortgages standing in the name of the mortgagee or of his transferee, that the mortgagor has no defense, in equity or law, to a demand for payment thereof.

Peremptory defense. That the plaintiff never had, or has not now, a right of action.

Sham defense. A mere pretense of a defense, set up in bad faith, and without color of fact. See further SHAM.

Whenever one is assailed in his person or property, he may defend himself, for the liability and the right are inseparable. . . . A sentence of a court pronounced against a party without affording him an opportunity to be heard is not a judicial determination of his rights. There must be notice of some kind, actual or constructive. The period is a matter of regulation by positive law, rule of court, or established practice.[5] See DAY, In court; ADMISSION, 2.

[1] Parsons *v.* Denis, 2 McCrary, 360 (1881); Gibson *v.* Chouteau, 13 Wall. 109 (1871).

[2] Northern Pacific R. Co. *v.* Paine, 119 U. S. 561 (1887); Phillips *v.* Negley, 117 *id.* 675 (1886), cases; Herklotz *v.* Chase, 32 F. R. 433 (1887).

[3] 3 Bl. Com. 296.

[4] Walker *v.* Flint, 3 McCrary, 510 (1882).

[5] Windsor *v.* McVeigh, 93 U. S. 277 (1876), Field, J.

DEFER.[1] To postpone to a future day; as, a deferred payment of principal and interest upon account of a mortgage, or of a dividend upon account of shares of stock. See DIVIDEND, 8; STOCK, 8 (2), Deferred; POSTPONE, 1.

DEFICIENCY. That part of the debt, which a mortgage was made to secure, not realized from the subject mortgaged.[2] See ESTIMATE; MORE OR LESS.

DEFINE. To set bounds to, mark the limits of. See DEFINITIO; DEFINITION.

1. To make clear the design or scope of previous action; to remove doubt or uncertainty as to the meaning or application of; to determine authoritatively, settle officially, decide judicially.

In popular meaning, often, to make clear and certain what was before uncertain or indefinite, to render distinct; but in legislation frequently has a broader signification. Many constitutional laws have been passed conferring powers and duties which could not be considered as merely explaining or making more clear those previously conferred or sought to be, although the word "define" was used in the title. In legislation the word is frequently used in creating, enlarging, and extending the powers and duties of boards and officers, and in defining and providing punishment for offenses — thus enlarging the scope of the criminal law. It may very properly be used in the title of a statute where the object is to determine or fix boundaries, especially where a dispute has arisen concerning them, whether the extent of territory included be enlarged or lessened.[3]

2. To enumerate or prescribe what act or acts shall constitute; to declare to be an offense.

"To define piracies" is to enumerate the crimes which shall constitute piracy.[4]

Declaring that a certain act shall constitute an offense is "defining" that offense.[5]

DEFINITE. Bounded, limited, defined: determinate, precise, fixed, certain. Opposed, **indefinite.**

A "definite failure of issue" occurs when a precise time is fixed by a will for the failure of issue. An "indefinite failure of issue" is the period when the issue or descendants of the first taker shall become extinct, and when there is no longer any issue of the issue of the grantee, without reference to a particular time or event.[6] See further DIE, Without children.

[1] L. *dis-ferre*, to put off, delay.

[2] [Goldsmith *v.* Brown, 35 Barb. 492 (1861).

[3] People *v.* Bradley, 36 Mich. 452 (1877), Marston, J.

[4] United States *v.* Smith, 5 Wheat. 160 (1820).

[5] United States *v.* Arjona, 120 U. S. 488 (1887).

[6] Huxford *v.* Milligan, 50 Ind. 546 (1875); 14 N. H. 220; 19 *id.* 84-85; 16 Johns. 399-400; 20 Pa. 513; 40 *id.* 22; 2 Redf. Wills, 276, n.

DEFINITIO. L. A bounding, limiting: defining, definition.

Omnis definitio in jure periculosa est. All limitation in law is perilous; defining in law is dangerous. Attempts to define the meaning of words, and to limit the application of statutes, are attended with more or less difficulty.

Thus, it is difficult to frame perfectly accurate definitions of such terms as accident; general agent, special agent;[1] bailment; boarder, guest, lodger; *crimen falsi;*[2] cruelty; dwelling-house; fraud;[3] internal police;[4] larceny; public policy;[5] reasonable doubt; slight, ordinary, and gross negligence; regulations of commerce as distinguished from police regulations. See those terms.

Thus, also, as there are exceptions to almost every rule of law, and as circumstances alter cases infinitely, when a statute itself imposes no limitation upon its meaning or application, the courts, in construing the statute, as a rule, confine themselves to the circumstances of the case in hand.

DEFINITION. An enumeration of the particular acts included by or under a name; as, the definition of a crime.[6] See DEFINE; DEFINITIO.

Legal definitions, for the most part, are generalizations derived from judicial experience. To be complete and adequate, they must sum up the results of all of that experience.[7]

The meaning given to common words by the leading lexicographers is entitled to weight, yet regard must always be had to the circumstances under which a word (as, traveler) is used in a statute.[8]

The definitions of the standard lexicographers are authority as indicating the popular use of words.[9]

See ETYMOLOGY; INDICTMENT; WORD.

DEFINITIVE. Is generally equivalent to "final" and opposed to interlocutory or provisional. But, in some relations, as when said of a judgment, decree, or sentence, may mean being above review or contingency of reversal.[10] Compare FINAL.

DEFORCEMENT. An injury by ouster or privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer has become unlawful. . . The holding of any lands or tenements to which another person hath a right.[1]

Deforciant. He who is chargeable with a deforcement.

A deforcement includes as well an abatement, an intrusion, a disseisin, or a discontinuance, or any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession.[1] See AMOTION.

DEFRAUD. See FRAUD.

DEGRADE. See CRIMINATE; LIBEL, 5; REINSTATE; REHABILITATE; SLANDER.

DEGREE.[2] One of a series of progressive steps upward or downward; grade.[3]

1. A remove in the line of relationship.

Levitical degrees. The degree of kinship, set forth in the eighteenth chapter of Leviticus, within which persons may not intermarry.[4]

Adopted in English and American law generally.

2. The grades of guilt or culpability attributed to the same offense committed under different circumstances: as, degrees of negligence, degrees in the law of arson or of murder, *qq. v.*

When a defendant is charged with an offense which includes others of an inferior degree, the law of each degree which the evidence tends to prove should be given to the jury.[5]

3. The rank to which a student who has attended a law-school is admitted among its alumni. Whence *bachelor of laws, doctor of civil law, doctor of laws.*

Taken in course, or conferred for supposed attainments,—the last named degree frequently so.

At the inns of court degrees were formerly conferred in the common law upon barristers. Whence the expression "take" and "receive" a degree.

DEHORNING. See CRUELTY, 3.

DEHORS.[6] From beyond; outside of: extraneous, extrinsic, foreign to, unconnected with; *aliunde*, q. v.

Applied to something as evidence, outside of a record, agreement, will, or other instrument.

Thus, a judgment may be falsified, reversed, or

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[1] 1 Pars. Contr. 40.
[2] 1 Greenl. Ev. § 373.
[3] 2 Pars. Contr. 769.
[4] 11 Pet. 138.
[5] 2 Pars. Contr. 949.
[6] Marvin *v.* State, 19 Ind. 184 (1862), Perkins, J.
[7] [Mickle *v.* Miles, 31 Pa. 21 (1856), Lowrie, J.; Pardee *v.* Fish, 60 N. Y. 269 (1875).
[8] Pennsylvania R. Co. *v.* Price, 96 Pa. 267 (1880).
[9] Burnam *v.* Banks, 45 Mo. 351 (1870); Dole *v.* New England Mut. Ins. Co., 6 Allen, 386 (1863).
[10] See United States *v.* The Peggy, 1 Cranch, 109 (1801); 1 Watts, 257; 37 Pa. 255; 96 *id.* 420; 3 Bl. Com. 401.

[1] 3 Bl. Com. 172; Wildy *v.* Bonney, 26 Miss. 39 (1853).
[2] F. *degré:* L. *de-gradus*, a step. Cf. Pedigree.
[3] Webster's Dict.
[4] 1 Bl. Com. 435.
[5] State *v.* Mize, 36 Kan. 188 (1887), State *v.* Evans, *ib.* 497 (1887).
[6] De-hôrz'. A French word, equivalent to the late Latin *deforis: foris, foras*, out of doors.

made void for a matter *dehors* the record,— that is, not apparent upon the face of it.[1]

A matter *dehors* a record may be shown as ground for a new trial.[2]

When doubt arises as to meaning of the words of a written contract, or difficulty as to their application, the sense may be ascertained by evidence *dehors* the instrument itself.[3]

DEL CREDERE. It. Of trust, credit.

Applied to an agent or factor who guarantees that the persons to whom he sells will perform the contracts he makes with them.[4]

When the person to whom goods or merchandise is consigned for sale undertakes, for additional compensation in case of sale, to guarantee to his principal the payment of the debt due by the buyer, he is said to receive a *del credere* commission.[5] See COMMISSION, 3; FACTOR.

DELAY. Putting off; postponement.

A conveyance may be made with intent to hinder and delay creditors without any intention to defraud them.[6] See BANKRUPTCY; CONVEYANCE, Fraudulent; HINDER.

Mere delay in enforcing equitable rights is not a defense to an action, except in cases where the statutes of limitation apply, or where the party has slept upon his rights and acquiesced for such length of time that his claim has become stale.[7] See LACHES; LIMITATION, 3, Statute of; STALE.

In the law of marine insurance, see DEMURRAGE; DEVIATION.

DELECTUS. L. Choice; selection.

Delectus personæ. Choice of person. **Delectus personarum.** Choice of persons or the persons.

The right to choose the person or persons who shall participate in a business or enterprise requiring the exercise of mutual confidence.

In particular, the absolute right which belongs to each member of a firm to decide what new partners, if any at all, shall be admitted to the firm.

In theory a partnership is a voluntary association. For this reason neither the purchaser of the interest of a member, nor his assignee, nor even his executor or heir, becomes entitled to admission into the association, except by consent of the remaining partners or by the terms of their compact.[8]

DELEGATA. See DELEGATUS.

DELEGATE, *v.* To commit power to another as agent or representative; to empower, depute. *n.* The person who is to exercise any such power; as, a Territorial delegate. See DELEGATUS.

Delegation. 1. At common law, the transfer of authority; the act of making a delegate or deputy.

2. In civil law, the substitution of one debtor for another: a species of novation.

The change of one debtor for another, when he who is indebted substitutes a third person who obligates himself in his stead to the creditor; so that the first debtor is acquitted and his obligation extinguished, and the creditor contents himself with the obligation of the second debtor.[1]

A delegation demands the consent of all three parties; any other novation demands the consent only of the two parties to the new debt.[1] See NOVATION.

DELEGATUS. L. A person chosen or commissioned: a deputy, agent, representative, trustee. **Delegata.** Deputed, empowered, intrusted.

Delegata potestas non potest delegari. Delegated authority cannot be redelegated. *Delegatus non potest delegare.* A deputy cannot deputize.

Whenever, for personal or other considerations, authority is conferred upon a particular person he cannot lawfully devolve the duties of his appointment or the functions of his office upon any other person, unless allowed so to do by express words, by acts equivalent thereto, or by the usage of trade.

Delegatus potestas, etc., as a general maxim, is correct when duly applied. For, to create a delegate by a delegate, in the sense of the maxim, implies an assignment of the whole power, which a delegate cannot make. A delegate has general powers, which he cannot transfer; but he may constitute another his servant or bailiff to do a particular act.[2]

A special authority is in the nature of a trust. It implies confidence in the ability, skill, or discretion of the party intrusted. The author of such a power may extend it if he will, as is done in ordinary powers of attorney, giving power to a person or his substitute to

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[1] [4 Bl. Com. 390.

[2] [3 Bl. Com. 387.

[3] Sandford *v.* New York, &c. R. Co., 37 N. J. L. 4 (1874): Shore *v.* Wilson, 9 Clark & F. 566 (1842), Tindal, C. J.

[4] *Exp.* White, L. R., 6 Ch. Ap. Cas. *403 (1870), Mellish, L. J.

[5] [Story, Agency, § 33; 50 Barb. 295.

[6] Crow *v.* Beardsley, 68 Mo. 439 (1878).

[7] Williams *v.* Boston, &c. R. Co., 17 Blatch. 23 (1879).

[8] Kingman *v.* Spurr, 7 Pick. 238 (1828), cases; Mathewson *v.* Clarke, 6 How. 140 (1848); Crittenden *v.* Witbeck, 50 Mich. 419, 420 (1883); Story, Partn. §§ 195, 5; 3 Kent, 55; 1 Pars. Contr. 154; 17 F. R. 571.

[1] Adams *v.* Power, 48 Miss. 454 (1873), Peyton, C. J.; 1 Domat, 919, § 2318.

[2] Hunt *v.* Burrel, 5 Johns. *137 (1809), cases, Per Curiam.

do the act authorized. But when it is not so extended it is limited to the person named.[1] See DEPUTY.

The utmost relaxation of the rule, in respect to mercantile persons, is, that a consignee or agent for the sale of merchandise may employ a broker, or a sub-agent, for the purpose, when such is the usual course of business.[2]

When the principal recognizes the validity of the services rendered by the subordinate of the appointed agent he cannot repudiate the acts of his employee and escape personal liability for the want of authority to employ him.[3]

Judicial power cannot be delegated.[4] Nor can a legislature delegate its power to any commission or body except as to the functions of local self-government conferred upon municipal corporations, *q. v.*; and as to some matters of police regulation which the people of a locality may be permitted to accept or reject by vote, as, for example, local option laws.[5] See OPTION, Local.

DELIBERATION. Balancing, weighing: consideration; reflection; meditation, premeditation.

1. When a man passes a thing by deed, there is a determination of the mind to do it, the writing, the signing, the sealing, and the delivery; and hence his deed imports consideration, viz.: the will of the maker.[6]

2. Slander in print is graver than slander by word of mouth, because it is not only disseminated wider, but is accompanied with greater coolness and deliberation.[7]

3. In describing a crime, "deliberate" imports that the perpetrator weighs the motives for the act and its consequences, the nature of the crime, or other things connected with his intentions, with a view to decision thereon; that he carefully considers all these; that the act is not committed suddenly.[8]

If an intention to kill exists, it is willful; if this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is deliberate.[9]

The statutory rule of deliberation and premeditation requires that the act be "done with reflection" and "conceived beforehand."[1]

"Deliberate" is from Latin words, which mean "concerning" and "to weigh." As an adjective it means that the manner of the performance was determined upon after examination and reflection — that the consequences, chances, and means were weighed, carefully considered and estimated. "Premeditated" means, literally, planned, contrived or schemed beforehand. It is not only necessary that the accused should plan, contrive and scheme, as to the means and manner of the commission of the deed, but that he should consider different means of accomplishing the act. He must "weigh" the modes of consummation which his premeditation suggests, and determine which is the most feasible.[2]

In some States "deliberate and premeditated" are applied to the malice or intent, not to the act, and thus seem to require a purpose brooded over, formed, and matured before the occasion at which it is carried into act.[3]

See further PREMEDITATE; WILL, 1.

DELICT. 1. In civil law, the act by which a person, through fraud or malignity, causes damage to another.

In its enlarged sense includes all kinds of crimes and misdemeanors, even injuries caused voluntarily or accidentally and without evil intention; but is commonly limited to offenses punishable by a small fine or a short imprisonment.[4]

2. A *delictum*, q. v.

DELICTUM.[5] L. A wrong, whether private or public: an offense, a civil injury or tort, a crime; also, simply a failing or fault, blame, guilt, culpability.[6]

Corpus delicti. The body of the offense; the fact of a crime. See further CORPUS, Delicti.

Ex delicto. Out of fault or a fault; arising from a tort or wrong — misconduct, negligence, crime.

Said of the actions of case, replevin, trespass, and trover. Opposed, *ex contractu*. See ACTION, 2.

Flagrante delicto. The offense still burning; in the *heat* of the offense: in the very act of perpetrating a crime or the crime.[7] Compare CRIMEN, Flagrans.

[1] Sanborn *v.* Carleton, 15 Gray, 408 (1860), Shaw, C. J. See 2 Kent, 633.

[2] Warner *v.* Martin, 11 How. 223 (1850), cases, Wayne, J. See Story, Agency, § 13.

[3] Commissioners *v.* Lash, 89 N. C. 170 (1883), Smith, C. J. See 71 Ala. 28; 3 Dak. T. 395; 41 N. J. E. 518; 63 Pa. 85.

[4] Van Slyke *v.* Trempealeau Ins. Co., 39 Wis. 392 (1876), cases, Ryan, C. J.; Runkle *v.* United States, 122 U. S. 557 (1887),—as to the President of the United States; Cooley, Const. Lim. 116, cases.

[5] Cooley, Const. Lim. 124, cases. See also Commonwealth *v.* Smith, 141 Mass. 140 (1886).

See generally 21 Am. Law Rev. 936-54 (1887), cases; 26 *id.* 74-94 (1888), cases.

[6] Smith, Contr. 14; Williams, R. P. 143.

[7] Addison, Torts, 765.

[8] State *v.* Boyle, 28 Iowa, 524 (1870), Beck, J.

[9] Commonwealth *v.* Drum, 58 Pa. 16 (1868), Agnew, J.

[1] Summerman *v.* State, 14 Neb. 569 (1883), Lake, C. J.; Wharton, Homicide, 180.

[2] Craft *v.* State, 3 Kan. 433 (1866), Crozier, C. J.

[3] Keenan *v.* Commonwealth, 44 Pa. 57 (1862), Lowrie, C. J. See 71 Mo. 220; 74 *id.* 219, 249, 256; 76 *id.* 104; 23 Ind. 262.

[4] [Bouvier's Law Dict.

[5] From *de-linquere*, to leave a person or thing; then, to be wanting in a matter, fail in duty, offend, transgress. Compare MALUS, Malum.

[6] See 3 Bl. Com. 363; 1 Kent, 552; 2 *id.* 241.

[7] See 4 Bl. Com. 307; 5 Cent. Law J. 389.

In pari delicto. In equal wrong: equal in guilt: equally guilty; equally to blame.

The first part either of the maxim *in pari delicto, melior est conditio possidentis*, in equal fault, the better is the situation of the party in possession; or else of the maxim *in pari delicto, potior est conditio defendentis*, in equal fault, the stronger is the situation of the defendant. Also spoken of as the rule of *par delictum*, equal wrong: parity of unlawful conduct.

Where misconduct is mutual the law will relieve neither party, but leave them where it finds them.

While defendants derive advantage from its application, the rule was not adopted for their benefit, but solely as a principle of general policy.[1]

A court of equity will not aid parties in the consummation or perpetration of a fraud; it will not assist a party to the betrayal of a trust to derive advantage therefrom; it will not undertake to unravel a tangled web of fraud to enable one of the parties to consummate his design. A complainant must come before the court with clean hands.[2]

The court will not enforce alleged rights resting upon a prohibited contract. In the application of the rule it is necessary to give parties a right to plead and to prove the nature of the transaction.[3] Whatever is stated in a contract for an illegal purpose, as, the violation of a statute, the defendant may show as the turpitude of himself and the plaintiff to prevent its enforcement. The objection is allowed on general principles of policy.[4]

Lord Mansfield, in 1760, laid down the doctrine, which has ever since been followed, that if the act be in itself immoral, or a violation of the general laws of public policy, both parties are *in pari delicto;* but where the law is designed for the protection of the subject against oppression, extortion, and deceit, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover.[5]

Where the illegality consists in the contract itself, and that contract is unexecuted, there is a *locus pœnitentiæ*, the *delictum* is incomplete, the contract may be rescinded by either party and money paid recovered. There is no parity where the law protects one party, or one acts under constraint, though the transaction is completed.[6]

If a contract, void as against public policy, is still executory it cannot be enforced, nor will damages be awarded for a breach thereof; but if it is executed the price paid or property delivered cannot be recovered.[1]

The rule is applied to cases of moral turpitude and to acts against public policy; not to cases of innocent mistake.[2]

One who bribes an officer of government cannot recover the money.[3]

In a few special cases, one party, less at fault than the other, has been allowed to maintain an action.[4] Compare NEGLIGENCE, Comparative, Contributory.

See ACTIO, Ex dolo, etc.; CONTRIBUTION; ESTOPPEL; INNOCENCE; LEGAL, Illegal, 2; TORT, 2; TURPITUDE; VOLO, Volenti, etc.

Propter delictum. On account of wrong — a crime or misdemeanor; as, a challenge of a juror for infamy.[5] See CHALLENGE, 4.

DELIRIUM. That state of the mind in which it acts without being directed by the power of volition, which is wholly or partially suspended.[6]

A temporary derangement of mind preceded or attended by a feverish and highly diseased state of the body.[7]

It may vary from slight wandering to violent derangement, and be accompanied, in a greater or less degree, with stupor or insensibility. A continuing insanity will not be presumed, where the malady was temporary and occasional.[7] See INSANITY; INTEMPERATE.

DELIVERY.[8] Transfer of the body or substance; surrender of physical possession or control; tradition. Opposed, non-delivery.

To "deliver" is to give or transfer anything to another person.

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[1] See Holman *v.* Johnson, 1 Cowp. 343 (1775), Mansfield, C. J.; Smith, Contr. 27, 205, 263, 296.

[2] Farley *v.* St. Paul, &c. R. Co., 14 F. R. 114, 117 (1882), Treat, D. J.; Lewis *v.* Meier, *ib.* 311 (1882); 2 McCrary, 599.

[3] Funk *v.* Gallivan, 49 Conn. 128-29 (1881), cases; Heineman *v.* Newman, 55 Ga. 262 (1875), cases; Myers *v.* Meinrath 101 Mass. 368 (1869), cases.

[4] Harris *v.* Runnels, 12 How. 86 (1851), Wayne, J.

[5] Smith *v.* Bromley, 2 Doug. 697: Thomas *v.* Richmond, *infra.*

[6] Thomas *v.* City of Richmond, 12 Wall. 355-56 (1870), cases, Bradley, J.; Congress & Empire Spring Co. *v.* Knowlton, 103 U. S. 58-60 (1880), cases, Woods, J. See also 116 U. S. 685-86; 48 Ark. 491; 101 Mass. 150; 107 *id.* 259; 25 Pa. 441; 79 *id.* 242; 25 Barb. 341; 10 Ind. 386; 59 Iowa, 190; 6 Col. 14; 58 N. H. 249; 17 Nev. 177; 76 Va. 423; 2 Story, Contr. § 617; 3 Pars. Contr. 127, 484; 2 Greenl. Ev. § 111.

[1] Setter *v.* Alvey, 15 Kan. 160 (1875), Brewer, J.

[2] See 55 Barb. 102; 22 Mich. 427; 11 Mass. 376; 4 N. H. 455; 3 N. Y. 230.

[3] Clark *v.* United States, 102 U. S. 331 (1880).

[4] See White *v.* Franklin Bank, 22 Pick. 181-90 (1839), cases; Daniels *v.* Tearney, 102 U. S. 420 (1880). As to counter-claims, 20 Cent. Law J. 363-65 (1885), cases.

[5] See 3 Bl. Com. 363; 2 Kent, 241.

[6] Owing's Case, 1 Bland's Ch. 386 (1828). See 1 Redf. Wills, 91.

[7] [Heirs of Clark *v.* Ellis, 9 Oreg. 129, 141 (1881), Lord, Chief Justice.

[8] F. *delivrer:* L. *de-liberare*, to set free.

A law against "selling or delivering intoxicating liquor to a minor" was held not to include a delivery to a minor for his father.[1] See LIQUOR.

In the sense of release from confinement, used in "jail-delivery." See JAIL.

"Delivery," used alone, is of personal property; of letters, notices, telegrams, *qq. v.*; of negotiable instruments, *q. v.*; of sealed instruments; of opinions, charges, verdicts, *qq. v.*

1. In the law as to gifts, sales, and transportation of personalty, delivery is absolute or conditional, actual or constructive, and symbolical.

Absolute delivery. A transfer without any qualification, expressed or implied. **Conditional delivery.** A transfer accompanied by one or more conditions which must be fulfilled before the general property vests in the possessor.

A conditional sale may become an absolute sale by an unconditional delivery of the goods, the title then passing to the purchaser. To constitute a conditional delivery it is not necessary that the seller declare the conditions in express terms. It is sufficient if the intent of the parties, that the delivery is conditional, can be inferred from their acts and the circumstances of the case.[2]

Actual delivery. Manual or corporal transfer, made in fact or reality. **Constructive delivery.** A transfer which while not in reality made is yet viewed in law as as good as made.

"Constructive delivery" is a general term, comprehending all acts which, although not truly conferring a real possession of the thing sold on the vendee, have been held *constructione juris* equivalent to acts of real delivery.[3]

Symbolic or symbolical delivery. Handing over one thing as evidence of parting with ownership in another or other things.

Delivery is frequently symbolical; as, delivery of the key to a room containing goods, by marking timber on a wharf or goods in a warehouse, or by separating, measuring, or weighing them; or otherwise constructive, as by delivery of part for the whole;[4] or by delivery of a bill of lading or of a bill of sale. See GIFT, 1.

As between vendor and vendee delivery is not necessary to complete a sale of personalty, especially where impracticable;[5] but as against a third person possession retained by the vendor is evidence of fraud — conclusive, by some authorities, by others, rebuttable.

Symbolical is a substitute for actual delivery, when the latter is impracticable, and leaves the real delivery to be made afterward. Thus, the delivery of a certificate of stock with a power of attorney in blank for making a transfer upon the proper books operates as a symbolical delivery of the stock itself, until the real delivery can be perfected.[1]

To constitute a delivery to a common carrier the latter must accept the goods as a carrier and assume exclusive control over them.[2]

What amounts to a delivery to a carrier may sometimes be a question of fact for a jury; ordinarily, a delivery at his wharf, freight or warehouse, brought to the notice of his servant, would be so considered. A delivery at a wharf may be of itself an incomplete act, to be explained by what precedes or follows.[3]

A common carrier by water must at least give notice to a consignee that the vessel has arrived or that the property has been landed.[4]

Proof of the unexplained non-delivery of property by a bailee upon demand makes a *prima facie* case of negligence, and, in the absence of evidence excusing the non-delivery, presents a question of fact as to actual negligence for the consideration of a jury.[5]

Property in a situation to be delivered to the consignee on demand may be said to be "awaiting delivery;" property on its way to a distant point to be taken thence by a connecting carrier, to be "awaiting transportation."[6]

Misdelivery. A delivery by a common carrier at such place or time as is not intended by the contract of carriage.

Opposed, a *good*, *sufficient*, or *legal* delivery.

A misdelivery by a carrier is equivalent to a conversion.[7]

See ACCEPT, 1; BAILMENT; CARRIER; PLACE, Of delivery; POSSESSION, Fraudulent; SALE.

As to collections on delivery, see COLLECTION.

Delivery bond. An obligation for the return of goods, or the payment of their value, taken into the possession of the law but now to be restored to the defendant; as, in seizures under revenue laws.[8]

2. Section 3892, Rev. St., is designed to

[1] State *v.* McMahon, 53 Conn. 415 (1885); Commonwealth *v.* Latinville, 120 Mass. 386 (1876).

[2] Fishback *v.* Van Dusen, 33 Minn. 116-18 (1885), cases, Mitchell, J.

[3] Bolin *v.* Huffnagle, 1 Rawle, *20 (1828).

[4] 1 Bouvier, 502, cases; 89 Ill. 218; 71 N. Y. 293; 2 Bl. Com. 313-15; 1 Pars. Contr. 530; 2 Kent, 506.

[5] Wyoming Nat. Bank *v.* Dayton, 102 U. S. 59, 62 (1880); Hare, Contr. 450.

[1] Winslow *v.* Fletcher, 53 Conn. 398-99 (1885); Cooke *v.* Hallett, 119 Mass. 148 (1875).

[2] Reed *v.* Philadelphia, &c. R. Co., 3 Houst. 206 (1865); O'Bannon *v.* Southern Express Co., 51 Ala. 484 (1874).

[3] Hobart *v.* Littlefield, 13 R. I. 342 (1881), cases; Hallgarten *v.* Oldham, 135 Mass. 8-12 (1883), cases.

[4] Ostrander *v.* Brown, 15 Johns. 42 (1818); 3 N. Y. 322; 11 F. R. 234.

[5] Confield *v.* Baltimore, &c. R. Co., 93 N. Y. 530 (1883), cases.

[6] Michigan Central R. Co. *v.* Mineral Springs Manuf. Co., 16 Wall. 327 (1872), cases.

[7] Forbes *v.* Boston, &c. R. Co., 133 Mass. 156 (1882).

[8] See R. S. § 938; 21 Wall. 98; 110 U. S. 280.

protect letters, (postal-cards, and packets), sent by mail, from embezzlement, and from interference, with the improper designs therein enumerated, until they reach their destination by actual delivery to the persons entitled to receive them.[1]

3. As to the delivery of telegrams, see TELEGRAPH.

4. In the law of sealed instruments, the final, absolute transfer to the grantee of a complete legal instrument sealed by the grantor, covenantor, or obligor. As a popular word, signifies mere tradition.[2]

A deed takes effect only from its tradition or delivery, which may be absolute or conditional.

Absolute delivery. A delivery to the grantee himself. **Conditional delivery.** To a third person to hold till some condition is performed by the grantee.[3]

In the latter case the instrument is delivered as an "escrow" — as a scrowl or writing, not to take effect as a deed till the condition is performed.[3]

A delivery of a legal obligation made upon condition does not become a legal delivery until the condition is fulfilled.[4]

The delivery of a deed is essential to the transfer of title. It is the final act, without which other formalities are ineffectual. The grantor must part with possession of the deed or the right to retain it; registry may justify a presumption of delivery.[5]

While a delivery of a deed is essential to pass an estate, and there can be no delivery without surrender of the instrument or the right to retain it, such delivery will be presumed, in the absence of direct evidence, from the concurrent act of the parties recognising a transfer of the title.[6]

Surrender *and* acceptance are necessary to a complete delivery.[7]

Its importance arises from the fact that the deed has taken the place of the livery of seisin of feudal times, when, to give effect to the feoffment of the new tenant, the act of delivering possession in a public manner was the essential evidence of the investiture of title to the land. This diminished in importance until the manual delivery of a piece of turf, and other "symbolic" acts, became sufficient. When all this passed away and the creation and transfer of estates by a written instrument, called the act or "deed" of the party, became the usual mode, the instrument was at first delivered on the land in lieu of livery of seisin. Finally, any delivery of the deed or any act intended to stand for such delivery became effectual to pass the title.[1]

Delivery in fact, by the officers of government, of recorded letters-patent for land, or of a charter, or of a commission to an office, and the like, in which the act of delivering is purely ministerial, may not be essential; it is enforceable by *mandamus*.[2] Compare LIVERY.

DELUSION. "Insane delusion" and "morbid delusion," as equivalent expressions, are common in medical jurisprudence.

If a person persistently believes supposed facts, which have no existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, so far as these imagined facts are concerned he is under a "morbid delusion;" and delusion in that sense is insanity.[3]

"Insane delusion" is an unreasoning and incorrigible belief in the existence of facts which are impossible of existence, either absolutely or under the circumstances, and which, in most cases, relate to something affecting the senses. While the delusion may concern the relations of the party with others, generally it centers around himself, his cares, sufferings, rights and wrongs. It comes and goes independently of the exercise of will; it is not the result of reasoning and reflection, nor can it be dispelled by them. A conviction founded upon evidence, upon a comparison of facts, opinions, and arguments, is not an insane delusion. Such a delusion does not relate to mere sentiments or theories or abstract questions in law, politics, or religion: all which are subjects of opinions,— beliefs founded upon reasoning and reflection, and liable to be changed by stronger external evidence or by sounder reasoning. . . In the law of homicide the subject is important only as it throws light upon the question of knowledge of or capacity to know right and wrong. If a man is under an insane delusion that another is attempting his life and kills him in self-defense he does not know that he is committing an unnecessary homicide. If he insanely believes he has a command from the Almighty to kill, it is difficult to understand how he can know it is wrong for him to kill.[3] See INSANITY.

[1] United States *v.* McCready, 11 F. R. 225, 234 (1882).

[2] Black *v.* Shreve, 13 N. J. E. 461 (1860), Whelpley, J.

[3] [2 Bl. Com. 307; 30 Wis. 646.

[4] McFarland *v.* Sikes, 54 Conn. 250 (1886).

[5] Younge *v.* Guilbeau, 3 Wall. 641 (1865), Field, J.; 5 *id.* 81; 79 Pa. 15; 4 Del. Ch. 311.

[6] Gould *v.* Day, 94 U. S. 412 (1876), Field, J. See Ireland *v.* Geraghty, 15 F. R. 45-46 (1883), cases,— note by M. D. Ewell.

[7] Best *v.* Brown, 25 Hun, 294 (1881); 6 Barb. 195; 102 Ill. 297; 22 Ind. 39.

[1] United States *v.* Schurz, 102 U. S. 398, 397 (1880), cases, Miller, J. See 20 Cent. Law J. 44-48 (1885), cases; 28 *id.* 8-10 (1886), cases; 26 Am. Law Reg. 451-55 (1887), cases; 4 Kent, 466; 2 Wash. R. P. 577.

[2] Seaman's Friend Society *v.* Hopper, 33 N. Y. 634 (1865), Denio, C. J.; *Re* Forman's Will, 54 Barb. 289 (1869), cases.

[3] United States *v.* Guiteau, 10 F. R. 170-71, 182 (Jan. 25, 1882), Charge of Judge Cox. See note by Francis Wharton, *ib.* 189; Commonwealth *v.* Rogers, 7 Metc. 502 (1844); State *v.* Pike, 49 N. H. 432 (1870); State *v.* Jones, 50 *id.* 395 (1871): Dew *v.* Clarke, 3 Addams, 79 (1826). As to wills and deeds, Duffield *v.* Morris's Executor, 2 Harr., Del., 380 (1839); Gass's Heirs *v.* Gass's Executor, 3 Humph. 283 (1842); Robinson *v.* Adams, 62 Me. 401 (1870); in general, Buswell, Insanity, §§ 13-16, cases; 1 Redf. Wills, 40; 1 Whart. Cr. L. § 37.

DEMAND. 1. Any account upon which money or other thing is, or is claimed to be, due.[1]

A claim; a legal obligation.[2]

The most comprehensive word in law, except *claim*. A release of demands discharges all sorts of actions, rights, titles, conditions before or after breach, executions, appeals, rents, covenants, annuities, contracts, recognizances, etc.[3] Includes, also, a cause of action,[4] and a judgment.[5] Is more comprehensive than "debt" or "duty."[6]

The meaning may be restricted, as, to debt upon contract.[7]

Demandant. One who demands a thing as due; specifically, the plaintiff in a real action, as, partition.

Cross-demand; counter-demand. A demand set up as against another demand on which claim is or can be made; a set-off, *q. v.*

2. A request, made under claim of right, to do some specified thing.

Required, in some cases, to fasten willfulness upon a person who refuses to perform a duty. Thus it is made: for payment of rent, before re-entry; under a contract for marriage, before action can be brought for breach of promise; in cases of illegal harboring of servants, and of illegal detention of personalty; in cases of refusal to obey orders of court; in other matters of contract and of tort.[8]

Demand and refusal are never necessary, except as furnishing evidence of an unlawful taking or detention against the rights of the true owner, in an action of replevin, or of an unlawful conversion in an action of trover. When the circumstances, without these, are sufficient to prove such taking or detention, a demand and a refusal are superfluous.[9]

On demand. In a note, does not make the demand a condition precedent to a right of action; imports that the debt is due and demandable immediately, or at least that the commencement of a suit therefor is a sufficient demand.[10]

When the promise is not to pay the note at a particular place demand must be made upon the maker personally, at his place of business or at his residence, or sufficient excuse for not making demand must be shown. Reasonable diligence must be used to find the maker, his residence and place of business.[1]

A note payable "on demand after date" is not a note "payable on time," within the meaning of the Massachusetts statute of 1874, c. 404.[2]

See CLAIM; INDORSEMENT; PAYMENT; REQUEST; STALE.

DEMENTIA. Mental derangement accompanied by general derangement of faculties.[3]

Characterized by forgetfulness, inability to follow any train of thought, and indifference to passing events.[4]

An impaired state of the mental powers, feebleness of mind caused by disease and not accompanied by delusion (*q. v.*) or uncontrollable impulse.[4]

May exist without complete prostration.

Senile dementia. That peculiar decay of the mental faculties which occurs in extreme old age, and in many cases much earlier, whereby the person is reduced to second childhood and sometimes becomes[5] wholly incompetent to enter into a binding contract or even to execute a will. It is the recurrence of second childhood by mere decay.[6]

See further INSANITY.

DEMESNE.[6] Own, one's own; original.

Demesne land. Land reserved by the lord of a manor for the use of himself and household.[7]

Ancient demesne. Tenure of manors belonging to the crown in the days of Edward the Confessor and William the Conqueror, and referred to in Domesday book.[8]

Demesne lands of the crown. Reservations of the crown at the original distribution, or such as came to it afterward by forfeiture or other means.[9]

Comprised divers manors, the tenants of which had peculiar privileges.[8]

Seised in his demesne as of fee. Formal words expressing the highest estate a subject can have in land. It is his property or *dominicum*, since it is for him and his

[1] Stringham *v.* Supervisors, 24 Wis. 600 (1869), Dixon, Chief Justice.

[2] Hollen *v.* Davis, 59 Iowa, 447 (1882): Code, § 3591.

[3] Coke, Litt. 291 *b*; 8 Rep. 299; 1 Denio, 261; 6 W. & S. 226.

[4] Saddlesvene *v.* Arms, 32 How. Pr. 235 (1866).

[5] Henry *v.* Henry, 11 Ind. 237 (1858).

[6] Sands *v.* Codwise, 4 Johns. *558 (1808); *Re* Denny, &c. Co., 2 Hill, 223 (1842).

[7] Heacock *v.* Sherman, 14 Wend. 59 (1835).

[8] See 1 Bouvier, 504, cases.

[9] Edmunds *v.* Hill, 133 Mass. 446 (1882).

[10] Young *v.* Weston, 39 Me. 494 (1855) cases; Byles, Bills, 409, cases by Sharswood; 2 Pars. N. & B. 639, cases.

[1] Demond *v.* Burnham, 133 Mass. 341 (1882).

[2] Hitchings *v.* Edmands, 132 Mass. 339 (1882).

[3] [Hall *v.* Unger, 4 Saw. 677 (1867), Field, J.

[4] Dennett *v.* Dennett, 44 N. H. 537 (1863), Bell, C. J. See 2 Redf. Sur. 132; 3 Wash. 580; 4 *id.* 262; 3 Am. L. Reg. 449; 2 Abb. C. C. 511.

[5] 1 Redfield, Wills, 63, 94. Owing's Case, 1 Bland's Ch. 389 (1828).

[6] F.: L. *dominium*, ownership. Cf. DOMAIN; ASSAULT, Son, etc.

[7] 2 Bl. Com. 90.

[8] 2 Bl. Com. 99; 1 *id.* 286.

[9] 1 Bl. Com. 286.

heirs forever, not absolute, but in a qualified or feudal sense; and *as of fee*, because not purely and simply his own, since it is held of a feudal superior.[1]

The owner of an incorporeal hereditament is said to be "seised as of fee," and not "in his demesne;" since he has no property in the thing itself, but something derived out of it.[1]

"Seised in his demesne as of fee" is an allegation that the person is seised in fee-simple.[2]

DEMIJOHN. See BOTTLE.

DEMISE.[3] In a lease for years creates an implied warranty of title and a covenant for quiet enjoyment.[4]

In a lease under seal implies a covenant, and in a lease not under seal a contract, for *title* in the lessor. "Let" or an equivalent word has the same effect.[5] See LEASE.

Demise and redemise. A conveyance by mutual leases of the same land, or of something out of the same, made by one party to the other; as, in a grant of rent-charge. See next word.

DEMITTERE. L. To demise, lease, let.

Ex demissione. By demise.

Used in entitling common-law actions of ejectment. Abridged *ex dem.* and *d.*: as, Doe *d.*, or *ex dem.*, Patterson *v.* Winn.[6]

Non demisit. He did not let or lease.

A plea to an action for rent on a parol agreement.

DEMONSTRATIO. L. A showing, pointing out: designation, description, demonstration, *q. v.*

Falsa demonstratio non nocet. Erroneous description does not vitiate. Spoken of as the maxim *falsa demonstratio.*

When an instrument contains an adequate description of a thing, with convenient certainty as to what was intended to be specified, a subsequent erroneous reference or addition will not vitiate the instrument. This qualification is sometimes expressed by the phrase *cum constat de corpore* or *de persona:* when it comports with the subject-matter or with the person.[7]

A false description, whether of subject-matter or parties, does not vitiate the instrument where the error appears upon its face and the writing itself supplies the means of making the correction.[1]

Applied to a devise the rule means that if there be a sufficient description, with reasonable certainty of what was meant to pass, a subsequent erroneous addition will not vitiate the devise. The characteristic of cases within the rule is that the description as far as false applies to no subject at all, and as far as true applies to one only.[2]

The maxim is of universal application as far as it means that we may reject, as surplusage, a false description not vital to the object of the controversy.[3]

Falsa demonstratione legatum non perimi. By erroneous description a legacy is not destroyed.

A bequest is not to be held void because of inaccurate language used in speaking of it.[4] See further DEMONSTRATION, 2.

DEMOCRATIC.[5] See GOVERNMENT.

DEMONSTRATION. 1. Proof which excludes possibility of error.[6]

A conclusion from a universal major premise, producing absolute certainty.[7]

Mathematical truth alone is susceptible of this high degree of evidence; matters of fact are proved by moral evidence.[6, 7] See CERTAINTY; EVIDENCE, Moral.

2. Whatever is said or written to designate a person or thing; designation; description.

Demonstrative. Pointing out specifically; designating particularly: as, a legacy payable out of a particular fund. See LEGACY.

An erroneous description does not render an instrument inoperative where the thing or person intended can be identified. As far as inapplicable it will be rejected; particularly so when merely additional to another description or reference which is unambiguous: as where, in the same instrument, land is correctly described by boundaries and wrongly described by parcel or number.[8] See further DEMONSTRATIO; DESCRIPTION.

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[1] 2 Bl. Com. 106.

[2] Butrick *v.* Tilton, 141 Mass. 94 (1886).

[3] F. *démettre*, to put away, lay down: L. *dimittere*, *demittere*.

[4] Stott *v.* Rutherford, 102 U. S. 109 (1875), cases, Conrad *v.* Morehead, 89 N. C. 34 (1883).

[5] Foster *v.* Peyser, 9 Cush. 246-47 (1852), cases; Metcalf, J., quoting Parker, B., in Hart *v.* Windsor, 12 M. & W. 68 (1844); Wilkinson *v.* Clauson, 29 Minn. 93 (1882); 6 Ala. 320; 50 Conn. 509; 18 Mass. 201; 9 N. H. 219; 7 Wend. 210; 26 Mo. 112; 5 Whart. 278; 105 Pa. 472.

[6] 5 Pet. 282 (1831); 7 T. R. 886.

[7] See Thomas *v.* Thomas, 6 Durnf. & E. 676 (1769), Kenyon, C. J.; Cleaveland *v.* Smith, 2 Story, 291 (1842); 71 Cal. 147; 65 Wis. 270; 67 *id.* 289.

[1] Dodd *v.* Bartholomey, 44 Ohio St. 175 (1886), Minshall, J.

[2] Morrell *v.* Fisher, 4 Exch. *604 (1849), Alderson, B.; 113 U. S. 447.

[3] Broom, Max. 629; 1 Whart. Ev. § 945.

[4] Broom, Max. 645; 3 Bradf. 144, 149.

[5] In Beardsley *v.* Bridgeport, 53 Conn. 493 (1885), used in a charitable bequest.

[6] [1 Greenl. Ev. § 1.

[7] [1 Whart. Ev. § 7.

[8] 1 Greenl. Ev. § 301. See White *v.* Luning, 93 U. S. 524 (1876); Springer *v.* United States, 102 *id.* 593 (1880); Noonan *v.* Lee, 2 Black, 504 (1862); Cleaveland *v.* Smith, 2 Story, 291 (1842); Ham *v.* San Francisco, 17 F. R. 121 (1883); 105 Ill. 364; 7 Cush. 460; 45 Pa. 481; 4 C. B. 898; 11 *id.* 208; 14 *id.* 122; 2 Pars. Contr. 550, n.

DEMURRAGE.[1] 1. The delay or period of delay of a vessel in port.

2. The sum fixed by the contract of carriage as remuneration to the ship-owner for detention of his ship beyond the days allowed for loading or unloading.

It is usual to calculate this sum at so much per day, and to specify the days allowed for demurrage.

An extended freight or reward to the vessel in compensation for the earnings she is improperly caused to lose. Every improper detention may be considered a demurrage, and compensation under that name be obtained for it.[2]

Not allowed for delay caused by unloading in accordance with the custom of the port.[3] See WORKING-DAYS.

DEMURRER.[4] A declaration that "the party will go no further, because the other has not showed sufficient matter against him;" imports that the objector will wait the judgment of the court whether he is bound to proceed.[5]

An admission of the fact, submitting the law to the court.[6]

The tender of an issue in law upon the facts established by the pleading.[7]

Also, the act of tendering such an issue; and, the writing in which the tender is made.

Demur. To object for legal insufficiency; to interpose a demurrer.

Demurrable. Admitting of a demurrer.

Demurrant. One who demurs; a demurrer.

In law, or at common law, an issue upon matter of law is called a "demurrer:" it confesses the facts to be true as stated by the opposite party, but denies that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse. The party who demurs, *demoratur*, rests or abides upon the point in question. The form is by averring the declaration or plea, the replication or rejoinder, to be insufficient in law to maintain the action or defense; and, therefore, praying judgment for want of sufficient matter alleged.[8]

A demurrer in equity is nearly of the same nature as a demurrer in law, being an appeal to the judgment of the court whether the defendant shall be bound to answer the plaintiff's bill; as, for want of sufficient matter of equity therein contained; or where the plaintiff, upon his own showing, appears to have no right; or where the bill seeks discovery of a thing which may cause a forfeiture of any kind, or may convict a man of criminal misbehavior. If the defendant prevails the plaintiff's bill is dismissed; if the demurrer is overruled the defendant is ordered to answer.[1]

Demurring is incident to criminal cases when the fact alleged is admitted to be true but the prisoner joins issue upon a point of law in the indictment, by which he insists that the fact as stated is not the crime it is alleged to be. . . Since the same advantage may be had upon a plea of not guilty, or by arrest of judgment when the verdict has established the fact, demurrers to indictments are seldom used.[2]

General demurrer. An exception in general terms to the sufficiency of a pleading as a whole. **Special demurrer.** Alleges a particular material imperfection.

In a general demurrer at law no particular cause of exception is alleged; in a special demurrer the particular imperfection is pointed out and insisted upon.[3]

In equity practice the formula for a general demurrer is that there is no equity in the bill; in the case of a special demurrer the particular defect or objection is pointed out.[4]

A general demurrer lies for defects of substance; a special demurrer lies for defects of form, and adds to the terms of the former a specification of the particular ground of exception. Thus, alleging a defective title is a fault in substance for which the party may demur generally; but if a title be defectively stated it is a fault in form which must be specifically assigned for cause of demurrer. Under statutes of 27 Eliz. (1585), c. 5, and 4 and 5 Anne (1706), c. 16, unless imperfections, omissions, defects, and other matters of like nature be specifically and particularly set down and shown for cause of demurrer, the court gives judgment according to the very right of the cause without regarding the imperfections, omissions, etc.[5]

Where the objection is to the substance of the allegation, a general demurrer is sufficient; where to a defect in form, a special demurrer is indispensable. But neither demurrer is good unless the objections are apparent upon the face of the bill, from matter inserted or omitted, or from defects in the frame or form of the pleading.[5, 6]

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[1] L. *demorari*, to stay: *mora*, delay.

[2] Donaldson *v.* McDowell, 1 Holmes, 292 (1873), Shepley, J. See 26 N. Y. 85; 5 Phila. 112; 4 Rand. 510; L. R., 10 Exch. 135; 2 Kent, 159; 2 Pars. Contr. 304; 3 Chitt. Com. L. 426.

[3] The Elida, 31 F. R. 420 (1887).

[4] F. *demourer*, to tarry, stay, hesitate: L. *de-morari*, to delay fully, rest: *mora*, delay.

[5] Leaves *v.* Bernard, 5 Mod. *132 (1696); 2 Ark. 117; Stephen, Pl. 61; Coke, Litt. 71 *b*.

[6] [*Exp.* Vermilyea, 6 Cow. 559 (1826); Havens *v.* Hartford, &c. R. Co., 28 Conn. 89–92 (1859).

[7] Goodman *v.* Ford, 23 Miss. 595 (1852), Smith, C. J.

[8] 3 Bl. Com. 314.

[1] 3 Bl. Com. 446. See 6 Pet. 327.

[2] 4 Bl. Com. 333–34.

[3] Christmas *v.* Russell, 5 Wall. 303 (1866), Clifford, J.: 1 Chitty, Pl. 663; 2 Johns. 428.

[4] Gindrat *v.* Dane, 4 Cliff. 262 (1874); Story, Eq. Pl. § 455.

[5] Commonwealth *v.* Cross-Cut R. Co., 53 Pa. 66 (1866): Stephen, Pl. 161; 1 Saunders, Pl. & Ev. 950. See also

A demurrer admits jurisdiction and such matters of fact as are relevant and well-pleaded; but not conclusions of law drawn from the facts,[1] nor matters of inference or argument.[2]

Upon either a general or a special demurrer the opposite party must aver the matter or the form to be sufficient, which is called a "joinder in demurrer," and then the parties are at issue — which the court must determine.[3]

In England special demurrers were abolished by the procedure act of 1852, s. 51.

A party may both demur and plead. By pleading over, the right to demur may be waived.[4] The right to amend, after a demurrer has been sustained, is discretionary with the court.[5]

A demurrer cannot be good in part and bad in part; it must be sustained or fail to the whole extent to which it is interposed.[6]

The court decides for the party who, on the whole, seems best entitled to a judgment.[7] The judgment is as conclusive as a verdict.[8] That a demurrer was made cannot be used as an admission of a fact.[9]

Propositions deducible from the authorities are: (1) A judgment rendered upon a demurrer to a declaration or other material pleading setting forth the facts is as conclusive of matters admitted as a verdict would be, since the facts are established in the former case, as in the latter, by matter of record; and the rule is that facts thus established can never afterward be contested between the same parties or those in privity with them. (2) If judgment is rendered for the defendant, the plaintiff can never afterward maintain against him or his privies any similar action for the same cause upon the grounds disclosed in the declaration: the judgment determines the merits of the cause; a final judgment determining the right ends a dispute, else litigation would be endless.[10]

A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint, on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause as a cause, not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court.[11]

Where the demurrer goes to the form of the action, to a defect in pleading, or to the jurisdiction of the court, the judgment will not preclude future litigation on the merits of the controversy in a court of competent jurisdiction upon proper pleadings; and where it goes both to defects of form and to the merits a judgment not distinguishing between the two grounds may be presumed to rest on the former. But where the demurrer is to a pleading setting forth distinctly specific facts touching the merits of the action or defense, and final judgment is rendered thereon, it would be difficult to find any reason in principle why the facts admitted should not be considered for all purposes as fully established as if found by a jury or admitted in open court. If the party against whom a ruling is made wishes to avoid the effect of the demurrer as an admission of the facts he should seek to amend his pleading or answer, as the case may be. Leave for that purpose will seldom be refused upon a statement that he can controvert the facts by evidence. If he does not ask permission the inference may justly be drawn that he is unable to produce the evidence, and that the fact is as alleged in the pleading.[1]

Speaking demurrer. A demurrer which introduces some fact or averment, necessary to support it, not appearing distinctly upon the face of the bill.[2]

Demurrer to evidence. When a record or other matter is produced as evidence, concerning the legal effect of which there arises a doubt, and the adverse party demurs to the same as evidence.[3]

A proceeding by which the court is called upon to say what the law is upon the facts shown in evidence.[4]

The demurrant admits the truth of the testimony, and such conclusions as a jury may fairly draw; but not forced and violent inferences. The testimony is to be taken most strongly against him, and such conclusions as a jury may justifiably draw the court ought to draw.[5]

A demurrer to plaintiff's evidence admits the facts the evidence tends to prove. The court is to make every inference of fact in favor of the plaintiff which a jury might infer. If, then, the evidence is insufficient to support a verdict in his favor, the demurrer should be sustained.[6] See NONSUIT.

Coke, Litt, 72 *a*; 3 Bl. Com. 315; 1 Chitty, Pl. 642, 16 Am. ed., *694-95.

[1] Gindrat *v.* Dane, *cats.*

[2] United States *v.* Ames, 99 U. S. 45-46 (1878), cases; 14 F. R. 498, cases. See 109 U. S. 253, 550; 20 How. 125.

[3] 3 Bl. Com. 315.

[4] Stanton *v.* Embrey, 93 U. S. 553 (1876), cases.

[5] United States *v.* Atherton, 102 U. S. 375 (1880).

[6] First Nat. Bank of St. Paul *v.* Howe, 28 Minn. 152 (1881).

[7] See Townsend *v.* Jemison, 7 How. 706, 714 (1849); 16 Ill. 269; 39 Me. 426; 28 Ala. 687.

[8] Gould, Pl. 444; generally, *ib.* 428-46.

[9] Pease *v.* Phelps, 10 Conn. 68 (1834); 26 *id.* 92.

[10] Gould *v.* Evansville, &c. R. Co., 91 U. S. 533-34 (1875), cases, Clifford, J.

[11] Alley *v.* Nott, 111 U. S. 475 (1884), Waite, C. J.; N. Y. Code Civ. Proc. secs. 488, 497.

[1] Bissell *v.* Spring Valley Township, 124 U. S. 232 (1888), cases, Field, J.

[2] [Brooks *v.* Gibbons, 4 Paige, 375 (1834), Walworth, Ch. See Edsell *v.* Buchanan, 2 Ves. Jr. *83 (1793); 1 Sim. 5; 2 Sim. & Stu. 127; 1 Barb. Ch. Pr. 107.

[3] [3 Bl. Com. 372. See Gould, Pl. 446-58; Goodman *v.* Ford, 23 Miss. 595 (1852), Smith, C. J.

[4] Suydam *v.* Williamson, 20 How. 426 (1857), cases, Clifford, J.

[5] Pawling *v.* United States, 4 Cranch, 221 (1808), Marshall, C. J.; Pleasants *v.* Fant, 22 Wall. 121 (1874), cases; 77 Va. 212.

[6] Donohue *v.* St. Louis, &c. R. Co., 91 Mo. 360 (1886); 73 *id.* 219.

Demurrer to interrogatory. The reason a witness offers for not answering a particular question among interrogatories.

DENARIUS DEI. L. God's penny; money given to the church or to the poor; earnest-money, *q. v.*

DENIAL. See DEFENSE, 2.

DENIZEN.[1] An alien born who has obtained *ex donatione regis* letters-patent to make him a subject.[2]

Whence denizenize, denizenation or denization,[3] and denizenship. The crown denizenizes; parliament consents to naturalization.

A denizen is in a kind of middle state between an alien and a natural-born subject, and partakes of both. He may take lands by purchase or devise, but not by inheritance — for the parent has no inheritable blood.[4] But since 1870, in England, an alien may hold and dispose of property as a natural-born subject.

In South Carolina the status seems to have been created by law.

DENOUNCEMENT. In Mexican law, a judicial proceeding equivalent to the inquest of office at common law.[5]

DENTIST. See CARE; MECHANIC; PHYSICIAN.

DENY. See ADMISSION, 2; DEFENSE, 2; TRAVERSE.

DEODAND.[6] Any personal chattel which was the immediate cause of the death of a rational creature.[7]

The chattel, whether an animal or inanimate object, was forfeited to the king, to be applied to religious uses. Designed, originally, as an expiation for the souls of such persons as were snatched away by sudden death. If any animal killed a person, or if a cart ran over him, it was to be forfeited,— in part, also, as punishment for the supposed negligence in the owner. If the thing was in motion, as, a cart with its loading, all that moved was forfeited; if not in motion, then only the part which was the immediate cause of the death. It mattered not whether the owner was concerned in the killing or not. The right to deodands, in time, was granted to the lords of manors as a franchise.[8]

Abolished by 9 and 10 Vict. (1846) c. 62.

DEPART. See DEPARTURE.

DEPARTMENT. (*Adj.* Departmental.) The departments of government are the legislative, the executive, and the judicial departments.

In our system, it is important that these departments be kept separate, that one be not allowed to encroach upon the domain of another.[1]

While a general separation has been observed between the different departments, so that no clear encroachment by one upon the province of the other has been sustained, the legislative department, when not restrained by constitutional provisions and a regard for certain fundamental rights of the citizen which are recognized in this country as the basis of all government, has acted upon everything within the range of civil government.[2]

The executive business of the general government, under a permission rather than a mandate of the Constitution, is distributed to seven executive "departments" of equal grade.

Administration of the duties of these respective departments is committed directly to a "secretary" or "head," who, with his principal assistants, is appointed by the President as chief executive, with the advice of the Senate.

The departments are designated as of — the interior,[3] justice,[4] the navy,[5] the post-office,[6] state,[7] the treasury,[8] and war.[9] The department of agriculture[10] is of subordinate grade.

The head of a department is required to exercise judgment and discretion in administering the concerns of his office. He exercises his own judgment in expounding the laws and resolutions of Congress under which he is to act. If he doubts, he may call on the attorney-general for counsel. If the Supreme Court should differ with him as to the construction to be placed upon any of these laws it would pronounce judgment accordingly. But the interference of the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief — such power was never intended to be given to them. . . The court by *mandamus* may direct the doing of a purely ministerial act, but not the exercise of a duty requiring judgment and discretion.[11]

The heads of departments are the President's authorized assistants in the performance of his "executive" duties, and their official acts, promulgated in

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[1] F. *deinsein*, a trader "within" the privilege of a city franchise: *deins*, within,— Skeat.

[2] 1 Bl. Com. 374; 6 Pet. 116, note.

[3] Webster's Dict.; 1 Bl. Com. 374.

[4] 1 Bl. Com. 374.

[5] [Merle *v.* Mathews, 26 Cal. 477 (1864).

[6] L. *deo-dandum*, given to God.

[7] [1 Bl. Com. 300.

[8] 1 Bl. Com. 300-2.

[1] See Mabry *v.* Baxter, 11 Heisk. 689-90 (1872).

[2] Maynard *v.* Hill, 125 U. S. 205 (1888). As to the independence of the departments of government, see 21 Am. Law Rev. 210-27 (1887), cases.

[3] R. S. § 437: Act 3 March, 1849.

[4] R. S. § 346: Act 24 Sept. 1789.

[5] R. S. § 415: Act 30 April, 1798.

[6] R. S. § 388: Act 8 May, 1794.

[7] R. S. § 199: Act 27 July, 1789.

[8] R. S. § 233: Act 2 Sept. 1789.

[9] R. S. § 214: Act 7 Aug. 1789.

[10] R. S. § 520: Act 15 May, 1862.

[11] Decatur *v.* Paulding, 14 Pet. 515-17 (1840), Taney, C. J.; United States *v.* Macdaniel, 7 *id.* *15 (1833); Kendall *v.* United States, 12 *id.* 616 (1838); Litchfield *v.* Register and Receiver, 9 Wall. 577 (1869); Carrick *v.* Lamar, 116 U. S. 426 (1886), cases.

the regular course of business, are presumptively his acts.[1]

When the head of a department is required by law to give information on any subject to a citizen he may ordinarily do this through subordinate officers.[2]

The supervision which the head of a department may exercise over a subordinate does not extend to a matter in which the latter is directed by statute to act judicially.[3]

See COMITY; CONSTITUTIONAL; DOCUMENT, Public; EXECUTIVE; GOVERNMENT; JUDICIARY; LEGISLATURE; MINISTERIAL, 1; PROCLAMATION, 2; REGULATION.

DEPARTURE. Parting from, separation, going away; relinquishment, dereliction.

1. "Departure from the State," said of a debtor, in a statute of limitations, does not mean temporary absence from the State, while his usual place of residence continues therein, but such absence as entirely suspends the power of the plaintiff to commence his action.[4] See ABSCOND; ABSENCE; START.

2. In marine insurance, deviation from the course prescribed.

Imports an effectual leaving of the place behind. If the vessel be detained or driven back, though she may have sailed, there is no departure.[5] See DEVIATION.

3. In pleading, the dereliction of an antecedent ground of complaint or defense for another distinct from and not fortifying the former ground.[6]

In the several stages of the process of pleading a party must not depart or vary from the title or defense he has once insisted on. For this, which is called a "departure," might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder the plea, without departing from it.[7]

When a party quits or departs from the case or defense which he has first made, and has recourse to another.[8]

Occurs when, for example, the replication or rejoinder contains matter not pursuant to the declaration or plea, not supporting and fortifying it. May arise in the replication or a subsequent pleading. If parties were permitted to wander from fact to fact, forsaking one to set up another, no issue could be joined, nor could there be any termination of the suit. A departure may be in the substance of the action or defense, or in the law on which it is founded.[1]

Taken advantage of by a demurrer, general or special.[2] Compare VARIANCE; DUPLICITY. See ASSIGNMENT, New.

DEPENDENT. 1, *adj.* Not to be performed until a connected thing is done by another. Opposed, independent, completely obligatory within itself: as, a dependent, or an independent, contract or covenant, *qq. v.* Compare APPENDENT.

2, *n.* A person who is dependent for support upon another.[3]

DEPONENT; DEPOSE. See DEPOSITION.

DEPOSIT.[4] 1, *v.* (1) To give in charge to another person, to commit to the custody and care of another; to leave with for safe-keeping; to deliver to for further action, for a special or a general purpose, explained or understood.

"Deposited," in a statute prescribing the duties of an election inspector, implies that the depositary must safely keep the papers committed to his custody until he surrenders them to the board whose duty it is to canvass the returns and certify the result of the election.[5]

At an election in which a Congressman is voted for, failure to keep the election papers safely as provided by law in Indiana is an offense against the United States government.[6]

(2) Specifically, to deliver money or personalty to another for safe-keeping, without remuneration, until the owner shall request a return of the possession.

2, *n.*[7] (1) A naked bailment of goods, to be kept for the bailor without reward, and to be returned when he shall require it.[8]

A bailment of goods to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust.[9]

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[1] Rumkle *v.* United States, 122 U. S. 557 (1887).

[2] Miller *v.* Mayor of New York, 109 U. S. 385, 394 (1883).

[3] Butterworth *v.* Hoe, 112 U. S. 50, 55 (1884), cases.

[4] Blodgett *v.* Utley, 4 Neb. 29 (1875), Maxwell, J.

[5] Union Ins. Co. *v.* Tysen, 3 Hill, 126 (1842), cases, Cowen, J. See Sloop Active *v.* United States, 7 Cranch, 100 (1812).

[6] Gould, Pl. 421 — Ch. VIII, sec. 65.

[7] 3 Bl. Com. 310.

[8] 1 Chitty, Pl. 674; Steph. Pl. 410; 49 Ind. 112.

[1] 1 Chitty, Pl. 674; Steph. Pl. 410; 49 Ind. 112.

[2] See 5 Ala. 344; 5 Conn. 379; 16 Mass. *92; 44 Mo. 64; 14 Nev. 289; 16 Johns. 206; 20 *id.* 160; 13 N. Y. 89.

[3] Ballou *v.* Gile, 50 Wis. 619 (1880); American Legion of Honor *v.* Perry, 140 Mass. 590 (1886).

[4] L. *de-ponere*, to lay away, place aside; intrust to.

[5] *Re* Coy, 31 F. R. 801 (1887), Harlan, J.; Ind. R. S. 1881, c. 56.

[6] United States *v.* Coy, 32 F. R. 533 (1787), Woods, J.; R. S. § 5515. Affirmed, Sup. Ct., May 14, 1888.

[7] Deposite was the old spelling,—2 Pet. *325; 7 Conn. 495.

[8] Jones, Bailm. 36, 117: 17 Mass. 499; 40 Vt. 260.

[9] Story, Bailm. § 41: 8 Ga. 180; 42 Miss. 544; 29 N. Y. 167.

Also, the thing itself so bailed — goods, money, or other movables.

Depositor. The bailor in a contract of deposit of goods. **Depositary.** The bailee in a contract; a depositee.[1]

Depository. The place where the goods are received or kept.

General deposit. A deposit which is to be returned in kind. **Special deposit.** A deposit to be returned in the identical thing.

Quasi-deposit. Possession of another's property obtained by finding it.

A depositary is bound to take only ordinary care of the deposit. What this degree of care is varies with the circumstances of each case. . . He is answerable for gross negligence, which is considered equivalent to a breach of faith. The degree of care necessary to avoid the imputation of bad faith is measured by the carefulness which he uses toward his own property of a similar kind. For although that may be so slight as to amount even to carelessness in another, yet the depositor has no reason to expect a change of character in favor of his particular interest.[2] See BAILMENT; DEPOSITUM.

(2) A delivery of money to a bank or banker upon a contract that an equal sum will be returned on demand; also, the money itself. This, by pre-eminence, is a "deposit."

Whence bank of deposit, bank-deposits, memorandum of deposit, etc.

Depositor. He who delivers money to a bank, subject to his order.

General deposit. In this the depositor parts with title to his money,—lends it to the bank which agrees to return an equivalent sum on demand. Also called an *irregular* deposit. **Special deposit.** When the depositor retains title to the thing delivered, which may be bullion, plate, securities, etc., as well as money, and the bank becomes a bailee under obligation to take ordinary care of the article and to return it to the owner when called for.

In the ordinary case of a deposit of money with a banking corporation or banker the transaction amounts to a mere loan, *mutuum*, or irregular deposit, and the bank is to restore not the same money, but an equivalent sum, when demanded. But in the case of a "special deposit" the very coin or bills are to be restored,— the transaction constitutes a genuine deposit; the banker has no authority to use the money, being bound to return it *in individuo*.[1]

Originally, a deposit of money was made by placing a sum in gold or silver with a bank or other depositary, to be returned, when called for, in the same identical coin, and without interest, the depositor paying the depositary a compensation for his care. Later, it became customary to make a deposit for a particular period, on interest, or payable at prescribed periods after notice. In time, "deposit" became a symbolical word to designate not only a deposit in its original sense, but all that class of contracts where money in any form was placed with a bank or banker, to be returned in other money on call or at a specified period, and with or without interest. The transaction, in this figurative use of the term, was in reality the same as a "loan" of money between individuals.[2]

Deposits made with bankers may be divided into two classes: that in which the bank becomes bailee of the depositor, the title to the thing remaining with the latter; and that kind of deposit of money, peculiar to banking business, in which the depositor, for his own convenience, parts with title to his money, and lends it to the banker, who, in consideration of the loan and the right to use the money for his own profit, agrees to refund the amount, or any part thereof, on demand.[3]

When the banker specially agrees to pay in bullion or coin he must do so or answer in damages for its value. But where the deposit is general, and there is no special agreement proved, the title to the money deposited passes to the bank, the transaction is unaffected by the character of the money in which the deposit was made, and the bank becomes liable for the amount as a debt, which can be discharged only by such money as is a legal tender. . . When a merchant deposits money with a bank, the rule is, the title to the money passes to the bank, and the latter becomes the debtor to that amount.[4]

Deposits undoubtedly may be made with a banker under such circumstances that the conclusion would be that the title remained in the depositor; and in that case the banker would become the bailee of the depositor, and the latter might rightfully demand the identical money deposited as his property; but where the deposit is general, and there is no special agreement proven inconsistent with such theory, the title to the deposit passes to the banker, and he becomes liable for the amount as a debt which can be discharged only by a legal payment. . . An agreement to refund all or part of a general deposit may be express or implied; if express, it may be to refund with or without interest. The fact that the depositary agreed to pay interest affords strong evidence that the

[1] 108 Pa. 534.

[2] Foster *v.* The Essex Bank, 17 Mass. 498 (1821), Parker, C. J. See 2 Bl. Com. 453.

[1] Story, Bailm. § 88; State *v.* Clark, 4 Ind. 316 (1853).

[2] Curtis *v.* Leavitt, 15 N. Y. 166 (1857), Shankland, J

[3] Marine Bank (of Chicago) *v.* Fulton Bank (of New York), 2 Wall. 256 (1864), Miller, J. Quoted, Phœnix Bank *v.* Risley, 111 U. S. 127 (1883), cases; 92 U. S. 370, and 80 N. Y. 96, *post*. See also 34 La. An. 607; 17 Nev. 152.

[4] Thompson *v.* Riggs, 5 Wall. 678, 680 (1866), Clifford, J Quoted, 92 U. S. 370, *post*.

title to the money passed out of the depositor by the act of making the deposit.[1]

The power to receive deposits includes all the kinds known and customary in the banking business. National banks have power to receive special deposits gratuitously or otherwise; and when received gratuitously they are liable for their loss by gross negligence. When any such bank has habitually received such deposits, this liability attaches to a deposit received in the usual way. . . The term "special deposits" includes money, securities or other valuables delivered to banks, to be specially kept and redelivered; it is not confined to securities held as collaterals to loans. . . The chief, in some cases the only, deposits received by the early banks were special deposits of money, bullion, plate, etc., for safe-keeping, to be specifically returned to the depositor. . . The definition of the business of banks of deposit, in the encyclopedias, embraces the receiving of the money or valuables of others, to keep until called for by the depositors. And although, in modern times, the business of receiving general deposits has constituted the principal business of the banks, it cannot be said that receiving special deposits is so foreign to the banking business that corporations authorized to carry on that business are incapable of binding themselves by the receipt of such deposits.[2]

Section 5223, Rev. St., which provides that it shall be lawful for a national bank after its failure to "deliver special deposits," is as effectual a recognition of its power to receive them as an express declaration to that effect would have been. The phrase "special deposits," thus used, embraces the public securities of the United States.[3]

It is now well settled that if a bank be accustomed to take special deposits, and this is known and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter.[4]

The contract between a bank and its depositor is that of debtor and creditor. Money held by a depositor in a fiduciary capacity does not change its character by being placed to his credit.[5]

The right of the depositor is a chose in action, and his check does not transfer the debt, or give a lien upon it to a third person, without the assent of the depositary.[6]

General deposits held by a bank are part of its general fund, and loaned as other moneys. The banker agrees to discharge his indebtedness by honoring checks drawn upon the deposit. When a check on the bank itself is offered, the bank may accept or reject it or receive it conditionally. If, being genuine, it is received as a deposit, when there are no funds, the case is an executed contract, and the thing done cannot be repudiated. Depositors must comply with all reasonable regulations as to depositing and drawing.[1]

It seems to be well settled that a mere check or draft does not operate as an assignment or appropriation of the drawer's deposit in favor of the payee before acceptance by the bank, but the doctrine has not been extended beyond instruments of that character, drawn in the ordinary form; nor to a transaction not restricted to the very terms of such paper.[2]

A general deposit in a bank is so much money to the depositor's credit. It is a debt to him by the bank, payable on demand to his order; not property capable of identification and specific appropriation. A check upon a bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder; it is simply an order which may be countermanded, and payment forbidden by the drawer, at any time before it is actually cashed. It creates no lien on the money which the holder can enforce against the bank. It does not of itself operate as an equitable assignment,[3] *q. v.*

A depositor in a bank who sends his pass-book to be written up and receives it back with entries of credits and debits, and his paid checks as vouchers for the latter, is bound, with due diligence, to examine the pass-book and vouchers, and to report to the bank without unreasonable delay any errors which may be discovered in them; and if he fails to do so, and the bank is thereby misled to its injury, he cannot afterward dispute the correctness of the balance shown by the pass-book.[4] See further BANK, 2; CHECK; TAX, 2.

Deposit, certificate of. A writing, issued by a bank, attesting that the person named has deposited money with it.

A negotiable security, upon the same footing as a promissory note. It is treated as money.[5] See CURRENCY.

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[1] Scammon *v.* Kimball, 92 U. S. 369-70 (1875), Clifford, J.

[2] Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 89, 94 (1880), cases, Rapallo, J. Earliest case, Foster *v.* The Essex Bank, 17 Mass. 478, 496 (1821), Parker, C. J.,—in which the special deposit was a cask containing $58,000 in gold coin.

[3] First Nat. Bank of Carlisle *v.* Graham, 100 U. S. 702, 702 (1879), Swayne, J.: 79 Pa. 106. See further Prather *v.* Kean, 29 F. R. 498 (1887): 26 Am. Law Reg. 96; *ib.* 97-98 (1887), cases.

[4] Chesapeake Nat. Bank *v.* Connecticut Mut. Ins. Co., 104 U. S. 54-71 (1881), cases. See 37 N. J. E. 18.

[5] Nat. Bank of the Republic *v.* Millard, 10 Wall. 157 (1869), cases; Rosenthal *v.* The Mastin Bank, 17 Blatch. 322-26 (1879), cases.

[1] See Thompson *v.* Riggs, Scammon *v.* Kimball, *ante;* First Nat. Bank of South Bend *v.* Lanier, 11 Wall. 375 (1870); First Nat. Bank of Cincinnati *v.* Burkhardt, 100 U. S. 689 (1879); Chesapeake Nat. Bank *v.* Connecticut Mut. Ins. Co., 104 *id.* 54, 64-71 (1881), cases.

[2] Coates *v.* First Nat. Bank of Emporia, 91 N. Y. 26 (1883).

[3] Florence Mining Co. *v.* Brown, 124 U. S. 391 (1888), Field, J.

[4] Leather Manufacturers' Bank *v.* Morgan, 117 U. S. 106 (1886), cases, Harlan, J. See same case, ACCOUNT, 1.

On relation of depositors to bank, see further Fletcher *v.* Sharpe, Sup. Ct. Ind. (1887), cases: 26 Am. Law Reg. 71; *ib.* 74-82 (1887), cases. As to fiduciary depositors, see *ib.* 25, 29-30 (1887), cases.

[5] Welton *v.* Adams, 4 Cal. 39 (1854); Gregg *v.* Union

By virtue of the assurance given, the credit of the bank is added to the credit of the original debtor.[1]

A certificate is a subsisting chose in action and represents the fund it describes, as in cases of notes, bonds, and other securities; so that a delivery of it as a gift constitutes an equitable assignment of the money.[2]

When in the usual form, payable to the order of the depositor, is in the nature of commercial paper, and the payee is chargeable upon his indorsement thereof. Its negotiable character is not affected by the fact that a demand is necessary before an action can be maintained thereon; nor is it changed by a provision therein by which it is made payable in current bank-notes. . . An indorser of the certificate is liable as such, until actual demand made; and the holder is not chargeable with neglect for omitting to make such a demand within any particular time.[3]

A certificate of deposit is, in effect, a negotiable promissory note; and the statute of limitations begins to run from the date of issue, without the necessity of demand of payment.[4]

If lost before it is indorsed by the depositor no title vests in the finder, and the bank cannot require of the depositor indemnity against possible future loss, although the money by the terms of the certificate is payable "on return of the certificate."[5]

By implication of law, contains a promise to repay the money, and cannot be varied by parol evidence.[6]

Deposit company. An association which, having provided a building constructed for protection against loss by theft or fire, and having furnished the same with boxes or safes for the deposit of securities, jewels, papers, etc., invites the public to lease the boxes or receptacles, the association insuring the safety of deposits against the acts of all persons except the depositors themselves.

A fuller name is "safe deposit and trust company."

Where bonds were found to be missing from a box so rented the company was held bound to explain the absence of the bonds, and, in default of evidence of negligence or guilt in the depositor, to pay him the value of the bonds.[7]

The robbery by burglars of securities deposited for safe-keeping in the vaults of a bank is not proof of negligence on the part of the bank.[8]

County Nat. Bank, 87 Ind. 289 (1882), cases; Poorman v. Woodward, 21 How. 275 (1858); 27 N. Y. 378.

[1] Downey v. Hicks, 14 How. 249 (1852).

[2] Basket v. Hassell, 107 U. S. 614 (1882).

[3] Pardee v. Fish, 60 N. Y. 265, 268-69 (1875), cases.

[4] Carran v. Witter, Sup. Ct. Wis. (1887), cases, Lyon, J.; 35 Alb. Law J. 389 (1887), cases.

[5] Citizens' Nat. Bank v. Brown, Sup. Ct. Ohio (1887), cases: 36 Alb. Law J. 26.

[6] Lang v. Straus, Sup. Ct. Ind. (1887), cases: 26 Am. Law Reg. 115. See generally 24 Cent. Law J. 196 (1887), cases.

[7] Safe Deposit Co. v. Pollock, 85 Pa. 391 (1877).

[8] Wylie v Northampton Bank, 119 U. S. 361 (1886).

Deposit in lieu of bail. One charged with a crime or tort in some cases may make a deposit of money or valuables, instead of furnishing bail for his appearance at the hearing or trial.[1]

Deposit of title deeds. Pledging the title deeds to the owner's estate as security for the repayment of a loan.

In effect an equitable mortgage, *q. v.*

DEPOSITION.[2] Sometimes is synonymous with "affidavit" or "oath;" but, in its more technical and appropriate sense, is limited to the written testimony of a witness given in the course of a judicial proceeding, at law or in equity.[3]

"Deposition" is a generic expression, embracing all written evidence verified by oath, and thus includes "affidavits;" but, in legal language, a deposition is evidence given by a witness under interrogatories, oral or written, and usually written down by an official person; while an affidavit is the mere voluntary act of the party making the oath, and is generally taken without the cognizance of him against whom it is to be used. Yet the terms may be convertible, as in the rules at law of the Supreme Court.[4]

Depose. Originally, to give testimony under oath, to testify; in present usage, to give testimony which is officially written down for future use. **Deponent.** One who, being under oath, testifies in writing.

A deponent is a witness who depones (*deponit*), i. e., places his hand upon the book of the Evangelists while he is being bound by the obligation of an oath. Depose, deponent, and deposition related, originally, then, to the mode in which the oath was administered, not to the testimony itself as oral or written.[5]

Depositions are taken of witnesses out of the jurisdiction, or aged, infirm, sick, or going abroad, upon written interrogatories, the answers to be used as evidence in the event of their death or departure before trial, or of their inability to attend the trial. Testimony in equity, and much in admiralty and divorce, is thus taken, as is also testimony at preliminary examinations in criminal causes; but, in the last case, is not admissible at trial, except, perhaps, by consent of the accused.[6] See further DEDIMUS.

The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in

[1] See Commercial Warehouse Co. v. Graber, 45 N. Y. 394 (1871); 31 Hun, 231; 18 Abb. N. Cas. 323-24 (1886), cases.

[2] L. *de-ponere*, to put, place; to lay down or aside.

[3] State v. Dayton, 23 N. J. L. 54 (1850), Green, C. J.

[4] Stimpson v. Brooks, 3 Blatch. 456-57 (1856), Betts, J

[5] [Bliss v. Shuman, 47 Me. 252 (1859), Appleton, J.

[6] See 3 Bl. Com. 383, 438.

which the case is to be tried, or to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient or infirm.[1]

Such deposition can only be read upon proof that the attendance of the witness upon the trial cannot be procured.[2]

Cases in equity are taken to the Supreme Court from the circuit courts, and the district courts sitting as circuit courts, by appeal, and are heard upon the proofs sent up with the record. "The mode of proof," by section 862, Rev. St., "shall be according to the rules now or hereafter prescribed by the supreme court, except as herein specially provided." The circuit courts are not now by law required to permit the examination of witnesses orally in open court upon the hearing of cases in equity. But if such practice is adopted, the testimony must be taken down, or its substance stated in writing and made part of the record.[3]

Formerly, in England, the mode of examining witnesses in equity was by interrogatories in writing. . . At the December term, 1861, of the Supreme Court, a new practice was introduced. Rule 67 was so amended as to make oral examination the rule, if either party desires it, and examination by written interrogatories the exception.[4]

Congress has not empowered the district and circuit courts to make rules touching the mode of taking testimony. . . Depositions taken under a State law in conflict with the provisions of the act of Congress in relation thereto are not admissible in evidence.[5]

A deposition filed is the property of the court; if the testimony is material it should be used. Some courts hold that it is as competent for one party to read a deposition filed by the other party as to introduce a witness summoned in his behalf.[6] See INTERROGATORY.

DEPOSITUM. L. A naked bailment without reward, and without any special undertaking.[7]

So called because the naked custody is given to another.[8] See DEPOSIT, 1; DEPOT, 1.

DEPOT. 1. In French law, *dépôt* is the *depositum* of the Roman and the *deposit* of the English law.

May mean a place where military stores or supplies are kept.[9]

2. A place where passengers get on and off the cars, and where goods are loaded and unloaded.

All ground necessary or convenient and actually used for these purposes is included.[1] See RAILROAD; STATION, 2.

DEPRIVE. Referring to property taken under the power of eminent domain, means the same as "take."[2]

While the Fourteenth Amendment ordains that no State shall "deprive any person of life, liberty, or property without due process of law," no definition of the word "deprive" is found in the Constitution. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it when employed in the same or a like connection.[3] See further TAKE, 8.

DEPUTY.[4] One who acts officially for another; the substitute of an officer — usually of a ministerial officer.

Deputize. To appoint another to act in one's own place or office.

General deputy. A deputy who is empowered to perform all the ordinary duties of an office. **Special deputy.** A deputy, chosen to do a particular act or acts.

An attorney-general, a district-attorney, a collector of revenue, a mayor, a constable, a marshal, a sheriff, a minister or consul, and other officers, are sometimes said to act by deputy.

There are two kinds of deputies of a sheriff: a general deputy or under sheriff who by virtue of his appointment has authority to execute all the ordinary duties of the office of sheriff. He executes process without special power from the sheriff, and may even delegate authority for its execution to a special deputy, who is an officer *pro hac vice*, to execute a particular writ on some certain occasion. He acts under a specific, not a general, appointment and authority.[5]

The deputy of a ministerial officer may do whatever his principal could do under the circumstances of each case.[6] See DELEGATUS.

DERAIGN.[7] Originally, to confound, disorder; to turn out of course; to displace. In old common law, to prove by disproving,

[1] R. S. §§ 863-75.

[2] Whitford *v.* Clark County, 13 F. R. 837, 839 (1882), cases; Stebbins *v.* Duncan, 108 U. S. 45 (1883); Whitford *v.* Clark County, 119 *id.* 522 (1886).

[3] Blease *v.* Garlington, 92 U. S. 1, 4-8 (1875), Waite, Chief Justice.

[4] Bischoffscheim *v.* Baltzer, 20 Blatch. 231 (1882); s. c. 10 F. R. 3.

[5] Randall *v.* Venable, 17 F. R. 162 (1883).

[6] Rucker *v.* Reid, 36 Kan. 470 (1887). As to rules of practice, see 22 Cent. Law J. 581 (1886), cases. Taking before U. S. commissioner, 1 Kan. Law J. 245-49 (1885) — Wash. Law Rep.

[7] Foster *v.* Essex Bank, 17 Mass. 498 (1821), Parker, C. J.; 33 Ala. 55; 2 Bl. Com. 453.

[8] Story, Bailm. § 43.

[9] Caldwell's Case, 19 Wall. 264 (1873).

[1] Fowler *v.* Farmers' Loan & Trust Co., 21 Wis. 79 (1866); Pittsburgh, etc. R. Co. *v.* Rose, 24 Ohio St. 229 (1873); State *v.* New Haven, &c. R. Co., 37 Conn. 163 (1870); 34 La. An. 624; 110 U. S. 682.

[2] Sharpless *v.* Philadelphia, 21 Pa. 167 (1853); Grant *v.* Courter, 24 Barb. 238 (1857).

[3] Munn *v.* Illinois, 94 U. S. 123 (1876), Waite, C. J.

[4] F. *deputé*, one deputed: L. *deputare*, to esteem, allot, destine.

[5] Allen *v.* Smith, 12 N. J. L. 162 (1831), Ewing, C. J.

[6] The Confiscation Cases, 20 Wall. 111 (1873); *Re* Executive Communication, 12 Fla. 652 (1868).

[7] O. F. *derainer*, to maintain in a legal action: L. L. *de rationare*, to contend in law.

or simply to prove; as, to deraign a right, deraign the warranty.[1]

Also spelled darraign, darrain.

DERELICT.[2] Relinquished, deserted, abandoned.

Dereliction. The state of being abandoned or cast away; also, the thing itself of which this is predicated.

1. Land left uncovered by the receding of water from its former bed.[3] Sometimes called "reliction." See ALLUVION.

2. Anything thrown away or abandoned with intention to relinquish claim of ownership thereto.

In the civil law the voluntary abandonment of goods by the owner, without the hope or purpose of returning to the possession.[4]

Dereliction or renunciation of goods requires both the intention to abandon and external action.[5]

The right of appropriating a derelict is one of universal law. It existed in a state of nature, and is only modified by society, according to the discretion of each community.[6] See ABANDON, 1.

3. Specifically, maritime property entirely deserted.

It is sufficient that the thing is found deserted or abandoned upon the seas, whether it arose from accident or necessity, or voluntary dereliction. . . A thing was not derelict in the civil law unless the owner voluntarily abandoned it without any further claim of property in it.[7]

The abandonment must be final, without hope of recovery or intention to return. It is not sufficient that the crew have left temporarily, as, to procure assistance.[8]

A case of "*quasi*-derelict" occurs when the vessel is not abandoned, but those on board are physically and mentally incapable of doing anything for their safety.[9] See SALVAGE.

DERIVATIVE. See ACQUISITION; CONVEYANCE, 2.

DERIVED. See DEVOLUTION.

DEROGATION. Partial repeal or abrogation: impairment of utility and force; restriction.

Statutes in derogation of the common law or of common right are to be strictly construed.[1] In this category are: attachment laws;[2] affidavit-of-defense laws;[3] changes in commercial paper sought to be made by local statutes;[4] contracts in restraint of the taxing power;[5] summary convictions.[6]

DESCEND.[7] Sometimes, to "pass by descent or inheritance" or "be inherited by,"— thereby expressing in a single term what otherwise might require a circumlocution. When so used, in statutes, it is usually accompanied by other words which prevent ambiguity: as, "descend to his father," "to his mother," "to his next of kin;" but in these cases these terms so qualify the word "descend" as to give it the effect of "pass by inheritance" to the person named or described. In a will the word cannot be construed to include any but lineal heirs, without clear indication that it was otherwise intended by the testator.[8]

Ordinarily, for an estate to vest by operation of law in the heirs, immediately upon the death of the ancestor.[9]

In a will, does not work a descent in the strict legal sense, as inheritance is through operation of law. It indicates, presumably, a desire that property shall follow the channel into which the law would direct it.[10]

May import devolution by force of the devise made, rather than descent in the legal sense; that is, "to go down."[11]

Descendant. One who has issued from an individual, including a child, a grandchild, and their children to the remotest degree.[12] Correlative, *ancestor*, q. v.

Often synonymous with "heir."[13]

"Descendants" includes every person descended from the stock referred to.— is co-extensive with "issue," but not as comprehensive as "relatives;"[14]

[1] [Jacob's Law Dict.] "A title deraigned by a sale," Freeman, Executions, § 282.

[2] L. *derelictio*, complete, neglect: *derelinquere*, to forsake.

[3] 2 Bl. Com. 262.

[4] Jones *v.* Nunn, 12 Ga. 473 (1853); 2 Bl. Com. 9; 10 Johns. 356.

[5] Livermore *v.* White, 74 Me. 455 (1883).

[6] Hawkins *v.* Barney, 5 Pet. *467 (1831).

[7] Rowe *v.* Brig and Cargo, 1 Mas. 373, 374 (1818), Story, J.; Montgomery *v.* The Leathers, 1 Newb. 425 (1852); Evans *v.* The Charles, *ib.* 330 (1842); 2 Kent, 357.

[8] The Island City, 1 Black, 128 (1861), Grier, J.; The Laura, 14 Wall. 336, 342 (1871); The Hyderabad, 11 F. R. 754-55 (1882), cases.

[9] Sturtevant *v.* The Nicholaus, 1 Newb. 452 (1852).

[1] 1 Shars. Bl. Com. 87.

[2] Mitchell *v.* St. Maxent's Lessee, 4 Wall. 243 (1866); 101 U. S. 565.

[3] 56 Pa. 21.

[4] Ross *v.* Jones, 22 Wall. 591 (1874).

[5] Tucker *v.* Ferguson, 22 Wall. 575 (1874).

[6] 1 Burr. 613; 4 Bl. Com. 280; 2 Kent, 73.

[7] L. *de-scendere*, to pass down.

[8] Baker *v.* Baker, 8 Gray, 119, 120 (1857), Shaw, C. J.; McDowell *v.* Addams, 45 Pa. 434 (1863).

[9] [Dove *v.* Torr, 128 Mass. 40 (1879), Gray, C. J.

[10] Halstead *v.* Hall, 60 Md. 213 (1883); Dennett *v.* Dennett, 40 N. H. 498 (1860).

[11] Ballentine *v.* Wood, 42 N. J. E. 558 (1886).

[12] Jewell *v.* Jewell, 28 Cal. 236 (1865): Bouvier.

[13] Huston *v.* Read, 32 N. J. E. 599 (1880).

[14] Barstow *v.* Goodwin, 2 Bradf. 416 (1853).

nor does it embrace "brothers and sisters;"[1] has not the same signification that "heirs of the body" has, and may be used by a testator as synonymous with "children."[2]

Descent. Passing downward; hereditary succession.

Hereditary succession to an estate in realty. The title whereby a man on the death of his ancestor acquires his estate by right of representation as his heir at law.[3] See HEIR.

Lineal descent. Descent from father or grandfather to son or grandson; or from mother to daughter, etc. *Collateral descent.* From brother to brother, cousin to cousin, etc.

Mediate, immediate descent. A descent may be mediate or immediate in regard to the mediate or immediate descent of the estate of right, or the mediateness or immediateness of the pedigrees or degrees of consanguinity.[4]

A descent from a parent to a child cannot be construed to mean a descent through and not from a parent. When an estate is said to have descended from A to B, the obvious meaning is that it is an immediate descent from A to B. "Come by descent" means by immediate descent.[5]

Canons of descent. The rules which regulate the descent of real estates of inheritance; the rules according to which estates are transmitted from ancestor to heir.

At common law these canons are:

I. An inheritance lineally descends to the issue of the person who last died actually seised, *in infinitum*, and never lineally ascends.

II. The male issue are admitted before the female.

III. Where there are two or more males in equal degree the eldest only inherits; but females altogether.

IV. Lineal descendants, *in infinitum*, represent their ancestor.

V. On failure of the lineal descendants of the person last seised the inheritance descends to his collateral relations, being of the whole blood of the first purchaser: subject to the last three preceding rules.

VI. The collateral heir of the person last seised must be his next collateral kinsman of the whole blood.

VII. In collateral inheritances male stocks (however remote) are preferred to female (however near); unless the lands have, in fact, descended from a female.[6]

Lord Hale reduced the rules upon the subject of descent, up to whose time they had continued the same some four hundred years, to this series of "canons." Material alteration was not again made in them till 1833,—by stat. 3 and 4 Will. IV, c. 106 (amended in 1859 by 22 and 23 Vict., c. 35, ss. 19, 20). By that act, which went into effect January 1, 1834, among other important alterations, the father is made heir to his son, the latter having no issue; all lineal ancestors are rendered capable of being heirs; and relatives of the half-blood are admitted to succeed on failure of relatives in the same degree of the whole blood.[1]

In England title by "descent" was favored by the courts, because land in the hands of the heirs at law by descent was chargeable with payment of the ancestor's debts, and because such title favored the right of escheat upon failure of heirs. On the other hand, land acquired by "purchase" was not liable for debts, and, upon the death of the owner, descended to the heirs on the paternal side, and upon failure of such heirs to the heirs on the side of the mother. Title by descent was considered the worthier, and where a will gave the devisee the same estate he would have taken as heir-at-law he was adjudged to take not under the will, but by descent or operation of law.[2]

The common-law canons of descent tended to prevent the diffusion of landed property, and to promote its accumulation in the hands of a few. The principles sprang from the martial genius of the feudal system. In the United States the English common law of descents, in its essential features, has been rejected; each State has established a law for itself.[3] So far as the British law was taken as the basis of this legislation, it was the statutes of Charles II (1671, 1678), and of James II (1685), respecting the distribution of personalty. The two systems are radically different.[4]

See BLOOD, 1; CAPUT, Per capita; DISTRIBUTION, 2; FEUD; INHERIT; PEDIGREE; PRIMOGENITURE; PURCHASE, 3.

DESCRIPTIO. L. Delineation: designation, description. Compare DEMONSTRATIO.

Descriptio personæ. Description of the person; an addition to a name or signature: as, "chairman," "president," "agent," "assignee," "executor."

An appellation thus used may not so much serve to show the capacity in which a person acts as to identify him as an individual; but circumstances may indicate an intention to qualify or limit liability.[4]

The rule is that if a person merely adds to the signature of his name the word "agent," "trustee," "treasurer," etc., without disclosing his principal, he

[1] Hamlin *v.* Osgood, 1 Redf. 411 (1862); 30 N. Y. 393; 35 Ga. 420.

[2] Schmauns *v.* Goss, 132 Mass. 144 (1882).

[3] 2 Bl. Com. 201; 46 Miss. 395; 25 Tex. 241.

[4] [Levy *v.* M'Cartee, 6 Pet. *112 (1832), Story, J.

[5] Gardner *v.* Collins, 2 Pet. *90, 91, 94 (1829), Story, J.; 3 Ohio St. 396; 35 Ind. 451.

[6] 2 Bl. Com. 208-35; Bates *v.* Brown, 5 Wall. 715-17 (1866).

[1] Williams, R. P. 93, 95, 96-106.

[2] Donnelly *v.* Turner, 69 Md. 83 (1882), Robinson, J.

[3] See 4 Kent, 412, 406, n.

[4] Bates *v.* Brown, *ante*, 2 Bl. Com. 515; McDowell *v.* Addams, 45 Pa. 434 (1863). Virginia law, 9 Va. Law J. 199-203 (1885).

[5] See Reznor *v.* Webb, 35 How. Pr. 364 (1866); DeWitt *v.* Walton, 9 N. Y. 572 (1854); Rathbon *v.* Budlong, 18 Johns. *2 (1818).

is personally bound. The appendix is regarded as a mere *descriptio personæ*. It does not of itself make third persons chargeable with notice of any representative relation of the signer. But if he is in fact a mere agent, trustee, or officer of some principal, and is in the habit of expressing in that way his representative character in his dealings with a particular party who recognizes him in that character, it would be contrary to justice and truth to construe documents thus made and used as his personal obligations, contrary to the intent of the parties.[1]

DESCRIPTION. See DESCRIPTIO.

Enumeration of characteristic qualities; designation; recital. Whence descriptive. Opposed, **misdescription:** an erroneous description.

1. A description of land is good if it identifies the land.[2]

Where the description in a deed is true in part, that which is false may be rejected. The instrument will take effect if a sufficient description remains to ascertain its application.[3]

Words clearly inconsistent with the rest of a description may be ignored.[4]

Specification of quantity, after a particular description by courses, distances, boundaries, etc., will be held subject to the controlling part of the description. If the purchaser gets the distinct thing contracted for, he cannot complain on account of a deficiency in quantity, unless deception has been practiced.[5]

A misdescription in a deed will not affect the conveyance, if the property is otherwise so described that it can be identified; especially, where the mistake is in a statement regarding the title.[6] See AT, 2; DEMONSTRATIO, Falsa, etc.; MORE OR LESS; ON; THENCE.

2. As to description of a patent, see INVENTION; PROCESS, 2.

3. Where there is a misdescription in a will, either of a person or of the subject-matter, extraneous evidence is always admissible to show who, or what property, was meant.[7] See AMBIGUITY.

4. Where words in a declaration are descriptive of the instrument sued on, the instrument, when offered in evidence, must conform strictly to that description. One bearing a different date will not be admitted. But as the same contract may be made on one day and take effect another, and as a bond may be dated one day to become obligatory on another, either instrument may be counted on as bearing the first date.[8]

An allegation of a matter of substance may be substantially proved; an allegation of a matter of *essential* description must be proved, in cases, with literal precision. . . Allegations of time, place, quantity, quality, and allegations in aggravation of damages, are not to be strictly proved, unless descriptive. In local actions place is material, and so of the kind and boundaries of land.[9]

The strict rule of pleading which formerly required exact accuracy in the description of premises sought to be recovered, has, in modern practice, been relaxed, and a general description held to be good. The provisions of statutes as to descriptions by metes and bounds have been held to be directory only; a description by name, where the property is well known, is often sufficient, as, to enable a sheriff to execute a writ of possession, or a surveyor to ascertain the precise limits of the location of a mining claim.[10] See ALLEGATION; INDICTMENT.

DESERTION.[11] A willful abandonment of an employment or duty, in violation of a legal or moral obligation.[12]

A soldier deserts his post, a sailor his ship, an apprentice his master, when they depart from the service to which they are bound without permission or contrary to orders. The word implies a separation which is not with the assent of the person deserted.[13] See ABANDON, 2.

1. By a husband or wife — an intentional and wrongful cessation of matrimonial cohabitation.[14]

An actual abandonment of matrimonial cohabitation, with an intent to desert, willfully and maliciously persisted in, without cause. Mere separation is, then, not desertion.[15]

A breach of matrimonial duty, composed of the actual breaking off of matrimonial cohabitation and of an intent to desert.[16]

Not merely a refusal of matrimonial intercourse, which would be a breach or violation

[1] Metcalf *v.* Williams, 104 U. S. 98 (1881), Bradley, J.; Taylor *v.* Davis, 110 *id.* 336 (1884); Wall *v.* Bissell, 125 *id.* 393 (1888); 24 Law Reg. 781-82 (1885), cases; 102 Ind. 445.

[2] Litchfield *v.* County of Webster, 101 U. S. 775 (1879).

[3] White *v.* Luning, 93 U. S. 524 (1876); Coleman *v.* Manhattan Beach Improv. Co., 94 N. Y. 229 (1883); Brookman *v.* Kurxman, *ib.* 276 (1883); 10 Oreg. 88-89; 1 Greenl. Ev. § 301.

[4] Sampson *v.* Security Ins. Co., 133 Mass. 54-55 (1882).

[5] See 4 Kent, 466; 1 Story, Eq. § 141; 3 Washb. R. P. 630; 102 U. S. 212. Compensation for misdescription, 3 Law Quar. Rev. 54-63 (1887), Eng. cases.

[6] Sherwood *v.* Whiting, 54 Conn. 333-37 (1886), cases.

[7] Hawkins *v.* Garland, 76 Va. 153 (1882).

[8] United States *v.* Le Baron, 4 Wall. 642, 648 (1866).

[9] 1 Greenl. Ev. §§ 56-66, cases; Whart. Ev. §§ 942, 945, 1004, 1040, cases.

[10] Glacier Mountain Silver Mining Co. *v.* Willis, 127 U. S. 480 (1888), Lamar, J.

[11] L. *de*, apart; *serere*, to join: to part from.

[12] Lea *v.* Lea, 8 Allen, 419 (1864), Bigelow, C. J.; Ford *v.* Ford, 143 Mass. 580 (1887).

[13] Benkert *v.* Benkert, 32 Cal. 470 (1867); Bennett *v.* Bennett, 43 Conn. 318 (1876).

[14] Ingersoll *v.* Ingersoll, 49 Pa. 251 (1865); Bishop *v.* Bishop, 30 *id.* 412 (1858); Grove's Appeal, 37 *id.* 447 (1860); McClurg's Appeal, 66 *id.* 366 (1870); Sower's Appeal, 89 *id.* 173 (1879).

[15] Bailey *v.* Bailey, 21 Gratt. 47 (1871); Latham *v.* Latham, 30 *id.* 322 (1878); Burk *v.* Burk, 21 W. Va. 456 (1883).

of a single duty only, but a cessation of cohabitation, a refusal to live together, which involves an abrogation of all the duties resulting from the marriage contract.[1] See ABANDON, 2 (1); NECESSARIES, 1.

2. By a sailor or seaman — an unauthorized leaving or absence from the ship with an intention not to return to her service.[2]

A quitting of the ship and her service, not only without leave and against the duty of the party, but with an intent not again to return to the ship's duty.[3]

3. By a soldier — absence and an intention not to return to the service.[4]

A minor, over eighteen and under twenty-one, who enlists in the army without the consent of his parent or guardian can commit the offense, and the military tribunals may try him therefor.[5]

4. Of property, see ABANDON, 1; DERELICTION, 3.

DESERVING. Denotes worth or merit, without regard to condition or circumstances.[6]

DESIGN. 1. Aim, intent, purpose; object, end in view.

In an indictment for having in one's possession materials for counterfeiting, may refer to the purpose for which the materials were originally designed, and not to criminal intent in the defendant to use them.[7] See INTENT; MALICE; WILL, 1.

2. Giving a visible form to a conception of the mind,— to an invention.[8]

The acts of Congress which authorize patents for designs were intended to give encouragement to the decorative arts. They contemplate not so much utility as appearance. It is a new and original design for a manufacture, whether of metal or other material; a new and original design for a bust, statue, *bas relief*, or composition in *alto* or *basso relievo;* a new or original impression or ornament to be placed on any article of manufacture; a new and original design for the printing of woolen, silk, cotton, or other fabric; a new and useful pattern, print, or picture, to be either worked into, or on, any article of manufacture; or a new and original shape or configuration of any article of manufacture,— one or all of these the law has in view. And the thing invented or produced, for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture, or article to which it may be applied, or to which it gives form. The law contemplates that giving new and original appearances to a manufactured article may enhance its salable value, enlarge the demand for it, and be a meritorious service to the public. It is the appearance itself, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense.[1]

The test of identity of design plainly must be sameness of appearance; and mere difference of lines in the drawing or sketch, a greater or smaller number of lines, or slight variances in configuration, if sufficient to change the effect upon the eye, will not destroy the substantial identity. . . . . It is not essential that the appearance should be the same to the eye of an expert. If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.[1]

The differences in designs necessary to take away their identity are such appearances as would attract the attention of an ordinary observer, giving such attention as a purchaser of the articles, for the purposes for which they were intended and purchased, would usually give. There may be an infringement of a patented design without taking the whole of it, but in such cases the part taken must be a part covered by the patent.[2]

Design patents stand on as high a plane as utility patents, and require as high a degree of the inventive or originative faculty. In patentable designs a person cannot be permitted to select an existing form, and simply put it to a new use, any more than he can be permitted to take a patent for a mere double use of a machine; but the selection and adaptation of an existing form may amount to a patentable design, as the adaptation of an existing mechanical device may amount to a patentable invention.[3] See PAINTING; PATENT, 2.

An act of Congress approved February 4, 1887 (24 St. L. 387), provides — That hereafter, during the term of letters patent for a design, it shall be unlawful for any person other than the owner of said letters patent, without the license of such owner, to apply the design secured by such letters patent, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or to sell or expose for sale any article of manufacture to which such design or colorable imitation shall, without the license of the owner, have been applied, knowing that the same has been so

[1] Southwick *v.* Southwick, 97 Mass. 328 (1867), Bigelow, C. J.; Magrath *v.* Magrath, 103 *id.* 579 (1870).

[2] Coffin *v.* Jenkins, 3 Story, 113 (1844), Story, J.

[3] Cloutman *v.* Tunison, 1 Sumn. 375 (1833), Story, J.; The Mary Conery, 9 F. R. 223 (1881); 3 Kent, 155.

[4] Hanson *v.* South Scituate, 115 Mass. 343 (1874).

[5] *Re* Zimmerman, 30 F. R. 176 (1887).

[6] Nichols *v.* Allen, 130 Mass. 218 (1881), cases, Gray, Chief Justice.

[7] Commonwealth *v.* Morse, 2 Mass. *131 (1806).

[8] [Binns *v.* Woodruff, 4 Wash. 52 (1821), Washington, J.

[1] Gorham Company *v.* White, 14 Wall. 524–28 (1871), cases, Strong J.: Act 29 Aug. 1842; 5 St. L. 543. See Acts 8 July, 1870, and 18 June, 1874: R. S. §§ 4929–33.

[2] Dryfoos *v.* Friedman, 18 F. R. 825 (1884), Wheeler, J.

[3] Western Electric Manuf. Co. *v.* Odell, 18 F. R. 321 (1883), Blodgett, J. For the rule as to damages for infringement, see Dobson *v.* Hartford Carpet Co., 114 U. S. 439, 445 (1885), cases, Blatchford, J.; Dobson *v.* Dornan, 118 *id.* 10, 17 (1886).

applied. Any person violating the provisions, or either of them, of this section, shall be liable in the amount of two hundred and fifty dollars; and in case the total profit made by him from the manufacture or sale, as aforesaid, of the article or articles to which the design, or colorable imitation thereof, has been applied, exceeds the sum of two hundred and fifty dollars, he shall be further liable for the excess of such profit over and above the sum of two hundred and fifty dollars; and the full amount of such liability may be recovered by the owner of the letters patent, to his own use, in any circuit court of the United States having jurisdiction of the parties, either by action at law or upon a bill in equity for an injunction to restrain such infringement.

Sec. 2. Remedies by existing law shall not be impaired; but the owner shall not twice recover the profit made from the infringement.

DESIGNATIO. L. Pointing out: designation.

Designatio personæ. Designation of the person — to a contract. Compare DESCRIPTIO.

Designatio unius. See EXPRESSIO, Unius, etc.

DESIGNATION. The use of an expression, instead of the name, to indicate a person or thing. Compare DEMONSTRATION, 2.

DESIRE. In a will, where the object is specified, may raise a trust.[1] See PRECATORY; WANT.

DESPATCH. See DISPATCH.

DESPOIL. Imports the use of violence or of clandestine means to deprive a person of something he possesses.[2]

DESTINATION. See ARRIVAL; PORT, Of destination.

DESTROY. To "destroy a vessel" is to unfit her for service beyond the hope of recovery by ordinary means.[3]

Destroyed instrument. See EVIDENCE, Secondary; LOST, 2.

Destroyed property. See MISCHIEF, Malicious; PERISHABLE; RES, Perit, etc.

DETAINER. A withholding; detention. See DETINERE.

1. Restraint of the person, unassented to. See IMPRISONMENT.

2. Withholding possession of property from the rightful owner. See CONVERSION, 2.

Forcible detainer. Keeping possession of another's realty by force and without authority of law.

The original entry may have been peaceable.[1]

Where one, who has entered peaceably upon land, afterward retains possession by force.[2]

Forcible entry and detainer. See ENTRY, 1.

DETECTIVE. See DECOY; REWARD, 1.

DETENTION. See DETAINER; IMPRISONMENT; REPLEVIN.

DETERIORATION. See PERISHABLE; SOUND, 2 (1).

DETERMINE.[3] To end, terminate; to close; to ascertain, settle.

1. To come to an end: as, for an estate for life to determine at death.[4]

2. To decide: as, to determine a question, a controversy. Compare DEFINE.

Determinable. Liable to come to an end: as, a determinable fee, *q. v.*

Determination. The ending of a thing — an action or proceeding, some right or privilege; also, the act of ascertaining a matter of fact or of law; and, again, the act of deciding, and the decision itself. Compare PREMEDITATE.

"Determined" and "has become void" both imply that the thing has in effect been brought to an end. But while the former comprehends every mode of terminating or of bringing to an end, the latter applies to termination in one specific mode.[5]

To "finally determine" refers to a final determination in the absolute sense. When a special tribunal has power to hear and determine a matter, its decision, within the scope of its authority, binds all parties. In this category, for example, are the decisions of land officers.[6] Compare SEWER; TRIBUNAL.

DETINERE. L. To hold, keep back, detain.

Detinet. He withholds. **Detinuit.** He withheld (has withheld). *Non detinet.* He does not withhold.

Technical words formerly used in actions of replevin to describe the claim, and the denial, that the property was illegally detained. See DETINUE; REPLEVIN. Compare DEBET, Et detinet; CAPERE, Cepit.

DETINUE. An action for depriving one of the possession of personalty acquired originally by lawful means.

Thus, if A lends B a horse, and B refuses to restore it, the injury consists in the detaining, not in the orig-

[1] Vandyck *v.* Van Beuren, 1 Caines, *84 (1806).

[2] [Suñol *v.* Hepburn, 1 Cal. 268 (1850).

[3] United States *v.* Johns, 1 Wash. 372 (1806).

[1] See 3 Bl. Com. 179.

[2] Ladd *v.* Dubroca, 45 Ala. 427 (1871); 71 *id.* 571; 1 Russ. Cr. 310; 41 Ill. 285; 4 Bl. Com. 148.

[3] L. *determinare*, to end, bound: *terminus*, limit, boundary.

[4] See 2 Bl. Com. 121, 146; 1 Washb. R. P. 880.

[5] [Sharp *v.* Curds, 4 Bibb, 548 (1817).

[6] Rector *v.* Gibbon, 2 McCrary, 286 (1881), cases; Johnson *v.* Towsley, 13 Wall. 83 (1871).

inal taking: and possession may be recovered by an action of detinue. To successfully maintain the action it is essential: that the defendant came lawfully into possession of the goods; that the plaintiff has a property in them; that they be of some value; and that they be identified. If the jury find for the plaintiff they must assess the value of the several articles, and damages for the detention. The judgment is that the plaintiff recover the goods, or, if they cannot be had, then their respective values, and the damages awarded for the detention.[1]

The plea of *non detinet* raises the general issue. In some States this action has yielded to the less technical actions of trover and replevin, *qq. v.*

DETINUIT. See DETINERE.

DETRIMENT. See CONSIDERATION, 2; DAMAGE; DAMAGES.

DEUS. See ACTUS; DENARIUS; EX VISITATIONE.

DEVASTATION. Wasteful use of trust property; particularly, the property of a deceased person. See DEVASTAVIT.

DEVASTAVIT.[2] L. He has wasted. The technical name for waste by an executor or an administrator; occasionally, extravagance or misapplication of assets by any trustee.[3]

A wasting of assets; any act or omission, any mismanagement, by which the estate suffers loss.[4]

A waste of the estate; as, payment by an executor of his private debt with assets, the payment not being intended to replace money advanced on account of debts of the testator.[5]

One who has reasonable ground to believe that a trustee is going to misapply assets can take no advantage of his own act of connivance.[6]

The assets or their proceeds, as far as they may be traced into the hands of persons affected with notice of the misapplication, may be followed and recovered.[7] See BONA, De bonis propriis.

DEVELOP. See MINERAL; MINE; OPERATE.

DEVEST. See VEST.

DEVIATION. In marine insurance, a voluntary departure, without necessity or reasonable cause, from the usual course of the voyage.[7]

Originally, only a departure from the course of the voyage; now, a material departure from or change in the risk insured against, without just cause.[1]

Unnecessary delay may be tantamount to a deviation. It is understood as part of the contract that the voyage is to be prosecuted in the usual, ordinary route, and the business attended to with at least ordinary diligence. The shortness of the time, when delay is really intended, is immaterial.[2]

Turning aside to save the lives of persons upon a distressed vessel is not a deviation.[3]

Nor is it to touch and stay at a port out of the course of the voyage, if such departure is within the usage of the trade. When a bill of lading provides that the goods are to be carried from one port to another, *prima facie* a direct voyage is intended; but this may be controlled by usage. Established usages relating to a voyage are impliedly made part of the contract, if nothing is expressed to the contrary.[4] See TOUCH.

DEVICE. See EQUIVALENT, 2; PATENT, 3.

DEVISARE. L. To separate, divide, distribute: to dispose of property by will; to devise.

Devisavit vel non. Did he make a devise or not; did he make a will. An issue, directed by a court of probate or other court of equity, to be tried by a jury in a court of law, to test the validity of a writing purporting to be a will, when it is alleged, and by *prima facie* proof established, that there was fraud, undue influence, or incapacity in the deceased, at the time of the making of the instrument. See INFLUENCE; INSANITY, 2 (5).

The right of an executor to costs in an issue depends upon the question whether the litigation is for the benefit of those entitled to the estate.[5]

DEVISE. 1, *v.* Originally, to divide or distribute property; now, to give realty by will. See DEVISARE.

2, *n.* A disposition of real property, contained in a man's last will and testament.[6]

A testamentary disposition of land.[7]

In England, an appointment of particular lands to a particular devisee,—in the nature of a conveyance by way of appointment.[8]

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[1] 3 Bl. Com. 151-52; Story, Eq. §§ 699-711, 906.

[2] Dĕv-as-tā'-vit.

[3] See 2 Bl. Com. 508; 3 *id.* 292; 71 Ala. 240.

[4] [Ayers *v.* Lawrence, 59 N. Y. 197 (1874); Clift *v.* White, 12 *id.* 531 (1855): 2 Williams, Exec. 1629.

[5] Smith *v.* Ayer, 101 U. S. 327-28 (1879), cases.

[6] 1 Story, Eq. §§ 560-61.

[7] [Coffin *v.* Newburyport Ins. Co., 9 Mass. 447 (1812).

[1] Wilkins *v.* Tobacco Ins. Co., 30 Ohio St. 341 (1876); 2 Pars. Mar. Ins. 1.

[2] Coffin *v.* Ins. Co., *ante;* 7 Cranch, 26; 3 Wheat. 159; 8 *id.* 291; Pet. C. C. 98; 3 Kent, 313-14.

[3] 1 Sumn. 400; 2 Wash. 80; 1 Newb. 449; Sprague, 141. See generally 15 Am. Law Rev. 108-20 (1881), cases.

[4] Hostetter *v.* Gray, 11 F. R. 181 (1882), cases.

[5] Sheets's Appeal, 100 Pa. 197 (1882). See generally 18 Cent. Law J. 83.

[6] [2 Bl. Com. 372.

[7] Fetrow's Estate, 58 Pa. 427 (1868).

[8] Harwood *v.* Goodright, 1 Cowp. 90 (1774), Mansfield, J.; 17 E. L. & Eq. 198.

Devisor.[1] He who gives realty by will. **Devisee.** He to whom it is given.

But "devise" is often used in the sense of "bequeath" and "bequest," as referring to a legacy of personalty. In doubtful cases it is safest to adhere to the technical meaning, on the presumption that the testator used the word in that sense; but this rule will give way when it clearly appears that he understood and used the word in the popular sense.[2]

Contingent devise. When the vesting of the interest is made to depend upon the happening of some future event; in which case, if the event never occurs, or until it occurs, no estate vests. **Vested devise.** A devise which is not subject to a condition, precedent or unperformed. See VEST, 2, Vested.

Executory devise. Such a disposition of lands by will that no estate vests at the death of the devisor, but on some future contingency.[3]

A limitation by will of a future estate or interest in lands or chattels.[4]

Such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law.[5]

Not a mere possibility, but a substantial interest, and in respect to transmissibility stands on the same footing with a contingent remainder.[6]

By it a remainder may be created contrary to the general rule, on the supposition that the testator acted without advice. . . An executory devise differs from a "remainder" in that it needs no particular estate to support it; by it a fee-simple or other less estate may be limited after a fee-simple; and by means of it a remainder may be limited of a chattel-interest, after a particular estate for life.[7]

A devise *in futuro* to an artificial being to be created is good as an executory devise.[8]

Although an estate may be devised to one in fee-simple or fee-tail, with a limitation over by way of an executory devise, yet, when the will shows a clear purpose to give an absolute power of disposition to the first taker, the limitation over is void.[9]

"If there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A in fee and if he dies *possessed* of the property without lawful issue, the remainder over, or the remainder over the property which he, dying without heirs, *should leave*, or without selling or devising the same,— in all such cases the remainder over is void as a remainder because of the preceding fee, and it is void as an executory devise because the limitation is inconsistent with the absolute estate or power of disposition expressly given or necessarily implied by the will."[1]

See ACCUMULATION; BEQUEST; DIE, Without children; LAPSE; LEGACY; REMAINDER; RESIDUARY; WILL, 2.

DEVOLUTION. 1. Transfer to a successor in office.

2. A passing from a person dying to a person living: as, the devolution of a title.[2]

"Devolution by law" occurs when the title is such that an heir takes under it by descent from an "ancestor" according to the rules of law applicable to the descent of heritable estates; and in all cases of descent, the estate of the successor is immediately "derived" from the "ancestor" from whom the estate descends.[3]

DI. See DIS.

DIAGRAM. See BOOK, 1.

DICE. See GAME, 2.

DICTA. See DICTUM.

DICTATE. To pronounce orally what is to be written down by another at the same time; as, to dictate a will.[4] See HOLOGRAPH.

DICTIONARY. See DEFINITION; WORD.

No meaning of a word, which has received a construction by law or uniform custom, can be adopted from the dictionaries in conflict with that construction. And where a word, as used, is reconcilable with law or established custom, a different meaning cannot be given to it upon the authority of a lexicographer.[5]

The dictionary clause of a statute is the section which defines what persons, places, things, etc., shall be included within the terms of the statute.[6]

DICTUM. L. A saying, observation, remark. Plural, *dicta*.

1. A voluntary statement; a comment.

Gratis dictum. A gratuitous remark. A statement one is not required to make, and

[1] Dē-vīz'-or; dĕv-ĭ-see'.

[2] Ladd *v.* Harvey, 21 N. H. 528 (1850); Fetrow's Estate, 58 Pa. 427 (1868); 21 Barb. 561; 13 *id.* 109.

[3] [2 Bl. Com. 172.

[4] Brown's Estate, 38 Pa. 294 (1861).

[5] Fearne, Cont. Rem. 386; Jarman, Wills, 864.

[6] Medley *v.* Medley, 81 Va. 268–72 (1886), cases.

[7] 2 Bl. Com. 173–75; Doe *v.* Considine, 6 Wall. 474–75 (1867); 50 Conn. 407; 2 Mich. 296; 52 N. H. 273; 11 Wend. 278; 31 Barb. 566; 2 Washb. R. P. 679.

[8] Ould *v.* Washington Hospital, 98 U. S. 313 (1877), cases; 2 Story, Eq. §§ 1146, 1160.

[9] Howard *v.* Carusi, 109 U. S. 730 (1883); Hoxsey *v.* Hoxsey, 37 N. J. E. 29 (1883); 16 S. C. 325.

[1] 4 Kent, 271.

[2] Parr *v.* Parr, 7 Eng. Ch. *643 (1833).

[3] Earl of Zetland *v.* Lord-Advocate, 3 Ap. Cas. 590 (1878). "Devolution of liability," 61 Wis. 330. In Louisiana an appeal may be "devolutive" or suspensive, 21 La. An. 295; 30 F. R. 533.

[4] [Prendergast *v.* Prendergast, 16 La. An. 220 (1861); Hamilton *v.* Hamilton, 6 Mart. 143 (1827).

[5] State *ex rel.* Belford *v.* Hueston, 44 Ohio St. 6 (1886), Spear, J.

[6] See R. S. §§ 1–5, 5013; 1 Shars. Bl. Com. 87.

for which he is not liable in damages for injury traceable thereto.[1]

As, an assertion by a vendor that his land is fit for a certain purpose, or is worth so much, cost so much, or that he has refused so much for it.[1] See CAVEAT, EMPTOR; COMMENDATIO.

2. An opinion expressed by a judge on a point not necessarily arising in a case.[2]

Dicta are opinions of a judge which do not embody the resolution or determination of the court, and, being made without argument or full consideration, are not the professed deliberate determinations of the judge himself.[3]

Obiter dicta. Such opinions, uttered "by the way," not upon the point or question pending, but as if turning aside for the time from the main topic to a collateral subject.[3] Often, simply, *obiter* or an *obiter*.

An expression of opinion upon a point in a case, argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the case, if a *dictum* at all, is a "judicial" *dictum* as distinguished from a mere *obiter dictum*, i. e., an expression originating alone with the judge who writes the opinion, as an argument or illustration.[4]

To make an opinion a decision there must have been an application of the judicial mind to the precise question necessary to be determined in order to fix the rights of the parties. Therefore the Supreme Court has never held itself bound by any part of an opinion which was not needful to the ascertainment of the question between the parties.[5]

"The case called for nothing more; if more was intended by the judge who delivered the opinion, it was purely *obiter*."[6]

Dicta are not binding as precedents; at most they receive the respect due to the private opinions of the judges by whom uttered.[7] See DECISION; OPINION, 3.

DICTUS. See ALIAS.

DIE; DYING; DEATH. In several phrases, have a technical meaning:

Die by his own hand or by suicide. In policies of life insurance, used in a proviso exempting the company from liability.

In such case the words mean: (1) That if the assured, being in the possession of his ordinary reasoning faculties, from any cause and by any means, intentionally takes his own life, there can be no recovery; (2) that if the death is caused by the voluntary act of the assured, he knowing and intending that death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effects of the act; or when he is impelled thereto by an insane impulse, which he has no power to resist,—such death is not within the contemplation of the parties, and the insurer is liable.[1]

The proviso refers to an act of *criminal* self-destruction; it does not apply to an insane person who takes his own life intending to take it, and knowing that death would be the result.[2]

"Die by his own hand," "die by suicide," and "commit suicide," are synonymous with voluntary suicide.[3] But the addition of the condition "sane or insane" will relieve the insurer, whatever be the condition of mind of the insured.[4,3]

In 1872, when Terry's Case was decided, there was a conflict of opinion as to the interpretation to be placed upon the words "die by his own hand" or "die by suicide." All authorities agreed that the phrases did not cover every possible case of self-destruction in a blind frenzy or under an overwhelming insane impulse. Some courts held that they included every case in which a man, sane or insane, voluntarily took his own life; others, that insane self-destruction was not within the condition. . . If a man's reason is so clouded or disturbed by insanity as to prevent his understanding the real nature of his act, as regards either its physical consequence or its moral aspect, the case appears to come within the forcible words uttered by the late Mr. Justice Nelson, when Chief Justice of New York, in the earliest American case upon the subject: "Self-destruction by a fellow-being, bereft of reason, can with no more propriety be ascribed to his own hand than to the deadly instrument that he may have used for the purpose;" and, whether it was by drowning, poisoning, hanging or other manner, "was no more his act, in the sense of the law, than if he had been impelled by irresistible physical power."[4]

Die in consequence of a violation of law. Expresses another condition under which a policy of life insurance will be rendered void.

In a recent case it was held that so long as there was a violation of law on the part of the assured, and death as its result, it was immaterial in what manner the death was produced, excepting that there must

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[1] Medbury *v.* Watson, 6 Metc. 259 (1843); Gordon *v.* Parmelee, 2 Allen, 214 (1861).

[2] State *v.* Clarke, 3 Nev. 573 (1867), Beatty, C. J.

[3] Rohrback *v.* Germania Fire Ins. Co., 62 N. Y. 56 (1875), Folger, J.

[4] Buchner *v.* Chicago, &c. R. Co., 60 Wis. 267-69 (1884), Cassoday, J.

[5] Carroll *v.* Lessee of Carroll, 16 How. 287 (1853), Curtis, J.; 6 Wheat. 399.

[6] United States *v.* County of Clark, 96 U. S. 218 (1877), Strong, J.; 107 *id.* 179.

[7] See 17 F. R. 423, 426.

[1] Mutual Life Ins. Co. *v.* Terry, 15 Wall. 583 (1872), Hunt, J.; 1 Dill. 403.

[2] Bigelow *v.* Berkshire Life Ins. Co., 93 U. S. 286 (1876), cases; Connecticut Mut. Life Ins. Co. *v.* Groom, 86 Pa. 96-98 (1878), cases; Cooper *v.* Massachusetts Life Ins. Co., 102 Mass. 238 (1869), cases; Knights of the Golden Rule *v.* Ainsworth, 71 Ala. 444-49 (1882), cases.

[3] Charter Oak Life Ins. Co. *v.* Rodel, 95 U. S. 232 (1877), cases.

[4] Manhattan Life Ins. Co. *v.* Broughton, 109 U. S. 127, 131 (Nov. 5, 1883), cases, Gray, J., quoting Breasted *v.* Farmers' Loan & Trust Co., 4 Hill, 75 (1843).

have been a direct connection between the criminal act and the death.[1]

In such case "violation of law" means crime; and "known violation of law" indicates a voluntary criminal act. The burden of proof is upon the insurer.[2]

Death from suicide is not a death "in violation of the criminal laws" of New York.[3].

Die without children, heirs, or issue. In a will, as applied to realty, *prima facie* import an indefinite failure of issue,— total extinction of the testator's family, or the death of all his descendants to the remotest generation.

This has uniformily been the construction, when there were no expressions in the will controlling the legal meaning of the words, or pointing to a definite failure of issue.[4]

As applied to personalty, construed to mean dying without heirs living at the death of the devisee.[5]

When there is anything in a gift or limitation to show that the testator meant a failure of issue in the life-time of the first taker, instead of an indefinite failure, a limitation over is construed as an executory devise in defeasance of a fee-simple, and not as a remainer sustained by an estate-tail.[6]

Whether a presumption that a person died without issue will be indulged depends upon the circumstances shown in each case. If, for instance, circumstances are proven indicating non-marriage or childlessness, then death without issue may be presumed.[7] See further DEFINITE; ISSUE, 5.

DIES. L. A day; the day.

Ad diem. At the day; on the very day: as, the *ad diem* demand of a bill.[8]

Comperuit ad diem. He appeared at the day. A plea that the defendant in an action upon a bail bond appeared on the day designated in the bond.

Solvit ad diem. He paid on the day. *Solvit post diem.* He paid after the day. Pleas to actions on bonds for the payment of money.

Dies a quo. The day from which. **Dies ad quem.** The day to which. The day from which, and the day to which, to compute time.

Dies dominicus. The Lord's day — Sunday. **Dies juridicus.** A judicial or court day.

Dies dominicus non est juridicus. Sunday is a non-judicial day — is not a day for court business, except as to the issue and return of criminal process. Whence *dies non* (juridicus): a non-judicial day.

Dies non juridicus means only that process ordinarily cannot issue, be executed, or returned, and that courts do not sit, on that day. It does not mean that no judicial action can then be had.[1] See SUNDAY.

A civil process awarded or a judgment entered on a holiday is not void.[2] See HOLIDAY.

Quarto die post. On the fourth day thereafter.

On every return-day in the term the person summoned has three days of grace, beyond the day named in the writ, in which to make his appearance, and if he appears on the fourth day inclusive, *quarto die post*, it is sufficient. . . The feudal law allowed three distinct days of citation, before the defendant was adjudged contumacious for not appearing. . . At the beginning of each term, the court does not usually sit for the dispatch of business till the fourth or appearance day.[3]

DIFFERENCES. See OPTION, Contract.

DIFFICULTY. 1. As applicable to what takes place between parties, when it results in a breach of the peace or a flagrant violation of law, is in general use, and well understood.[4]

It is of constant application in legal proceedings, and in the reports of adjudicated cases. It is expressive of a group or collection of ideas that cannot, perhaps, be imparted so well by any other term.[4]

2. In the performance of a covenant, see POSSIBLE.

DIGEST. A compilation presenting the substance of many books in one, under an arrangement (usually alphabetical) intended to facilitate reference.

It reproduces the rules of the decisions by mere quotation and extract.[5]

[1] Murray *v.* N. Y. Life Ins. Co., 80 Hun, 429 (1883); Bradley *v.* Mut. Benefit Co., 45 N. Y. 422 (1871); Cluff *v.* Mut. Benefit Life Ins. Co., 95 Mass. 316 (1866).

[2] Cluff *v.* Mut. Benefit Life Ins. Co., 99 Mass. 326 (1868).

[3] Darrow *v.* Family Fund Society, 42 Hun, 245 (1886).

[4] See Williams *v.* Turner, 10 Yerg. 289 (1837); Wardell *v.* Allaire, 20 N. J. L. 9-16 (1842), cases; Davies *v.* Steele, 38 N. J. E. 170-73 (1884); 37 *id.* 81; Gray *v.* Bridgeforth, 33 Miss. 344 (1857); Wilson *v.* Wilson, 32 Barb. 332 (1860); *Re* Merceron's Trusts, 4 Ch. Div. 182 (1876); 20 Moak, 759; Snyder's Appeal, 95 Pa. 177-81 (1880), cases; Magrum *v.* Piester, 16 S. C. 323-24 (1881); Quigley *v.* Gridley, 132 Mass. 37 (1882), cases; Schmauns *v.* Göss, *ib.* 145 (1882).

[5] Wallis *v.* Woodland, 32 Md. 104 (1869); Moffat *v.* Strong, 10 Johns. *15 (1813).

[6] Williams, R. P., 4 Rawle's ed., 207, cases; 26 Am. Law Rev. 107-15 (1888), cases.

[7] Bank of Louisville *v.* Trustees of Public Schools, 86 Ky. 231-32 (1885), cases.

[8] 101 U. S. 565.

[1] State *v.* Ricketts, 74 N. C. 193 (1876).

[2] Paine *v.* Fresco, 1 Co. Ct. R. 562 (Pa., 1886), cases.

[3] 3 Bl. Com. 278.

[4] Gainey *v.* People, 97 Ill. 279 (1881).

[5] [Abbott's Law Dict.

Simply a manual of reference to the original cases, which are the authority.[1]

See ABRIDGMENT; COMPILATION.

DIGGING. May mean excavating, and not be confined to removing earth as distinguished from rock.[2]

DIGNITY. In old English law, a species of incorporeal hereditament.

Dignities bear a near relation to offices. They were originally annexed to the possession of certain estates in land, and created by a grant of those estates. Although now little more than personal distinctions, they are still classed under the head of realty.[3]

DILAPIDATION. See PERISHABLE.

DILATORY. Said of a defense or a plea that resists the plaintiff's present right of recovery by interposing some temporary objection, as that the court has no jurisdiction, that the plaintiff lacks capacity to sue.[4] See PLEA.

DILIGENCE. 1. In the law of bailment and of common carriers of persons is opposed to "negligence," and synonymous with "care" in its three degrees of slight, ordinary, and extraordinary or great.[5]

Due diligence. What constitutes "due diligence," in an action to recover damages caused by negligence, is for the jury; and the burden of proof is with the plaintiff to show the negligence.[6]

Ordinary diligence. That degree of care, attention, or exertion which, under the circumstances, a man of ordinary prudence and discretion would use in reference to the particular thing were it his own property, or in doing the particular thing were it his own concern.[7]

"Common" or "ordinary" diligence is that degree of diligence which men in general exert in respect to their own concerns, and not any one man in particular.[8]

See further BAILMENT; CARE; CARRIER; NEGLIGENCE.

2. To charge the indorser of a bill or note, upon non-payment by the maker or acceptor, the exercise of "diligence," "due diligence," or "reasonable diligence" toward notifying the indorser of the fact of non-payment, is required by the law-merchant.

Due diligence. Some effort or attempt to find the party, which the court or judge shall be satisfied is reasonable under the circumstances.[1] See PROTEST, 2.

Diligently inquire. Said of a grand jury, see INQUIRY, 2.

DIMINUTION. Omission; defect; incompleteness.

Where the whole of a record is not properly or not truly certified by an inferior court to the court of review the party injured thereby may allege or "suggest" diminution of the record, and cause it to be rectified[2] — by means of a writ of *certiorari*, q. v.

DIPLOMATIC OFFICERS. Ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, chargés d'affaires, agents and secretaries of legation.[3] See CONSUL; MINISTER, 8.

DIPSOMANIA. See INTEMPERATE.

DIRECT. 1, *adj.* Straight; not circuitous; immediate; the first or original.

Opposed (1) to **indirect:** as, a direct or indirect — confession, contempt, damage, docket or index, examination, interest, interrogatory or question, tax, *qq. v.*

Opposed (2) to **redirect,** the direct over again: as, an examination (*q. v.*) following a cross-examination.

Opposed (3) to *cross:* as in direct examination; to *collateral:* as, the direct line of descent; to *circumstantial:* as, direct evidence; to *contingent* or *remote:* as, a direct interest; to *consequential:* as, direct damages. See those substantives.

The "most direct route of travel" between two places, within the meaning of a statute giving a sheriff mileage for carrying prisoners to a penitentiary, is the railroad, although it is sixty-four miles long while the highway is but thirty-five.[4] See DISTANCE.

To "proceed direct" to a port is to take a direct course, without deviation or unreasonable delay; not, to leave port immediately.[5]

What cannot be done directly cannot be done indirectly.[6]

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[1] [Bouvier's Law Dict.; 1 Bl. Com. 81.

[2] Sherman *v.* New York City, 1 N. Y. 320 (1848).

[3] 2 Bl. Com. 37; 1 Ld. Raym. 13; 7 Rep. 122.

[4] See 3 Bl. Com. 301.

[5] See Brand *v.* Troy, &c. R. Co., 8 Barb. 378 (1850); 19 How. Pr. 219; 29 Ala. 305.

[6] Haff *v.* Minneapolis, &c. R. Co., 14 F. R. 558 (1882).

[7] Swigert *v.* Graham, 7 B. Mon. 668 (1847), Marshall, Chief Justice.

[8] City of Rockford *v.* Hilderbrand, 61 Ill. 160 (1871), Sheldon, J.; 71 Ala. 121; 5 Kan. 180; 71 Me. 41; 6 Metc. 96; 25 Mich. 297; 3 Drewst. 14; 31 Pa. 572.

[1] Bixby *v.* Smith, 49 How. Pr. 53 (1874); Demond *v.* Burnham, 132 Mass. 311 (1882); Bank of Columbia *v.* Lawrence, 1 Am. L. C. 405; Byles, Bills, 272.

[2] [4 Bl. Com. 390; Tidd, Pr. 1109.

[3] R. S. § 1674.

[4] Maynard *v.* Cedar County, 51 Iowa, 421 (1879).

[5] The Onrust, 6 Blatch. 536 (1869).

[6] New York *v.* Louisiana, 108 U. S. 91 (1883).

2, *v.* To guide, instruct, charge. Opposed, **misdirect**, to instruct wrongly, to mislead: as, to direct, and to misdirect, a jury in the law which is to regulate its deliberations and verdict. See further CHARGE, 2 (2, c).

Directory. 1, *adj.* Containing instructions as to what may be done: as, a directory — statute, clause, trust. Opposed, *mandatory*, q. v.

"Directory," referring to a charter, means that it is to be considered as giving directions which ought to be followed, not as so limiting the power that it cannot be effectually exercised without observing them.[1] See LEGAL, Illegal; PROHIBITION, 1.

2, *n.* A board of directors, *q. v.*

DIRECTORIES. See COPYRIGHT.

Where the commercial value of two society directories depends upon the judgment of the compilers in selecting names, each is original as far as the selection is original. One compiler may not merely copy names from the other's book; but he may use it to verify the orthography of names or the correctness of addresses. The existence of the same errors in the two books raises a presumption of piracy that can be overcome only by clear evidence to the contrary.[2]

DIRECTORS. Persons legally chosen to manage the affairs of a corporation or company.

Directors, board of, or directory. The whole body of such managers, jointly considered.

The directors of a corporation are subject to the obligations imposed upon trustees and agents.[3]

They are officers and agents, and represent the interests of the abstract legal entity, and of those who own the shares of its stock.[4]

To the stockholders they are not as technical trustees, but as mandataries, bound to exercise ordinary skill and diligence. They are not liable for a mistake of judgment, within the scope of their powers; but they are responsible for losses occasioned by embezzlement, willful misconduct, breach of trust, or gross inattention by which fraud has been perpetrated by an agent, officer, or co-director.[5]

They are at least *quasi* trustees for the creditors of the corporation. When that is insolvent good faith forbids that they use their position to save themselves or one of their number at the expense of other creditors.[6]

The directors of a corporation are its exclusive executive agents, and, as it can act only through them, the powers vested in the corporation are deemed conferred upon its representatives; but they are, nevertheless, trustees for the stockholders. The law recognizes the stockholders as the ultimately controlling power in the corporation, because they may at each authorized election entirely change the organization, and may at any time keep the trustees within the line of faithful administration by an appeal to a court of equity. . . General power in a board of directors "to perform all corporate acts" refers to the ordinary business transactions of the corporation. The stockholders alone can make or authorize fundamental or organic changes.[1]

As a rule, the directors of a corporation are only required, in the management of its affairs, to keep within the limits of its powers and to exercise good faith and honesty. They undertake, by virtue of the assumption of the duties incumbent on them, to perform those duties according to the best of their judgment and with reasonable diligence, and a mere error of judgment will not subject them to personal liability for its consequences. And unless there has been some violation of the charter or the constating instruments, or unless there is shown to be a want of good faith, or a willful abuse of discretion, or negligence, there will be no personal liability. They are personally only bound, in the management of the affairs of the corporation, to use diligence and prudence, such as men usually exercise in the management of their own affairs of a similar nature. But they are personally liable if they suffer the corporate funds or property to be wasted by gross negligence and inattention to the duties of their trust.[2]

That which directors, by proper diligence, ought to have known as to the general course of business in their bank, they may be presumed to have known, in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business.[3]

See CORPORATION; DIVIDEND, 3; MEETING; MINUTES, 2; TRUST, 1.

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[1] Town of Danville *v.* Shelton, 76 Va. 311 (1882).

[2] List Publishing Co. *v.* Keller, 30 F. R. 772 (1887), Wallace, J.

[3] Wardell *v.* Union Pacific R. Co., 103 U. S. 658 (1880), cases.

[4] Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 589, 587 (1875).

[5] Spering's Appeal, 71 Pa. 20 (1872), cases, Sharswood, J.; United Society of Shakers *v.* Underwood, 9 Bush, 609 (1873), cases; First Nat. Bank of Ft. Scott *v.* Drake, 29 Kan. 326-27 (1883); Morse, Banks, 70.

[6] Coons *v.* Tome, 9 F. R. 532 (1881); s. c. 13 Rep. 136; Drury *v.* Cross, 7 Wall. 302 (1868); Jackson *v.* Ludeling, 21 *id.* 616 (1874); Richards *v.* New Hampshire Ins. Co., 43 N. H. 263 (1861).

[1] Cass *v.* Manchester Iron, &c. Co., 9 F. R. 640 (1881); s. c. 13 Rep. 167.

[2] Ackerman *v.* Halsey, 37 N. J. E. 363 (1883), cases, Runyon, Ch. See also Williams *v.* Hilliland, 38 *id.* 374 (1884), cases; Chicago City R. Co. *v.* Allerton, 18 Wall 233 (1873); Bradley *v.* Farwell, 1 Holmes, 440 (1874), cases.

Directors as fiduciaries, Bent *v.* Priest, 86 Mo. 476 (1885), cases: 25 Am. Law Reg. 125-33 (1886), cases. Liability of, of national banks, and generally, Movius *v.* Lee, 30 F. R. 806-7 (1887), cases; Witters *v.* Sowles, 31 *id.* 1 (1887), cases; 23 Cent. Law J. 172 (1886), cases Powers of, of banks, 22 Cent. Law J. 318 (1886), cases; of corporations generally, 19 *id.* 305-10, 327-30 (1884), cases; 6 South. Law Rev. 386-413 (1880), cases. Dealing with the corporation, 1 Col. Law T. 1: 3-95 (1888).

[3] Martin *v.* Webb, 110 U. S. 15 (1884), Harlan, J

DIS. A prefix or inseparable preposition, used in compounds. In the Latin, corresponds to asunder, apart, in two; and denotes separation, parting from, and hence has the force of a privative or negative.

In a few words, becomes *di-*; but *di-* may be a form of *de*, as in divest.

DISABILITY. Incapacity for action under the law; incapacity to do a legal act.[1]

A personal incapacity; and may relate to power to contract or to sue, and arise from want of sufficient understanding, as in cases of lunacy and infancy; or from want of freedom of will, as in cases of coverture and duress; or from the policy of the law, as in cases of alienage, outlawry, and the like.[2]

Any incapacity of acquiring or transmitting a right, or of resisting a wrong; and arises from the act of the party, of his ancestor, of the law, or of God.[3]

Civil disability. Disqualification created by the law. **Physical disability.** An infirmity inherent in the constitution of the body or mind.

In a statute providing what shall be done in the event of the death or disability of a public officer, "disability" will cover any cause which prevents the officer from acting, as, his resignation.[4]

Where there are two or more co-existing disabilities in the same person he is not obliged to act until the last disability is removed.[5] Thus, coverture enables a wife to postpone avoidance of a deed made in infancy to a reasonable time after the coverture is ended, without regard to the statute of limitations. One under a disability to make a contract cannot confirm or disaffirm a voidable contract.[6]

Compare CAPACITY; QUALIFY. See ABATE, 5; AFFIRM, 2; RATIFICATION.

Disabling. Disqualifying; incapacitating; restricting; restraining: as, a disabling statute, *q. v.*

DISAFFIRM. See AFFIRM, 2.

DISAGREE. See JURY; VERDICT.

DISALLOW. See ALLOW.

DISAPPROVE. See ESTOPPEL; PROTEST, 1.

DISBAR. See BAR, 1.

DISBURSEMENT.[7] Paying out money; also, the money itself.

By an administrator — money or currency paid in extinguishment of the liabilities of the decedent or of the expenses of administration.[8]

Also, an expenditure of money necessarily incurred in the regular course of proceedings in an action, and allowable as costs.[1] Compare REIMBURSE. See EARNINGS.

DISCHARGE. As a verb and noun, conveys the idea of relieving of a charge, burden, weight, or of a duty, service, or responsibility.

1, *v.* (1) To empty of cargo or freight: as, to discharge a vessel; also, to remove that with which a thing is laden: as, to discharge a cargo. See DISPATCH; PORT, Of discharge.

(2) To extinguish, satisfy: as, to discharge a demand, debt, legacy, lien, judgment, incumbrance, obligation, *qq. v.*

(3) To free from the payment of indebtedness already incurred: as, to discharge a bankrupt, an insolvent, *qq. v.*

(4) To absolve from contingent pecuniary liability: as, to discharge an indorser, a surety, a guarantor, *qq. v.*

(5) To relieve from the performance of the duties of a trust: as, to discharge an assignee, administrator, executor, guardian, receiver, *qq. v.*

(6) To relieve from further service in the consideration of a cause; to dismiss: as, to discharge a jury.

(7) To set at liberty; to free from imprisonment: as, to discharge a prisoner, a convict.

(8) To decline further to entertain a proceeding; to vacate: as, to discharge a rule.

2, *n.* (1) Relief from some burden or duty: extinguishment or satisfaction of an obligation; exoneration from responsibility, accountability, liability; exemption from service or action; liberation; annulment. See CHARGE, 2.

(2) Any such action in itself considered.

(3) The certificate or document in evidence thereof.

The discharge of a guardian is any mode by which the relation of guardianship is effectually determined and brought to a close: as, by his removal, resignation, or death, by the marriage of a female ward, by the arrival of a minor ward at the age of twenty-one, or otherwise.[2]

To be construed a discharge for money, a paper need not contain the word "discharge;" every receipt for money, which is not an accountable receipt, is a discharge for money.[3]

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[1] [Wiesner *v.* Zaun, 39 Wis. 206 (1875): Burrill.

[2] Meeks *v.* Vassault, 3 Saw. 218 (1874), Sawyer, Cir. J.

[3] See 32 Barb. 480; 103 Ind. 195; 16 Alb. L. J. 292; 3 Bl. Com. 301; Coke, Inst. l. 5, p. 21; l. 8, p. 69.

[4] State *v.* City of Newark, 27 N. J. L. 197 (1858).

[5] Mercer's Lessee *v.* Selden, 1 How. 37 (1843).

[6] Sims *v.* Everhardt, 102 U. S. 310 (1880), cases; 77 Va. 73.

[7] F. *desbourser*, to take out of a purse.

[8] Wright *v.* Wilkerson, 41 Ala. 272 (1867).

[1] Case *v.* Price, 9 Abb. Pr. 114 (1859). And see Hanover *v.* Reynolds, 4 Dem. 385 (1886): N. Y. Code, § 3256.

[2] Loring *v.* Alline, 9 Cush. 70 (1851), Shaw, C. J.

[3] [Commonwealth *v.* Talbot, 2 Allen, 162 (1861), cases

DISCLAIMER. The act, declaration, or document by which a person denies, disavows, or renounces some interest or right which he formerly claimed, or which has been imputed or offered to him.[1]

1. In feudal law, when a tenant neglected to render services, and, upon an action brought to recover them, disclaimed to hold of the lord.

In a court of record, a forfeiture of the lands to the lord.[2]

When the tenant, upon a writ of assize of rent, or on a replevin, disavowed his tenure, whereby the lord lost the verdict, the lord could thereupon have a writ of right, *sur disclaimer;* and, upon proof of the tenure, recover the land as a punishment to the tenant for his false disclaimer.[3]

A disclaimer must be a renunciation by the party of his character of tenant, by setting up a title in another or by claiming title in himself.[4]

2. A formal mode of expressing a grantee's dissent to a conveyance before the title has become vested in him.[5]

Prevents the estate from passing from the grantor.[6]

It is essential that the estate disclaimed would vest but for the disclaimer, unless there be an express condition that the grantee shall elect.[6]

Filed in an action to try title to land, admits the plaintiff's title; and entitles the defendant to his costs, unless he was in possession when the suit was brought.[7]

3. Renunciation of what is or seems to be part of a patentee's claim for invention, and as to which he has no valid claim.

Wherever, through inadvertence, accident, or mistake, and without any willful default or intent to defraud or mislead the public, a patentee in his specification has claimed more than that of which he was the original and first inventor or discoverer, his patent is valid for all that part which is truly and justly his own, provided the same is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right; and the patentee, upon seasonably recording in the patent office a disclaimer in writing of the parts which he did not invent, or to which he has no valid claim, may maintain a suit upon that part which he is entitled to hold, although in a suit brought before the disclaimer he cannot recover costs. A reissued patent is within the letter and spirit of these provisions.[8]

Drawings cannot be used, even on an application for a reissue;[1] much less, on a disclaimer, to change the patent, and make it embrace a different invention from that described in the specification.[2] See ISSUE, 1.

4. When a defendant denies that he has or claims any right to the thing in demand by the plaintiff's bill, and disclaims, that is, renounces, all claim thereto.[3]

Where the defendant renounces all claim to the subject of the demand made by the plaintiff's bill.[4]

Distinct in substance from an answer, although sometimes confounded with it; and it can seldom be put in without an answer.[4]

DISCLOSE. 1. "Disclosing a defense upon the merits" means opening out and letting the judge see whether there really is a defense.[5]

2. An agent is said to "disclose his principal" when he makes known who his principal is; and principals are said to be "disclosed" or "undisclosed." See AGENT; AUCTIONEER.

DISCONTINUANCE. The cessation of an action or an estate.

1. (1) A chasm or gap left by neglecting to enter a continuance in an action.[6]

When a plaintiff fails to follow up his case and leaves a chasm in the proceedings by his laches.[7]

When the plaintiff leaves a chasm in the proceedings, as by not continuing the process regularly from time to time, the suit is discontinued, and the defendant need not attend.[8] See CONTINUANCE; DISMISS.

(2) At common law, the act of the plaintiff in demurring or replying to a plea which answered a part of his declaration.

By not taking judgment for the part unanswered, he was held not to have followed up his whole demand.[9]

2. When, at common law, a tenant in tail granted a larger estate than he could rightfully transfer.

Abolished in England in 1834; but prior thereto had already become obsolete.[10]

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[1] [Abbott, Law Dict.]

[2] [2 Bl. Com. 275.

[3] 3 Bl. Com. 233.

[4] Williams *v.* Cooper, 39 E. C. L. 334 (1840), Tindal, Chief Justice.

[5] [Watson *v.* Watson, 13 Conn. 85 (1839).

[6] Jackson *v.* Richards, 6 Cow. 620 (1827).

[7] Wootters *v.* Hall, 67 Tex. 513 (1887); Prescott *v.* Hutchinson, 13 Mass. *442 (1816).

[8] Gage *v.* Herring, 107 U. S. 646 (1882), cases, Gray, J.; United States Cartridge Co. *v.* Union Cartridge Co., 112 *id.* 642 (1884); R. S. §§ 4917, 4922; 17 Blatch. 67-69.

[1] Parker & Whipple Co. *v.* Yale Lock Co., 123 U. S. 87 (1887), cases.

[2] Hailes *v.* Albany Stove Co., 123 U. S. 582 (1887).

[3] 1 Daniel, Ch. Pr. 706.

[4] Story, Eq. Pl. § 383.

[5] Whiley *v.* Whiley, 93 E. C. L. *663 (1858).

[6] Taft *v.* Northern Transportation Co., 56 N. H. 416 (1876), Cushing, C. J.

[7] Roundtree *v.* Key, 71 Ala. 215 (1883), Jackson, C. J. *Id.* 307.

[8] [3 Bl. Com. 296.

[9] See Steph. Plead. 241; Gould, Pl. 336.

[10] See 3 Bl. Com. 172; 1 Steph. Com. 510, n.

DISCOUNT. 1. A counting off; an allowance or deduction from a gross sum on any account.[1]

A right which a debtor has to an abatement of the demand against him in consequence of a partial failure of the consideration, or on account of some equity arising out of the transaction on which the demand is founded.[2]

2. The difference between what is paid for a claim evidenced by negotiable paper and the face amount thereof.

A bank of discount furnishes loans upon drafts, promissory notes, bonds, and other securities. . . "Discounting" and "buying" a note are not identical. The latter denotes the transaction "when the seller does not indorse the note and is not accountable for it." . . Power to carry on the business of banking, by discounting evidences of debt, is merely an authority to lend money thereon, with the right to deduct the legal rate of interest in advance.[3]

In *Atlantic State Bank* v. *Savery*, 82 N. Y. 291, 302 (1880), it was decided that the purchase of a promissory note for a less sum than its face is a discount thereof within the meaning of the provision of the Banking Act of that State (Laws of 1836, c. 260, § 18), which authorizes associations organized under it to discount bills and notes. And in support of that definition of the terms the court cites the authority of McLeod on Banking, p. 43, where the author says, "The difference between the price of the debt and the amount of the debt is called discount," and "to buy or purchase a debt is always in commerce termed to discount it." In *Fleckner* v. *Bank of United States*, 8 Wheat. 350 (1823), Mr. Justice Story said, "Nothing can be clearer than that, by the language of the commercial world and the settled practice of banks, a discount by a bank means a deduction or drawback made upon its advances or loans of money, upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank," and added that if the transaction could properly be called a sale "it is a purchase by way of discount." Discount, then, is the difference between the price and the amount of the debt, the evidence of which is transferred, and that difference represents interest charged, being at some rate, according to which the price paid, if invested until the maturity of the debt, will just produce its amount. And the advance, therefore, upon every note discounted, without reference to its character as business or accommodation paper, is properly denominated a "loan," for interest is predicable only of loans, being the price paid for the use of money. The specific power given to national banks (Rev. St. § 5136) is "to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt." So that the discount of negotiable paper is the form according to which they are authorized to make their loans, and the terms loans and discounts are synonymous. It was so held in *Talmage* v. *Pell*, 3 Seld. 328, 339 (1852); and in *Niagara County Bank* v. *Baker*, 15 Ohio St. 68, 87 (1864), the point decided was that "to discount paper, as understood in the business of banking, is only a mode of lending money with the right to take the interest allowed by law in advance." . . A national bank is restricted to taking no more than seven per centum for the discount of negotiable paper when the person discounting is an indorser thereon.[4] See USURY.

DISCOVERT. See COVERT.

DISCOVERY.[5] A bringing to light; making known for the first time; disclosure; also, that which is found out, revealed, disclosed.

1. Finding a previously unknown country or land. Spoken of as the "right of discovery" or of "original discovery."

The English possessions in America were not claimed by right of conquest, but by right of discovery. According to the principles of international law, as then understood, the Indian tribes were regarded as the temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nations by which any portion of the country was first discovered.[6]

The Europeans respected the right of the natives as occupants, but asserted the ultimate dominion to be in themselves; and exercised, as a consequence, a power to grant the soil while it was yet in the possession of the natives.[7] See OCCUPANCY.

2. In the law of patent rights, refers to something that had existed unknown, until brought to light and utilized.

The Congress shall have power to secure for limited times to inventors the exclusive right to their discoveries.[8]

This does not apply to the discovery of a fundamental truth or abstract principle, in which no one can have an exclusive right; nor to a power of nature, in which the invention is in the application to a useful object. The discovery must be reduced to practice,— be embodied in some practical method for rendering it useful.[9]

In its naked, ordinary sense, a discovery is not patentable. A discovery of a new principle, force, or

[1] [Dunkle v. Renick, 6 Ohio St. 535 (1856).

[2] Trabue v. Harris, 1 Metc. 599 (Ky., 1858), Simpson, Chief Justice.

[3] Farmers', &c. Bank v. Baldwin, 23 Minn. 205-6 (1876), cases.

[4] Nat. Bank of Gloversville v. Johnson, 104 U. S. 276-78 (1881), Matthews, J. See also 14 Ala. 667; 13 Conn. 259; 20 Kan. 450; 42 Md. 592; 48 Mo. 191; 7 N. Y. 343; 18 Barb. 462; 13 Bankr. Reg. 268.

[5] F. *decouvrir*, to uncover.

[6] Martin v. Waddell, 16 Pet. 409 (1842), Taney, C. J.

[7] Johnson v. McIntosh, 8 Wheat. 572 (1823), Marshall, C. J.; Buttz v. Northern Pacific R. Co., 119 U. S. 67 (1886); 3 Kent, 379.

[8] [Constitution, Art. I, sec. 8, cl. 8.

[9] Burr v. Duryee, 1 Wall. 570 (1863); Le Roy v. Tatham, 14 How. 174 (1852).

law, operating, or which can be made to operate, on matter, will not entitle the discoverer to a patent. He controls his discovery through the means by which he has brought it into practical action, or their equivalent. It is then an "invention," although it embraces a discovery. Every invention may, in a certain sense, embrace more or less of discovery, for it must always include something that is new; but it by no means follows that every discovery is an invention.[1]

See further INVENTION; PATENT, 2; PRINCIPLE, 2; PROCESS, 3; SECURE, 1; TELEPHONE.

3. In the law regulating the granting of new trials and rehearings, refers to evidence brought to light or obtainable after trial or hearing, and which, could it have been presented upon that occasion, would likely have changed the result. Whence "after-discovered" and "newly-discovered" evidence.

The unconsidered evidence must be such as reasonable diligence, on the part of the party asking for the rehearing, could not have secured at the former trial; it must be material to its object, not merely cumulative, corroborative, or collateral; and be such as ought to produce important results on its merits.[2] See AUDITA QUERELA; REVIEW, 2, Bill of.

4. In the law of limitation of actions, refers to information had of the fact that a mistake was made or fraud perpetrated.

In cases of fraud and mistake a court of equity does not allow the statute of limitations to run until the discovery thereof. This rule has been incorporated into the statute law of many of the States.[3] See further FRAUD; LIMITATION, 3; MISTAKE; RESCISSION.

5. In the law of bankruptcy, refers to the disclosure made, or to be made, by the debtor of the nature, kind, amount, situs, etc., of his assets.[4] See BANKRUPTCY.

6. In equity practice, the disclosure by the defendant of matters important to enable the plaintiff to maintain his rights. Procured by a —

Bill of discovery. Every bill in equity may be deemed such, since it seeks a disclosure from the defendant, on oath, of the truth of the circumstances constituting the plaintiff's case as propounded in his bill. But that which is emphatically called a bill of discovery is a bill which asks no relief but simply the discovery of facts resting in the knowledge of the defendant, or the discovery of deeds, writings, or other things in his possession or power, in order to maintain a right or title of the party asking it in some suit or proceeding in another court.[1]

Not entertainable: where the subject is not cognizable in any court; where the court cannot, in this manner, aid the other court; where the plaintiff is under disability, or has no title to the character in which he sues; where the value in suit is trivial; where the plaintiff has no interest in the subject-matter or no title to the discovery required, or where an action will not lie; where some other person than the plaintiff has a right to call for the discovery; where the policy of the law exempts the defendant from discovery; where the defendant is not bound to discover his own title; where the discovery is not material to the suit; where the defendant is a mere witness; or where a discovery would criminate him.[2]

At common law, discovery could not be had before trial; hence the resort to chancery. At present it is had, in effect, by bills of particulars, by attachments in execution, by affidavits of defense, by inspection of books and documents, by examination of one's adversary before trial, and by other means specially provided by statute.

For want of the power of discovery at law, courts of equity acquired a concurrent jurisdiction with other courts in all matters of account.[3] See CREDITOR'S BILL; FISHING, 2.

DISCREDIT. See CREDIT.

DISCREPANCY. See AMBIGUITY; DESCRIPTION.

DISCRETION.[4] Discernment of what is right or proper; sound sense; deliberate judgment.

1. Capacity or understanding to discern what is right or lawful, so as to be answerable for one's actions.

Presumed to be enjoyed at fourteen — the "age of discretion;" but, really, the law has fixed no arbitrary period when the immunity of childhood ceases.[5] See AGE; CAPAX; NEGLIGENCE.

2. Foresight, wisdom, sagacity; judgment, action. Sometimes termed *personal discretion:* limited to a particular individual.

Where there is a trustee in existence, capable of acting in the exercise of a discretion vested in him by

[1] Morton *v* New York Eye Infirmary, 5 Blatch. 121 (1862), Shipman, J.

[2] Dower *v.* Church, 21 W. Va. 57 (1882); Codman *v.* Vermont, &c. R. Co., 17 Blatch. 3 (1879); Whalen *v.* Mayor of New York, 17 F. R. 72 (1882).

[3] West Portland Homestead Association *v.* Lownsdale, 17 F. R. 207, 205 (1883); Fritschler *v.* Koehler, 83 Ky. 82 (1885); Parker *v.* Kuhn, Neb., March, 1887, cases: 32 N. W. Rep. 74; 2 Story, Eq. § 1521 *a*.

[4] See 2 Bl. Com. 483.

[1] [2 Story, Eq. § 1486; 1 *id.* § 689; 1 Pomeroy, Eq. §§ 144, 191.

[2] 2 Story, Eq. § 1489; 1 Pomeroy, Eq. §§ 195-215. As against a corporation, see Post *v.* Toledo, &c. R. Co., 144 Mass. 347 (1887), cases; McComb *v.* Chicago, &c. R Co., 19 Blatch. 69 (1881); Colgate *v.* Compagnie Francaise, 23 F. R. 82 (1885), cases.

[3] 3 Bl. Com. 437, 382. See 1 Bouv. 536.

[4] L. *dis-cernere*, to separate, distinguish, perceive

[5] 1 Bl. Com. 453; Nagle *v.* Allegheny R. Co., 88 Pa. 35 (1879).

the instrument under which he is appointed, equity will not interfere to control that discretion.[1]

A devisee charged with making such provision for designated beneficiaries "as in his judgment will be best," must exercise a proper and honest judgment in determining the nature and amount of the provision, having due regard to the amount of the estate, and the condition and circumstances of the beneficiaries.[2] See BENEVOLENT; EXECUTOR; POWER, 2; TRUST, 1.

3. Applied to public functionaries — a power or right, conferred upon them by law, of acting officially in certain circumstances, according to their own judgment and conscience, uncontrolled by the judgment or conscience of others.

This discretion, to some extent, is regulated by usage, or by fixed principles. Which means merely that the same court cannot, consistently with its dignity, and with its character and duty of administering impartial justice, decide in different ways two like cases. Whether cases are alike is, of necessity, a question for the judgment of some tribunal.[3]

An officer in whom public duties are confided by law is not subject to control by a court in the exercise of a discretion reposed in him as a part of his official functions.[4] See DEPARTMENT; GRANT, 3; SEWER.

4. In legislation, the deliberate, cautious judgment of the law-making body.

The courts will not presume a detrimental exercise of judgment in the legislature. Security against abusive exercise resides in the responsibility of the law-makers to the public.[5] See POLICY, 1; PUBLIC.

5. Equitable determination by a court as to what is just, in a given case.

Judicial discretion. A discretion to be exercised in discerning the course prescribed by the law; never, the arbitrary will of the judge.[6]

According to Coke, *discernere per legem, quid sit justum:* perceiving by or through (or according to) the law, what would be just.[1]

Arises only in the exercise of judicial authority, which presupposes the existence of some cause or controversy submitted for decision in the customary form of judicial proceedings.[2]

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law and can will nothing. When they are said to exercise a "discretion," it is a mere legal discretion, a discretion in discerning the course prescribed by law; and when that is discerned it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for giving effect to the will of the legislature, in other words to the will of the law.[3]

Were the judges to set the law to rights as often as it differs from their ideal of excellence, their corrections would not suit those who came after them, and we should have nothing but corrections; there would be no guide in the decision of causes but the discretion of fallible judges in the court of last resort and no rule by which the citizen might beforehand shape his actions. "The [private] discretion of a judge," said Lord Camden, "is the law of tyrants: it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst it is every vice, folly, and passion to which human nature can be liable."[4]

The determination or disposition of many matters is committed to the sound discretion of the court; as, amendments to pleadings, and petitions; continuances, the order of introducing evidence, the amount of cumulative testimony admissible, the examination of witnesses, the granting or refusing of new trials and of the extraordinary writs, sales and resales of property; custody of children; allowances for maintenance and remuneration.

The universal rule of practice is that orders or decrees involving an exercise of judicial discretion purely are not re-examinable in a court of errors; only a plain abuse of discretion in such cases will be interfered with.[5]

Abuse of discretion, especially a "gross" and "palpable" abuse (the terms ordinarily employed), to justify an interference with the exercise of discretionary

[1] Nichols *v.* Eaton, 91 U. S. 794 (1875), cases; Cooper *v.* Cooper, 77 Va. 208 (1883); Lovett *v.* Thomas, 81 *id.* 255 (1885); 78 *id.* 114; 79 *id.* 640.

[2] Colton *v.* Colton, 127 U. S. 300 (1888). As to cases in which personal discretion was conferred upon executors and held not transmissible to the administrator *de bonis non* by such expressions in wills as think, see, or deem "advisable," "best," "fit," "prudent," "judicious," "wise," see Giberson *v.* Giberson, 43 N. J. E. 116-21 (1887), note, cases: 37 Alb. Law J. 7-8 (1888), cases.

[3] Judges of Oneida Common Pleas *v.* People, 18 Wend. 99 (1837).

[4] Gaines *v.* Thompson, 7 Wall. 348 (1868); County of San Mateo *v.* Maloney, 71 Cal. 208 (1886); 45 *id.* 639; 52 *id.* 179.

[5] Baltimore, &c. R. Co. *v.* Maryland, 21 Wall. 471 (1874).

[6] Tripp *v.* Cook, 26 Wend. 152 (1841); Platt *v.* Munroe, 34 Barb. 298 (1861).

[1] See Faber *v.* Bruner, 18 Mo. 543 (1850).

[2] States *v.* Judges, 34 La. An. 1116 (1882).

[3] Osborn *v.* United States Bank, 9 Wheat. 866 (1824), Marshall, C. J.

[4] Commonwealth *v.* Lesher, 17 S. & R. *164 (1827), Gibson, C. J. See also State *v.* Cummings, 36 Mo. 278 (1865); Rooke's Case, 3 Coke, 100 (1598); Rex *v.* Wilkes, 4 Burr. 2539 (1770); 1 *id.* 560, 571; 34 Ala. 235; 46 *id.* 310; 4 Iowa, 283; 25 Miss. 226; 1 Heisk. 774.

[5] Pomeroy's Lessee *v.* Bank of Indiana, 1 Wall. 598 (1863), cases; *Exp.* Reed, 100 U. S. 23 (1879); Wills *v.* Russell, *ib.* 626 (1879); United States *v.* Atherton, 102 *id.* 375 (1880); Tilton *v.* Cofield, 93 *id.* 166 (1876).

power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.[1]

DISCRIMINATION. See CITIZEN; COMMERCE.

DISCUSSION. 1. By the Roman law, a surety was liable for the debt only after the creditor had unsuccessfully sought payment from the principal debtor. This was called the "benefit" or "right of discussion." A like rule obtains in Louisiana.[2]

2. In the sense of debate, see LIBERTY, Of press, Of speech; PRIVILEGE, 4.

DISEASE. Within the meaning of a warranty in a policy of life insurance, not a temporary ailment, unless it be such as indicates a vice in the constitution, or so serious as to have a bearing upon the general health and the continuance of life, or such as in common understanding would be called a disease.[3]

See ACCIDENT, Insurance; DISORDER, 1; EPIDEMIC; HEALTH; INSANITY; INSPECTION, 1; NUISANCE; POLICE, 2; QUARANTINE, 2; SOUND, 2 (2); SUICIDE.

DISENFRANCHISE; DISFRANCHISE. See FRANCHISE, 2.

DISENTAIL. See TAIL.

DISFIGURE. See MAIM, 2.

DISGRACE. See CRIMINATE.

DISGUISE. A man hiding behind bushes is not "in disguise," within the meaning of a statute which makes the county liable in damages to the next of kin of one murdered by persons in disguise.[4] See AMBUSH.

DISHERISON. See INHERIT.

DISHONOR. To refuse or neglect to accept or to pay negotiable paper at its maturity; also, the failure itself in this respect. Opposed, *honor*, q. v.

The law presumes that if the drawer of a bill of exchange has not had due notice of dishonor he is injured, because otherwise he might have immediately withdrawn effects from the hands of the drawee; and that if the indorser has not had timely notice the remedy against the parties liable to him is rendered more precarious. The consequence, therefore, of neglect of notice is that the party to whom it should have been given is discharged from liability.[1] See PROTEST, 2.

DISINHERIT. See INHERIT.

DISINTEREST. See INTEREST, 2 (1).

DISJOINDER. See JOINDER.

DISJUNCTIVE. Describes a term or an allegation which expresses or charges a thing in the alternative. Opposed, *conjunctive*. See OR, 2.

DISMISS. To send away; to refuse to entertain further; to send out of court: as, to dismiss a bill in equity for defects in its structure or for insufficiency in law —

Borrowed from proceedings in a court of chancery, where the term is applied to the removal of a cause out of court without further hearing.[2]

"Dismissed" refers to the final hearing of a suit — the end of the proceeding.[3]

A bill in equity will be dismissed where (1) there is a want of certainty in the allegations to show that the plaintiff is entitled to the relief demanded; (2) where the right to relief has been barred by the statute of limitations; (3) where there has been negligence in seeking relief, unexplained by sufficient equitable reasons and circumstances.[4]

After a decree, whether final or interlocutory, has been made, by which the rights of a defendant have been adjudicated, or such proceedings have been taken as entitle him to a decree, the complainant cannot dismiss his bill without the consent of the defendant.[5]

Whenever it becomes apparent to the court that it has no authority to adjudicate the issue presented, its duty is to dismiss the cause.[6]

A dismissal for want of jurisdiction does not conclude the plaintiff's right of action.[7] See DISCONTINUANCE, 1; PREJUDICE, 2.

DISORDER. 1. Disease; physical malady.

A person suffering from a "contagious disorder" may be indicted for exposing himself in a place endangering the public health.[8] See DISEASE; HEALTH; SLANDER, 1.

2. Conduct which disturbs the community. See PEACE, 1.

Disorderly conduct. Any conduct which is contrary to law.[9]

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[1] People v. N. Y. Central R. Co., 29 N. Y. 431 (1864); White v. Leeds, 51 Pa. 189 (1865); 21 *id.* 466; 53 *id.* 158; 67 *id.* 31; 14 Hun, 3; 78 N. Y. 56; 15 Fla. 317; 52 Ala. 87.

[2] La. Civ. Code, arts. 3014-20.

[3] Cushman v. United States Life Ins. Co., 70 N. Y. 77 (1877), cases.

[4] Dale County v. Gunter, 46 Ala. 142 (1871).

[1] Byles, Bills, 297; Riggs v. Hatch, 16 F. R. 838, 849-50 (1883), cases.

[2] Boscley v. Bruner, 24 Miss. 462 (1852); 3 Bl. Com. 451.

[3] Taft v. North. Transportation Co., 56 N. H. 417 (1876).

[4] Taylor v. Holmes, 14 F. R. 499 (1882).

[5] Chicago, &c. R. Co. v. Union Rolling Mill Co., 109 U. S. 713 (1883); 69 Ga. 100.

[6] Watson v. Baker, 67 Tex. 50 (1886), cases.

[7] Smith v. McNeal, 109 U. S. 429 (1883), cases.

[8] King v. Vantandillo, 4 Maule & S. 73 (1815); King v. Burnett, *ib.* 272 (1815); Boom v. City of Utica, 2 Barb. 104 (1848).

[9] State v. Jersey City, 25 N. J. L. 541 (1856).

Disorderly house. A house the inmates of which behave so badly as to become a nuisance to the neighborhood.[1]

Includes any gambling house, dance house, bawdy house, prohibited liquor saloon, or other habitation made obnoxious by the habitual recurrence of fighting, noise, or violence.[2]

The keeping may consist in allowing such disorder as disturbs the neighborhood, or in drawing together idle, vicious, dissolute or disorderly persons engaged in unlawful or immoral practices, thereby endangering the public peace and promoting immorality.[3]

A complaint will be supported by proof that one person was disturbed, if the acts are such as tend to annoy all good citizens.[4]

Disorderly person. A person amenable to police regulation, for misconduct affecting the public.[5] See BEHAVIOR.

DISPARAGEMENT. 1. Inequality in rank.

In old law, while a female infant was in ward, the guardian could tender a match "without disparagement" or inequality: lest she might marry the lord's enemy. The Great Charter provided that the next of kin should be notified of the proposed contract.[6]

2. Derogation, belittlement; impeachment.

A tenant may not disparage the title in his landlord; nor may the former owner of property disparage the title he has conveyed.

Declarations by the vendor of realty in disparagement of the grant are never admissible, nor, generally, are the assertions of the seller of a chattel.[7]

See ASSIGNMENT, 2; DECLARATION, 1; ESTOPPEL; LANDLORD.

DISPATCH. As used in charter-parties, relative to the discharge of vessels, has frequently been the subject of definition.

Customary or usual dispatch. In accordance or consistently with all well-established usages of the port of discharge.[8]

The usual dispatch of persons who are ready to receive a cargo.[9]

Excludes a custom by which a charterer may decline to receive a cargo, because it is advantageous to postpone.[9]

"Customary dispatch in discharging "means discharging with speed, haste, expedition, due diligence, according to the lawful, reasonable, well known customs of the port of discharge; the same as "usual dispatch," but not the same as "quick dispatch," which excludes certain usages and customs.[1]

When there is no undertaking to unload the vessel within a specified time, but she is to be discharged "with all possible dispatch," or "with usual dispatch," or "with the customary dispatch of the port," or "within reasonable time," the freighter must use reasonable diligence to do his part toward unloading according to the terms and meaning of the charter party.[2]

DISPAUPER. See PAUPER, 2.

DISPLACE. In shipping articles, to disrate; not, to discharge.[3]

DISPOSE. 1. To alienate, direct the ownership of: as, to dispose of property.

Includes to barter, exchange, or partition; is broader than sell.[4]

Under the power "to dispose of the property of the United States," Congress may lease the public lands. The nature of the disposal is discretionary.[5]

"Dispose," said of an insolvent, in an attachment law, includes any intentional putting of property beyond reach of creditors.[6]

To convey by advancement is to dispose;[7] but to mortgage may not be, within the meaning of a statute.[8]

Disposing mind. Testamentary capacity, *q. v.* Compare JUS, Disponendi.

2. To place a dead infant upon a wall in a field is to "secretly dispose" of it.[9] See ABANDON, 2 (2).

3. To decide, determine: as, to dispose of a controversy.[10]

DISPOSSESS. See POSSESSION, Dispossession.

DISPROVE. See PROOF; REBUT.

DISPUTE. A fact alleged by one party and denied by the other, with some show of reason; not, a naked allegation without or against evidence.[11] Whence disputable,—see PRESUMPTION.

Matter in dispute. In a statute predicating appellate jurisdiction on the value of

[1] State *v.* Maxwell, 33 Conn. 259 (1866), Hinman, C. J.

[2] See 1 Bish. Cr. L. § 1106; 4 Bl. Com. 167.

[3] Thatcher *v.* State, 48 Ark. 63-64 (1886); 120 Mass. 356; 30 N. J. L. 104.

[4] Commonwealth *v.* Hopkins, 133 Mass. 381 (1882), cases.

[5] See 4 Bl. Com. 169.

[6] 2 Bl. Com. 70.

[7] See Roberts *v.* Medbery, 132 Mass. 101 (1882), cases; Robertson *v.* Pickrell, 109 U. S. 616 (1883).

[8] [Smith *v.* Yellow Pine Lumber, 2 F. R. 399 (1880).

[9] Lindsay *v.* Cusimano, 10 F. R. 308 (1882).

[1] Lindsay *v.* Cusimano, 12 F. R. 507 (1882).

[2] Nelson *v.* Dahl, 12 L. R., Ch. D. 568, 582-84 (1879); Williams *v.* Theobald, 15 F. R. 468, 473 (1883); Sleeper *v.* Puig, 17 Blatch. 38-39 (1879), cases; 22 F. R. 790.

[3] Potter *v.* Smith, 103 Mass. 69 (1869).

[4] Phelps *v.* Harris, 101 U. S. 380 (1879).

[5] United States *v.* Gratiot, 14 Pet. 538 (1840).

[6] Auerbach *v.* Hitchcock, 28 Minn. 74 (1881); 62 Tex. 436-37.

[7] Elston *v.* Schilling, 42 N. Y. 79 (1870).

[8] Bullene *v.* Smith, 73 Mo. 16 (1880).

[9] Queen *v.* Brown, 1 Cr. Cas. Res. 246 (1870).

[10] See *Exp.* Russell, 13 Wall. 669 (1871); 14 Blatch. 13

[11] [Knight's Appeal, 19 Pa. 494 (1852), Black, C. J.

the "matter in dispute" — the subject of litigation, the matter for which suit is brought, on which issue is joined, and in relation to which jurors are called and witnesses examined.[1]

Until shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction. . . The amount stated in the body of the declaration is considered — the actual matter in dispute as shown by the record, and not the *ad damnum* alone.[2]

For the purpose of review the amount is fixed by the amount of the judgment below, not by the amount of the verdict.[3]

The act of March 3, 1887, excludes from the computation interest accrued up to the date of the suit.[4]

When the record is silent as to the value, it is good practice for the court below to allow affidavits and counter-affidavits of value to be filed under direction from the court.[5]

Where the value of land in controversy was necessarily involved in the determination of a case, and found by the court to be $5,000, to effect an appeal the defendant was not allowed to present affidavits showing the value to be $7,000.[6] See CONTROVERSY; REMAND, 2.

DISQUALIFY. See QUALIFY.

DISRATE. See DISPLACE.

DISSEISIN. See SEISIN.

DISSENT. See ASSENT; CONSENT; OPINION, 3.

DISSIMILAR. See SIMILAR.

DISSOLVE. 1. To put an end to, terminate: as, to dissolve a relation; *e. g.*, the marriage relation, — see DIVORCE.

The dissolution of a partnership (*q. v.*) does not affect contracts made between the partners and others.[7]

"Dissolving a corporation" is sometimes synonymous with annulling its charter or terminating its existence, and sometimes refers merely to the judicial act which alienates the property and suspends the business of the corporation, without terminating its existence.[8] See STOCK, 3 (2).

2. To discharge or relieve from a proceeding which involves a lien or seizure; to open, annul: as, to dissolve an attachment, an injunction, *qq. v.*

3. As to dissolving parliament, see PROROGUE.

DISSUADE. See JUSTICE, Offenses against.

DISTANCE. Is measured in a straight line, "as the crow flies," or on the horizontal plane.[1]

May refer to the usually traveled road.[2] See ALONG; COURSE, 1; DIRECT, 1; NEAR.

DISTILLER. Any person, firm, or corporation who distills or manufactures spirits, or who brews or makes mash, wort, or wash for distillation, or the production of spirits.[3]

One who produces alcoholic spirits by distillation.[4] Compare RECTIFIER.

Distilled spirits. The products of distillation, whether rectified or not.[5]

Unlawful distilling of spirits is sometimes termed "illicit."

The business of distilling having been made a *quasi* public employment, a distiller's books are *quasi* records.[6] See CRIMINATE.

Distillery. A place where alcoholic liquors are distilled or manufactured; not, then, every structure where the process of distillation, as of paraffine, is used.[7] See CONDITION, Repugnant.

DISTRACTED. In Illinois and New Hampshire, expresses a degree of insanity.

DISTRAIN. See DISTRESS.

DISTRESS.[8] Taking a personal chattel out of the possession of the wrong-doer into the custody of the party injured, to procure satisfaction for a wrong committed.[9]

A taking of beasts or other personal prop-

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[1] Lee *v.* Watson, 1 Wall. 339 (1863), Field, J. See 10 La. An. 170; 12 *id.* 87; 3 Cranch, 159; 3 Dall. 405; 13 Cal. 30; 25 Gratt. 177.

[2] Hilton *v.* Dickinson, 108 U. S. 174-76 (1883), cases; The Jesse Williamson, *ib.* 309-10 (1883); Bruce *v.* Manchester, &c. R. Co., 117 *id.* 515 (1886); Gibson *v.* Shufeldt, 122 *id.* 28-40 (1887); 106 *id.* 578-80; 110 *id.* 223; 112 *id.* 227.

[3] N. Y. Elevated R. Co. *v.* Fifth Nat. Bank, 118 U. S. 606 (1886).

[4] Moore *v.* Town of Edgefield, 32 F. R. 498 (1887).

[5] Wilson *v.* Blair, 119 U. S. 387 (1886).

[6] Talkington *v.* Dumbleton, 123 U. S. 745 (1887), Waite, Chief Justice.

[7] See 3 Kent. 27.

[8] *Re* Independent Ins. Co., 1 Holmes, 109 (1872); 2 Harr., Del., 12-16; 2 Kent, 307. As to notice, see 24 Cent. Law J. 588 (1887), cases.

[1] Leigh *v.* Hind, 17 E. C. L. 774 (1829); 78 *id.* *688; 85 *id.* *92; 88 *id.* *350.

[2] Smith *v.* Ingraham, 7 Cow. 419 (1827).

[3] Revenue Act 13 July, 1866, § 9: 14 St. L. 117.

[4] R. S. § 3247; United States *v.* House No. 3, 6 Rep. 391 (1879).

[5] R. S. §§ 3248, 3289, 3299; United States *v.* Anthony, 14 Blatch. 92 (1877); Boyd *v.* United States, *ib.* 317 (1877).

[6] United States *v.* Myers, 1 Hughes, 534 (1876); R. S. § 3308.

[7] Atlantic Dock Co. *v.* Libby, 45 N. Y. 502 (1871).

[8] F. *destraindre*, to strain, press, vex extremely: L. *distringere*, to pull asunder.

[9] 3 Bl. Com. 6; 44 Barb. 488.

erty by way of pledge to enforce the performance of something due from the party distrained upon.[1]

Distrain. To take by distress.

Distrainor; distrainer. He who levies a distress.

Distraint. The act or proceeding by which a distress is made.

The more usual injury for which a distress may be taken is non-payment of rent; but it is also a remedy where another's animals are found damage-feasant (*q. v.*), and for the enforcement of some duties imposed by statute.[2]

At common law all personal chattels are distrainable, unless expressly exempted. Not distrainable are: (1) Things in which no one can have an absolute property; as, a wild animal. (2) Whatever is in personal use; as, a horse while a man is riding him. (3) Valuable things in the way of trade; as, a horse standing in a shop to be shod, or at an inn, cloth left with a tailor, grain sent to a mill or a market. These are privileged for the benefit of trade. But all chattels found upon the premises are distrainable for rent: if not, fraud could be readily practiced. A stranger to the lease may recover from the tenant. (4) The tools and utensils of one's trade or profession: taking these would prevent the owner from serving society. Beasts of the plow and sheep are privileged, dead goods and other beasts not. To deprive the debtor of the means of earning money would defeat the end for which distress is intended. (5) A thing which cannot be returned in its former good plight: a distress being only a pledge, to be restored after the debt is paid. By 2 William and Mary (1691), c. 5, grain and hay may be taken. (6) A thing fixed to the freehold. By 11 Geo. II (1739), c. 19, the landlord may distrain natural products, and harvest them when matured.[3] See CROP.

All distresses must be by day, except of animals doing damage. The distrainor must enter upon the premises; within six months after the lease ends, where the tenant continues in possession. By 8 Anne (1710), c. 14, and 11 Geo. II (1729), c. 19, the landlord may distrain goods carried off the premises clandestinely, wherever found within thirty days, unless sold to an innocent purchaser. Once inside the house, the distrainor may break open an inner door; by 11 Geo. II, he may, in the day-time, break open any place to which goods have been fraudulently removed, oath being first made, in the case of a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein.[4]

A distress should be for the whole duty at once; but if mistake is made in the value of the articles, or if there is not sufficient upon the premises, a *second* distress may be taken.[5]

By 52 Hen. III (1270), c. 4, taking an unreasonable distress for rent is amercible. The remedy for an *excessive* distress is by a special action under that statute — there being, at common law, no trespass.[1]

The things distrained should be impounded. On the way they may be rescued, if the taking was unlawful. Once in the pound, they are in the custody of the law, and may be replevined.[2]

In Pennsylvania, prior to the act of March 21, 1772, a distress could be held only for enforcing payment of rent. That act provides for a sale of the goods, which makes the distress like an execution. The act is similar to that of William and Mary, *ante* — under which it was decided that a tender after an impounding availed nothing; but the later decisions are that a sale, after tender of rent and costs within five days, is illegal.[3]

In some States a lessor has no power of distress, but, instead, attachment on mesne process, an action of covenant or debt, or *assumpsit* for use and occupation. In other States the common-law right, greatly modified, is preserved.

What the power of distress was in feudal times may be inferred from the fact that the word came to signify extreme "suffering."[4] See DISTRICT, 1.

Distress infinite. A distress unlimited as to quantity, and repeatable till the delinquent does his duty.

In cases of distress for fealty or suit of court no distress could be considered unreasonable. This sort of distress was used in summoning jurors. The property was to be restored after the duty was performed.[5]

Now resorted to to compel the doing of a thing required by a court, as, to appear, when process cannot be personally served. See ATTACHMENT, Of person; DISTRINGAS; SEQUESTRATION.

See also ELOIGN; LANDLORD; POUND, 2; REPLEVIN; RESCUE, 1.

DISTRIBUTION. 1. Allotment; apportionment; division.

Specifically, division of an intestate's estate according to law.[6]

A decree distributing a fund in court will not preclude an omitted claimant from asserting, by bill or petition, his right to share in the fund.[7]

Distributee. One who receives a share or portion of the assets of an intestate's estate.[8]

Distributive. Due or received upon a legal division: as, a distributive share.

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[1] 3 Bl. Com. 231.

[2] 3 Bl. Com. 6–7.

[3] 3 Bl. Com. 7–10. Articles exempt, 26 Am. Law Reg. 153–58 (1887), cases.

[4] 3 Bl. Com. 11.

[5] 3 Bl. Com. 11–12.

[1] 3 Bl. Com. 12. See 100 Pa. 397, 401, *infra*; 39 How. Pr. 167; 8 Kern. 299.

[2] 3 Bl. Com. 12–15.

[3] Richards *v.* McGrath, 100 Pa. 400 (1882); 105 E. C. L. 262; 3 Bl. Com. 14. See also Patty *v.* Bogle, 59 Miss. 493–94 (1882).

[4] 1 Pars. Contr. 517; Taylor, Landl. & T. §§ 556-59.

[5] 3 Bl. Com. 231.

[6] Rogers *v.* Gillett, 56 Iowa, 268 (1881); 102 Ind. 412.

[7] *Re* Howard, 9 Wall. 184 (1869), cases.

[8] See Henry *v.* Henry, 9 Ired. L. 279 (1848).

Statutes of distribution. Statutes which regulate the division of an intestate's estate among his widow and heirs or next of kin, after the debts of the estate are paid.

Title to realty vests in the heirs by the death of the ancestor; the legal title to personalty is vested in the executor or administrator, and is transferred to the distributees upon confirmation of the proceedings in distribution.[1]

In thirty or more of the States and Territories the rules for the distribution of personalty are essentially the same as the rules for the descent of realty, where no distinction is made between realty ancestral and non-ancestral, and, where such distinction is made, for the descent of realty non-ancestral.[2]

See AUDIT; DESCENT, Canons of; EQUAL, Equally; PROPERTY.

2. As applied to a publication like a newspaper or a periodical, imports a delivery to persons who have bought or otherwise become entitled to the same.[3]

DISTRICT. A division of territory.

1. Originally, the space within which a lord could coerce and punish — *distrain.*[4]

The circuit within which a man might be compelled to appear, or the place in which one hath the power of distraining.[5]

2. A division of a State or Territory for any purpose whatever: as, *collection* district, for the collection of revenue duties; *Congressional* district, for the election of representatives in Congress; *election* district, for purposes of elections, municipal, State, or United States; *judicial* district, for judicial purposes — with its district *court*, district *judge*, district *attorney*, and district *clerk*; *land* district, for regulating sales of public lands; *school* district, for purposes connected with the public schools; *tax* district, for the levying and collection of taxes.

May designate an area larger or smaller than a county; as, the district from which the jury in a criminal case may be drawn.[6]

A "taxing" district is not necessarily a large division of a State's territory, like a county or parish, as, in the act of Congress of June 7, 1862, § 6; it may be any portion of territory solely for the assessment of taxes.[7] See D, 3; PRECINCT.

District attorney. See ATTORNEY-GENERAL.

District clerk, court, judge. See COURTS, United States.

District of Columbia. Is neither a State nor a Territory. Congress is authorized "to exercise exclusive Legislation in all Cases whatsoever over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."[1]

Maryland and Virginia ceded territory on the Potomac, which Congress, by act of July 16, 1790, accepted. In December, 1800, the seat of government was removed from Philadelphia. By the act of July 11, 1846, Congress retroceded the county of Alexandria to Virginia. The District constitutes the county of Washington.

A citizen of the District of Columbia is not a citizen of a State.[2]

The laws in force December 1, 1873, were revised and republished, by direction of Congress, in a separate volume known as the Revised Statutes relating to the District of Columbia.[3] See COURTS, page 284; LEVY, 3.

DISTRINGAS. L. That you distrain.

The emphatic word in the writ of "distress infinite" (*q. v.*), when expressed in Latin. The writ enforced compliance with something required of the person (natural or artificial) named in the writ.

Referring to a defendant who neglected to appear, a process issued from the court of common pleas commanding the sheriff to distrain the defendant from time to time, by taking his goods and the profits of his lands.[4]

The process against a body corporate, which, having been served with a subpœna issued out of chancery, fails to appear in court, is by *distringas*, to distrain them by their goods and chattels, rents and profits, till they obey the summons.[5]

In detinue, after judgment, the plaintiff had a *distringas*, to compel the defendant to deliver the goods, by repeated distresses of his chattels.[6]

Distringas juratores. That you distrain the jurors. A writ commanding the sheriff to distrain jurors by their lands and goods, so that they be constrained to appear in court.[7]

Distringas nuper vice comitem. That you distrain the late sheriff. A writ to compel a sheriff who had gone out of office to bring in a defendant, or to sell goods under a *fieri facias* which he failed to do while in office.[8]

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[1] Roorbach *v.* Lord, 4 Conn. 349 (1822).

[2] See 1 Bouvier's Law Dict. 544; 2 Kent, 420, 426.

[3] Dawley *v.* Alsdorf, 25 Hun, 227 (1881).

[4] [Webster's Dict.

[5] [Jacob's Law Dict.

[6] State *v.* Kemp, 34 Minn. 62 (1885).

[7] Keely *v.* Sanders, 99 U. S. 448-49 (1878); De Treville *v.* Smalls, 98 *id.* 517 (1878).

[1] Constitution, Art. I, sec. 8, par. 17.

[2] Cissel *v.* McDonald, 16 Blatch. 152-54 (1879), cases.

[3] See generally Fort Leavenworth R. Co. *v.* Lowe, 114 U. S. 528-29 (1885).

[4] 3 Bl. Com. 280.

[5] 3 Bl. Com. 445. See 37 Hun, 546; 89 N. C. 585.

[6] 3 Bl. Com. 413.

[7] 3 Bl. Com. 354; 1 Arch. Pract. 365.

[8] See 1 Tidd, Pract. 313.

DISTURBANCE. 1. Interruption of a state of peace; disquiet; disorder: as, the disturbance of a lawful public meeting.[1] See ASSEMBLY; PEACE, 1.

2. A wrong to an incorporeal hereditament, by hindering or disquieting the owner in his lawful enjoyment of it.[2] See ENJOYMENT, Quiet.

It may be of a franchise, a common, a way, or a tenure.[3]

DITCH. See DRAIN.

DISUSE. See USE, 2.

DIVERS.[3] Several; sundry; more than one, yet not many.

In an indictment for the larceny of a number of articles all of one kind, the allegation may be "divers," "divers and sundry," or "a quantity," without stating a specific number, along with an averment of the aggregate value of the whole number.[4]

DIVERSION. Turning a stream, or a part of it, from its accustomed direction or natural course.[5]

DIVEST. See VEST.

DIVIDE. See DIVISION; PARTITION.

DIVIDEND. A portion of the principal or the profits of a thing divided among its several owners.[6]

1. In bankruptcy and insolvency law, assets apportioned among creditors.

2. In the administration of the estates of decedents, a distributive share.[7] See EQUAL.

3. A distribution of the funds of a corporation among its members, pursuant to a vote of the directors or managers.[8]

Corporate funds derived from the business and earnings of a corporation, appropriated by a corporate act to the use of, and to be divided among, the stockholders.[9]

Referring to a corporation engaged in business, and not being closed up and dissolved,—a fund which the corporation sets apart from its profits to be divided among its members.[1]

The dividends declared by a corporation in business are, and, except under special circumstances, always should be, from profits. Hence, the word frequently carries with it the idea of a division of profits; but that is not necessarily its only meaning. Its special signification, in a particular case, is dependent upon the character of the thing divided.[2]

Does not necessarily imply a *pro rata* distribution.[3]

Preferred dividend. A dividend paid to one class of shareholders in priority to that to be paid to another class.[4]

Preferential dividend. A preference to a limited extent in the division of the sum to be divided.[5]

Dividends on preferred stock are payable only out of net earnings applicable thereto; they are not payable absolutely and unconditionally, as is interest. Until declared, the right to a dividend is not a debt; and the obligation to declare it does not arise until there is a fund from which it can properly be made. When to declare a dividend, and the amount thereof, is, ordinarily, a matter of internal management. Unless it appears that somebody in particular will be injured, a court of equity will not interfere.[6]

A dividend declared out of earnings is not an asset of the company, but belongs to the shareholder. The corporation holds it as his trustee. Before the dividend is declared, each share of stock represents the owner's whole interest; when he transfers the share, he transfers his entire right; hence, a dividend subsequently declared belongs to the new holder.[7]

A stock dividend does not diminish or interfere with the property of a corporation. It simply dilutes the shares as they existed before. The corporation is just as capable of meeting demands upon it; the aggregate of the stockholders own the same interest they had previously. When stock has been lawfully created, a dividend may be made, provided the stock represents property. There is no statute in New York which requires dividends to be made in cash; and there is no rule or policy of law which condemns a property dividend. The stockholders can take the property divided to them and sell it for cash. But a dividend payable in cash, or payable generally, makes the corporation a debtor.[8]

See EX, 3; STOCK, 3 (2), Preferred.

[1] See 4 Bl. Com. 54; State v. Oskins, 28 Ind. 364 (1867), cases; Wall v. Lee, 34 N. Y. 141 (1865), cases.

[2] [3 Bl. Com. 236.

[3] L. *diversus*, different.

[4] Commonwealth v. Butts, 124 Mass. 452 (1878), cases.

[5] [Parker v. Griswold, 17 Conn. *299 (1845).

[6] [Commonwealth v. Erie, &c. R. Co., 10 Phila. 466 (1873).

[7] University v. North Carolina R. Co., 76 N. C. 105 (1877).

[8] Williston v. Michigan, &c. R. Co., 13 Allen, 404 (1866).

[9] [Hyatt v. Allen, 56 N. Y. 556 (1874), Andrews, J.; Chaffee v. Rutland R. Co., 55 Vt. 129 (1882); Pierce, Railr. 120.

[1] Lockhart v. Van Alstyne, 31 Mich. 79 (1875), Cooley, J.; 108 U. S. 399.

[2] Eyster v. Centennial Board, 94 U. S. 504 (1876), Waite, C. J. See Cary v. Savings Union, 22 Wall. 41 (1874); 18 Barb. 657; 8 R. I. 333; 1 De G. & J. *636-37.

[3] Hall v. Kellogg, 12 N. Y. 335 (1855).

[4] Taft v. Hartford, &c. R. Co., 8 R. I. 333 (1866), Bradley, C. J. See 55 Vt. 129, *infra*.

[5] See Henry v. Great Northern Ry. Co., 1 De Gex & J. *636 (1857).

[6] Chaffee v. Rutland R. Co., 55 Vt. 126, 127, 133 (1882), cases.

[7] Jermain v. Lake Shore, &c. R. Co., 91 N. Y. 492 (1883).

[8] Williams v. Western Union Tel. Co., 93 N. Y. 189

DIVINE. See GOD; LAW; OATH; RELIGION; SUNDAY; WORSHIP.

DIVISION. 1. A setting apart: separation, apportionment, partition, sharing out; also, a separate part or portion, a share, an allotment. See EQUAL; FENCE; WALL.

Divisible. Admitting of separation into distinct parts; separable. **Indivisible.** Entire; inseparable.

Agreements, covenants, and considerations may or may not be divisible into parts performed or capable of being performed or enforced, or into parts which are lawful and parts which are unlawful.[1] See CONTRACT, Divisible; UTERE, Utile, etc.

Undivided. That a tract of land, held in common, shall remain undivided, implies that the land is not subject to partition, is not to be divided, set off, allotted to individuals in severalty.[2]

2. Difference of opinion; non-concurrence in a decision. See OPINION, 3.

3. Separation of the members of a legislative body, to ascertain the vote cast.

DIVISUM. See IMPERIUM.

DIVORCE.[3] The dissolution or partial suspension, by law, of the marital relation. A dissolution is termed a divorce from the bond of matrimony — *a vinculo matrimonii;* a suspension, divorce from bed and board — *a mensa et thoro.*[4]

"Divorced" imports a dissolution, in the largest sense, of the marriage relation.[5]

In England, prior to 1857, the subject of divorce belonged to the ecclesiastical courts and to parliament. Statutes of 20 and 21 Vict. (1857) c. 85, created the Court of Divorce and Matrimonial Causes, with exclusive jurisdiction in all matrimonial matters. Divorce causes are now heard in the Probate and Divorce Division of the High Court of Justice, appeal lying to the Court of Appeal.

In this country, formerly, it was common for the legislatures to grant divorces by special acts, but the practice fell into disuse, and is now forbidden in some States, by the constitution. The necessary jurisdiction is generally conferred upon courts possessing equity powers.[6]

The inhibition upon the legislative department against exercising judicial functions, implied from the division of government into three departments, has never been understood to exclude control by the legislature of a State over the marriage relation, notwithstanding that the exercise of such power may involve investigation of a judicial nature. Hence, unless forbidden by the constitution, a legislature may grant a divorce.[1]

Congress is not empowered to legislate upon the subject; and the legislation of the States and Territories is far from uniform. In South Carolina divorce is not allowed for any cause; in New York for adultery only. Elsewhere it is allowed for adultery, cruelty, indignity, willful desertion, or sentence to a State's prison for two years or longer period, habitual drunkenness, pre-contract, fraud (incontinency, or pregnancy), coercion, imbecility or impotency unknown to the other party, consanguinity, and affinity, *qq. v.*

Common defenses are: connivance, collusion, condonation, recrimination, denial of allegation of desertion or infidelity.

Some of the consequences of a divorce follow directly from the law, others may depend upon the special order of court: the law ends all rights, based upon the marriage, not actually vested; as, dower and curtesy,[2] and the husband's power over the wife's choses in action. The court may allow alimony, and direct the custody of children.

A decree made in one State, being a judgment of record, will be given its original force in every other State. For this purpose, courts of equity, Federal, and State, have jurisdiction.[3] But, otherwise, if the record shows on its face that a party was a non-resident.[4]

A marriage forbidden by a decree of divorce in one State may be contracted in another State not also prohibiting it.[5]

The decree in nature is *in rem.* It determines the question of the marriage relation, or of the personal status, as against the world, and is therefore conclusive upon parties and strangers.[6]

See, further, the related topics mentioned.

DO; DONE. See ACT, 1; MAKE; FACERE.

190, 192 (1883). See also Bailey *v.* N. Y. Central R. Co., 22 Wall. 605, 633 (1874); generally, 19 Am. Law Rev. 871–92, 737–62 (1885), cases.

[1] See Oregon Navigation Co. *v.* Winsor, 20 Wall. 70 (1873), cases.

[2] Wellington *v.* Petitioners, 16 Pick. 98 (1834).

[3] F.: L. *divortium*, separation,—4 Mo. 142. Divorcement is obsolete.

[4] 2 Bishop, Mar. & D. § 225; 1 Bl. Com. 440.

[5] Miller *v.* Miller, 33 Cal. 355 (1867).

[6] See Bishop, Mar. & D. §§ 664, 78, 85; 17 Nev. 221. In Delaware, during the session of the legislature for 1886–87, forty-four special acts were passed.

[1] Maynard *v.* Hill, 125 U. S. 203–9 (1888), cases, Field, J., deciding that the act of Dec. 22, 1852, of the Territory of Oregon, divorcing one Maynard and wife, was constitutional.

[2] See Barrett *v.* Failing, 111 U. S. 523 (1884), cases.

[3] Barber *v.* Barber, 21 How. 591, 584 (1858); Cheever *v.* Wilson, 9 Wall. 124 (1869).

[4] Hood *v.* State, 56 Ind. 263 (1877); People *v.* Baker, 76 N. Y. 78 (1879); Blackinton *v.* Blackinton, 141 Mass. 435 (1886), cases; 30 Kan. 717; 24 Iowa, 204.

[5] Van Voorhis *v.* Brintnall, 86 N. Y. 18, 24 (1881), cases; 16 Am. Law Reg. 65–78, 193–204 (1877), cases; Whart. Confl. Laws, § 135. Marrying again, as bigamy, 17 Cent. Law J. 83–86 (1883), cases; 20 Am. Law Rev. 718–26 (1886), cases. National legislation, 21 Am. Law Rev. 675–78 (1887), cases. The new French act, 1 Law Quar. Rev. 358 (1885).

[6] McGill *v.* Deming, 44 Ohio St. 657 (1887), cases.

DOCK.[1] 1, *v.* To clip, cut off a part: to diminish.

Dock an account. To deduct something from a particular account.

Dock an entail. To curtail, destroy, defeat an estate tail.

2, *n.* (1) The space between wharves. Whence *dockage:* a charge for the use of a dock;[2] *dock-master; dock-warrant.* See WHARF.

The occupant of a dock is liable in damages to a person who, while using it, is injured in consequence of a defect permitted to exist, provided the injured person exercised due care.[3]

A dry-dock is not a subject of salvage service. The fact that it floats does not make it a "vessel," which only is a subject of salvage.[4]

(2) A space inclosed within a court room, for occupancy by an accused person while in court awaiting trial or sentence: the prisoner's dock.

DOCKET. 1, *v.* To abstract — and enter in a book.[5] See DOCK, 1.

To enter in a book called a docket.

2, *n.* A brief writing; an abstract, an epitome.

Originally, a memorandum of the substance of a document written upon the back or outside of it. In time, these memoranda, particularly those of judgments, were transcribed into books, and the name "docket" thereafter designated the books.

A brief statement in a book of the things done in court in the progress of a cause; also, the book which contains such history; and, again, a volume for the entry of all abstracts of a particular sort.

Whence docket *costs*, docket *entry*, docket *receipt*, docket *record*, docket *fee* — see FEE, 2.

Numerous terms are in use descriptive of the nature of the entries in dockets or of the persons by whom they are made. Thus, there may be a *prothonotary's* or a *clerk's* docket, a *sheriff's* or a *marshal's* docket, the docket of a *magistrate*, of an *alderman* or of a *justice of the peace*, an *attorney's* private docket; a *civil*, an *equity*, or a *criminal* docket, an *appearance* and an *issue* docket, a *recognisance* docket; a *trial* docket — often referred to as "the docket;" a *judgment* and an *execution* docket; an *ejectment*, a *mechanic's lien*, a *partition* docket; an *auditor's report* docket.

The docket of judgments is a brief writing or statement of a judgment made from the record or roll, kept with the clerk, in a book alphabetically arranged.[1]

Such docket affords purchasers and incumbrancers information as to the liens of judgments.[2]

Entries in dockets may or may not be "records." They are admissible in evidence when a formal record is not required.[3] See INDEX; JUDGMENT; MINUTES, 1; NOTICE, 1.

DOCTOR. One qualified to teach: a learned man; a person versed in one or more sciences or arts.

Doctor of laws. A title conferred by a college or university upon a person distinguished for his attainments in one or several departments of learning. Whence LL. D., from the Latin *legum* or *legibus doctor*.

Doctor of the civil law. A degree conferred upon a person who has pursued a prescribed course of study in general jurisprudence in a law school or university. Abbreviated D. C. L. See DEGREE, 3.

Doctor of medicine or physic. As popularly used, a practitioner of physic, irrespective of the system or school.[4] See PHYSICIAN.

DOCTRINE. The principle involved, applied, or propounded: as, the doctrine of escheat, estoppel, relation; the *cy prés* doctrine.

DOCUMENT. That which conveys information; that which furnishes evidence or proof; a written or printed instrument.

An instrument on which is recorded, by means of letters, figures, or marks, matter which may be evidentially used.[5]

Documentary. Pertaining to what is written; consisting of one or more documents: as, documentary evidence.

Ancient document. Any private writing thirty or more years old. See WRITING, Ancient.

Foreign document. Such writing as originates in or comes from another jurisdiction.

Judicial document. Any instrument emanating from a court of justice. **Legislative, and executive, document.** Any

[1] 1, *v.* Welsh *too-*, *doc-*, to cut short, curtail. 2, *n.* Dutch *dokke*, a harbor: Gk. *doche*, receptacle.

[2] City of Boston *v.* Lecrow, 17 How. 434 (1854); The Buckeye State, 1 Newb. 71 (1856).

[3] Nickerson *v.* Tirrell, 127 Mass. 230 (1879), cases.

[4] Cope *v.* Vallette Dry-Dock Co., 119 U. S. 627 (1887).

[5] [3 Bl. Com. 397; 2 *id.* 511. In former times spelled "docquet."

[1] Stevenson *v.* Weisser, 1 Bradf. 344 (N. Y., 1850).

[2] Appeal of First Nat. Bank of Northumberland, 100 Pa. 427 (1882).

[3] Philadelphia, &c. R. Co. *v.* Howard, 13 How. 331 (1851), cases; *Re* Coleman, 15 Blatch. 426-27 (1879), cases.

[4] [Corsi *v.* Maretzek, 4 E. D. Sm. 5 (N. Y., 1855).

[5] 1 Whart. Ev. § 614.

instrument or record made or kept in the legislative or executive departments of government, and evidence of public business therein.

Private document. An instrument affecting the concerns of one or more individuals. **Public document.** An instrument or record concerning the business of the people at large, preserved in or emanating from any department of government; also, a publication printed or issued by order of one or both houses of Congress or of a State legislature.

Public documents include state papers, maps, charts, and like formal instruments, made under public auspices. A copy of such document, issued by public authority, is as valid as the original; as, an officially published statute. The term also embraces official records required to be kept by statute.[1]

A public statute proves its own recitals; not so, a private statute. Journals of legislatures and executive documents are *prima facie* evidence of the facts they recite.[2]

Official registers, kept as required by law, are evidence of the facts they record. They must be identified, be complete, indicate accuracy, and not be secondary.[3]

Parish records of births, baptisms, marriages, and deaths are receivable as evidence when made by the persons whose duty it was to note such facts.[4]

Family records prove family events.

A relative instrument is inadmissible without its correlative. Admission of a part involves the whole document. All the usual incidents accompany the document.[5]

A document is to be proved by him who offers it; otherwise, when produced in pursuance of notice, or by an adverse party who relies on the writing as part of his title. A document sued upon must be proved when its execution has been denied.[6]

In matters of execution the law of the place where the instrument is to have effect governs. A writing void as a contract may be valid as an admission. The identity of a signer is to be proved. An agent's power to execute must first be shown.[7]

See ALTERATION, 2; BOOK; COPY; EVIDENCE; HANDWRITING; INSPECTION, 2; INSTRUMENT, 2, 3; LOST, 2; NEWSPAPER; RECORD; SEAL, 1; STAMP; WRITING.

DOE; ROE. "John Doe" and "Richard Roe" were fictitious persons used as standing pledges (common bail, *q. v.*) for the appearance of parties at a time when furnishing security for the prosecution of a suit by the plaintiff, and for attendance by the defendant, had become matters of form.[1]

The names may have been first used for the fictitious plaintiff and defendant in the old action of ejectment.[2] See STRAW.

Where defendants, whose real names were not known to the plaintiff, were described as "John Doe and Richard Roe, owners" of a particular vessel, and the true owners voluntarily appeared and filed answers, it was held that the plaintiff need not prove the ownership of the vessel.[3]

DOG. See ANIMAL; GAME, 2; KEEPER, 2; WORRY.

The almost unbroken current of authority is that, although dogs are property, their running at large in cities may be regulated or entirely prohibited; the requirement may be that they be classified, be registered, wear collars, and be destroyed if found running at large in violation of a statute or ordinance.[4]

A dog is a "thing of value," and may be stolen, and burglary may be committed in attempting to steal it.[5]

DOLI. See DOLUS.

DOLLAR. The unit of our currency; — money, or its equivalent.[6]

A silver coin weighing four hundred and twelve- and one-half grains, or a gold coin weighing twenty-five and four-fifths grains, of nine-tenths pure to one-tenth alloy of each metal.[7]

The *coined* dollar of the United States; a certain quantity and fineness of gold or silver, authenticated as such by the stamp of the government.[8] See further COIN.

A contract to pay in "dollars" means in lawful money of the United States, and cannot be explained by parol; otherwise, of a contract made in another country, or in the late Confederate States, in which last case the reference may be to "Confederate dollars."[9]

"Dollars" will be supplied where the context shows that word omitted.[10]

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[1] See McCall *v.* United States, 1 Dak. 321-28 (1876), cases; 1 Sup. R. S. pp. 154, 288.

[2] 1 Whart. Ev. §§ 685-88; Whiton *v.* Albany, &c. Ins. Co., 109 Mass. 30 (1871), cases.

[3] 1 Whart Ev. §§ 639-48; 1 Greenl. Ev. §§ 493, 484, 496.

[4] 1 Whart. Ev. §§ 649-59; 1 Greenl. Ev. § 493.

[5] 1 Whart. Ev. §§ 618-20, 642.

[6] 1 Whart. Ev. §§ 689-91, 736.

[7] 1 Whart. Ev. §§ 700-2, 739 *a*.

[1] 3 Bl. Com. 274, 287, 295.

[2] 3 Steph. Com. 618.

[3] Baxter *v.* Doe, 142 Mass. 562 (1886); Pub. St. c. 161, § 90.

[4] State *v.* City of Topeka, 36 Kan. 84 (1886), cases. See generally 20 Alb. Law J. 6-10 (1879), cases.

[5] State *v.* Yates, C. P. of Fayette Co., Ohio: 37 Alb. Law J. 232 (1888); *ib.* 348-50, cases.

[6] United States *v.* Auken, 96 U. S. 368 (1878).

[7] Borie *v.* Trott, 5 Phila. 366, 404 (1864), Hare, J.

[8] Bank of New York *v.* Supervisors, 7 Wall. 30 (1868), Chase, C. J.

[9] Thornington *v.* Smith, 8 Wall. 12 (1868), Chase, C. J.; Cook *v.* Lillo, 103 U. S. 792 (1880); 35 Ill. 396, 440; 39 N. Y. 98; 1 W. N. C. 223; 33 Tex. 351.

[10] Hines *v.* Chambers, 29 Minn. 11 (1884); Hunt *v.* Smith, 9 Kan. 153 (1872).

An instrument in the form of a promissory note for the payment of "25.00 as per deed, 10 per cent. till paid," is a note for twenty-five dollars.[1]

Where a jury found "for the plaintiff in the sum of thirteen hundred and ninety-nine and 48-100," it was held that the omission of the word "dollars" was not such a defect as prevented rendering judgment according to the intent of the jury, although it would have been more regular to have amended the verdict before judgment.[2]

Any mark commonly employed in business transactions to denote the division of figures, obviously representing money, into dollars and cents, is sufficient for that purpose.[3]

"One dollar" — see CONSIDERATION, 2, Nominal.

See generally CURRENCY; MONEY; TENDER, Legal; WAR.

DOLUS. L. Device, artifice, guile, craft, intention to deceive,— especially when used with *malus:* actual fraud. Evil purpose; unlawful intention, illegal ill-will; legal malice. Compare CULPA.

Doli capax. Able to distinguish between right and wrong; having capacity to intend wrong, to commit crime. **Doli incapax.** Incapable of meditating wrong.

Capacity for guilt is measured by the strength of the understanding. Under seven years of age, an infant cannot be guilty of felony; under fourteen, though he be *prima facie* adjudged *doli incapax*, yet if it appears that he was *doli capax*, and could discern between good and evil, he may be convicted.[4]

Dolus bonus. Craftiness which falls short of fraud; as, adroitness in effecting a sale, not amounting to false representation.

Dolus malus. Actual false representation, intended to injure.

Ex dolo malo. See ACTIO.

See DECEIT; FRAUD.

DOM. As a termination — jurisdiction, property, as in kingdom; or — state, condition, quality, as in freedom, serfdom. Originally, *doom* — judicial sentence.

Dom-boc or -boc. See DOME.

DOMAIN.[5] 1. Dominion, ownership, property; absolute proprietorship or right of control.[6]

Domain, eminent. The power to take private property for public uses is termed "the right of eminent domain."[7]

"Eminent" imports having preference, being paramount, prerogative, sovereign.

All separate interests of individuals in property are held of the government under the implied reservation that the property may be taken for the public use, upon paying a fair compensation, whenever the public interest requires it. The possession is to be resumed in the manner directed by the constitution and laws.[1]

The ultimate right of the sovereign power to appropriate, not only the public property, but the private property of all citizens within the territorial sovereignty, to public purposes. Vattel says that the right in society or the sovereign to dispose, in case of necessity, and for the public safety, of all the wealth (property) in the state, is "eminent domain," and a prerogative of majesty.[2]

In every political sovereign community there is, or there, necessarily, the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power, denominated the "eminent domain" of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise. The whole policy of the country relative to roads, mills, bridges, and canals rests upon this single power, under which lands have always been condemned; without the exertion of the power no one of these improvements could be constructed. The exercise of a franchise is subject to the power.[3]

The propriety of exercising the right is a political question — exclusively for the legislature to determine.[4]

The mode of exercising the right, in the absence of provision in the organic law prescribing a contrary course, is within the discretion of the legislature. If the purpose be a public one, and just compensation be paid or tendered the owner of the property taken, there is no limitation upon the power of the legislature.[5]

The right of eminent domain exists in the government of the United States, and may be exercised by it within the States, so far as is necessary to the enjoyment of the powers conferred by the Constitution. Such authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other author-

[1] State *v.* Schwartz, 64 Wis. 432 (1885).

[2] Hopkins *v.* Orr, 124 U. S. 513 (1888), cases, Gray, J.

[3] Delashmutt *v.* Sellwood, 10 Oreg. 325 (1882).

[4] 4 Bl. Com. 23.

[5] F. *domaine*, a lordship: L. *dominium*, right of ownership. Compare DEMESNE; DOMAIN.

[6] See 2 Bl. Com. 1.

[7] United States *v.* Jones, 109 U. S. 518 (1883), Field, J.

[1] Beekman *v.* Saratoga, &c. R. Co., 3 Paige, 72–73 (1831), Walworth, Ch.; Bloodgood *v.* Mohawk, &c. R. Co., 18 Wend. 13–18 (1837), cases.

[2] Charles River Bridge *v.* Warren Bridge, 11 Pet. *641 (1837), Story, J. Vattel is also quoted in 109 U. S. 519, *post*.

[3] West River Bridge Co. *v.* Dix, 6 How. 531–33 (1848), Daniel, J.

[4] Hyde Park *v.* Cemetery Association, 119 Ill. 149 (1886); 111 Mass. 125.

[5] Secombe *v.* Milwaukee, &c. R. Co., 23 Wall. 118 (1874); People *v.* Smith, 21 N. Y. 597–98 (1860); Holt *v.* Council of Somerville, 127 Mass. 410, 413 (1879).

ity, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. No one doubts the existence in the State governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. But it is no more necessary for the exercise of the powers of a State government than for the exercise of the conceded powers of the Federal government. That government is sovereign within its sphere, as the States are within theirs. . . When the power to establish post-offices and to create courts within the States was conferred upon the Federal government, included in it was authority to obtain sites for such offices and for court-houses, by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The Fifth Amendment contains a provision that "private property" shall not "be taken for public use without just compensation." What is that but an implied assertion that, on making just compensation, it may be taken. . . This power of the Federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. In some instances the States, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the States. . . The proper view of the right of eminent domain seems to be that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the lands shall have been acquired.[1]

The right requires no constitutional recognition. When the use is public, the necessity or expediency of the appropriation is not a subject of judicial cognizance. The power may be delegated to a private corporation, to be exercised in the execution of a work in which the public is interested. Whether attached conditions have been observed is a matter for judicial cognizance.[1]

Ascertainment of the amount of compensation to be made is not an essential element of the power of appropriation. The constitutional provision for "just compensation" is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. The proceeding for the ascertainment of the value of the property and the compensation to be made is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners, special boards, or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon. Whether the tribunal shall be created directly by an act of Congress, or one already established by the States shall be adopted for the occasion, is a matter of legislative discretion.[2]

The right over the shores and the land under the water of navigable streams resides in the State for municipal purposes, within legitimate limitations.[3]

Land taken for one purpose cannot, without special authority from the legislature, be appropriated, by proceedings *in invitum*, to a different use.[4]

The power of eminent domain expropriates, upon indemnity for public utility; the "police power" is exercised without making compensation—any loss occasioned is *damnum absque injuria*.[5] See further POLICE, 2; USE, 2, Public.

See also COMPENSATION, 3; LAND, Public; PARK, 2; TAKE, 8.

2. Territory owned and governed; lands.

Domain, public. Public lands, with any buildings thereon, held in trust by the government.

Congress has exclusive power to dispose of the public domain of the United States, and the exercise of the power is limited only by the discretion in that body.[6] See LANDS, Public.

DOME. A judgment, decree, sentence.

Dome-book. Any book of judgments.

Alfred collected the customs of the kingdom and reduced them to a system or code in his "Dom-bec,"

[1] Kohl *v.* United States, 91 U. S. 371–74 (1875), cases, Strong, J. Approved, Fort Leavenworth R. Co. *v.* Lowe, 114 *id.* 531 (1885); Roanoke City *v.* Berkowitz, 80 Va. 619, 623 (1885).

[1] Mississippi, &c. Boom Co. *v.* Patterson, 98 U. S. 406 (1878).

[2] United States *v.* Jones, 109 U. S. 518–19 (1883), Field, J. See Wagner *v.* Railway Co., 38 Ohio St. 35 (1882).

[3] Omerod *v.* New York, &c. R. Co., 13 F. R. 370 (1882)

[4] Prospect Park, &c. R. Co. *v.* Williamson, 91 N. Y. 552, 561 (1883); Anniston, &c. R. Co. *v.* Jacksonville, &c. R. Co., 82 Ala. 300 (1886). cases.

[5] Bass *v.* State, 34 La. An. 496 (1882); Davenport *v.* Richmond City, 81 Va. 689 (1886); 17 F. R. 114; 81 Pa. 85. See generally 3 Law Q. Rev. 314–25 (1887), cases; 2 Kent, 339; 19 Bost. Law Rep. 241, 301.

[6] West River Bridge Co. *v.* Dix, 6 How. 540 (1848);

for the use of his tribunals. The volume also contained the maxims of the common law, forms for judicial proceedings, and certain penalties.[1]

The book may be seen, in both Saxon and English, in "The Ancient Laws and Institutes of England," published by the Record Commissioners, Vol. 1, pp. 45–101. At the head of the book stand the Ten Commandments, followed by many Mosaic precepts. After quoting the canons of the apostolic council at Jerusalem, Alfred refers to the commandment "As ye would that men should do to you, do ye also to them," adding, "from this one doom a man may remember that he judge every one righteously: he need heed no other doom-book."[2]

The Commandments and such portions of the Law of Moses as were prefixed to the code became a part of the law of the land. Labor on Sunday was made criminal, and heavy punishments were exacted for perjury.[3]

Domesday-book. A survey of all the lands in England, with the names of their owners, their value, etc., compiled, by direction of the Conqueror, 1081–86.

The completeness of the survey made it "a day of judgment" as to the extent, value, and other qualities of every piece of land. It was practically a careful census, and became a final authority on tenures and titles. The two original volumes are preserved in the Exchequer.[4]

DOMESTIC.[5] Belonging or pertaining to one's own home, State, or country.

1. Residing in the same house with the master he serves: as, a domestic servant; or, simply, a domestic: a house servant; not, an outdoor workman, nor a person hired for a day.[6]

Living about the habitations of men; tame, domesticated: as, a domestic animal, *q. v.*

2. Relating to the law of the place of a person's domicil.

Having jurisdiction at one's domicil: as, the domestic court, forum, tribunal.

Appointed at the place of residence — of the person lately deceased, or of a ward: as, a domestic administrator, guardian, *q. v.*

3. Relating to the law, property, trade, or inhabitants of some particular State.

For the benefit of creditors within the debtor's own State: as, a domestic assignment, *q. v.*; whence, also, domestic creditors.

Maintainable against a resident debtor: as, a domestic attachment, *q. v.*

Created under the laws of the State in which it transacts business: as, a domestic corporation, *q. v.*

Rendered by a court of the State where it was first entered or enrolled: as, a domestic decree, or judgment, *q. v.*

Arising or committed within the borders of a State or among the inhabitants thereof: as, domestic violence, *q. v.*

4. Relating to the territorial limits or to the jurisprudence of two or more States, or of the whole United States.

Confined within the United States, or, possibly, one State: as, domestic commerce, manufactures, *qq. v.*

Acquired within a subdivision of a country: as, a domestic domicil, *q. v.*

Resident within the State or country in question: as, a domestic factor, *q. v.*

DOMICIL.[1] The place where a person lives or has his home; that is, where one has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.[2]

The habitation fixed in any place, without any present intention of removing therefrom.[3]

Domiciliate, or domicile. To establish one, or oneself, in a fixed residence.

Domiciliary. Pertaining to one's permanent residence: as, a domiciliary court, the domiciliary administrator or guardian, domiciliary inspection or visitation.

There is a wide difference between domicil and mere residence. While they are usually at the same place, they may be at different places. Domicil is the established, fixed, permanent, ordinary dwelling place

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United States *v.* Gratiot, 14 Pet. 536 (1840); 1 Kent, 166, 257; 37 Am. Jur. 121.

[1] 4 Bl. Com. 411; 3 *id.* 65.

[2] See 1 Bl. Com. 65, note by Warren.

[3] Green, Short Hist. Eng. People, 81.

[4] See 2 Bl. Com. 49, 99; 3 *id.* 331; Green, Short Hist. Eng. People, 114.

[5] L. *domesticus*, belonging to a household: *domus*, a house

[6] *Eg.* Meason, 5 Binn. 174–84 (1812); Wakefield *v.* State, 11 Tex. 558 (1874); Richardson *v.* State, 43 *id.* 456 (1875); Ullman *v.* State, 1 Tex. Ap. 221 (1876); Waterhouse *v.* State, 21 *id.* 666 (1886). See R. S. § 4063.

[1] Spelled also domicile. F. *domicile*, a dwelling: L. *domicilium*, habitation: *domus*, a house; and *-cilium*, allied to *celare*, to hide.

[2] Story, Conf. Laws, § 41; Hannon *v.* Grizzard, 89 N. C. 120 (1883), Smith, C. J.; 75 Pa. 205.

[3] Putnam *v.* Johnson, 10 Mass. *501 (1813), Parker, J.; State *v.* Moore, 14 N. H. 454 (1843); Crawford *v.* Wilson, 4 Barb. 520 (1848).

or residence of a party, as distinguished from his temporary and transient though actual place of residence. One is his legal residence as distinguished from his temporary place of abode; in other words, one is his home, as distinguished from the place or places to which business or pleasure may temporarily call him.[1]

Primarily a person's domicil is his legal home; but domicil implies more than mere residence in a country.[2]

The domicil of a person may be in one place and his residence in another.[3]

Residence, with no present intention of removal, constitutes domicil.[4]

"Domicil" has a fixed and definite signification. For the ordinary purposes of citizenship there are rules of general, if not of universal, acceptation applicable to it. "Citizenship," "habitancy" and "residence" are severally words which may in the particular case mean precisely the same as "domicil," but frequently they may have other and inconsistent meanings, and while in one use of language the expressions a change of domicil, of citizenship, of habitancy, of residence, are necessarily identical or synonymous, in a different use of language they import different ideas.[5]

In international law, domicil means a residence at a particular place, accompanied with positive or presumptive proof of intending to continue there for an unlimited time.[6]

To ascertain this domicil, it is proper to take into consideration the situation, the employment, and the character of the individual; the trade in which he is engaged, the family he possesses, and the transitory or fixed character of his business are ingredients which may properly be weighed.[7]

Domicil is spoken of: as *national*, or that of a person's country, and opposed to *domestic*, or that of a subdivision of a country; as *foreign*, established in another state; as *commercial*, the place of one's trade or business; *of birth*, that of one's parents; *acquired*, vested by the law; *by choice*, selected of free will; *by law*, by operation of law.

Once existing, a domicil continues until another is acquired; when a change is alleged the burden of proof rests upon the party making the allegation. To constitute a new domicil, two things are indispensable: residence in the new locality, and the intention to remain there, *facto et animo*. Mere absence from a fixed home, however long continued, cannot work the change. Among the circumstances usually relied upon to establish the *animus manendi* are: declarations, exercise of political rights, payment of personal taxes, a house of residence, a place of business.[1]

A change does not depend so much upon the intention to remain in the new place for a definite or an indefinite period, as upon its being without an intention to return to the former place of actual residence. An intention to return, however, at a remote or indefinite period, will not control, if the other facts which constitute domicil all give the new residence the character of a permanent home and place of abode. The intention and actual fact of residence must concur, when such residence is not in its nature temporary. There is a right of election by expressed intention, only when the facts are to some extent ambiguous.[2]

A domicil *of origin* is presumed to be retained until residence elsewhere has been shown.[3] A domicil of origin, or an acquired domicil, remains until a new one is acquired. A native domicil is not so easily changed as an acquired domicil, and is more easily lost. A man can have but one domicil at the same time for the same purpose.[3]

Domicil is acquired by residence and the *animus manendi*, the intent to remain.

A wife's domicil is that of the husband; but she may acquire a separate one, whenever necessary or proper, as, for a suit in divorce,[4] *q. v.* See also CITIZEN; LEX, Domicilii; RESIDE.

DOMINANT. See EASEMENT, Dominant.

DOMINION. Complete ownership; absolute property.[5]

The right in a corporeal thing, from which arises the power of disposition and of claiming it from others.[7]

Proximate dominion. Obtaining possession by delivery of a thing sold, which,

[1] Town of Salem *v.* Town of Lyme, 29 Conn. 79 (1860), Hinman, J.

[2] McDonald *v.* Salem Capital Flour-Mills Co., 31 F. R. 577 (1887).

[3] Lyon *v.* Lyon, 30 Hun, 456 (1883); Foss *v.* Foss, 58 N. H. 284 (1878), cases.

[4] Lindsay *v.* Murphy, 76 Va. 430 (1882).

[5] Borland *v.* City of Boston, 132 Mass. 93 (1882), Lord, J.

[6] Guier *v.* O'Daniel, 1 Binn. *350 (1806), Rush, P. J.; State *v.* Collector, 32 N. J. L. 194 (1867); Mitchell *v.* United States, 21 Wall. 352 (1874).

[7] Livingstone *v.* Maryland Ins. Co., 7 Cranch, 542 (1813), Story, J.; The Venus, 8 Cranch, 278 (1814).

[1] Mitchell *v.* United States, 21 Wall. 353, 352 (1874), cases, Swayne, J.; Desmare *v.* United States, 93 U. S. 609 (1876); Doyle *v.* Clark, 1 Flip. 537–38 (1876), cases; Lindsay *v.* Murphy, 76 Va. 430 (1882); 21 Cent. Law J. 430–32 (1885), cases — Solicitors Journal (London).

[2] Hallet *v.* Bassett, 100 Mass. 170–71 (1868), cases, Colt, J.; Guier *v.* O'Daniel, 1 Am. Lead. Cas. 747–50, cases.

[3] Ennis *v.* Smith (Kosciusko's Case), 14 How. 423 (1852).

[4] Newton *v.* Commissioners, 100 U. S. 562 (1879), Swayne, J.

[5] Cheever *v.* Wilson, 9 Wall. 124 (1869); Cheely *v.* Clayton, 110 U. S. 705 (1884), cases; 2 Bishop, Mar. & D. 475; 23 Alb. Law J. 86 (1881), cases.

See generally 13 Am. Law Rev. 261–79 (1879), cases, 11 Cent. Law J. 421–25 (1880), cases; 1 Wall. Jr. 382; 7 Fla. 81, 152; 46 Ga. 277; 74 Ill. 314; 89 Ind. 177; 51 Iowa 79; 20 La. 314; 26 *id.* 338; 52 Me. 165; 27 Miss. 718, 54 *id.* 310; 77 Mo. 678; 37 N. J. L. 495; 8 Wend. 142; 8 Paige, 524; 31 Barb. 476; 67 N. Y. 379; 71 Pa. 309; 42 Vt. 352.

[6] See 2 Bl. Com. Ch. I.

[7] Coles *v.* Perry, 7 Tex. 136 (1851), Hughes, J.

without anything else, being preceded by the title, vests the right in the thing — which is the dominion. **Remote dominion.** The title which vests a right to a thing sold, and gives a cause of action against the vendor who has not delivered the thing.[1]

Compare DEMESNE; DOMAIN; DOMINIUM.

DOMINIUM. L. Complete ownership of property.

Dominium directum. Immediate ownership,— possession.

Dominium utile. Beneficial ownership,— enjoyment.

Dominium directum et utile. Direct and beneficial ownership: complete ownership and possession in one person. Compare DROIT-DROIT.

DOMINUS. L. Lord or master; owner.

Dominus litis. The actor in a cause; the principal in a suit; the client, as distinguished from his agent or attorney.[2]

Domino perit res. The thing has perished for its owner. See further RES, Perit.

Domino volente. The owner willing.

DOMITÆ. See ANIMAL.

DOMUS. L. A house; the house.

Domus procerum. The house of lords. Abbreviated *dom. proc.*, and D. P.

Domus sua cuique est tutissimum refugium. His own dwelling is for every one the safest refuge: every man's house is his castle. See further HOUSE, 1.

DONA. See DONUM.

DONATE. See DONATION.

DONATIO. L. A giving; a gift. See DARE; GIFT.

Donatio inter vivos. A gift between living persons: when the maker of a gift is not apprehending death. See further GIFT.

Donatio mortis causa, or causa mortis. A gift in view of death; a death-bed disposition of personalty.

A donation *causa mortis* takes place when a person in his last sickness, apprehending dissolution near, delivers or causes to be delivered to another the possession of any personal goods to keep in case of his decease. Such a gift is to revert to the donor, if he survives, and is not valid as against creditors.[3]

There must have been a transfer of property in expectation of death from an existing illness.[1]

A gift of personal property, by a party who is in peril of death, upon condition that it shall presently belong to the donee, in case the donor shall die, but not otherwise. There must be a delivery by the donor. The gift will be defeated by revocation, or by recovery or escape from the impending peril. It is in no sense a testamentary act. There may be a good donation of anything which has a physical existence and admits of corporal or symbolical delivery. Negotiable instruments, and even bonds and mortgages, may be thus transferred.[2]

A *donatio mortis causa* must be completely executed, precisely as is required in the case of a gift *inter vivos*, subject to be devested by the happening of any of the conditions subsequent, that is, upon actual revocation by the donor, by his surviving the apprehended peril, by his outliving the donee, or by the occurrence of a deficiency of the assets necessary to pay the debts of the donor. If the gift does not take effect as a complete transfer of possession and title, legal or equitable, during the life of the donor, it is a testamentary disposition, and good only if made and proved as a will. . . The instrument transferring a chose in action must be the evidence of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to devest the owner of all present control over it, absolutely and irrevocably, but upon the recognized conditions subsequent. A delivery which empowers the donee to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift.[3]

Recent statutes make valid a wife's death-bed donations of personalty without her husband's assent.[4]

Donatio propter nuptias. A gift in consideration of marriage. In the civil law, the provision made by the husband as the counterpart of the *dos* or marriage portion brought by the wife.

DONATION. See DONATIO. A contract by which a person gratuitously dispossesses himself of something by transferring it to another to become the latter's property upon acceptance.[5]

[1] Coles *v.* Perry, 7 Tex. 136 (1851), *ante*.

[2] See 4 Hughes, 341.

[3] 2 Bl. Com. 514.

[1] Grattan *v.* Appleton, 3 Story, 755, 763 (1845).

[2] 1 Story, Eq. §§ 606-7; 3 Pomeroy, Eq. §§ 1146-51; 2 Kent, 244.

[3] Basket *v.* Hassell, 107 U. S. 609-10, 614 (1882), cases, Matthews, J.; Same *v.* Same, 108 *id.* 267 (1883), 8 Biss. 306-9 (1878), cases. See also 16 Ala. 221; 59 Cal. 665; 38 Ind. 454; 54 N. H. 87; 31 Me. 429; 77 Mo. 173; 30 Hun, 632, 635; 20 Johns. 514; 33 N. Y. 584; 23 Pa. 63; 51 *id.* 349-50; 39 Vt. 624; 4 Gratt. 479; 1 Am. Law Reg. 1-11 (1852), cases; 19 Cent. Law J. 222-26 (1884), cases; 2 Law Q. Rev. 444-52 (1886); 21 Am. Law Rev. 732-63 (1887), cases; Ward *v.* Turner, W. & T. L. C. Eq. Vol. 1, pt. 2, 1205-51, cases.

[4] Schouler, Wills, § 63, cases.

[5] See Fisk *v.* Flores, 43 Tex. 343 (1875).

Donate. To give gratuitously or without consideration.[1]

In the act of Indiana of May 9, 1869, enabling a city to aid the construction of a railroad, etc., "donation" means an absolute gift or grant of a thing without any condition or consideration.[2] See AID, 1, Municipal.

Letting the labor of convicts in consideration of their being fed, clothed, etc., by the hirer, is not a "donation" or gratuity.[3]

DONIS. See DONUM.

DONOR; DONEE. 1. The giver, and the recipient, respectively, of personalty. See DONATIO; DONATION.

2. He who confers, and he who is invested with, a power. See POWER, 2.

3. He who gives, and he who receives, lands in tail, *q. v.*

DONUM. L. A gift. See DARE; DONATIO.

De donis. Respecting gifts — estates-tail.

The first chapter of the statute of Westminster 2 (13 Edw. I, 1285) is called the Statute *de donis* or *de donis conditionalibus*. It took from donees the power of alienating their estates-tail, thus introducing perpetuities.

At common law an estate-tail was known as a conditional fee — limited to particular heirs; the condition being that if the donee died, without leaving an heir, the estate reverted. Upon the birth of issue the estate became absolute for three purposes: the donee could alien it, and thus bar his issue and the reversioner; he could forfeit it by an act of treason; he could encumber it. As soon as issue was born the donee aliened and immediately repurchased, thereby obtaining a fee-simple absolute for all purposes. To keep estates in the hands of the great families, the statute *de donis* was passed. It directed that the will of the donor should be observed, and forbade alienation. It abolished the conditional fee and made the estate descend *per formam doni*, or passed in reversion. The statute continued in force two centuries. In the reign of Edw. IV, it was held[4] that the entail might be destroyed by a common recovery, and the issue, the donee, and the donee's expectant, be barred, on the death of the tenant in tail "without issue." Fines and special laws subsequently effected the same end.[5] See further FEE, 1.

Dona clandestina sunt semper suspiciosa. Secret gifts are always viewed with suspicion: secret transfers of property are regarded with distrust.[1] See CONVEYANCE, Fraudulent.

DOOM. See DOME.

DOOR. See HOUSE, 1.

DORMANT. Sleeping: silent, unavowed, undisclosed: as, a dormant partner; secret, not of public record: as, a dormant judgment; in abeyance, suspended: as, a dormant execution. See those substantives.

DOS. L. A marriage portion; dowry. French *dot*.

In Roman law, property given a husband to aid him in sustaining the burdens of the marriage relation.

In English law, the portion bestowed upon a wife at marriage; also, the portion a widow is entitled to out of the estate of her deceased husband.

Dos rationalibus. A reasonable marriage portion; common-law dower,[2] *q. v.*

DOTAGE. See DEMENTIA, Senile.

DOTAL. Pertaining to dowry. Opposed, **extra-dotal**: not part of dowry. See DOS.

DOUBLE. 1. By two married persons: as, double adultery, *q. v.*

2. On behalf of each of two parties: as, a double agency. See BROKER.

3. For the same cause of action: as, a double arrest, *q. v.*; double punishment, or satisfaction, *q. v.*

4. Twofold: as, a contingency with a double aspect, *q. v.*

5. Upon the same subject-matter, twice over: as, a double assessment or taxation. See TAX, 2.

6. Twice the original: as, double costs, *q. v.*

7. Increased by the court, over the actual amount: as, double damages.

8. For, by, or from two persons; opposed to single: as, a double deed.

9. Additional; upon the same property, against the same risks, and for the same person; as, double insurance, *q. v.*

10. Second, duplicated: as, a double payment.

11. Twice the original or true amount: as, a double penalty, *q. v.*

12. Containing two or more distinct causes of action or defense: as, double pleading. See DUPLICITY.

[1] Goodhue *v.* City of Beloit, 21 Wis. 642 (1867).

[2] Indiana North & South R. Co. *v.* City of Attica, 56 Ind. 486, 476 (1877); Wilkinson *v.* City of Peru, 61 *id.* 9 (1878).

[3] Georgia Penitentiary Co. *v.* Nelms, 65 Ga. 503-5 (1880).

[4] Taltarum's Case, Year Book, 12 Edw. IV (1473), c. 19.

[5] 2 Bl. Com. 112, 360; Croxall *v.* Shererd, 5 Wall. 283 (1866).

[1] Broom, Max. 289, 290; 4 B. & C. 652; 1 M. & S. 253.

[2] See 2 Bl. Com. 129, 492, 516; 1 Washb. R. P. 147, 209. 132 Mass. 275; 6 Mart., La., 460.

13. Permissive and commissive: as, double waste, *q. v.*

DOUBT.[1] Fluctuation of mind arising from want of evidence or knowledge; uncertainty of mind; unsettled opinion.[2]

Equipoise of mind arising from an equality of contrary reasons.[3]

In civil cases, a doubt is to be resolved against the party who might have furnished facts to remove it, but has neglected so to do. In charges of fraud, the presumption of innocence will remove a doubt. In criminal cases, whenever a reasonable doubt exists as to the guilt of the accused he is to receive the benefit of the doubt.

Where, in a civil proceeding, proving the cause of action or the defense will also prove a crime committed by the adverse party, it is not necessary that the proof be of the degree required in a criminal proceeding for the offense, that is, beyond a reasonable doubt. The issue should be determined in accordance with the preponderance of the proof.[4]

Reasonable doubt. "That state of the case, which, after the entire comparison and consideration of all evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."[5]

The expression is not easily defined. It does not mean mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. . . All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal.[6]

It is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it.[7]

If the law, which mostly depends upon considerations of a moral nature, should require absolute certainty, it would exclude circumstantial evidence altogether.[8]

"Proof beyond a reasonable doubt" is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which tends to support. It is proof "to a moral certainty," as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; each has been used by eminent judges to explain the other; and each signifies: Such proof as satisfies the judgment and consciences of the jury as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible.[1] See CERTAINTY, 1, Moral.

Such doubt must be founded on something growing out of the state of the testimony, which leaves a rational uncertainty as to guilt, and which nothing else in the case removes. The degree of conviction of guilt should be something more than a bare preponderance of belief; something more than the probability of guilt merely outweighing the probability of innocence. The mind should be able to rest reasonably satisfied of the guilt of the accused before a verdict of that character is given.[2]

A doubt founded upon a consideration of all the circumstances and evidence, and not a doubt resting upon conjecture or speculation.[3]

The jury must find the facts established to such a degree of certainty as they would regard sufficient in the important affairs of life. The proof need not necessarily exclude all doubt.[4]

"A doubt which a reasonable man of sound judgment, without bias, prejudice, or interest, after calmly, conscientiously, and deliberately weighing all the testimony, would entertain as to the guilt of the prisoner." The guilt must be established to a reasonable, not an absolute, demonstrative or mathematical, certainty.[5]

An indefinable doubt which cannot be stated, with the reason upon which it rests, is not a reasonable doubt, within the rule that an accused is to be given the benefit of such doubt.[6]

Not any fanciful conjecture which an imaginative man may conjure up, but a doubt which reasonably

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[1] F. *douter:* L. *dubitare* (q. v.), to waiver in mind.

[2] [Webster's Dict.

[3] [Bouvier's Law Dict.

[4] Thoreson *v.* Northwestern Nat. Ins. Co., 29 Minn. 107 (1882), cases.

[5] Commonwealth *v.* Webster, 5 Cush. 320 (1850), Shaw, C. J. Frequently cited, as in 59 Cal. 395; 60 *id.* 108; 3 Monta. 137, 162; 6 Nev. 340; 26 N. J. L. 615; 103 U. S. 312; 120 *id.* 440, *post*,—commented on.

[1] Commonwealth *v.* Costley, 118 Mass. 24 (1875), cases, Gray, C. J.; cited, 120 U. S. 440, *post*.

[2] United States *v.* Gleason, 1 Woolv. 137 (1867), Miller, J.

[3] United States *v.* Knowles, 4 Saw. 521 (1864), Field, J.

[4] United States *v.* Wright, 16 F. R. 114 (1883), Billings, J.

[5] State *v.* Rounds, 76 Me. 125 (1884), Peters, C. J., quoting State *v.* Reed, 62 *id.* 144, 142-45 (1874).

[6] People *v.* Guidici, 100 N. Y. 510 (1885); 3 Greenl Ev. § 29.

flows from the evidence or the want of evidence; a doubt for which a sensible man could give a good reason, based upon the evidence; such a doubt as he would act upon in his own concerns.[1]

It is difficult to conceive what amount of conviction would leave the mind of a juror free from a reasonable doubt, if it be not one which is so settled and fixed as to control his action in the more weighty and important matters relating to his own affairs. Out of the domain of the exact sciences and actual observation there is no absolute certainty. The guilt of the accused, in the majority of cases, must necessarily be deduced from a variety of circumstances leading to proof of the fact. Persons of speculative minds may in almost every case suggest possibilities of the truth being different from that established by the most convincing proof. Jurors are not to be led away by speculative notions as to such possibilities.[2]

"The jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural." To justify acquittal, a doubt must arise from an impartial investigation of all the evidence, and be such that, "were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause." "If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt; . . . you are not at liberty to disbelieve as jurors, if, from the evidence, you believe as men."[3]

An instruction which says that the doubt must be "real," substantial, well-founded, arising out of the evidence, is not reversible.[4]

As to questions relating to human affairs, a knowledge of which is derived from testimony, it is impossible to have the kind of certainty created by scientific demonstration. The only certainty we can have is a moral certainty, which depends upon the confidence placed in the integrity of witnesses, and their capacity to know the truth. If, for example, facts not improbable are attested by numerous witnesses who are credible, consistent, uncontradicted, and had every opportunity of knowing the truth, a reasonable or moral certainty would be inspired by their testimony. In such case a doubt would be unreasonable, imaginary, or speculative, which it ought not to be. It is not a doubt whether the party may not possibly be innocent in the face of strong proof of his guilt, but a sincere doubt whether he has been proved guilty, that is called "reasonable." And even where the testimony is contradictory, so much more credit may be due to one side than the other, that the same result will be produced. On the other hand, the opposing proofs may be so nearly balanced that the jury may justly doubt on which side lies the truth. In such case the accused is entitled to the benefit of the doubt. As certainty advances, doubt recedes. If one is reasonably certain, he cannot, at the same time, be reasonably doubtful, that is, have a reasonable doubt of a fact. All that a jury can be expected to do is to be reasonably or morally certain of the fact which they declare by their verdict.[1] See also EVIDENCE; PREPONDERANCE; PROOF.

Doubtful. Where, at the date of an assignment, certain choses were reported as "doubtful," it was held that the assignee could not be charged with them unless the creditors proved that they might have been collected by due diligence.[2]

DOWER.[3] The interest which the law gives a widow in the realty of her deceased husband. Compare DOWRY.

The life estate, created by law, where a man is seised of an estate of inheritance, and dies in the life-time of his wife.[4]

In the common law, that portion of lands or tenements which the wife has for the term of her life of the lands or tenements of her husband after his decease, for the sustenance of himself and the nurture and education of her children.[5]

Tenant in dower is where the husband of a woman is seised of an estate of inheritance and dies; the wife shall then have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life.[6]

Dowable. Entitled to dower, subject to dower; endowable: as, a dowable interest in lands, dowable lands.

Dowager. A widow endowed; particularly, the widow of a person of rank. **Dowress.** A widow entitled to dower; a tenant in dower.

Endow. To assign dower to; to become invested with rights of dower. Whence endowable. See ENDOW.

The widow must have been the actual wife of the party at the time of his decease. She is endowable of all lands and tenements of which her husband was seised in fee-simple or fee-tail, at any time during the coverture, and of which any issue she might have had might by possibility have been heir. . . There was also dower *by custom:* as, that the wife should have a quarter, a half, or all of the land; dower *ad ostium*

[1] [United States *v.* Jones, 31 F. R. 724 (1887), Speer, J.; *ib.* 718, note.

[2] Hopt *v.* Utah, 120 U. S. 439–41 (1887), cases, Field, J.

[3] Spies *et al. v.* People, 122 Ill. 251–52 (1887), cases.

[4] State *v.* Blunt, 91 Mo. 506 (1887), cases.

[1] United States *v.* Guiteau, 10 F. R. 164 (Jan. 25, 1882), Cox, J. See Miles *v.* United States, 103 U. S. 312 (1880), cases; 9 Pet. *601; 18 Wall. 545; 70 Ala. 45; 37 Conn. 360; 67 Ga. 153; 39 Ill. 457; 100 *id.* 242; 104 *id.* 364; 23 Ind. 170; 64 Iowa, 90; 29 Kan. 141; 1 Duv. (Ky.) 226; 9 Bush, 593; 38 Mich. 482; 44 *id.* 290; 14 Neb. 540; 42 N. Y. 6; 4 Pa. 274; 88 *id.* 141–42; 3 Heisk. 28.

[2] Wimbish *v.* Blanks, 76 Va. 365, 369 (1882).

[3] F. *douaire:* L. *dotare*, to endow: *dot-*, to give.

[4] 4 Kent, 35; 71 Ala. 81.

[5] Coke, Litt. 30 *b*, 31 *a;* Sutherland *v.* Sutherland, 69 Ill. 485 (1873); 4 Kent, 33.

[6] 2 Bl. Com. 129–30.

ecclesiæ; when a tenant in fee-simple, at the church door (where marriages were celebrated), after affiance made, endowed the wife with a certain part of his lands; dower *ex assensu patris:* when a son, by express agreement of his father, endowed his wife with a part of the father's possessions.[1]

Dower *ad ostium ecclesiæ* and *ex assensu patris* were abolished by 3 and 4 Will. IV (1833), c. 105. Dower given by the law is the only kind which has ever obtained in this country. . . During the life of the husband the right is a mere expectancy or possibility. Not being a natural right, but being conferred by law alone, the power that gives may increase, diminish, or otherwise alter it, or even wholly take it away. Upon the death of the husband, the right of the widow becomes vested.[2]

The law of the *situs* determines rights of dower. At common law the widow has dower: in an estate in common; in incorporeal hereditaments; in mines opened by the husband She now has dower in wild lands; in an equity of redemption; in some States only in what her husband dies seised of.

At common law she has no dower: in an inheritance of which her husband had no right of immediate seizin; in a term of years (personalty); in an estate in joint-tenancy, except as widow of the survivor; in an estate held for another's life; in a vested remainder. Nor, generally, has she dower now: in a preemption claim; in shares of a corporation; in an estate held in trust by him, but otherwise as to his equitable estates; in a mortgagee's estate, till irredeemable; in partnership lands, before the debts are paid;[3] in a contract to purchase which he could not enforce.

The right may be defeated by any claim which would have defeated the husband's seisin: at common law, by alienage,— a rule now generally changed; by foreclosure of a mortgage made by him before marriage, or made for purchase-money after marriage; in some States, by sale on an execution for a debt; by sale for taxes; by an exercise of the right of eminent domain; by dedication to a public use; not, by an assignment in insolvency or bankruptcy — as see below.

The right may be barred: by divorce *a vinculo*, she being the delinquent; by elopement and adultery; by a jointure; by a joint conveyance duly acknowledged,— the common method; by equitable estoppel; by taking what he wills her.

Dower was to be assigned or set out, by right, immediately upon his death. Magna Charta allowed her to occupy his principal "mansion-house" forty days, if on dowable lands. One mode of assigning was by "common right" — by legal process; another mode, "against common right," rested upon her agreement. The former was by metes and bounds; the latter by indenture. Procedure for assignment has been called "admeasurement." As against the heir the value at assignment is regarded; as against an alienee the value at transfer, and, according to numerous decisions, the increase from general improvement.

Two or more widows may be endowable out of the same realty. The estate is a continuation of the husband's. The widow may convey it away; and it may be levied upon.

The right, being no part of his estate, is not affected by proceedings in bankruptcy against him.[4]

A woman who is *sui juris* may, by ante-nuptial contract, relinquish the right.[5]

Writ of dower. Process to secure an "assignment" of dower.

Writ of dower *unde nihil habet* — whereof she has nothing: complains that assignment has not been made within time.[6]

See further subjects mentioned, and HUSBAND, PARAPHERNALIA; QUARANTINE, 1; SETTLE, 4; TABLE, 4.

DOWRY. That which the wife gives the husband on account of marriage,— a donation toward his maintenance and the support of the relation.[7]

In Louisiana, "the effects which the wife brings the husband to support the expenses of marriage." Being given to him to be enjoyed during the marriage, the income is his absolutely. He is to administer the property. She cannot deprive him of it. Realty is inalienable during marriage, unless the contract stipulates otherwise.[8]

"Dowry," "dowery," and "dower" are etymologically different forms of the same word. "Dowery" is obsolete. In Massachusetts, neither "dowery" nor "dowry" has ever meant "dower,"[9] *q. v.*

DRAFT.[10] 1, *n.* (1) A drawing, delineation, sketch. See COPYRIGHT.

(2) In common speech, a bill of exchange.[11] See EXCHANGE, 2.

Any order for the payment of money drawn by one person upon another.[12]

Also, money checked out of a bank by this means.

The *drawer* is he who prepares the order; the *drawee*, he to whom it is addressed.

Drafts, as used in the collection of debts, are not usually negotiable. The office of a draft is to collect for the drawer, from the drawee, residing in another

[1] 2 Bl. Com. 130, 131, 132.

[2] Randall *v.* Kreiger, 23 Wall. 147 (1874); 25 Minn. 464.

[3] Lenow *v.* Fones, 48 Ark. 560-67 (1886), cases.

[4] Porter *v.* Lazear, 109 U. S. 86 (1883); Lazear *v.* Porter, 87 Pa. 513 (1878).

[5] Barth *v.* Linés, 118 Ill. 332 (1886), cases; Forwood *v.* Forwood, Sup. Ct. Ky. (1887), cases.

[6] See generally 2 Bl. Com. 136-37; 3 *id.* 183, 194; 4 Kent, 35-72; Williams, R. P. 223-28; 1 Washb. R. P. *146-262; 1 Story, Eq. §§ 624-32; 3 Pomeroy, Eq., Index; 1 Bouv. 564-67, cases; Mayburry *v.* Brien, 15 Pet. 21 (1841), cases.

[7] [Cutter *v.* Waddingham, 22 Mo. 254 (1855): 1 Parti das, 507.

[8] De Young *v.* De Young, 6 La. An. 787 (1851); Buard *v.* De Russy, 6 Rob. 113 (1843); Gates *v.* Legendre, 10 id 78 (1845).

[9] Johnson *v.* Goss, 132 Mass. 275-76 (1882).

[10] Originally *draught*,— Webster.

[11] 2 Bl. Com. 467; 39 N. Y. 100.

[12] [Wildes *v.* Savage, 1 Story, 30 (1839).

place, money to which the former may be entitled, either on account of balances due or advances upon consignments; and although they may sometimes be used for raising money that is not the necessary or ordinary purpose for which they are employed.[1] See ASSIGNMENT, Equitable; DUPLICATE.

Overdraft. The demand against a depositor in a bank after he has drawn out more money than his balance; also, the act of drawing too much, and the state of the account thereafter.[2]

As between a banking firm and a depositor not a member of the firm, an overdraft is a loan. The payment of the latter's check when no funds stand to his credit is an advance by the firm of its own money, for the repayment of which, with lawful interest, the customer is liable. It is payable absolutely and in full, without abatement or contingency, and so constitutes a loan in all its characteristics. If more than legal interest is paid, the borrower loses the excess above the legal rate, and if the contract stands and is carried out, the loss is absolute and certain. But the situation changes when the person making the overdraft is a member of the firm which advances it.[3]

(3) An allowance to an importer, when a duty is ascertained by weight, to insure good weight.

"Tare" is allowed for the covering on the article.[4]

2, *v.* To prepare in writing. See DRAW, 3.

Draftsman. In equity practice, a person who prepares pleadings; also, one who manually writes a will.

DRAIN. 1, *n.* Any hollow space in the ground, natural or artificial, where water is collected and passes off; a ditch.[5] Compare GUTTER.

2, *v.* To rid land of its superfluous moisture, by deepening, straightening, or embanking the natural water-courses, and supplementing them, when necessary, by artificial ditches.[6]

An easement to drain water through another's land may be acquired by grant or prescription.[7]

Drainage. As a matter of legal definition it cannot be said that sewerage may not, in cases, be included in drainage; yet when the simple word "drainage" is used, as appurtenant to lands, the most obvious suggestion is drainage of water.[8]

See AQUA, Currit, etc.; MEADOW; SEWER.

[1] Evansville Nat. Bank *v.* Kaufmann, 93 N. Y. 280 (1883), Ruger, C. J.

[2] [Abbott's Law Dict.; 24 N. J. L. 484.

[3] Payne *v.* Freer, 91 N. Y. 48 (1883), Finch, J.; 2 Utah, 411.

[4] Napier *v.* Barney, 5 Blatch. 192 (1863), Nelson, J.

[5] Goldthwait *v.* East Bridgewater, 5 Gray, 64 (1855).]

[6] People *v.* Parks, 58 Cal. 639 (1881); *ib.* 648.

[7] See 3 Kent, 436.

[8] Wetmore *v.* Fiske, 15 R. I. 359 (1886).

DRAM. In common parlance, implies that the drink has alcohol in it — something that intoxicates.[1]

DRAMA. A public representation of an uncopyrighted play by the author, for his own advantage, is not a dedication of the play to the public.

A spectator may take notes for any fair purpose, as, for comparison with other works, or for comment as a critic. A ticket of admission is a license to witness the play, not to reproduce it, if the spectator can recollect it or stenograph it. In whatever mode a copy is obtained, a subsequent unauthorized representation, operating to deprive the author of his exclusive rights, will be enjoined.[2] See COPYRIGHT; REVIEW, 3; THEATER.

DRAW. 1. To take from a place of deposit; to call for and receive from a fund: as, to draw money from a bank or a trust, to draw a dividend or share.

2. To take names from the authorized receptacle: as, to draw a jury.

3. To write in form, prepare; to draw up: as, to draw, or draw up, a document or writing — deed, bill in equity, will, etc.

4. To produce, gain: as, for money to draw interest.

5. To drag (on a hurdle) to the place of execution: as, to draw a traitor, and to be drawn.[3] See TREASON.

Drawback. A remission of money paid as freight, taxes, or other charges. Compare REBATE. See COMMERCE, page 201, Act of 1887, sec. 2.

A refunding of duties paid upon imported merchandise which becomes an export.[4]

Drawbridge; draw. A contrivance by which a section of a bridge across a navigable water is turned upward or at right angles to itself, and parallel with the direction of the stream, so as to admit of the passage of vessels through the open space.[5] See BRIDGE.

Drawee; Drawer. See DRAFT, 1 (2).

Drawing. See COPYRIGHT.

[1] Lacy *v.* State, 32 Tex. 226 (1869). As to dram-shop keeper, see State *v.* Owen, 15 Mo. *507 (1852).

[2] Tompkins *v.* Halleck, 133 Mass. 32, 45 (1882), cases; Keene *v.* Wheatley, 9 Am. Law Reg. 33–108 (C. C., E. D. Pa., 1860).

[3] See 4 Bl. Com. 92, 377.

[4] See R. S. tit. XXXIV, Ch. 9.

[5] Hughes *v.* Northern Pacific R. Co., 18 F. R. 114 (1883). Law as to, Gates *v.* Northern Pacific R. Co., 64 Wis. 64 (1885).

DRAYMEN. See POLICE, 2.

Drayage. Where, to keep a wharf in repair, a toll was charged on coal taken from the wharf in vessels or warehoused "without drayage," it was held that the reference was to loaded conveyances, and included a tramway supported by pillars resting upon the wharf.[1]

DRED SCOTT CASE. See CITIZEN; SLAVERY.

DREDGE. Originally, a net or drag for taking oysters; now, a machine for cleansing canals and rivers,—a dredger. To dredge is to gather or take with a dredge; to remove sand, mud, etc., with a dredging machine. A dredge is not a "vessel."[2]

DRIFT-STUFF. Matters floating at random, without any discoverable owner, and which, if cast ashore, will probably never be reclaimed, but belong to the riparian proprietor.[3]

A right to "sea manure" is a right to appropriate the random drift and refuse of the ocean, but not goods washed ashore from a wrecked vessel.[3]

DRIP. See EASEMENT.

DRIVER. See LIVERY, Keeper; NEGLIGENCE.

DROIT. F. A right; law abstractly considered.

Opposed to *lot;* law in the concrete sense. Equivalent to *jus* in the Roman law. See MONSTRANS.

Autre droit. Another's right. *En autre droit.* In another's right. Applied to an administrator, executor, guardian, *prochein ami*, or other representative of another's rights or interest.[4]

Droit civil. A private right independent of citizenship.

Droit-droit. A right upon a right; a double right: rights of possession and of property joined—necessary to a complete title to land. A *jus duplicatum.*[5]

Droit international. International law.

Droit maritime. Maritime law.

Droit of admiralty. In English law, applied to a ship of the enemy taken by an uncommissioned subject; and to a vessel seized in a port, on the breaking out of war. Also spoken of as an *admiralty droit.*[6]

Droitural. Used of an action upon a writ of right, as distinguished from a *possessory* action, upon the fact of, or right to, possession merely.

DRUGGIST. In popular acceptation, one who deals in medicines, or in the materials used in the preparation of medicines—in its largest signification.[1]

Properly, one whose occupation is to buy and sell drugs, without compounding or preparation. More restricted, therefore, than "apothecary,"[2] *q. v.*

Drugs. Substances used in compounding medicines, in dyeing, and in chemical operations.

"Drugs and medicines," in an insurance policy, includes saltpeter.[3] Whether benzine is a drug is a question of fact.[4] See LIQUOR; MEDICINE; OIL.

Adulterating drugs is a misdemeanor, in most of the States. In some States, competency to compound drugs must be evidenced by a certificate from a board of examiners, or from a reputable school of pharmacy.

The care required of a druggist is proportioned to the danger involved. Actual negligence must be shown before he can be made liable for the consequences of a mistake.[5]

Where a druggist informs a customer that a preparation is poisonous, and correctly instructs him as to the quantity he may take, and the purchaser dies from an overdose taken in disregard of the directions, the druggist is not liable for a failure to label the parcel "poison," as required by a statute.[6]

Nor is he liable when he has carefully compounded a physician's prescription.[7]

Criminal negligence, followed by fatal results, may convict him of involuntary manslaughter, *q. v.*[8] See POLICE, 2.

DRUMMER. A commercial agent who travels for a wholesale merchant taking orders for goods to be shipped to retail dealers.[9]

An agent, such as is usually denominated a "drummer" or "commercial traveler," who simply exhibits samples of goods kept for sale by his principal, and

[1] Soule *v.* San Francisco Gas Light Co., 54 Cal. 241 (1880).

[2] The Nithsdale, 15 Up. Can. Law J. 269 (1879).

[3] Watson *v.* Knowles, 13 R. I. 641 (1882).

[4] See 1 Greenl. Ev. § 179.

[5] See 2 Bl. Com. 199.

[6] See 13 Ves. 71; 3 Bos. & P. 191; 6 Wheat. 264; 8 Cranch, 110.

[1] [Mills *v.* Perkins, 120 Mass. 42 (1876), Ames, J.

[2] State *v.* Holmes, 28 La. An. 767 (1876): Webster. Hainline *v.* Commonwealth, 13 Bush, 352 (1877); 77 Mo. 128.

[3] Collins *v.* Farmville Ins. Co., 79 N. C. 281 (1878): Webster.

[4] Carrigan *v.* Lycoming Fire Ins. Co., 53 Vt. 496 (1881).

[5] Brown *v.* Marshall, 47 Mich. 582 (1882), cases; 16 Ark. 308; 32 Conn. 75; 61 Ga. 505; 13 B. Mon. 219; 15 La. An. 448; 64 Me. 120; 20 Md. 297; 106 Mass. 143; 6 N. Y. 397; 51 *id.* 746; L. R., 5 Exch. 1.

[6] Wohlfahrt *v.* Beckert, 92 N. Y. 490, 494 (1883).

[7] Ray *v.* Burbank, 61 Ga. 505 (1878).

[8] Tessymond's Case, 1 Lewin, 169 (1826).

[9] [Singleton *v.* Fritsch, 4 Lea, 96 (1879); Montana *v.* Farnsworth, 5 Monta. 308 (1885); 34 Ark. 557.

takes orders for such goods afterward to be delivered by the principal to the purchasers, payment therefor to be made to the principal, is neither a peddler nor a merchant; nor will a single sale and delivery of goods by such agent out of his samples or other lot of goods constitute him a peddler or merchant.[1] See further COMMERCE, page 199, col. 2; PEDDLER.

In common language a drummer sells goods,— by sample, by procuring orders; and the dealer sells by him as his agent. While in such cases the sale is usually consummated by a delivery at the vendor's place of business to a common carrier, and, perhaps, in another State, a legislature may say that the acts done by the drummer shall of themselves constitute a sale; as, in a statute forbidding sales of liquors by samples or by soliciting orders without first taking out a license.[2]

Article 4665, of the Revised Statutes of Texas, is unconstitutional as to a citizen of another State selling goods by sample, and having no goods in the State.[3]

DRUNKENNESS. The result of excessive drinking of intoxicating liquors; ebriety, inebriation, intoxication; the state which follows from taking into the body, by swallowing or drinking, excessive quantities of such liquors.[4]

Drunk. So far under the influence of intoxicating liquor that the passions are visibly affected or the judgment impaired.[5]

Drunkard. One whose habit is to get drunk, whose ebriety has become habitual. "Drunkard," "common drunkard" and "habitual drunkard," mean the same.[6]

While "common" imports frequency, the law does not specify the number of instances in a given time.[7]

It is impossible to lay down a rule as to when a man shall be deemed an "habitual drunkard." Occasional acts of drunkenness do not make him such: it is not necessary that he be continually intoxicated. He may become intoxicated and yet remain sober for weeks together. The test is, Has he a fixed habit of drunkenness? Is he habituated to intemperance when opportunity offers?[8]

"Habitual" imports formed or acquired by habit; customary; usual; accustomed to intemperance whenever opportunity offers.[9]

An "habitual drunkard" is a person who by frequent repetition has acquired an involuntary tendency to become intoxicated.[1]

The proceeding to determine whether a person is an habitual drunkard, and the legal consequences, are substantially the same as in a case of lunacy, *q. v.*

1. In civil law. A contract made by one too drunk to understand the consequence of his act is voidable, except when for necessaries or for goods kept after he becomes sober.[2]

If, without fault of his, he is unable to restore the consideration, provision for its repayment may be made in the final decree.[3]

Before a court of equity will grant relief the drunkenness must have been so excessive as to utterly deprive the complainant of the use of his reason. In that condition there can be no serious, deliberate consent.[4]

Total drunkenness in the maker of a note, known to the payee, avoids it as to him. But this defense cannot be set up against the claim of an innocent holder for value. . . A drunken man is responsible to an innocent person for an act done while drunk: he voluntarily produces his disability.[5]

2. In criminal law. "A drunkard," says Lord Coke, "who is *voluntarius dæmon*, hath no privilege thereby; but what hurt or ill soever he doeth, his drunkenness doth aggravate it."[6]

No other rule would be safe for society.[7]

At common law, as a rule, voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence. But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a state of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject for consideration by the jury.[8]

See INTEMPERATE; INTOXICATION; INSANITY; LIQUOR; OPTION, Local; PROHIBITION, 2.

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[1] City of Kansas *v.* Collins, 34 Kan. 436–37 (1885), citing twenty-five cases.

[2] State *v.* Ascher, 54 Conn. 306 (1886).

[3] *Exp.* Stockton, 33 F. R. 95 (1887).

[4] [Commonwealth *v.* Whitney, 11 Cush. 479 (1853), Merrick, J.

[5] State *v.* Pierce, 65 Iowa, 85 (1886); 64 *id.* 88 (1884).

[6] Commonwealth *v.* Whitney, 5 Gray, 86 (1855), Thomas, J.

[7] Commonwealth *v.* McNamee, 112 Mass. 286 (1873).

[8] Ludwick *v.* Commonwealth, 18 Pa. 174 (1851), Rogers, J.

[9] Trigg *v.* State, 49 Tex. 676 (1878), Roberts, C. J.

[1] Murphy *v.* People, 90 Ill. 60 (1878), Per Curiam. See also Mahone *v.* Mahone, 19 Cal. 629 (1872); Wheeler *v.* Wheeler, 53 Iowa, 512 (1880); Walton *v.* Walton, 34 Kan. 198 (1885), cases; Richards *v.* Richards, 19 Bradw. 468 (1886), cases.

[2] Johnson *v.* Harmon, 94 U. S. 379–89 (1876), cases; 69 Iowa, 82; 2 Kent, 452; 1 Pars. Contr. 383.

[3] Thackrah *v.* Haas, 119 U. S. 499, 502 (1886); 1 Wash., Va., 164; 64 N. Y. 200.

[4] 1 Story, Eq. §§ 230–31; 2 Pomeroy, Eq. § 949.

[5] State Bank *v.* McCoy, 69 Pa. 207–9 (1871); McSparran *v.* Neeley, 91 *id.* 24 (1879); Gore *v.* Gibson, 13 M. & W. *626 (1845); Bush *v.* Breinig, 113 Pa. 316 (1886); 26 Am Law Reg. 40–41 (1887), cases; 1 Ames, Cas. Bills & N. 558; 18 Cent. Law J. 65–68 (1884), cases; 2 Kent, 451.

[6] 1 Coke, Inst. 247; 4 Bl. Com. 25; 2 Steph. Hist. Cr. Law Eng. 165.

[7] United States *v.* Cornell, 2 Mas. 111 (1820); United States *v.* McGlue, 1 Curtis, 13 (1851).

[8] Hopt *v.* People, 104 U. S. 634–35 (1881), cases, Gray, J See also Jones *v.* Commonwealth, 75 Pa. 406 (1874); Tidwell *v.* State, 70 Ala. 46 (1881); Honesty *v.* Commonwealth, 81 Va. 301 (1886); 24 Am. Law Reg. 507–11 (1876), cases; 27 *id.* 159–61 (1879), cases; 28 Am. Jur. 290; Bish

DRY. See EXCHANGE, 2; RENT; TRUST, 1.

DRY-DOCK. See DOCK, 2 (1).

DRY GOODS. See PERISHABLE; SAMPLE.

DUBITARE.[1] L. To doubt.

Dubitante. Doubting.

Affixed to the name of a judge, in a reported case, denotes that he questions the soundness of the decision.

Dubitatur. It is doubted.

Indicates that a proposition as sound law is open to question. Compare QUÆRE.

DUCES. See SUBPŒNA, Duces, etc.

DUE.[2] 1. Owed, or owing; payable; demandable. See DUTY.

Applied to debts, expresses the mere state of indebtment — is equivalent to "owed" or "owing;" and the fact that the debt has become payable.[3]

A debt payable now or in the future is a "debt due." "Debt" itself implies this. But the popular acceptation of "due" is, payable in present time.[4]

When not qualified by a time clause, means that the money or property is due at the time of executing the instrument.[5]

May import indebtedness without reference to the day of payment, or that that day has passed.[6]

May be used not in the sense of "payable," but as importing an existing obligation.[7]

In its largest sense, covers liabilities matured and unmatured.[8]

A debt which has yet to originate cannot properly be said to be a debt which is to become due.[9]

Due-bill. A written acknowledgment that a sum of money is due.

Not payable to order, nor transferable by indorsement.[10]

May be payable in specific property. When no time or place for payment is mentioned, before a suit to recover the amount can be maintained, a demand is necessary.[1]

In Colorado an ordinary due-bill has the character of a promissory note, whether it contains a promise to pay, or words of negotiability, or not.[2] See I O U.

Overdue; past-due. Time for paying gone by, yet not paid; matured and unpaid.

"Overdue" sometimes refers to a right of action against a drawer or indorser: a bill is not then overdue until presented and payment refused. Sometimes it is used in considering whether an indorser has been released by a failure of the holder to present the bill for payment, and to give the indorser notice of its dishonor within time. Sometimes it is applied to a bill which has come into the hands of an indorser so long after its issue as to charge him with notice of its dishonor, and thus subject it in his hands to the defenses which the drawer had against it in the hands of the assignor.[3]

"Past-due interest" means interest which has matured, and is collectible on demand. . . Money may be "owing" which is not "due." A man owes the money represented by his note; but the money is not due until the note matures.[4]

A note overdue, payable to bearer, passes, by delivery, the legal title subject to all equities between the original parties.[5] Indorsing such a note is equivalent to making a new note payable at sight.[6]

Underdue. Not yet payable; unmatured.

In the absence of proof, the law presumes that a note taken is underdue.[7]

See NEGOTIATE, 2; PAYMENT.

2. Required by circumstances; proper; executed by law; timely: as, due care or diligence, *qq. v.*

3. Regular; appropriate; usual; according to legal form, in legal manner, conformably to law: as, due course or process of law; due form, notice, service, return, *qq. v.*

The "due execution" of a writing relates to the manner and form of execution by a person competent under the law of the place.[8]

Duly. In due manner; regularly; legally.

In the proper way, regularly, according to law:[9] as, duly acknowledged, notified, served, sworn.

Cr. L. §§ 488–96; 1 Ben. & H. Ld. Cr. Cas. 113–24. Medical Jurisprudence of, 21 Am. Law Rev. 955–69 (1887), cases. Condoning, 26 Cent. Law J. 123 (1888), cases.

[1] Literally, to waver in mind, be of two minds: *duo*, two,— Müller, Science of Lang. 360.

[2] F. *deu: devoir:* L. *debere*, to owe.

[3] United States *v.* State Bank, 6 Pet. *36 (1832), Story, Justice.

[4] Leggett *v.* Bank of Sing Sing, 25 Barb. 332 (1857); Same *v.* Same, 24 N. Y. 286 (1862); People *v.* Arguello, 37 Cal. 525 (1869); Collins *v.* Janey, 3 Leigh, *391 (1831); 16 Moak, 708.

[5] Lee *v.* Balcom, 9 Col. 218 (1886), Beck, C. J.

[6] Scudder *v.* Coryell, 10 N. J. L. 345 (1829), Ewing, C. J.; Allen *v.* Patterson, 7 N. Y. 480 (1852); Bowen *v.* Slocum, 17 Wis. 190 (1863).

[7] Sand-Blast Co. *v.* Parsons, 54 Conn. 313 (1886).

[8] People *v.* Vail, 6 Abb. N. C. 210 (1879).

[9] Thomas *v.* Gibbons, 61 Iowa, 50 (1883).

See also 19 Pick. 381; 31 Mich. 215; 14 Barb. 11; 26 Tex. 59; Story, Bills, § 233, Prom. Notes, § 440.

[10] See Byles, Bills, *11, n. (t).

[1] Winder *v.* Walsh, 3 Col. 548 (1877).

[2] Lee *v.* Balcom, 9 Col. 218 (1886), Beck, C. J.

[3] La Due *v.* First Nat. Bank of Kasson, 31 Minn. 86 (1883), Mitchell, J.

[4] Coquard *v.* Bank of Kansas City, 12 Mo. Ap. 265 (1882).

[5] See Nat. Bank of Washington *v.* Texas, 20 Wall. 66 (1873).

[6] Colt *v.* Barnard, 18 Pick. 261 (1836); Morgan *v.* United States, 113 U. S. 499–500 (1885), cases.

[7] New Orleans, &c. Co. *v.* Montgomery, 95 U. S. 18 (1877).

[8] Cox *v.* Northwestern Stage Co., 1 Idaho, 376 (1871).

[9] Gibson *v.* People, 5 Hun, 543 (1875).

"Duly and legally appointed," in an indictment, may be sufficient without stating by whom appointed.[1]

"Duly assigned" may require a transfer in writing.[2]

"Duly convened" means regularly convened.[3]

"Duly presented" means presented according to the custom of merchants.[4]

"Duly recorded" means recorded in compliance with the requirement of law.[5]

4. Just, lawful, legal: as, due rights.[6]

Undue. Improper, wrongful, unlawful: as, undue concealment, influence, *qq. v.*

DUEL.[7] In ancient law, a fight between two persons for the trial of the truth in a doubtful case.[8]

Actually fighting with weapons in pursuance of an agreement.[9]

If either participant is killed, the offense is murder in the survivor, seconds, and spectators; otherwise, the offense is a misdemeanor.[10]

Under the constitutions of several States, as of Kentucky, Pennsylvania, and Wisconsin, participation in a duel disqualifies from holding office.[11]

See AFFRAY; CHALLENGE, 1; COMBAT.

DULY. See DUE, 8.

DUM. L. While. Compare DURANTE.

Dum bene se gesserit. While he behaves well.

Dum fervet opus. While the affair is warm: while the transaction is fresh.

A party's own admission, whenever made, may be given in evidence against him; but the declaration of his agent binds him only when made during the continuance of the agency in regard to a transaction then depending *et dum fervet opus.*[12] See ADMISSION, 2.

Dum sola. While single, or unmarried.

DUMB. See IDIOT; WILL, 2; WITNESS.

A person who is dumb, uneducated in the use of signs, and merely able to assent or dissent to direct questions by a nod or shake of the head, may be a legal witness, but the jury should be instructed that, because it was not possible to cross-examine him, the weight of his testimony is reduced.[13]

[1] Commonwealth *v.* Chase, 127 Mass. 13 (1879).

[2] Ragland *v.* Wood, 71 Ala. 149 (1881); *ib.* 335; 139 Mass. 16.

[3] People *v.* Walker, 3 Barb. 305 (1856).

[4] Schofield *v.* Bayard, 3 Wend. 491 (1830).

[5] Dunning *v.* Coleman, 27 La. An. 48 (1875).

[6] Ryerson *v.* Boorman, 8 N. J. E. 705 (1849).

[7] It. *duello:* L. *duellum*, a fight between two — *duo.*

[8] [Jacob's Law Dict.

[9] [Herriott *v.* State, 1 McMul. 130 (S. Car., 1841).

[10] 4 Bl. Com. 199, 145; 2 Bish. Cr. L. §§ 310-15; 1 Arch. Cr. Pr. 926-39; 1 Russ. Cr. 443; 2 Chitty, Cr. L. 728, 848; 3 Steph. Hist. Cr. L. Eng. 99-104.

[11] See Commonwealth *v.* Jones, 10 Bush, 725 (1874).

[12] 1 Greenl. Ev. § 113; Long *v.* Colton, 116 Mass. 415 (1875); 66 Ga. 367.

[13] Quinn *v.* Holbert, 55 Vt. 298 (1883).

DUNGEON. An underground apartment in a prison, for the confinement of refractory convicts.

DUPLICATE.[1] The double of anything, an original repeated; a document the same as another; a transcript equivalent to the first or original writing; a counterpart: as, a duplicate bond, certificate, check or draft, land-warrant, receipt, will. See ORIGINAL, 2.

A document essentially the same as another.[2]

A document the same in all respects as some other document, from which it is indistinguishable in its essence and operation.[3]

"Duplicate," written across the face of a draft given to replace a lost draft of the same tenor, imports that the draft is to take the place of the original, that no new liability is created by it.[4]

Each duplicate writing is complete evidence of the intention of the parties. The deliberate destruction of one, as, of a duplicate will, creates a presumption that the other was also to be destroyed.[5] See EVIDENCE, Secondary.

Duplicate United States bonds will be issued, when the originals are defaced or destroyed.[6]

DUPLICITY.[7] Double pleading. Alleging two or more distinct grounds of complaint or defense when one would be as effectual as both or all.[8]

Because it produces useless prolixity, and tends to confusion, and to the multiplication of issues, regarded as a fault in all pleading.[9]

Predicated of a plea which contains more than one matter. To avoid a multitude of issues in one dispute every plea is to be confined to a single point. "Duplicity begets confusion," that is, defeats the object of all pleading — a single issue upon the same matter.[10]

In criminal practice, joining two or more distinct offenses in one count.[11]

Not applicable to the union of several facts in one matter, nor to matters of explanation, nor where but one of the defenses is valid.

[1] L. *duplicatus*, two-fold: *duplicare*, to double.

[2] [Toms *v.* Cuming, 49 E. C. L. 94 (1845).

[3] Lewis *v.* Roberts, 103 E. C. L. 29 (1861), Erle, C. J.

[4] Benton *v.* Martin, 40 N. Y. 347 (1869).

[5] 1 Whart. Ev. § 74; 1 Greenl. Ev. § 558.

[6] R. S. § 3702.

[7] F. *duplicité:* L. *duplicitatem*, doubleness.

[8] [Gould, Plead. 389. Approved, — Sprouse *v.* Commonwealth, *infra.*

[9] [Sprouse *v.* Commonwealth, 81 Va. 376 (1886), Lacy, J.

[10] 3 Bl. Com. 308, 311; 1 Chitty, Plead. 236; 10 Me. 53; 24 N. J. L. 344; 2 Johns. 465; 7 Cow. 458; 10 Vt. 353; 11 F. R. 238.

[11] Tucker *v.* State, 6 Tex. Ap. 253 (1879); State *v.* Gorham, 55 N. H. 168 (1875); 1 Bish. Cr. Proc. § 432.

May exist in any part of the pleadings. At common law was a fatal defect, reached by special demurrer; but not now so regarded: in the discretion of the court, tolerated for the furtherance of justice.[1]

See DISCLAIMER, 4; PLEADING; REPUGNANT.

DURANTE. L. During, while. Compare DUM.

Durante absentia. During absence. See ADMINISTRATOR.

Durante bene placito. During good pleasure. See BEHAVIOR.

Durante minore ætate. During minority. See ADMINISTRATOR.

Durante viduitate. During widowhood.

Durante vita. During life.

DURESS.[2] In its more extended sense, that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness.[3]

Actual violence is not necessary to constitute duress, even at common law, as understood in the parent country, because consent is the very essence of a contract, and, if there be compulsion, there is no actual consent, and moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy free agency, without which there can be no contract, because, in that state of the case, there is no consent.

Text-writers divide the subject into **duress per minas** and **duress of imprisonment.** This classification was uniformly adopted in the early history of the common law, and is generally preserved in the decisions of the English courts.

Where there is an arrest for an improper purpose, without just cause, or where there is an arrest for a just cause but without lawful authority, or for a just cause but for an unlawful purpose, even though under proper process, it may be construed as "duress of imprisonment;" and if the person arrested executes a contract or pays money for his release, he may avoid the contract as one procured by duress, and recover the money in an action for money had and received.

"Duress *per minas*," as defined at common law, is where a party enters into a contract for fear of loss of life, loss of limb, of mayhem, or imprisonment. Many modern decisions of the courts of England still restrict the operation of the rule within those limits.

Those decisions deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, and the reason assigned is that such threats are not of a nature to overcome the mind and will of a prudent man, because if such an injury is inflicted adequate redress may be obtained in a suit at law.

Cases to the same effect may be found in the reports of decisions in this country, and some of our text-writers have adopted the rule that it is only where the threats uttered excite fear of death, or of great bodily harm or unlawful imprisonment, that a contract, so procured, can be avoided, because, as such courts and authors say, the person threatened with slight injury to the person, or with loss of property, ought to have sufficient resolution to resist such a threat, and to rely upon the law for his remedy.

On the other hand there are many American decisions of high authority which adopt the more liberal rule that a contract procured by threats of battery to the person, or of the destruction of property, may be avoided on the ground of duress, because in any such case there is nothing but the form of a contract.

But all cases agree that a contract procured through fear of loss of life, produced by the threats of the other party, wants the essential element of consent, and may be avoided for duress.[1]

"Duress of imprisonment" is a compulsion by an illegal restraint of liberty. This will avoid an extorted bond. But if a man is lawfully imprisoned, and to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by such duress.[2]

In the law of homicide, in self-defense, "duress of imprisonment" is where a man actually loses his liberty. "Duress *per minas*" is where the hardship is only threatened and impending, and is for fear of loss of life, for fear of mayhem, or loss of limb. And this fear must be upon sufficient reason — before a man may kill in self-defense. A fear of battery is no duress; neither is fear of one's house being burned, or of one's goods being taken away and destroyed; because for these a man may have satisfaction in damages,

[1] See 8 Ark. 378; 8 Ind. 96; 32 Mass. 104; 33 Mo. 185; 38 N. H. 415.

[2] *Du'-ress.* Mid. Eng. *duresse:* F. *duresce:* L. *duritia*, harshness; *durus*, severe.

[3] Brown v. Pierce, 7 Wall. 214-16 (1868), cases, Clifford, J. Quoted or cited, Baker v. Morton, 12 *id.* 157 (1870); French v. Shoemaker, 14 *id.* 332 (1871); United States v. Huckabee, 16 *id.* 431-32 (1872). See also 26 Alb. Law J. 494-96 (1882), cases; 1 Chitty, Contr., 11 Am. ed., 269-73; 2 Greenl. Ev. §§ 301-2; 1 Whart. Contr. Pref. iv; 2 Whart. Ev. §§ 981, 1099; 1 Story, Eq. § 239; 2 Pomeroy, Eq. § 950, cases.

[1] Brown v. Pierce, *ante.*

[2] 1 Bl. Com. 136; Heckman v. Swartz, 64 Wis. 55-62 (1885); 59 Pa. 444.

but no suitable atonement can be made for loss of life or limb.[1]

"Duress of goods" is by unlawfully seizing or withholding property, or threatening to do so, till some demand be acceded to.

The payment of money by the owner of goods in order to redeem them from the hands of a person who unlawfully withholds them and demands such money, may be treated as a compulsory payment, so that the amount is recoverable, as having been obtained by oppressive means. The owner of the goods may have so urgent occasion for them that the ordinary action would afford imperfect redress.[2]

Duress exists where one, by the unlawful act of another, is induced to make a contract or to perform some act under circumstances which deprive him of the exercise of free will. . . "Duress of the person" is by imprisonment, by threats, or by an exhibition of force which apparently cannot be resisted. . . "Duress of goods" may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them in possession but refuses to surrender them unless the exaction is submitted to.[3]

To constitute coercion or duress sufficient to make a payment involuntary, there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment.[4]

Excessive charges, involuntarily paid to railroad companies refusing to carry or deliver goods, have been recovered on the ground of distress.[5]

Mere vexation and annoyance do not constitute such duress as will justify setting aside a deed, unless insanity ensued and existed at the time of execution.[6]

Threats of lawful prosecution, resorted to to overcome the will through intimidation, will avoid a contract thereby obtained.[7]

Regard is had to age, sex, and condition. If the threats are such as tend to deprive a particular person of his freedom of will he will be relieved from liability, although the same threats would not produce a like effect on a firm and courageous man.[8]

Where there is no arrest made nor force used, simply threats uttered, the question as to the duress by which a promise is alleged to have been obtained is ordinarily one of fact. It must be shown that the threats constrained the will of the promisor.[1]

See COERCION; CONSENT; INFLUENCE; PAYMENT, Compulsory.

DURING. See DUM; DURANTE; FOR.

DUTCH. See AUCTION.

DUTY. 1. What one ought or ought not to do; legal obligation. See DUE.

"Duty" and "right" are correlative terms. Such rights as are due from the citizen are called "civil duties." All social duties are of a relative nature — due *from* one man *to* another.[2]

When a right is invaded a duty is violated. A "public duty" is one owing to the community; a "private duty" is an obligation to be observed toward one or more individuals. In an action for non-fulfillment, it is essential to show: the duty, a breach thereof, and the resulting damage. . . When the law "casts a duty" upon one, he is answerable for any damage consequent upon non-performance.[3]

Laws designed to enforce moral and social duties stand on the best and broadest basis. Though it is not every such duty the neglect of which is the ground of an action. For there are what are called in the civil law duties of "imperfect obligation," for the enforcing of which no action lies.[4]

See ASSUMPSIT; CARE; CHARGE; DEMAND; KNOWLEDGE, 1; NEGLIGENCE; OBLIGATION, 1; POWER, 1; PRESUMPTION; RIGHT; UNDERTAKING.

2. An indirect tax, imposed on the importation, exportation, or consumption of goods.[5]

A "custom" is a duty imposed upon imports or exports.[6]

Duties. Things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than "taxes;" in its most restricted meaning, is applied to "customs," and in that sense is nearly the synonym of "imposts."[6]

Whence dutiable, and non-dutiable.

Ad valorem duty. A sum ascertained by a percentage on the value of the article — not necessarily the actual value. **Specific duty.** A fixed sum payable upon an article by name.[7]

[1] 1 Bl. Com. 131; 4 *id.* 30; United States *v.* Haskell, 4 Wash. 406 (1823).

[2] Chitty, Contr. 625. See also White *v.* Heylman, 34 Pa. 144 (1859); Miller *v.* Miller, 68 *id.* 493 (1871); Motz *v.* Mitchell, 91 *id.* 117 (1879); Block *v.* United States, 8 Ct. Cl. 461 (1872); 35 Tex. 77; 59 *id.* 478; 101 U. S. 470.

[3] Hackley *v.* Headley, 45 Mich. 574 (1881), Cooley, J.

[4] Radich *v.* Hutchins, 95 U. S. 213 (1877), cases, Field, Justice.

[5] See Garton *v.* Bristol, &c. R. Co., 28 L. J. Exch. 169 (1859).

[6] Brower *v.* Collander, 105 Ill. 100 (1882).

[7] Haynes *v.* Rudd, 30 Hun, 239 (1883); 94 Pa. 347; 31 *id.* 73.

[8] Jordan *v.* Elliott, 12 W. N. C. 56, 59 (1882). See generally 24 Cent. Law J. 75 (1887), cases.

[1] Dunham *v.* Griswold, 100 N. Y. 226 (1885), cases; Fisher *v.* Bishop, 36 Hun, 114 (1885), cases. As a defense in civil actions, see 9 Va. Law J. 705-17 (1885), cases.

[2] 1 Bl. Com. 123. To whom due, 21 Cent. Law J. 382 (1885), cases.

[3] See Broom, Com. Law, 109, 651 *c*, 655, 670-80.

[4] Pasley *v.* Freeman, 3 T. R. 63 (1789), Kenyon, C. J.

[5] Cooley, Taxation, 3.

[6] Tomlins, Law Dict.; Pacific Ins. Co. *v.* Soule, 7 Wall. 445 (1868); Hylton *v.* United States, 3 Dall. *175 (1796); 1 Story, Const. § 952.

[7] See United States *v.* Clement, 1 Crabbe, 512 (1843); 18 F. R. 394.

Laws regulating the payment of duties are for practical application to commercial operations, and to be understood in a commercial sense. It is to be presumed that Congress intended them to be so understood.[1]

The commercial will prevail over the ordinary meaning of words, where the intent is apparent.[2]

If an article is found not enumerated in the tariff laws, the first inquiry is whether it bears a similitude in material, quality, texture, or the use to which it may be applied, to any article enumerated as chargeable with duty. If it does, and the similitude is substantial, it is to be deemed the same. Though not specifically enumerated, it is provided for under the article it most resembles. If nothing is found to which it bears the requisite similitude, a duty will be assessed at the highest rates chargeable on any of its component materials. Any other construction would leave the law open to evasion.[3] See CUTLERY.

The common-law right of action to recover duties illegally collected is taken away by the statutory remedy. The time for commencing the action is within ninety days after an adverse decision by the secretary of the treasury on appeal, but if he fails to render a decision within ninety days the importer may begin suit at once, or await the decision and sue within ninety days thereafter.[4]

The plaintiff, within thirty days after notice of the appearance of the defendant, must serve a bill of the particulars of his demand, giving, among other items, the date of the appeal, and of the decision of the secretary. This requirement makes it unnecessary to state the same facts in the declaration.[5]

No recovery can be had for duties paid after the importer has received the goods, although paid under protest.[6]

When a reliquidation of duties takes place its date is the final liquidation for the purpose of protest.

A departmental regulation which has been acquiesced in for many years is not to be disregarded without the most urgent reasons.[7]

See APPRAISE; COMMERCE; CUSTOMS; DRAWBACK; ENTRY, II, 2; EXCISE; IMPOST; NEGLIGENCE; NOSCITUR; PAYMENT, Involuntary; PROTEST, 1; REFUNDS; SMUGGLE.

DWELLING. A person has his dwelling where he resides permanently, or from which he has no present intention to remove. See ABODE; DOMICIL; RESIDE.

Dwelling-house. 1. A description of realty, as a dwelling-house, in a deed, may pass a house, the buildings belonging to it, its curtilage, garden, orchard, and the close on which it is built, with reasonable limitations according to the circumstances of the case.[1] See GRANT, 2; CURTILAGE.

Includes such buildings and attachments as are for the ordinary purposes of a house.[2]

2. In a statute against pulling down dwelling-houses to alter a highway, does not include a billiard saloon.[3]

3. In a homestead exemption law, may not embrace a building adapted to purposes of business, as, a saloon, a store, or a public hall.[4]

4. In the New York statute defining arson, includes any edifice usually occupied by persons lodging therein at night; not, a warehouse, barn, shed, or other out-house, unless part of a dwelling-house.[5] See ARSON.

5. In the law of burglary, includes whatever is within the curtilage, even if not inclosed with the dwelling, if used with it for domestic purposes,— all buildings the forcible breaking of which for felonious purposes during the hours of rest would naturally cause alarm, distress and danger.[6]

Must be a habitation of man, and usually occupied by some person lodging in it at night.[7]

Not such habitation is an underground cellar, used for storing ice and beer, with no internal door communicating with the living-rooms in the upper stories, and not under the control of any occupant of the building.[8]

Whether a building is a dwelling-house depends upon the use made of it.[9] See BURGLARY.

Dwelling-place. Some permanent place of abode or residence, with intention to remain there.[10]

See HOUSE; RESIDENCE; POLICE, 3; UTERE, Sic utere, etc.

DYEING. See PROCESS, 2.

DYING. See DEATH; DECLARATION, 1, Dying.

[1] United States v. Casks of Sugar, 8 Pet. 279 (1834); 16 Op. Att.-Gen. 359.

[2] Newman v. Arthur, 109 U. S. 137 (1883); Arthur v. Morrison, 96 *id.* 110 (1877), cases; Worthington v. Abbott, 124 *id.* 434 (1888).

[3] Arthur v. Fox, 108 U. S. 128 (1883), Waite, C. J.; R. S. § 2499; Herrman v. Arthur, 127 *id.* 363 (1888).

[4] Arnson v. Murphy, 109 U. S. 238 (1883); Snyder v. Marks, *ib.* 193–4 (1883), cases.

[5] Beard v. Porter, 124 U. S. 437 (1888), cases.

[6] Porter v. Beard, 124 U. S. 429 (1888), cases; R. S. § 2011.

[7] Robertson v. Downing, 127 U. S. 613 (1888), cases.

[1] Marston v. Stickney, 58 N. H. 610 (1879), cases.

[2] Chase v. Hamilton Ins. Co., 20 N. Y. 55 (1859).

[3] State v. Troth, 34 N. J. L. 377 (1871); 36 *id.* 494.

[4] *Re* Lammer, 14 Bankr. Reg. 460 (1876).

[5] See 2 N. Y. Rev. St. 657, §§ 9, 10; 20 Conn. 245; 33 Me. 30; 6 Mich. 142; 13 Gratt. 763.

[6] Stearns v. Vincent, 50 Mich. 219 (1883), Cooley, J.

[7] Scott v. State, 62 Miss. 782 (1885).

[8] State v. Clark, 89 Mo. 429–30 (1886).

[9] Davis v. State, 38 Ohio St. 506 (1882). See also 8 Cranch, C. C. 21; 68 N. C. 207; 72 *id.* 598; 3 S. & R. 199; 16 Gratt. 543; 13 Bost. L. R. 157.

[10] Jefferson v. Washington, 19 Me. 300 (1841); 2 *id.* 411; 49 N. H. 552.

E.

E. 1. As an abbreviation, ordinarily denotes Easter (term), eastern (district), ecclesiastical, Edward (king), English, equity, or exchequer.

2. In *e. g.*, an abbreviation of the first word of the Latin phrase, *exempli gratia*, for (in favor of, for the sake of) an example, for instance.

3. The form of the Latin preposition, *ex*, from, before a consonant sound. See EX, 1.

E contra. From the opposite side; on the contrary.

E converso. On the other hand; conversely.

EACH. Every one of the two or more composing the whole.

Foreign express companies being exempted, in Kentucky, from local taxation by paying a State tax, a provision in the charter of a city authorizing it to tax "each" express company was held not to apply to foreign companies.[1]

A, a testator, gave C and T "two thousand dollars each." The legatees were brother and sister, not related to the testator. C died before A. *Held*, that the legacy was of two thousand dollars to each legatee individually, and not of four thousand dollars to a class, and that the legacy to C lapsed.[2]

Compare A, 4; ALL; ANY; EVERY.

EAGLE. See COIN.

EAR. See MARK, 1 (2); MAYHEM.

EARL. See SHERIFF.

EARNEST.[3] A thing delivered to a vendor in assurance of a serious purpose to complete the contract of sale.

Giving earnest is one of the alternatives prescribed by the original Statute of Frauds (*q. v.*) for the validity of a contract for a sale of personalty of the value of £10 or more.[4]

If the purchaser accepts and pays for the goods the earnest-money counts as part of the price; if not, the amount is forfeited.

The idea was taken from the civil law. A deposit with a third person, to be forfeited if the buyer does not complete his purchase, is not earnest.[5]

Whatever may have been thought by old writers respecting the effect, in the transmission of property, of giving and receiving earnest money, it is now considered of no importance, or of the smallest importance.[6]

[1] Adams Express Co. *v.* Lexington, 83 Ky. 660 (1886).

[2] Claflin *v.* Tilton, 141 Mass. 343 (1886).

[3] Mid. Eng. *ernes*, a pledge.

[4] See 2 Bl. Com. 448; 2 Kent, 389.

[5] Howe *v.* Hayward, 108 Mass. 55 (1871), cases: Mass. Gen. Stat. c. 105, § 5; Benj. Sales, 2 ed., 260.

[6] The Elgee Cotton Cases, 22 Wall. 195 (1874), Strong, Justice.

EARNINGS. Money or property gained by labor or services: as, the earnings of a wife, minor, servant, insolvent debtor, corporation.

In a statute of exemptions, the gains of the debtor derived from his services or labor without the aid of capital.[1]

May embrace more than "wages," *q. v.* May apply to compensation for services rendered which involve more than mere labor, and may include expenditures;[2] or, compensation for expenditures or materials furnished, together with work done or services rendered; but will not include rents, which require no personal service by the lessor.[3]

Gross earnings; net earnings. As a general proposition, the net earnings of a railroad company are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves.[4] See MORTGAGE, Railroad.

"Net earnings" is often the equivalent of surplus or net profits; and may refer to the surplus for a limited period.[5]

"Gross earnings" and "receipts," in the lease of a railroad, will be taken to mean the same thing, unless other parts of the agreement require a different construction.[6] See TAX, 2.

Separate earnings. Refers to the ownership in married women of the proceeds of their own labor or services.

At common law these belonged to the husband.[7]

In some States, upon petition filed, any married woman may have a decree of court investing her with the absolute right of property in her earnings, wholly free from all claims of her husband or of his creditors, the same as if she were a single woman.

Any married woman in Pennsylvania, with or without cause, may avail herself of the act of 1872; while, to entitle her to become a *feme-sole* trader, she must bring herself within the act of 1718 or the act of 1855. The act of 1872, by securing her the earnings of her business, impliedly authorizes her to engage in business with consequent liability for her contracts.[8] See FEME-SOLE, Trader; HUSBAND.

[1] Brown *v.* Hebard, 20 Wis. 330 (1866).

[2] Jenks *v.* Dyer, 102 Mass. 236 (1869); Somers *v.* Kelliher, 115 *id.* 167 (1874): Statute, 1865, c. 43, § 2.

[3] Kendall *v.* Kingsley, 120 Mass. 95 (1876).

[4] Union Pacific R. Co. *v.* United States, 99 U. S. 420 (1878), Bradley, J. See also St. John *v.* Erie R. Co., 22 Wall. 148 (1874); 10 Blatch. 271; 108 U. S. 279; 30 Minn. 312.

[5] Cotting *v.* New York & New England R. Co., 54 Conn. 168 (1886).

[6] Cincinnati, &c. R. Co. *v.* Indiana, &c. R. Co., 44 Ohio St. 315-16 (1886).

[7] Carter *v.* Worthington, 82 Ala. 336 (1886).

[8] Bovard *v.* Kettering, 101 Pa. 183 (1882). Compare Act June 3, 1887: P. L. 332.

Surplus earnings. An amount owned (by a company) over and above capital and actual liabilities.[1]

EARTH. Soil of all kinds, including gravel, clay, loam, and the like, in distinction from the firm rock.[2]

"Hard pan" is a "hard stratum of earth." Earth, then, includes hard-pan.[3] See ALLUVION; LAND; MINERAL.

EASEMENT.[3] A service or convenience which one neighbor has of another by charter or prescription, without profit.[4]

The right which one man has to use the land of another for a specific purpose.[5]

A liberty, privilege, or advantage in land, without profit, distinct from an ownership in the soil.[6]

Easements include all those privileges which the public, or the owner of neighboring lands or tenements, has in the lands of another, and by which the "servient owner," upon whom the burden of the privilege is imposed, is obliged to suffer, or not to do something, on his own land, for the advantage of the public, or for the "dominant owner" to whom the privilege belongs.[7]

The essential qualities of easements are: they are incorporeal; they are imposed upon corporeal property; they confer no right to participation in profits arising from such property; there must be two distinct tenements, the dominant, to which the right belongs, and the servient, upon which the obligation rests.[8]

Easements restrict the enjoyment of natural rights in land, light, air, and water. Attaching to land as incidents or appurtenances, are, among others: the rights of pasture, of way, of taking water, wood, minerals or other product of the soil, of receiving air, light, or heat, of receiving or discharging water, of support to buildings, of carrying on an offensive trade.

An easement is not a tenancy.[9]

Affirmative easement. Such right in another's land as authorizes acts actually injurious to the land; as, a right of way. **Negative easement.** Such right as is, in its exercise, consequentially injurious; as, forbidding a thing to be done, like that of obstructing light.[1]

Apparent or continuous easement. Depends upon some artificial structure upon, or natural formation of, the servient tenement, obvious and permanent, which constitutes the easement or is the means of enjoying it; as, the bed of a running stream, an overhanging roof. **Non-apparent or non-continuous easement.** Has no means specially constructed or appropriated to its enjoyment, and is enjoyed at intervals, leaving between these intervals no visible sign of its existence; as, a right of way.[2] See CONTINUOUS, Non-continuous.

Appendant or appurtenant easement. When the grant of the easement is made with reference to other land whereon, or in connection wherewith, it is to be used or enjoyed.

Such easement is appendant or appurtenant to the dominant estate, and passes with it as an incident.

A right in or upon the land of another, to be used by the grantee generally, and not in connection with or dependent upon any other land or estate, is a right *in gross*,— in bulk. It belongs to, and dies with, the person.[3]

Easement of necessity. A privilege without which the dominant owner could not carry on his trade or enjoy some other property right. **Easement of convenience.** Enables such owner to prosecute his business or to enjoy some right in real property with increase of facilities or comfort.

Private easement. Exists in favor of one or more individuals. **Public easement.** Exists in favor of the people generally.

Easements originate in grant, express or implied. They do not change with the persons. Disturbances may be remedied by action on the case, by injunction, or by abatement. They are extinguished by release, merger, necessity, end of prescription, cesser of use for twenty years, renunciation or abandonment shown by decisive acts.[4]

When an easement has once been acquired, mere non-user will not defeat the right; there must be an

[1] People *v.* Commissioners, 76 N. Y. 74 (1879). See 34 N. J. L. 482.

[2] Dickinson *v.* Poughkeepsie, 75 N. Y. 76 (1878); Webster.

[3] F. *aise*, ease, relief: assistance, accommodation, convenience.

[4] Post *v.* Pearsall, 22 Wend. 433 (1839): Jacob.

[5] Jackson *v.* Trullinger, 9 Oreg. 397 (1881), Lord, C. J.

[6] Jamaica Pond Aqueduct Corporation *v.* Chandler, 9 Allen, 165 (1864), Bigelow, C. J. See also 19 Ark. 33; 74 Ill. 185; 24 Iowa, 61; 40 *id.* 456; 24 Mich. 284; 51 N. H. 330; 70 N. Y. 421; 54 Pa. 369; 44 Tex. 267; 27 Gratt. 87; 109 U. S. 255.

[7] 3 Kent, 419.

[8] Pierce *v.* Keator, 70 N. Y. 421 (1877). See Parsons *v.* Johnson, 68 *id.* 65-66 (1877); 70 *id.* 447-48; Tardy *v.* Creasy, 81 Va. 556-57 (1886), cases.

[9] Swift *v.* Goodrich, 70 Cal. 106 (1886).

[1] 2 Washb. R. P. 26, 56-60, 82-85, 453-56; 70 N. Y. 448.

[2] Fetters *v.* Humphreys, 18 N. J. E. 262 (1867), Zabriskie, Ch.

[3] Salem Capital Flour Mills Co. *v.* Stayton Water-Ditch & Canal Co., 33 F. R. 154 (1887); Washb. Easem. 9, cases.

[4] See Steere *v.* Tiffany, 13 R. I. 570 (1882); Sanderlin *v.* Baxter, 76 Va. 305 (1882); Washb., Easements.

adverse use by the servient estate for a period sufficient to create a prescriptive right.[1]

See AIR; LICENSE, 1; LIGHT; NUISANCE; PROFITS, A prendre; SERVITUDE, 2; SUPPORT, 2; USE, 1, Non-user; WALL; WATER; WAY.

EASTER. See TERM, 4.

EATING-HOUSE. Compare RESTAURANT; SALOON.

Any place where food or refreshments of any kind, not including spirits, wine, ale, beer, or any other malt liquors, are provided for casual visitors, and sold for consumption therein.[2]

A market-stall where meals are furnished to the public is not an eating-house.[3]

EAVES-DROPPING. The nuisance of hanging about the dwelling-house of another, hearing tattle, and repeating it to the disturbance of the neighborhood.[4]

Eaves-droppers. Such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales.[5]

Eaves-dropping is a common nuisance, indictable at common law, and punishable by fine and by having to furnish sureties for good behavior.[6]

Consists in privily listening, not in looking or peeping. It is a good defense that the act was authorized by the husband of the prosecutrix.[6]

EBB AND FLOW. See NAVIGABLE.

ECCENTRICITY. See INSANITY.

ECCLESIASTICAL. See CHURCH; CORPORATION.

ECLECTIC. See MEDICINE.

ECONOMITES. See COMMUNITY, 8.

ECONOMY, PUBLIC. See POLICE, 2.

EDITOR. Formerly included not only the person who wrote or selected articles for publication, but also the person who published the paper and put it into circulation. Now, the business of editor is separated from that of publisher and printer.[7]

See LIBERTY, 1, Of the press; NEWSPAPER.

EDUCATION. Includes proper moral, as well as intellectual and physical, instruction.[8]

May be particularly directed to the mental, the moral, or the physical powers and faculties, but in its broadest and best sense relates to them all.[1]

An education acquired through the medium of the English language is an "English education." It is the language employed as the medium of instruction that gives distinctive character to the education, whether English or German, and not the branches studied. . . . A "common school education" begins with the rudiments of an education, whatever else it may be made to embrace.[2]

Parents owe to their children the duty of giving them an education suitable to their station in life. Yet the municipal laws of most countries do not constrain parents to bestow such education.[3]

"All persons . . . having children, and all the Guardians or Trustees of Orphans, shall cause such to be instructed in reading and writing; under a penalty of five pounds for each child having capacity in body and understanding."[4]

See CHARITY, 2; SCHOOL.

-EE. See OR, 1.

EFFACE. See ALTER, 2; CANCEL.

EFFECT. 1. That which is produced; result of a cause. See CAUSE, 1.

2. Letters-patent will not be granted for a mere effect; they may be for a new mode or application of machinery to produce an effect. See PATENT, 2.

3. The manner in which a contract, instrument, or law will operate, as ascertained by construction. See TENOR.

"Take effect," "be in force," and "go into operation" are interchangeable.[5]

4. To prosecute with effect: with due diligence to a finality. See further PROSECUTE.

Effected. A condition in a policy of insurance that "every person insuring in this company must give notice . . . of any other insurance effected in his behalf on said property," applies to all other insurance, whether taken out before or after the execution of the policy in question.[6]

EFFECTS. A word of extensive import, frequently used in wills as a synonym for personal estate. In *Hogan* v. *Jackson*, 1 Cowp. 304 (1774), Lord Mansfield considered it synonymous with "worldly substance," which means whatever can be turned to value, and therefore that "real and personal effects" means all a man's property.

[1] Curran v. Louisville, 83 Ky. 632 (1886), cases.

[2] Revenue Act, 13 July, 1866, § 9: 14 St. L. 118.

[3] State v. Hall, 73 N. C. 254 (1875).

[4] State v. Pennington, 3 Head, 300 (Tenn., 1859): 2 Bish. Cr. L. 274.

[5] 4 Bl. Com. 168; 1 Hawk. P. C. 132; 1 Russ. Cr. 302.

[6] Commonwealth v. Lovett, 4 Clark, 5 (Pa., 1831): 8 Hax. Pa. Reg. 305.

[7] Pennoyer v. Neff, 95 U. S. 721 (1877), Field, J.

[8] Rouhs v. Backer, 6 Heisk. 400 (1871); Tenn. Code, § 2621.

[1] Mount Hermon Boys' School v. Gill, 145 Mass. 146 (1887), Knowlton, J.

[2] Powell v. Board of Education, 97 Ill. 375 (1881).

[3] 1 Bl. Com. 450.

[4] Laws of Prov. of Penn., Ch. CXII (1682): Linn, 161.

[5] Maize v. State, 4 Ind. 348 (1853).

[6] Warwick v. Monmouth County Mut. Fire Ins. Co., 44 N. J. L. 83 (1882).

In admiralty, includes ships.[1]

In a will, may include any personalty whatever, and even realty.[2]

Construed to include land where it can be collected from the will that such was the testator's intention.[3]

Used indefinitely in a will, but, in connection with something particular and certain, is limited by association to other things of a like kind. From the subject-matter, intention of something else may be implied; and that may be larger or less.[4]

EFFIGY. See LIBEL, 5.

EFFLUX.[5] In a lease, the ending of the contract period in the regular course of events, as distinct from an earlier termination by a subsequent agreement or by some unexpected event. "Effluxion" was formerly in use.

EGRESS. See INGRESS.

EI INCUMBIT. See PROBATIO.

EIGHT-HOUR RULE. See SERVICE, 1.

EIGN, EIGNE, or EISNE. Eldest, or first-born. A corruption of the French *aîné, aisné.*

Bastard eigne. A child born before the marriage of its parents. Opposed, *mulier puisné:* a legitimate child.[6]

EITHER. One *or* the other of several things; but, sometimes, one *and* the other.[7] See OR, 2.

May be used, as in a statute, in the sense of "any."[8]

EJECT. To put out or off; to dispossess, evict, oust. See EJECTIO.

Casual ejector. He who ousted the rightful lessee by making a formal entry in order to test the right to possession in court.[9] See EJECTMENT.

EJECTIO.[10] L. Dispossession; ouster.

Ejectione custodiæ. By ejectment of ward. A writ by which a guardian recovered possession of the land or person of his ward.

Ejectione firmæ. For ejectment of "farm," *q. v.* A remedy where the lessee of a term of years was deprived of possession.

The original of the later and modern action of ejectment,[1] *q. v.*

EJECTMENT. An action to recover possession of realty, with damages for the wrongful detention. See EJECTIO.

Originally devised for a lessee ousted of his term of years, and who, having but a chattel interest, could not support a real action for recovery of possession. In effect, the action was for the trespass; and the remedy was in damages for the dispossession. Later, it was decided that the lessee could also recover his *term.* This brought the action into general use; and by the formalities of lease, entry, and ouster (which see below), the action was converted into a method of trying, collaterally, the *title* of the lessor. Then, as the title was never formally and directly in issue, but the trespass for the expulsion only, the verdict was not pleadable in bar of another trespass. Thus it came that a verdict and judgment were conclusive only as regarded personalty. Afterward, when the fictions were abolished, the idea of a difference as between realty and personalty lingered in many States, a single verdict and judgment was not considered conclusive, and provision was made by statute for a second trial. Where no such provision exists a former action may be a bar.[2]

In the original action the plaintiff had to prove a *lease* from the person shown to have title, an *entry* under the lease, and an *ouster* by some third person. The modified action was brought by a fictitious person as lessee against another fictitious person (the casual ejector) alleged to have committed the ouster. Service was made upon the tenant in possession, with notice from the casual ejector to appear and defend. If the tenant failed to do this, judgment was given by default and the claimant put in possession. If he did appear, he was allowed to defend only by entering into the "consent rule," by which he confessed the fictitious lease, entry, and ouster to have been made, leaving only the *title* in question. See DOE.

These fictions were abolished in England by the common-law procedure act of 1852, and further changes were made by the judicature acts of 1873 and 1875. In some States the action has never been adopted; in others it has been materially modified by statute; in a few it still exists in its original form. The ancient form is also employed in the circuit courts of the United States sitting in States where the old form was observed when those courts were established.[3]

Ejectment is the remedy to recover a corporeal hereditament — an estate in fee-simple, fee-tail, for life, or for years; not, for rent, a right of way, or dower. The plaintiff, at the time of the institution of the suit, must have a right of entry and of possession

[1] The Alpena, 7 F. R. 862 (1881). Arthur *v.* Morgan, 112 U. S. 499 (1884). See also 1 Hill (S. C.), 155; 15 Ves. 507; 15 M. & W. 450; 16 East, 222.

[2] Smyth *v.* Smyth, 25 Moak, 477 (1878): 8 C. D. 561; 16 Moak, 710.

[3] Page *v.* Forest, 89 N. C. 449 (1883), cases.

[4] Ennis *v.* Smith (Kosciusko's Will), 14 How. 421 (1852), cases, Wayne, J. See also 2 Shars. Bl. Com. 384, n.; 3 Cranch, C. C. 306; 3 Minn. 389; 30 *id.* 195; 37 Tex. 19.

[5] L. *ef(ex)-fluere,* to flow out, go by.

[6] See 2 Bl. Com. 248.

[7] Chidester *v.* Springfield, &c. R. Co., 59 Ill. 89 (1871).

[8] Lafoy *v.* Campbell, 42 N. J. E. 37 (1886).

[9] 3 Bl. Com. 201.

[10] From *ejicere,* to put out: *jacere,* throw, cast.

[1] 3 Bl. Com. 199.

[2] Sturdy *v.* Jackaway, 4 Wall. 175–76 (1866), cases, Grier, J.; Miles *v.* Caldwell, 2 *id.* 40 (1864); Blanchard *v.* Brown, 3 *id.* 248 (1865); Dickerson *v.* Colgrove, 100 U. S. 583 (1879); 3 Bl. Com. 199.

[3] See 3 Bl. Com. 198–207; 3 Steph. Com. 599–94, 617–30.

under legal title. In the Federal courts of law, the strict legal title prevails. The defendant must be in actual possession, and notice be given to the terre-tenant. The action is maintainable by a joint tenant or a tenant in common against a co-tenant who has dispossessed him. Recovery is upon the strength of the plaintiff's title, not upon the weakness of the defendant's,[1] with proof of injury equivalent to a dispossession. The plea of "not guilty" raises the general issue. The judgment is, that the plaintiff recover his term, or the possession of the land, and damages, which, as a rule, are nominal.[2] See Possession, Adverse; Profits, 1, Mesne.

Equitable ejectment. Ejectment at law, upon an equitable title; in effect, a bill in equity for the specific performance of a contract or obligation to convey land.

In Pennsylvania, whenever a court of equity will presume a trust to have arisen, compel its execution, or enforce an article of agreement, the courts of law by this means will administer the same relief.[3]

Ejectment bill. Generally, a bill in equity will not lie if it is in substance and effect an ejectment bill, and if the relief it seeks can be obtained by an action in ejectment.[4]

EJECTOR. See Eject.

EJUSDEM GENERIS. L. Of the same kind or nature; of the same class.

In the construction of statutes, contracts, and other instruments, where an enumeration of specific things is followed by a general word or phrase, the latter is held to refer to things of the same kind as those specified.[5] See General, 6; Inferior, 2; Other; Vehicle.

ELDEST. The eldest son is the first-born son — the *primo-genitus*.

The words "shall become the eldest son" of a person living at the date of a will cannot, without an explanatory context, be extended beyond the life-time of that person; they are connected with the heirship of, and right of succession to, a living man.[6]

ELECT.[7] To select, choose; also, selected, chosen, elected: as, a judge-elect, the President-elect.

[1] Nelson *v.* Triplett, 81 Va. 237 (1885), cases; Butrick *v.* Tilton, 141 Mass. 96 (1886); Mitchell *v.* Lines, 36 Kan. 380 (1887).

[2] See Gibson *v.* Chouteau, 13 Wall. 102 (1871); Foster *v.* Mora, 98 U. S. 428 (1878); Equator Co. *v.* Hall, 106 *id.* 87 (1882); Holland *v.* Challen, 110 *id.* 19 (1883); 112 *id.* 535; 116 *id.* 692; 18 Fla. 52; 55 Vt. 569; 76 Va. 288; 107 U. S. 392; Bouvier.

[3] Deitzer *v.* Mishler, 37 Pa. 86 (1860); 7 *id.* 158; 14 *id.* 145, 249; 22 *id.* 225; 87 *id.* 286; 1 T. & H. § 36; 2 *id.* § 1838.

[4] Killian *v.* Ebbinghaus, 110 U. S. 568, 572 (1883).

[5] See United States *v.* Buffalo Park, 16 Blatch. 100 (1879); Reiche *v.* Smythe, 13 Wall. 165 (1871); Narramore *v.* Clark, 63 N. H. 167 (1884), cases; Lynchburg *v.* Norfolk, &c. R. Co., 80 Va. 248-50 (1885), cases; 54 Conn. 467; 8 Pick. 14; 9 Metc. 258; 122 Mass. 575.

[6] Bathurst *v.* Errington, 2 Ap. Cas. 698 (1877); 20 Moak, 203, 213.

[7] L. *eligere*, to pick out. See Eligible.

Election. A choosing, or selecting; also, the condition of having been chosen or selected: choice, selection.

Primer election. First choice.

In England, in cases of partition, unless otherwise agreed, the eldest sister (coparcener) has the first choice of purparts.[1]

1. Selection of a person to fill an office in (1) a private corporation,— whence *corporate* election; or (2) in a department of government — national, State, county, municipal,— whence *popular* election.[2]

In its constitutional sense, a selection by the popular voice of a district, county, town, or city, or by an organized body, in contradistinction to appointment by some single person or officer.

Voting and taking the votes of citizens for members to represent them in the general assembly or other public stations.[3]

In either of the senses noted, particularly in the case of a *popular* election, whether a *general* or a *special* or *local* election, choice of persons is effected through the instrumentality of a *board* or *officers* of election, within an election *district* or *precinct*, or place of known and fixed boundaries, on an appointed election *day* and between certain election *hours*, with a prescribed mode for certifying the election *returns*, and all in conformity with the election *laws;* followed, too, in cases, by an election *contest* between opposing candidates.[4]

The doctrine at the foundation of popular government is, that in elections the will of the majority controls; mere irregularities or informalities in the conduct of an election are impotent to thwart the expressed will of the majority.[5]

All fraudulent acts affecting the purity and safety of elections are offenses at common law.[6]

But illegal votes will make void an election only when they affect the result.[7]

A statute which, in addition to the requirements of the constitution, provides that "no person hereafter naturalized shall be entitled to be registered as a voter within thirty days therefrom," is unconstitutional.[8]

[1] Littleton, § 243.

[2] Police Commissioners *v.* Louisville, 3 Bush, 608 (1868), William, J.

[3] Commonwealth *v.* Kirk, 4 B. Mon. 2 (1843), Ewing, C. J. See also 54 Ala. 205; 13 Cal. 144; 23 Mich. 341; 5 Nev. 121.

[4] See 2 Dill. 219; 41 Pa. 403; 30 Conn. 591; 44 N. H. 643.

[5] Prohibitory-Amendment Cases, 24 Kan. 720 (1881). See Commonwealth *v.* Smith, 132 Mass. 295 (1882).

[6] Commonwealth *v.* Hoxey, 16 Mass. 385 (1820); Commonwealth *v.* McHale, 97 Pa. 408 (1881); 91 Pa. 503.

[7] Tarbox *v.* Sughrue, 36 Kan. 230, 232 (1887), cases. On conducting elections, see 24 Cent. Law J. 487 (1887), cases.

[8] Kinneen *v.* Wells, 144 Mass. 497 (1887), cases. See also State *v.* Conner, Sup. Ct. Neb. (1887), cases.

Elective. (1) Pertaining to the right, in the individual, to choose agents of government: as, the elective franchise. *q. v.*

(2) Bestowed by virtue of a popular election, as opposed to being invested with by appointment: as, the elective system — for filling judicial offices. See JUDICIARY.

Elector. (1) One who has the right of a choice or vote; more particularly, one who has the right of casting a vote for a public officer.[1]

(2) One who, having a right to vote, actually votes.[2]

Electoral. Pertaining to or consisting of electors: as, the "electoral college," on which the formal legal choice of President and Vice-President is made finally to depend.

Presidential electors. Members of the electoral college.

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."[3]

"The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."[4]

"The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; —

The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.[1]

The act of Congress approved February 3, 1887 (24 St. L. 373), to fix the day for the meeting of the electors of President and Vice-President, and to regulate the counting of the votes, and the decision of questions arising thereon, provides as follows:

That the electors of each State shall meet and give their votes on the second Monday in January next following their appointment, at such place in each State as the legislature of such State shall direct.

Sec. 2. That if any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to the said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

Sec. 3. That it shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of electors in such State, by the final ascertainment under and in pursuance of the laws of such State providing for such ascertainment,

[1] See Beardstown *v.* Virginia, 76 Ill. 39 (1875).

[2] See Taylor *v.* Taylor, 10 Minn. 123 (1865); State *ex rel. v.* Tuttle, 53 Wis. 49 (1881).

[3] Constitution, Art. II, sec. 1, cl. 2. See 2 Bancroft, Const. 165–85.

The electoral vote of the respective States is (1888) as follows: Alabama, 10; Arkansas, 7; California, 8; Colorado, 3; Connecticut, 6; Delaware, 3; Florida, 4; Georgia, 12; Illinois, 22; Indiana, 15; Iowa, 13; Kansas, 9; Kentucky, 13; Louisiana, 8; Maine, 6; Maryland, 8; Massachusetts, 14; Michigan, 13; Minnesota, 7; Mississippi, 9; Missouri, 16; Nebraska, 5; Nevada, 3; New Hampshire, 4; New Jersey, 9; New York, 36; North Carolina, 11; Ohio, 23; Oregon, 3; Pennsylvania, 30; Rhode Island, 4; South Carolina, 9; Tennessee, 12; Texas, 13; Vermont, 4; Virginia, 12; West Virginia, 6; Wisconsin, 11. Total, 401.

[4] Constitution, Art. II, sec. 1, cl. 3.

[1] Constitution, Amend. Art. XII. Ratified Sept. 25, 1805.

to communicate, under the seal of the State, to the secretary of state of the United States, a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by the preceding section to meet, the same certificate, in triplicate, under the seal of the State; and such certificate shall be inclosed and transmitted by the electors at the same time and in the same manner as is provided by law for transmitting by such electors to the seat of government the lists of all persons voted for as President and of all persons voted for as Vice-President; and section one hundred and thirty-six of the Revised Statutes is hereby repealed; and if there shall have been any final determination in a State of a controversy or contest as provided for in section two of this act, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate, under the seal of the State, to the secretary of state of the United States, a certificate of such determination, in form and manner as the same shall have been made; and the secretary of state of the United States, as soon as practicable after the receipt at the state department of each of the certificates hereinbefore directed to be transmitted to the secretary of state, shall publish, in such public newspaper as he shall designate, such certificates in full; and at the first meeting of Congress thereafter he shall transmit to the two Houses of Congress copies in full of each and every such certificate so received theretofore at the state department.

Sec. 4. That Congress shall be in session on the second Wednesday in February succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the hall of the House of Representatives at the hour of one o'clock in the afternoon on that day, and the president of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the president of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted in the manner and according to the rules in this act provided, the result of the same shall be delivered to the president of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice-President of the United States, and, together with a list of the votes, be entered on the journals of the two Houses. Upon such reading of any such certificate or paper, the president of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section three of this act from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the president of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section two of this act to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section two of this act, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its laws; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the question submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

Sec. 5. That while the two Houses shall be in meeting as provided in this act the president of the Senate shall have power to preserve order: and no debate shall be allowed and no question shall be put by the

presiding officer except to either House on a motion to withdraw.

Sec. 6. That when the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate.

Sec. 7. That at such joint meeting of the two Houses seats shall be provided as follows: For the president of the Senate, the speaker's chair; for the speaker, immediately upon his left; the Senators, in the body of the hall upon the right of the presiding officer; for the Representatives, in the body of the hall not provided for the Senators; for the tellers, secretary of the Senate, and clerk of the House of Representatives, at the clerk's desk; for the other officers of the two Houses, in front of the clerk's desk and upon each side of the speaker's platform. Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this act, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day; Sunday excepted, at the hour of ten o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first meeting of the two Houses, no further or other recess shall be taken by either House.

See BALLOT; BRIBERY; CANDIDATE; CONGRESS; DEPOSIT, 1 (1); HOLIDAY; QUALIFIED, 1; VACANCY; VOTE.

2. The obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both. This, technically, is "election," or the "doctrine of election," at law and equity.

In equity jurisprudence, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party, who has a right to control one or both, that one should be a substitute for the other.[1]

Thus, one may have an election: to pay money or deliver goods, as a consideration; to observe a contract, or pay damages or forfeit a sum; to retain a security for a debt, or surrender it and share as a distributee in a dividend; to rescind or affirm a voidable contract; between a statutory and common-law remedy; between a joint and a several action; between suing an agent and suing his undisclosed principal; between independent grounds of defense or of action.

A very common example is the choice a widow makes between dower and a testamentary provision.

A person who is entitled to any benefit under a will or other instrument, must, if he claims that benefit, abandon every right or interest the assertion of which would defeat, even partially, any of the provisions of the instrument. But in no case is one to be put to an election unless it is clear that the provisions of the instrument in some degree would be defeated by the assertion of his other rights.[1]

The doctrine rests upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who asserts an interest under an instrument is bound to give full effect, as far as he can, to that instrument. Or, as it is sometimes expressed, he who accepts a benefit under a deed or will must adopt the contents of the whole instrument, conforming to all its provisions and relinquishing every right inconsistent with it.[2]

An election may be implied as well as expressed. Whether there has been an election must be determined upon the circumstances of the particular case, rather than upon general principles. It may be inferred from the conduct of the party — his acts, his omissions, and his mode of dealing with the property. Unequivocal acts of ownership, with knowledge of the right to elect, and not through a mistake with respect to the condition and value of the estate, will generally be deemed an election to take under a will. It has become a maxim that no one is bound to elect in ignorance of his rights.[3] Compare SATISFY, 2 (2).

3. The right to choose, or the act of choosing, between different actions or remedies, where the plaintiff has suffered one species of wrong from the act complained of.

This right arises where he may sue in tort or upon the contract implied by law in the case; or where he may bring an action of a purely equitable nature, or such as merely seeks a money judgment.[4]

ELECTRICITY. See LIGHTNING; TELEGRAPH; TELEPHONE.

ELEEMOSYNARY. See CHARITY, 2: CORPORATION.

ELEGIT. See EXECUTION, 8, Writs of.

ELEVATED. See RAILROAD.

ELEVATOR. See NEGLIGENCE.

ELIGIBLE. Relates to capacity of holding as well as of being elected to an office.[5]

Ineligible. Refers as well to disqualification to hold, as to disqualification to be elected to, an office.[6]

[1] 2 Story, Eq. § 1075; 1 Pomeroy, Eq. § 461 *et seq.*; 54 Me. 456.

[1] Gibson *v.* Gibson, 17 E. L. & E. 353 (1853), Kinderley, V. C.; 14 Gratt. 548; 76 Va. 123.

[2] Penn *v.* Guggenheimer, 76 Va. 846 (1882), Staples, J.

[3] 76 Va. 850, *supra;* Burroughs *v.* De Couts, 70 Cal. 370 (1886); Streatfield *v.* Streatfield (1735), 1 Lead. Cas. Eq., W. & T., 504, 510, 541; 2 Story, Eq. §§ 1076–96.

[4] See 22 Cent. Law J. 533–38 (1886), cases.

[5] [Carson *v.* McPhetridge, 15 Ind. 331 (1860); 15 Cal. 117; 3 Nev. 566.

[6] State *v.* Murray, 28 Wis. 99 (1871).

Re-eligible. Capable of election, or of holding office, more than once. See ELECTION, 1; OFFICE.

ELISOR.[1] An elector chosen by a court to return a panel of jurors where the sheriff and the coroner are disqualified.[2]

If exception lies to the coroner, the *venire* is directed to two clerks of the court, or to two other persons of the county, named by the court and sworn; these two, called "elisors," or electors, indifferently name the jury, and their return is final, no challenge being allowed to their array.[3]

ELOIGN.[3] When the sheriff seeks to replevy goods distrained, and finds them carried out of the county, or concealed, he may return that they are eloigned, *elongata*, carried to a distance, to places to him unknown.[4] See CAPERE, Capias, *Withernam*.

When, under ancient practice, he sought to replevy a man and found him conveyed out of bailiwick he made return that the person was *elongatus*.[5]

Eloignment. Removal of goods distrained, to prevent a replevy.

Eloigner. He who makes an eloignment.

ELOPEMENT.[6] The act in a wife of voluntarily leaving her husband to live with another man.

She thereby forfeits her right of dower, unless the offense is condoned. The husband is not liable for her contracts for necessaries, unless, preserving her purity, she has offered to return and he has refused to receive her.[7]

The "leaving" implies a going beyond the husband's actual control.[8]

ELSEWHERE. In or at another place. Compare ALIBI.

In a will, will pass land wherever situated.[9]

In shipping articles, was construed in subordination to the principal voyage — the words being "to the Pacific ocean, or elsewhere, thence to Boston, with wages payable at Canton."[10]

EM. See EN, 3.

EMANCIPATION.[11] The act by which a person, who is under the power or control of another, is rendered free to act for himself.[1]

Filial emancipation. Enfranchisement of a minor from parental authority.

Attaining majority is, *ipso facto*, emancipation.

Emancipation proclamation. Issued, January 1, 1863, by President Lincoln as commander-in-chief of the army and navy of the United States, during the existence of armed rebellion. It purported to be "a fit and necessary war measure for suppressing said rebellion;" and declared that all persons held as slaves within designated States, and parts of States, were and henceforward should be free.[2] See CITIZEN, Amendment, XIII.

EMBARGO.[3] The detention, by a government, of ships of commerce in its ports.

A prohibition against sailing.[4]

Civil embargo. Is laid upon ships belonging to citizens of the State imposing it.

Hostile embargo. Is laid upon ships belonging to the enemy.

The effect of a hostile embargo is, that if war does not follow the vessels are restored to their owners; if otherwise, they are confiscated. Bonds for the observance of the prohibition may be required.[5] See BLOCKADE.

EMBASSADOR. See MINISTER, 8.

EMBEZZLEMENT.[6] 1. Appropriation to one's own use of anything belonging to another, whether rightfully or wrongfully in the possession of the taker; theft.

At an early date, spending, wasting, squandering.

"He left an estate to an unthrift son who embezzled it."[7]

"Embezzling or vacating records . . is a felonious offense."[8]

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[1] E-li'-sor. F. *eliseur*: L. *eligere*, to choose.

[2] 3 Bl. Com. 354; 91 Pa. 495.

[3] F. *éloigner*, to remove to a distance: L. L. *e-longe*, far off.

[4] 3 Bl. Com. 149.

[5] 3 Bl. Com. 129.

[6] Dutch *ontloopen*, to run away; by substituting the prefix *e-* for Du. *ont-*. A. S. *hleapan*, to leap, run.

[7] 2 Bl. Com. 130; 1 *id.* 442; 11 Johns. 281; 12 *id.* 293; 11 Wend. 33; 3 Pick. 289; 7 S. & R. 249; Chitty, Contr. 49; Bish. M. & D. § 625.

[8] Cogswell *v.* Tibbetts, 3 N. H. 42 (1824).

[9] 3 P. Wms. 56; 3 Atkyn, 254.

[10] Brown *v.* Jones, 2 Gall. 479 (1815).

[11] L. *e-mancipare*, to transfer ownership: *mancipium* (q. v.), purchase by imposition of hand — *manus capere*.

[1] See Fremont *v.* Sandown, 56 N. H. 308 (1876): Bouvier.

[2] Slaughter-House Cases, 16 Wall. 68 (1872). See also 43 Ala. 592; 44 *id.* 70; 20 La. Ann. 199; 43 Miss. 102; 13 S. C. Eq. 366; 31 Tex. 504.

[3] Spanish *embargo*, putting a bar (*barra*) in the way: arrest, stoppage of ships.

[4] [The King William, 2 Wheat. 189 (1817); L. R., 8 C. P. 659.

[5] See Wheaton, Int. Law, 372; The King William, *supra*; 7 Cranch, 237; 5 Johns. 290.

[6] N. F. *embeasiller*, to filch,— Webster. Formerly, *embesile* or *-ell*; the same as *imbécill*, to weaken, diminish, subtract from. A shop-boy embezzled his master's store imperceptibly by repeated filching,— Skeat. In early statutes spelled *imbesil*,— 2 N. M. 208.

[7] Fuller, The Worthies (1662).

[8] 4 Bl. Com. 127 (1769).

"Embezzlers of Charters, Grants, Records, Bonds, Bills, Wills, &c., shall make Double Satisfaction, and be publicly Disgraced as False persons."[1]

"The goods of shipwrecked vessels shall be preserved from spoil and embezzlement."[2]

"He who would embezzle a ship's furniture, would not hesitate to embezzle the cargo."[3]

Section 5467, Rev. St., creates two statutory offenses: that of embezzling a *letter* in postal custody which has a valuable thing enclosed; and that of taking and stealing such thing out of a letter which has been embezzled. A prosecution may be for one or both offenses.[4]

2. The fraudulent conversion of property by a person to whom it has been intrusted.[5]

A species of theft, consisting in the stealing of property by clerks, agents, servants — persons acting in a fiduciary capacity.[6]

Distinguishable from "larceny" in that the taker comes lawfully into possession of the property.[6]

To "embezzle" is to appropriate to one's own use property or money intrusted to him by his employer.[7]

At common law, had no definite meaning. As an offense, had its origin in efforts made to amend the law of larceny. The first statute was that of 8 Henry VIII (1517), c. 7, in which the descriptive words were "did embezzle or otherwise convert the money to his own use." Statute of 7 Geo. IV (1827) improved and superseded earlier legislation; in it the words are "shall fraudulently embezzle."[8]

Frequently termed "larceny by bailee."

Where the accused is not named as a "bailee," it may be a question of law upon the averments whether or not he was a bailee.[9] See LARCENY.

It is essential: that the accused occupy a fiduciary relation; that he received property (money) in the course of his employment; that the property belonged to his principal; that he converted it with intent to steal and embezzle it.[10]

The indictment must allege that the accused "feloniously did steal, take and carry away" the property.[11]

The details of the crime being statutory, the decisions of other States are to be read with caution.[1]

Many State statutes follow 24 and 25 Vict. (1861) c. 96, §§ 68–72.[2]

In some States the injured person may receive payment for the property embezzled or take security therefor.[3]

In the Revised Statutes, the term designates a variety of offenses having in common the idea that the person has an opportunity to commit them by reason of some office or employment; and that they include some breach of confidence or trust, some misuse of a confidential opportunity: as, conversion by a public officer to his own use of public money intrusted to him for safe-keeping, disbursement, transfer, or other purpose.[4]

See DECOY; PECULATION.

EMBLEMENTS.[5] The vegetable chattels called emblements are the corn [grain] and other growth of the earth which are produced annually, not spontaneously but by labor and industry; thence called *fructus industriales.*[6]

A growing crop of grass, even if grown from seed, and ready to be cut for hay, cannot be taken as emblements: the improvement is not distinguishable from natural product, although it may be increased by cultivation.[6]

The doctrine of emblements is founded on the uncertainty of the termination of the tenant's estate. Where that is certain there exists no title to emblements.[7]

Nursery trees more nearly resemble emblements than fixtures; emblements being the annual product or fruit of things sown or planted. Hops, berries, and the like, are such, but not the roots and bushes from which they grow. Emblements reared by a tenant entering subsequently to a mortgage pass to the purchaser at a foreclosure sale, unless gathered before the sale.[8]

The word is used both for the crops or grain and for the privilege of reaping or gathering them. See further CROP; FRUCTUS.

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[1] Great Law of Penn., Ch. L (1682).

[2] *Ibid.*, Ch. CXXXI (1683).

[3] The Boston, 1 Sumn. 356 (1833), Story, J.

[4] United States *v.* Baugh, 4 Hughes, 508 (1880). See United States *v.* Long, 4 Woods, 454 (1881).

[5] 2 Bishop, Cr. L. § 326; Pittsburgh, &c. Pass. R'y Co. *v.* McCurdy, 114 Pa. 558 (1886).

[6] United States *v.* Lee, 12 F. R. 618 (1882), Cox, D. J.; 11 *id.* 293; State *v.* Wingo, 89 Ind. 206 (1883); 41 How. Pr. 294; 62 Wis. 63; 4 Tex. Ap. 408.

[7] State *v.* Wolff, 34 La. An. 1154 (1882), Manning, J.

[8] State *v.* Wolff, *supra;* New Mexico *v.* Maxwell, 2 N. M. 267–68 (1882); United States *v.* Conant, 9 Cent. Law J. 129 (Cir. Ct., Mass., 1879), cases: R. S. § 5209 — national bank officer or agent; 3 Steph. Hist. Cr. L. Eng. 152–53.

[9] People *v.* Johnson, 71 Cal. 392 (1886).

[10] *Exp.* Hedley, 31 Cal. 112 (1866).

[11] Commonwealth *v.* Pratt, 132 Mass. 246 (1882): Gen. Sts. c. 161, § 33.

[1] 7 Tex. Ap. 417; 4 *id.* 407–9, cases; 2 Bishop, Crim. Law, § 331.

[2] 2 Bish. Cr. L. §§ 326–70, 392–462; 2 Whart. Cr. L. §§ 1905–42, 2069–2102.

[3] Johnston Harvester Co. *v.* McLean, 57 Wis. 262 (1883); Fagnan *v.* Knox, 66 N. Y. 526 (1876). See generally Calkins *v.* State, 18 Ohio St. 366 (1868): 98 Am. Dec. 126–74, cases.

[4] United States *v.* Conant, *ante;* United States *v.* Cook, 17 Wall. 171 (1872): 6 *id.* 385. See R. S. §§ 5427, 5467, 5486, 5496.

[5] O. F. *emblér, emblader, blayer,* to sow with grain: *bled, blé,* corn, grain, "blade."

[6] Reiff *v.* Reiff, 64 Pa. 137 (1870), Read, J.; 1 Williams, Exec. 670, 672; Taylor, Landl. & T. § 543.

[7] Whitmarsh *v.* Cutting, 10 Johns. *361 (1813). See at length 2 Bl. Com. 122–23, 145–46.

[8] Hamilton *v.* Austin, 36 Hun, 142 (1885), Follett, J. See also 19 Am. Law Rev. 24–31 (1885), cases.

EMBRACERY.[1] An attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainment, and the like.[2]

Embraceer or embracer. One who attempts to influence a jury (or a juror) by corrupt or unlawful means.

EMERGENCY. See ACCIDENT; NEGLIGENCE.

Within the meaning of a statute against practicing medicine without a certificate, except where the services are gratuitous and "the case one of emergency," the reference is to a case in which the ordinary and qualified practitioners are not readily obtainable, not to a case in which the patient has been given up as incurable by physicians of the schools provided for by the statute.[3]

EMIGRATION. See IMMIGRATION; COMMERCE; EXILE, Ne exeat. Compare EXPATRIATION.

EMINENT. See DOMAIN, 1.

EMIT. See CREDIT, 2, Bill of.

EMOLUMENT. Any perquisite, advantage, profit, or gain arising from the possession of an office.

Imports, then, more than "salary" or "fees."[4] See FIX, 3; OFFICE, 1.

EMOTIONAL. See INSANITY.

EMPANEL. See PANEL.

EMPHYTEUSIS.[5] An estate in land, under the Roman law, analogous to a fee-farm, or perpetual lease, in English law.

It gave the occupant, or his transferee, a perpetual lease, conditioned upon payment of rent, and, perhaps, improvement of the land.

Whence emphyteutic.[6]

EMPLOYMENT.[7] Occupation; position involving business; service.

Employ. (1), *n.* Originally, the poetical form of employment.

(2), *v.* To engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs. Used with respect to a servant or laborer, equivalent to "hire."[8]

Employed. May refer to any present occupation, but commonly to continuous occupation.[1]

"Employed" in anything imports not only the act of doing it, but also being engaged to do it, being under contract or orders to do it.[2]

Employe, or employee; employer. "Employe" is from the French, but has become naturalized in our language. Strictly and etymologically it means "a person employed;" but in practice in the French language it ordinarily denotes a person in some official employment.[3]

"Employe" is the correlative of "employer." Neither term is restricted to any particular employment or service. "To employ" is to engage or use another as an agent or substitute in transacting business, or the performance of some service, it may be skilled labor or the service of the scientist or professional man as well as servile or unskilled manual labor.[4]

"Employe" usually embraces a laborer, servant, or other person occupied in an inferior position.[5]

Applies equally to a person within or without an office, whether a servant or a clerk. An "employee in an office" is a person engaged in the performance of the proper duties of an office, whether his duties are carried on within or without the walls of the building in which the chief officer transacts his business.[6]

The English form employee, though legitimate as conforming to analogy, is not sanctioned by the usage of good writers.[7]

See BOYCOTTING; BUSINESS; CONTRACTOR; GIFT; LABOR, 1; NEGLIGENCE; SERVANT; SUNDAY; TRADE.

EMPOWER. See AGENT; AUTHORITY, 1; DELEGATUS; POWER.

EMPTY. Ordinarily, to make void, exhaust, deprive of contents.

Section 3324, Rev. St., which makes it an offense to fail to obliterate a stamp at the time of "emptying" a cask of spirits, does not mean that absolutely every particle of the spirit be drawn off. The emptying intended is such as can be conveniently done by the ordinary method.[8]

Compare OCCUPIED; VACANT.

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[1] O. F. *embracer*, to clasp in the arms, embrace.

[2] 4 Bl. Com. 140. See Gibbs *v.* Dewey, 5 Cow. 505 (1826); State *v.* Sales, 2 Nev. 269 (1866); Hawk. Pl. Cr. 259.

[3] People *v.* Lee Wah, 71 Cal. 80 (1886).

[4] Apple *v.* Crawford County, 105 Pa. 303 (1884); Const. Pa. Art. III, § 13.

[5] Accent on -teu-. Gk. *emphyteuein*, to plant or improve land.

[6] See 3 Bl. Com. 232; Maine, Anc. Law, 289.

[7] F. *employer*, to involve, engage, occupy.

[8] McCluskey *v.* Cromwell, 11 N. Y. 599 (1854).

[1] Wilson *v.* Gray, 127 Mass. 99 (1879), Lord, J.

[2] United States *v.* Morris, 14 Pet. 475 (1840), Taney, C. J.; 2 Paine, C. C. 745; 22 Ohio, 194; 20 S. C. 4-5.

[3] Gurney *v.* Atlantic, &c. R. Co., 2 N. Y. Supr. Ct. 458 (1873), Talcott, J.

[4] Gurney *v.* Atlantic, &c. R. Co., 58 N. Y. 371 (1874), Allen, J.; Krauser *v.* Ruckel, 17 Hun, 465 (1879).

[5] People *v.* Board of Police, 75 N. Y. 41 (1878).

[6] Stone *v.* United States, 3 Ct. Cl. 262 (1867); Peck, J.

[7] Webster's Dict.

[8] United States *v.* Buchanan, 4 Hughes, 488 (1881).

EN. In; into.

1. The French form of the English and Latin preposition *in*. See IN, 1, 3 (2).

En autre droit. In right of another. See DROIT.

En fait. In fact; in deed.

En owel main. In equal hand. See OWELTY.

En route. On the way. See ROUTE.

En ventre. In the womb; unborn. See VENTER.

2. As a prefix, coincides with the Latin *in*.

Some English words are written indifferently *en-* or *in-*: as, encumber and incumber, endorse and indorse, enjoin and injoin. *In* seems to be preferred.

For ease of pronounciation, changes to *em-*, particularly before a labial: as, in embracery, employ, empower.

ENABLING. Describes an enactment which confers power to do a thing: as, statutes of wills, statutes permitting parties to testify; opposed to disabling or restraining acts or statutes.

ENACT. See ACT, 3, Enact.

ENCEINTE. See ANCIENT, 2; PREGNANCY; VENTER.

ENCHANTMENT. See WITCHCRAFT.

ENCLOSURE. Imports land enclosed with something more than the imaginary boundary line,—some visible or tangible obstruction, as, a fence, hedge, ditch, or an equivalent object, for the protection of the premises against encroachment, as by cattle.[1]

A tract of land surrounded by a fence, together with such fence: as, in a statute limiting one's right to distrain beasts to those doing damage within his enclosure.[2] See CLOSE, 3.

ENCROACH. To intrude upon, make gain upon, occupy, or use the land, right, or authority of another, as if by gradual or partial assumption of right. See PURPRESTURE.

ENCUMBER. See INCUMBER.

END. See AT, 2; FINAL; FINE; TERMINUS.

ENDORSE. See INDORSE.

ENDOW. 1. To confer rights of dower, *q. v.*

2. To make pecuniary provision for the support of a person or institution.

Endowment. The act of settling a fund upon one; also, such fund itself. Used of a policy of insurance payable at a certain age or at death.

An endowment policy is an insurance into which enters the element of life. In one respect it is a contract payable in the event of a continuance of life; in another, in the event of death before the period specified.[1]

By the endowment of a school, hospital, or chapel is commonly understood, not building or purchasing a site for the institution, but providing a fixed revenue for its support.[2]

The "endowment of a religious or educational corporation" refers to that particular fund, or part of the fund, of the institution, bestowed for its more permanent uses, and usually kept sacred for the purposes intended.[3]

ENEMY. A nation, or a citizen or subject thereof, at war with another nation.

Alien enemy. One who owes allegiance to a government at war with ours, dwelling within our territory or seeking some action from a department of our government.

Enemies of the United States. The subjects of a foreign power in a state of open hostility toward us. Does not embrace "rebels" in insurrection against their own government. An "enemy" is always the subject of a foreign power, who owes no allegiance to our government or country.[4]

"Rebels" and "enemies" may be synonymous for those who have cast off their allegiance and made war upon their own government. Who are enemies in a *civil war*, the law of nations has not defined; but, within the meaning of a confiscation act, the term may include those who are residents of the territory under the power of the parties resisting the regular government. . . In the case of a *foreign war*, applies to all who are inhabitants of the enemy's country, though not participants, and even though subjects of a neutral State, or even subjects of the government prosecuting the war against the State within which they reside.[5]

Public enemy. Referring to the undertaking of a common carrier, applies to foreign nations with whom there is open war, and to pirates, who are considered at war with all mankind; does not include robbers, thieves, rioters, insurgents, whatever be their violence, or Indians.[6]

[1] [Porter *v.* Aldrich, 39 Vt. 331 (1866): Act 1797, R. S. 612, § 4; *id.* 34.

[2] Taylor *v.* Wilbey, 26 Wis. 44 (1874); 34 *id.* 666.

[1] Brummer *v.* Cohn, 86 N. Y. 17 (1881), Andrews, J.

[2] [Edwards *v.* Hall, 6 De G. M. & G. *87, 83 (1855), Cranworth, Ld. C.

[3] State *v.* Lyon, 32 N. J. L. 361 (1867), Bedle, J.

[4] United States *v.* Greathouse, 4 Saw. 466 (1863), Field, J.

[5] Prize Cases, 2 Black, 674 (1862); Miller *v.* United States, 11 Wall. 310-12 (1870); Gates *v.* Goodloe, 101 U. S. 617 (1879); 20 How. 249; 21 W. Va. 357.

[6] Story, Contr. 752, Bailm. § 526; Southern Express Co. *v.* Womack, 1 Heisk. 269 (1870); 7 *id.* 625; State *v.* Moore, 74 Mo. 418 (1881); League *v.* Rogan, 59 Tex. 494 (1883); 4 Op. Att.-Gen. 81.

In a policy of marine insurance, "enemies" means "public enemies," those with whom a nation is at war.[1] See CARRIER, Common; TREASON; WAR.

ENFEOFF. See FEOFFMENT.

ENFORCE. See FORCE; PERFORMANCE.

ENFRANCHISE. See FRANCHISE, 2.

ENGAGEMENT. See AGREEMENT; ASSUMPSIT; CONTRACT; PROMISE; UNDERTAKING.

ENGINE. Includes a snare, which is a device or contrivance for killing game.[2]

Engineer. See ADMISSION, 2; COMMERCE.

ENGLAND; ENGLISH. See BOROUGH; CHANCERY; CHARITY, 2; CONSTITUTION; COURT; CY PRES; DESCENT, Canons of; EXTRADITION, 1; FEUD; KING; LATIN; LAW, Common; PARLIAMENT; STATUTE.

ENGRAVING. See COPYRIGHT; PRINT.

ENGROSS. 1. To write in a gross, *i. e.*, a large, hand; to copy in a fair hand: as, to engross an instrument on parchment. Whence engrosser, engrossing.

After a proposed statute has been read and acted upon a sufficient number of times, it is ordered to be engrossed.

"A bill ordered to be engrossed is to be written in a strong gross hand."[3] See GROSS.

2. At common law the offense of engrossing was the getting into one's possession, or buying up, large quantities of corn [grain] or other dead victuals, with intent to sell them again.[4]

An injury to the public. If permitted, one or more men could raise the price of provisions at will. The total engrossing of any other commodity, with intent to sell it at an unreasonable price, was also an indictable offense.[4] See COMBINATION, 2; CORNER; MONOPOLY.

ENHANCED. In an unqualified sense, is equivalent to "increased," and comprehends any increase of value, however caused or arising.

In Oregon if a husband aliens dowable lands, and they become "enhanced in value" thereafter, they shall be estimated, in setting forth the dower, according to their value when aliened. *Held*, that "enhanced" included only the value caused by improvements made, and not that which arises fortuitously, or from natural causes.[5]

[1] Monongahela Ins. Co. *v.* Chester, 43 Pa. 498 (1862); Vattel, Law of Nations, 367.

[2] Allen *v.* Thompson, L. R., 5 Q. B. *339 (1870).

[3] 1 Bl. Com. 153.

[4] 4 Bl. Com. 158.

[5] Thornburn *v.* Doscher, 33 F. R. 812 (1887), Deady, J.; 2 Or. Laws, § 2960. The syllabus (by the court) reads "not arising from improvements."

ENJOIN. See INJUNCTION.

ENJOYMENT. Possession; occupation; use; exercise.

Enjoyment as of right is an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission from time to time, on each occasion, or on many occasions, of using it; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user or by deed conferring the right, or, though not strictly legal, yet lawful to the extent of excusing a trespass.[1]

Adverse enjoyment. The possession or exercise of an easement or privilege under a claim of right against the owner of land.

If open, and continued without interruption for twenty years, a conclusive prescription of grant arises, provided that during the time there was some one in possession, qualified to resist the claim.[2] Compare POSSESSION, Adverse.

Quiet enjoyment. Peaceable, undisturbed possession of land.

Covenant for quiet enjoyment. A covenant in a conveyance or lease of land, engaging that the grantee or lessee shall be permitted to use the land unmolested.[3]

Every lease implies a covenant for quiet enjoyment. But it extends only to the possession; and its breach, like that of a warranty for title, arises only from eviction by means of title. It does not protect against entry and ouster of a tort-feasor. The tenant may call his landlord into his defense; and, if eviction follows as the result of a failure to defend him, he can then refuse to pay rent, and fall back upon this covenant for quiet enjoyment to recover his damages.[4]

A lease with an express covenant for quiet enjoyment implies a covenant that the lessor has title and power and right to convey it. The implied covenant is broken if the lessor has made a prior and still outstanding lease of part of the premises. A recovery of the premises by the prior lessee is such an eviction as constitutes a breach of the covenant for quiet enjoyment; and the lessee may recoup his damages from the rent due.[5]

See DEMISE; WARRANTY, 1.

ENLARGE. To extend, increase, lengthen the time of; also, to set at liberty.

Enlarge an estate. To increase the tenant's interest.

Enlarge an order or rule. To extend the time for complying with it.

[1] Tickle *v.* Brown, 31 E. C. L. 91 (1836), Denman, C. J.

[2] 2 Washb. R. P. 42, 43.

[3] 1 Washb. R. P. 325; 4 Kent, 474, *n.*

[4] Schuylkill, &c. R. Co. *v.* Schmoele, 57 Pa. 273 (1868); Mark *v.* Patchin, 43 N. Y. 171-72 (1870), cases.

[5] McAlester *v.* Landers, 70 Cal. 83-84 (1886), cases.

To "enlarge" and to "extend" the time for taking testimony may have different meanings in a particular case.[1]

Enlarging statute. Extends a right or a remedy as it exists at common law.[2]

ENLISTMENT. Either the complete act of entering into military service, or the first step taken toward that end.[3]

A technical term, derived from Great Britain. In the English Cyclopædia, defined to be "a voluntary engagement to serve as a private soldier for a certain number of years." Chambers defines it as "the means by which the English army is supplied with troops as distinguished from the conscription prevailing in many other countries."[4]

Has never included entry into service under commission as an officer.[5]

Public policy requires that a minor be at liberty to enter into a contract to serve the state, wherever such contract is not positively forbidden by the state itself. This at least is the common law of England.[6]

Rev. St., §§ 1116-17, authorizes enlistment in the army of men above the age of sixteen, no person under twenty-one to be mustered into service without the written consent of his parents or guardian.

A contract made by a minor over sixteen, without consent, can be avoided only by his parents, they claiming his custody before majority.[7]

Habeas corpus is the judicial proceeding to secure release of a minor whose parents did not consent to his enlisting.[8] See DESERTION, 3.

ENORMIA. L. Wrongs; unlawful acts.

Alia enormia. Other wrongful acts.

After a specific allegation of wrong done by a defendant, the plaintiff may further charge, generally, *alia enormia*, to the damage, etc.,—"and other wrongs then and there did against the peace," etc. Then, all matters naturally arising from the act complained of may be given in evidence.[9] See DAMAGES, Special.

ENQUIRY. See INQUIRY.

ENROLL. See ROLL; REGISTRY, Of vessels.

ENS. L. A being; a creature.

Ens legis. A creature of the law; an artificial person, a legal entity, a corporation.

[1] James v. McMillan, 55 Mich. 136 (1884).

[2] See 2 Bl. Com. 324; 1 *id.* 87.

[3] Tyler v. Pomeroy, 8 Allen, 485 (1864), Gray, J. See Erichson v. Beach, 40 Conn. 286 (1873); Sheffield v. Otis, 107 Mass. 282 (1871).

[4] Babbitt v. United States, 16 Ct. Cl. 213 (1880), Davis, J.

[5] Hilliard v. Stewartstown, 48 N. H. 280-81 (1869), Perley, C. J.

[6] Commonwealth v. Gamble, 11 S. & R. 94 (1824), Gibson, J.

[7] *Re* Hearn, 32 F. R. 141 (1887).

[8] *Re* Baker, 23 F. R. 30 (1885), cases; R. S. § 1117.

[9] 2 Greenl. Ev. §§ 268, 273, 278; 1 Chitt. Pl. 397; 3 Mass. 223; 15 *id.* 194.

ENTAIL. See TAIL.

ENTER. See ENTRY.

ENTERPRISE. See GIFT, 1.

ENTERTAINMENT. Public reception; something connected with the enjoyment of refreshment-rooms, tables, and the like.[1] See INN.

A public aquarium is a "place of entertainment and amusement," when a band plays and the fish are fed.[2] See EXHIBITION; THEATER.

ENTICE. See ABDUCTION; HUSBAND; PERSUADE.

ENTIRE. Untouched: complete; unbroken, whole; undivided, indivisible, inseverable: as, an entire — consideration, covenant, contract,[3] *q. v.* See SEPARABLE.

An entire claim arising out of one transaction, contract or tort, cannot be divided into separate and distinct claims. A verdict for one portion will bar an action on another.[4] See DAMAGES; MULTIPLICITY.

Entirely. "Entirely satisfied" implies a firm and thorough assent of the mind and judgment to the truth of a proposition; and this may exist, notwithstanding a possibility that the fact may be otherwise.[5]

Entirety. The whole, as opposed to a moiety.

If an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common; for, being one person in law, they cannot take the estate by moieties, but both are seized of the entirety,—the consequence of which is, that neither can dispose of any part without the assent of the other, but the whole must remain to the survivor.[6]

The right, at common law, to control the possession of the estate during their joint lives is in the husband. Subject to the limitation that neither can defeat the right of the survivor to the whole estate, the husband has such rights as are incident to his own property, and which he acquires in her realty. Having the usufruct of all her realty interests, by the weight of authority he may lease the estate during coverture. Statutes enabling married women to hold and dispose of their property as if sole do not affect this species of estate, unless expressly so stated.[7]

The survivor does not take as a new acquisition, but under the original limitation, his (or her) estate being simply freed from participation by the other; so that

[1] Muir v. Keay, L. R., 10 Q. B. 597-98 (1875).

[2] Terry v. Brighton Aquarium Co., L. R., 10 Q. B. 306 (1875). See Howes v. Board of Revenue, 1 Ex. Div. 335 (1876).

[3] See 2 Pars. Contr. 517.

[4] Phillips v. Berick, 16 Johns. 136 (1819).

[5] People v. Phipps, 39 Cal. 335 (1870).

[6] [2 Bl. Com. 182.

[7] Pray v. Stebbins, 141 Mass. 223-24 (1886), cases.

if, for instance, the wife survives and then dies, her heirs would take to the exclusion of the heirs of the husband. Nor can partition be made of the estate. During coverture the husband has control of the estate. Upon his death, the wife, or her heir, may enter without action against his alienee — by 32 Hen. VIII (1541), c. 28, which is in force in Kentucky, Massachusetts, Tennessee, and possibly in New York and New Jersey. Divorce of the wife from the husband restores her to her moiety. A grant or devise to them and another invests them with an entirety in one-half only. It is always competent, however, to make husband and wife tenants in common by proper words. The law of the States is not uniform on the subject.[1]

ENTITLE. See TITLE, 2.

ENTRAP. See DECOY.

ENTRY.[2] I. As relates to Property. The act of actually going upon land, or into a building.

At common law, an assertion of title by going upon the land; or, if that was hazardous, by "making continual claim."[3]

Taking possession of lands by the legal owner.[4]

1. An extrajudicial and summary remedy by the legal owner, when another person, who has no right, has previously taken possession of lands or tenements.

The party entitled may make a formal but peaceable entry thereon, declaring that thereby he takes possession, which notorious act of ownership is equivalent to a feudal investiture; or he may enter on any part of the land in the same county in the name of the whole; but if the land lies in different counties he must make different entries. If the claimant is deterred from entering by menaces he may "make claim" as near the estate as he can, with the like forms and solemnities, which claim is in force for a year and a day; and, if repeated once in the like period (called "continual claim"), has the same effect as a legal entry. Such entry puts into immediate possession him that has the right of entry, and thereby makes him complete owner, capable of conveying. But this remedy applies only in cases in which the original entry of the wrong-doer was unlawful, viz., in abatement, intrusion, and disseisin. In discontinuance and deforcement the owner of the estate cannot enter; for, the original entry being lawful, an apparent right of possession is gained, and the owner is driven to his action at law. In cases where entries are lawful, the right of entry may be "tolled," that is, taken away, by descent. Corresponds to recaption of personalty.[1]

Re-entry. The right reserved to consider a lease forfeited and to resume possession of the premises, upon failure in the lessee to perform a covenant; also, any exercise of this right.

This being a harsh power, the courts will restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised.[2]

When for rent in arrear, unless dispensed with by agreement or statute, demand of payment of the rent must first be made.[3]

2. On the subject of entry by a grantor for breach of condition by the grantee, see GRANT, 2.

3. Going upon the landed property of another for any other purpose than those above mentioned.

It is not a trespass to enter upon another's premises to abate a nuisance, retake goods, make repairs, demand rent, distrain, or capture an estray.[4] See TRESPASS, Ab initio.

Forcible entry. An entry made with violence, against the will of the lawful occupant, and without authority of law.

Such entry as is made with a strong hand, with unusual weapons, an unusual number of servants or attendants, or with menace of life or limb; not a mere trespass.[5]

"When a man enters peaceably into a house, but turns the party out of possession by force, or by threats frights him out of possession."[6]

It will be sufficient if the entry is attended with such a display of force as manifests an intention to intimidate the party in possession, or deter him from defending his rights, or to excite him to repel the invasion, and thus bring about a breach of the peace.[7]

Forcible entry and detainer. An offense against the public peace, committed by violently taking or keeping possession of lands and tenements by menaces, force, and arms, and without the authority of law.

The entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained by force, by violence and with unusual weapons.[8]

In early days, at common law, any man who had a right of entry upon lands was authorized to enter with

[1] 1 Wash. R. P. 425, cases; 4 Kent, 362; Chandler *v.* Cheney, 37 Ind. 394-414 (1871), cases; *Re* Benson, 8 Biss. 118-21 (1877); Jacobs *v.* Miller, 50 Mich. 124 (1883); Hadlock *v.* Gray, 104 Ind. 598 (1885); 25 Am. Law Reg. 369-74 (1886), cases; 18 Cent. Law J. 183-88, 326-29 (1884), cases; 5 Kan. Law J. 5 (1887), cases; Thornton *v.* Thornton, 3 Rand. 182-90 (Va., 1825), cases; 3 Lead. Cas. R. P. 143-58 (1887), cases.

[2] F. *entrer:* L. *in-trare*, to go into.

[3] [Innerarity *v.* Mims, 1 Ala. 674 (1840).

[4] Guion *v.* Anderson, 8 Humph. 306 (1847).

[1] 3 Bl. Com. 174-79, 5; 2 *id.* 314.

[2] The Elevator Cases, 17 F. R. 200 (1881).

[3] Johnston *v.* Hargrove, 81 Va. 121-23 (1885), cases.

[4] Keifer *v.* Carrier, 53 Wis. 404 (1881).

[5] Willard *v.* Warren, 17 Wend. 261 (1837).

[6] Bacon, Abridg.: Edwick *v.* Hawkes, 18 Ch. Div. 211 (1881). See also 8 Ala. 87; 9 Cal. 46; 21 N. J. L. 498.

[7] Ely *v.* Yore, 71 Cal. 133 (1886), cases.

[8] 4 Bl. Com. 148; Reeder *v.* Purdy, 41 Ill. 285 (1866).

force and arms, and by force and arms retain possession — provided, possibly, that the entry was not by a breach of the public peace. The general revision of the written law upon the use of force by an individual to establish his own rights, made by statute 8 Hen. VI (1429), c. 9, is substantially the origin of existing law upon the subject of forcible entry and detainer. Prosecution under this statute is by indictment. In Massachusetts, unless the entry and detainer is accompanied by an actual breach of the peace, the process is substantially a civil proceeding. Under either procedure the court will award restitution of the premises.[1]

The purpose of statutes forbidding forcible entry and detainer is, that, without regarding the actual condition of the title to property, where a person is in the peaceable and quiet possession of it he shall not be turned out by strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title or may have the better right to the present possession, but the policy of the law is to prevent disturbances of the public peace, to forbid any person righting himself, in a case of that kind, by his own hand and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been obtained; and that, when the parties are *in statu quo*, in the position they were in before the use of violence, the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance.[2]

If a claimant (a railroad company) of real estate, out of possession, resorts to force, amounting to a breach of the peace, to obtain possession from another claimant (also a railroad company) who is in peaceable possession, and personal injury arises therefrom, the party using the force is liable in damages, compensatory and punitive, for the injury, without regard to the legal title, or to the right of possession.[3]

4. Entrance into a dwelling-house with the whole or a part of the body, or with any implement for the purpose of committing a felony. See BURGLARY.

II. As a matter of Writing. Setting down in written characters; placing upon the record: recording.

1. Setting down in a book of accounts the particulars of a business transaction.

Original entry. The first statement made by a person in his account-books, charging another with money due upon a contract between them. Whence "book of original entries."[4] See further BOOK, Entries.

Short entry. It was a custom in London for bankers to receive bills for collection and to enter them immediately in their customers' accounts, but never to carry out the proceeds in the column to their credit until actually collected. This was called "short entry" or "entering short."[1]

2. The transaction by which an importer obtains entrance of his goods into the body of the merchandise of the country.

Until the entire transaction is closed, by a withdrawal and payment of the duties upon all the goods covered by the original paper called the **entry for warehouse**, the "false entry" contemplated by the act of Congress of March 3, 1863, is not completed.[2]

In the statutes in relation to duties, but one entry is referred to — the original entry provided, regulated, and defined by sections 2785-90, Rev. St. "Entry for withdrawal" is a misnomer.[3]

3. Filing or inscribing upon the records of a land-office the written proceedings required to entitle a person to a right of pre-emption or of homestead in public lands.

The act by which an individual acquires inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of the "entry-taker," an officer who corresponds in his functions to the register of land-offices.[4] See LAND, Public; PRE-EMPTION, 2.

4. Depositing for copyright the title or description of a book or other article.

Whence "Entered according to Act of Congress," etc. See COPYRIGHT.

5. Recording in due form and order a thing done in court: as, an appearance made, a judgment rendered. Styled "docket" or "record" entries.

When a written order is signed by the judge and filed with the clerk, who enters a brief statement thereof in his "minute-book, the order, although not then recorded in the order-book, is "entered," within the meaning of a law limiting the time for appeal.[5]

In a literal sense, writing up a judgment in a docket is "entering" it; as, entering the judgment of a justice of the peace.[6]

6. In the practice of legislative bodies, the orderly inscription in a journal of any action or determination required to be preserved in writing.

The constitution of Iowa requires that a proposed amendment "shall be entered" in the journals of the two houses of Assembly "with the yeas and nays."

[1] Hodgkins *v.* Price, 132 Mass. 200 (1882), Lord, J.; Presbrey *v.* Presbrey, 13 Allen, 284 (1866); 10 Oreg. 485.

[2] Iron Mountain & Helena R. Co. *v.* Johnson, 119 U. S. 611 (1887), Miller, J.

[3] Denver & Rio Grande R. Co. *v.* Harris, 122 U. S. 597, 605 (1887), Harlan, J. As to civil action, see 22 Cent. Law J. 292 (1886), cases.

[4] See generally Roche *v.* Ware, 71 Cal. 376-77 (1886), cases; Bridgewater *v.* Roxbury, 54 Conn. 213 (1886).

[1] Blaine *v.* Bourne, 11 R. I. 121 (1875), Potter, J.

[2] [United States *v.* Baker, 5 Bened. 35 (1871), Blatchford, J.; 12 St. L. 737.

[3] United States *v.* Seidenberg, 17 F. R. 230 (1883), Pardee, J.

[4] Chotard *v.* Pope, 12 Wheat. 588 (1827), Johnson, J.

[5] Uren *v.* Walsh, 57 Wis. 102 (1883); R. S. Wis § 3042.

[6] Conwell *v.* Kuykendall, 29 Kan. 707, 710 (1883); Kan. Comp. Laws, 1879, ch. 81, § 115.

This means that the amendment shall be spread at length thereon, and the yeas and nays set out in the journal in full. But instances where "to enter" and "entered" do not mean to spread at length may be cited. The object to be obtained must be considered in each case.[1] See YEAS AND NAYS.

III. As a Remedy. A "writ of entry," at common law, was a proceeding by which the possession of land, wrongfully withheld from its owner, could be recovered.

A real action, possessory in nature. In a greatly modified form, has been used in this country. In England, superseded by the action of ejectment, and, later, abolished.[2]

ENUMERATION. Separate mention.

The enumeration of particular things in an instrument may include others of the same class; there is no absolute rule that such enumeration includes things of a different class, when the general terms are broad enough to include them.[3] See EJUSDEM GENERIS; EXPRESSIO, Unius, etc.; GENERAL, 6; OTHER.

ENURE. See INURE.

ENVELOPE. See LETTER, 8; PUBLICATION, 2.

ENVOY. See MINISTER, 8.

EO. L. On that, in that; at the same. See Is.

Eo die. On the same day, at the same time; as, *eo die*, writ issued.

Eo instante. At the same moment or instant.

Eo nomine. In or under the same name; as, interest *eo nomine*.

EPIDEMIC. See DISEASE; HEALTH.

When, in a policy of insurance, it does not appear that the word "epidemics" was understood by the parties in any other than its popular sense, evidence is not admissible to change that meaning. The insurer may stipulate for exemption from liability for any disease that may by possibility prevail to an extent which could be called epidemic.[4]

EQUAL.[5] Compare EQUIVALENT.

Like or alike in quality, degree, amount, or merit; corresponding; uniform; the same: as, equal provision, equity, protection, rights.

Equal to. Not less than: as, in an agreement to keep the number of boats in a freight line "equal to" the number leased.[6]

Equally. In a will, may mean not that shares are to be held in the same manner, but as equal in quantity.[1]

A *per capita* division is intended by "divided equally," whether the devisees are children and grandchildren, brother or sisters, nephews or nieces, or strangers in blood to the testator.[2]

When a testator designates the objects of his gift by their relationship to a living ancestor, they take equal shares, *per capita*. But this rule will be controlled by the general intention of the testator.[3]

"Equality is equity," and where distribution is to be made among two or more, without anything to indicate the proportions, the presumption is that the shares are equal.[4]

An estate given to two persons, "equally to be divided" between them, is, under a *deed*, a joint tenancy; under a *will*, a tenancy in common. In the case of a deed is implied no more than the law has annexed to the estate, viz., divisibility; in the case of a will, the devisor may be presumed to have meant what is most beneficial to both devisees.[5]

Equality. Uniformity, likeness; sameness: as, of civil liberty. See CITIZEN, Amendment, XIV; EQUITY; TAX, 2.

EQUITABLE. See EQUITY, Equitable.

EQUITY.[6] 1. The point of contact between the law of nations (*q. v.*) and the law of nature was "equity;" a term which some derive from a Greek word denoting the principle of equal distribution: but that origin is to be preferred which gives the term the sense of "leveling." The civil law of Rome recognized many arbitrary distinctions between classes of men and property. The neglect of these distinctions was that feature of the law of nature which is depicted in equity. It was first applied, without ethical meaning, to foreign litigants.[7]

2. Equality of right; exact justice between contending parties; fairness in determining conflicting claims; justice.

3. That portion of natural justice which is

[1] Koehler *v.* Hill, 60 Iowa, 557, 556 (1883), Seevers, J.

[2] See 3 Bl. Com. 180.

[3] Corwin *v.* Hood, 58 N. H. 402 (1878); *Re* Swigert, 119 Ill. 89 (1886).

[4] Pohalski *v.* Mutual Life Ins. Co., 36 N. Y. Super. Ct. 252 (1873); affirmed, 56 N. Y. 640 (1874).

[5] L. *æqualis: æquus*, even, level, exact; just, right, fair.

[6] Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 517 (1875).

[1] Bannister *v.* Bull, 16 S. C. 227 (1881).

[2] Purnell *v.* Culbertson, 12 Bush, 370-71 (1876), cases.

[3] Young's Appeal, 83 Pa. 63 (1876), cases; Risk's Appeal, 52 *id.* 271 (1866); Harris's Estate, 74 *id.* 453 (1873); Walker *v.* Griffin, 11 Wheat. 375 (1826).

[4] Lewis's Appeal, 89 Pa. 513 (1879). See also 37 Ala. 208; 20 Conn. 122; 120 Mass. 135; 46 Md. 186; 37 Miss. 59; 46 N. H. 489; 30 N. J. E. 595; 33 *id.* 520; 70 N. Y. 512; 33 Ohio St. 328; 104 Pa. 637; 10 Gratt. 275; 4 Ired. E. 244; 5 *id.* 324; 6 *id.* 437; 10 Ves. 166; 8 Beav. 579; 4 Kent, 375; Roper. Leg. 88, 156.

[5] 2 Bl. Com. 193; 5 Cow. 221.

[6] L. *æquitas*, the quality of being *æquus*, even, level, equal, *q. v.*

[7] Maine, Ancient Law, p. 55.

made up of the decisions of the judges of the English court of chancery in the exercise of their extraordinary jurisdiction. See further CHANCERY.

"In this sense, equity is wider than law, and narrower than natural justice, in the *extent* of the subject-matters within its jurisdiction: it cannot be defined in its *content* otherwise than by an enumeration of the matters."

Not the chancellor's sense of moral right nor of what is equal and just, but a complex system of established law.[1]

That portion of remedial justice exclusively administered by a court of equity, as contradistinguished from the portion exclusively administered by a court of common law.[2]

In the most general sense we are accustomed to call that equity which, in human transactions, is founded in natural justice, in honesty and right, and which properly arises *ex æquo et bono*. In this sense it answers precisely to the definition of justice, or natural law, given by Justinian in his Pandects. And the word *jus* is used in the same sense in the Roman law. . . It would be a great mistake to suppose that equity, as administered in England and America, embraced a jurisdiction as wide and extensive as that which arises from the principles of natural justice above stated. Probably the jurisprudence of no civilized nation ever attempted so wide a range of duties for any of its judicial tribunals. Even the Roman law, which has been justly thought to deal to a vast extent in matters *ex æquo et bono*, never affected so bold a design. On the contrary, it left many matters of natural justice wholly unprovided for, from the difficulty of framing general rules to meet them, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, and kindness, or even to positive engagements of parties, where they are not founded in what constitutes a meritorious consideration. . . A still more limited sense of the term is that in which it is used in contradistinction to strict law — *strictum et summum jus*. Thus, Aristotle has defined the very nature of equity to be the correction of the law, wherein it is defective by reason of its universality. It is of this equity, as correcting, mitigating, or interpreting the law, that, not only civilians, but common-law writers, are most accustomed to speak.[3]

The general purpose of equity is to moderate the rigor of the law, supply its deficiencies, and bring it into harmony with conscience and moral justice.[4] See CONSCIENCE.

The term "equity" is also used, elliptically, for a court of equity or a court administering the principles of equity: as when it is said that equity will reform an instrument, or will afford relief or redress.

And "equities" is often employed to denote the several rights or interests, whatever they may be, belonging to one person or party, which will receive recognition and enforcement in a court of equity.[1]

"This court held that there was no equity in the bill, on the ground that, if the plaintiff had any right of action for money had and received, it was an action at law."[2] See DEMURRER, General.

Court of equity. The essential difference between a court of equity and a court of law consists in the different modes of administering justice in them, in the modes of proof, of trial, and of relief.[3]

A court of equity — (1) adapts its decrees to all the varieties of circumstances which may arise, and adjusts them to all the peculiar rights of all the parties in interest; whereas a court of common law is bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff or the defendant. (2) It can administer remedies for rights which a court of common law does not recognize at all; or, which, if recognized, are left wholly to the conscience and good-will of the parties. Such are trusts, many cases of losses and injuries by mistake, accident, and fraud; cases of penalties and forfeitures; cases of impending irreparable injuries, or meditated mischiefs; cases of oppressive proceedings, undue advantages and impositions, betrayals of confidence, and unconscionable bargains. (3) Remedies in a court of equity are often different, in nature, mode, and degree from remedies in a court of law, even when each has jurisdiction over the subject-matter. Thus, a court of equity, if a contract is broken, will often compel specific performance; whereas a court of law can only give damages for the breach. So, a court of equity will interfere by way of injunction to prevent wrongs; whereas a court of common law can grant redress only, when the wrong is done. (4) The modes of seeking and granting relief differ. A court of law tries a contested fact by means of a jury; and the evidence is generally drawn from third persons, disinterested witnesses. But a court of equity tries causes without a jury; and, addressing itself to the conscience, requires the defendant, under oath, to give his knowledge of the facts stated in a bill in the nature of a bill of discovery,[4] *q. v.*

Perhaps the most general, if not the most precise, definition of a court of equity is, that it has jurisdiction in cases of rights, recognized and protected by the municipal juris-

[1] Savings Institution *v.* Makin, 23 Me. 366 (1844), Shepley, J.

[2] [1 Story, Equity Jurisprudence, § 25.

[3] 1 Story, Eq. §§ 1-3, 6, 8. See also 1 Pomeroy, Eq., pp. 36-38, 308-21.

[4] 3 Pars. Contr. 393.

[1] See 1 Pomeroy, Eq. § 146.

[2] Ætna Life Ins. Co. *v.* Middleport, 124 U. S. 547 (1888), Miller, J.

[3] 3 Bl. Com. 426.

[4] 1 Story, Eq. §§ 28-31. See also 1 Pomeroy, Eq. §§ 129-45.

prudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law.[1]

In America, this branch of jurisprudence has grown up chiefly since the formation of the National government. It follows the model of the English court of chancery; except that, in some States, and in the National tribunals, it is administered by the common-law courts; in some the jurisdiction is very imperfect, in others scarcely known.[2]

The great advantage possessed by a court of equity is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally its jurisdiction is as well defined and limited as that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations. Generally its jurisdiction depends upon legal obligations and its decrees can only enforce remedies to the extent and in the mode established by law. It cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without authority of law. It acts upon established principles not only, but through established channels.[3]

Courts of law and of equity are independent. They act upon different principles, and, except where some recognized ground of equity jurisdiction is concerned, are each alike bound to recognize the validity and conclusiveness of the record of what the other has done. Equity, in such cases, does not contradict but supplements. It does in this way what right and justice require, and what, from the inflexibility of the principles upon which a court of law proceeds, it could not do.[4]

When a court of equity has once acquired jurisdiction of a cause it may go on to a complete adjudication, even to the extent of establishing legal rights and granting legal remedies.[5]

A too severe application of the common-law rules forced the courts of chancery into existence in England. The body of the chancery law is nothing more than a system of exceptions; of principles applicable to cases falling within the letter but not within the intention of particular rules. The exercise of equity powers, in every government of laws, is conclusive proof of a necessity that they be lodged somewhere. Every rule, from its universality, must be defective. A legislature can do little more than mark out general principles; their application, as well as the more minute details, must in general be left to the courts, as cases arise.[6]

The absence of a plain and adequate remedy at law affords the only test of equitable jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the pleadings.[1]

Where there is plain, adequate and complete relief at law, the defendant has a right to a trial by jury.[2]

The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes, or over the appointment and removal of public officers. To assume such a jurisdiction would be to invade the domain of the courts of common law, or of the administrative department of government. Any jurisdiction over criminal matters that the English court of chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of *habeas corpus* for the discharge of persons unlawfully imprisoned.[3]

Equity does not enjoin against a crime as a crime. But injunctions have often been granted against acts injurious to individuals, though they have also amounted to a crime against the public.[4]

The equity jurisdiction of the Federal courts is derived from the Constitution and laws of the United States, and is not affected by State statutes. Section 913 of the Revised Statutes, which declares that the modes of proceeding in equity causes shall be according to the principles, rules, and usages which belong to courts of equity, refers to the principles, rules, and usages by which the English court of chancery was governed at the time of the passage of the Judiciary Act in 1789.[5]

The test of equity jurisdiction in the Federal courts — namely, the inadequacy of the remedy at law — is the remedy which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Congress.[6]

The practice in a court of equity is regulated by law or rule, and cannot be varied by the agreement of parties.[7] See PROBATE, Court of.

Bill in equity. The document by which a suit is begun in a court of equity.

Is in the style of a petition; and in the nature of a declaration at law. Sets forth the circumstances of the case at length, alleging that a trust relation exists, or that some fraud, accident, mistake, or peculiar hardship exists or has been or is attempted; avers want of adequate relief at law; asks for a subpœna

[1] 1 Story, Eq. § 33.

[2] 1 Story, Eq. §§ 54–58.

[3] Reese *v.* City of Watertown, 19 Wall. 121-22 (1873), Hunt, J.

[4] Tilton *v.* Cofield, 93 U. S. 167 (1876), Swayne, J.

[5] Walters *v.* Farmers' Bank, 76 Va. 18 (1881); 1 Story, Eq. § 65; 1 Pomeroy, Eq. § 181.

[6] Pennock *v.* Hart, 8 S. & R. 378 (1822), Gibson, J.

[1] Watson *v.* Sutherland, 5 Wall. 79 (1866), Davis, J.; Buzard *v.* Houston, 119 U. S. 351–52 (1886), cases.

[2] Hipp *v.* Babin, 19 How. 278 (1856); Parker *v.* Winnipiseogee, &c. Co., 2 Black, 551 (1862), cases; Smith *v.* Bourbon County, 127 U. S. 111 (1888).

[3] *Re* Sawyer, 124 U. S. 210 (1888), cases, Gray, J.

[4] Sparhawk *v.* Union Passenger R'y Co., 54 Pa. 418 (1867), Strong, J.

[5] Strettell *v.* Ballou, 3 McCrary, 47 (1881), McCrary, J.; Boyle *v.* Zacharie, 6 Pet. 658 (1832); 3 Wheat. 212; 4 *id.* 115; 13 How. 271; 2 Black. 551; 1 McCrary, 162.

[6] McConihay *v.* Wright, 121 U. S. 206 (1887).

[7] Nickerson *v.* Atchison, &c. R. Co., 30 F. R. 86 (1886).

to compel respondent to answer the charges, and, perhaps, for an injunction. Calls into court as parties all persons interested in the subject-matter. Should contain no scandalous or impertinent matter. Filing the bill is followed, in different suits, by service of the subpœna, sequestration, appearance, demurrer, plea to the jurisdiction or to the person, answer, amendments, supplemental bills, cross-bills, decree or reference to a master for a report as to the facts and the form of a decree, exceptions to the report, final hearing, final decree, bill of review, appeal to a higher court. See further BILL, IV.

Better equity. A claim to property superior, in contemplation of a court of equity, to another claim.

In this category is a second mortgagee who has no knowledge of the existence of a prior unrecorded mortgage.

Countervailing equity. Such equity as offsets or counteracts another equity; an adverse counter-balancing right or equity.

Equal equity. Equality of equitable right.

Exists between persons who have been equally innocent and equally diligent.[1]

Equity of a statute. The intention of the law-maker, as evinced by the spirit and reason of an enactment. See further STATUTE.

Equity of redemption. The reasonable time within which a mortgagor may redeem his estate after forfeiture. See further REDEEM.

Equity of settlement; wife's equity. See SETTLE, 8.

Secret equity. An interest or claim, cognizable in a court of equity, of which notice has been withheld from one or more interested persons or from the public generally.

Equitable. 1. According to natural right or justice; just and right in a particular case, as distinguished from the strict rule of a general, positive law. Opposed, *inequitable.*

2. That which can be sustained or made available or effective in a court of equity, or upon principles of equity jurisprudence.[2] Opposed, *legal.*

The remedies for the redress of wrongs and the enforcement of rights are: (1) those which are administered in courts of common law; and (2) those which are administered in courts of equity. Rights which are recognised and protected, and wrongs which are redressed, by the former courts are called "legal" rights and "legal" injuries. Rights which are recognized and protected, and wrongs which are redressed, by the latter courts only, are called "equitable" rights and "equitable" injuries. The former are said to be rights and wrongs at common law, and the remedies, remedies at common law; the latter, rights and wrongs in equity, and the remedies, remedies in equity.[1]

It is customary to speak of "equitable" (and legal) — action, assets, assignment, consideration, conversion, defense, estate, estoppel, execution, interest, jurisdiction, levy, lien, mortgage, owner, plaintiff, remedy, title, value, waste, *qq. v.*

In the Federal courts, the distinction between legal and equitable proceedings is strictly maintained; distinct proceedings must be instituted for the enforcement of equitable rights.[3]

Separate courts of equity exist in Alabama, Delaware, Kentucky, Maryland, Mississippi, New Jersey, and Tennessee. In Arkansas, Connecticut, Florida, Georgia, Illinois, Iowa, Maine, Massachusetts, Michigan, New Hampshire, North Carolina, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, and West Virginia, chancery powers are exercised by the judges of the common-law courts. In the other States, the distinction between actions at law and suits in equity have been abolished, but certain equitable remedies are still administered under the statutory form of the civil action.[3]

In a given case equity jurisdiction may be *exclusive* of the law, *auxiliary* to it, *remedial* of it, or *concurrent* with it — that is, executive, adjustive, or protective.[4]

Maxims embodying fundamental principles upon which equity jurisprudence rests, are: Equity, once having had, does not lose, jurisdiction; follows the law — in affording redress;[5] assists the vigilant; suffers no right to be without a remedy; suffers the law to prevail, where there is equal equity or equality; delights in equality — is equality;[6] requires that he who seeks equity must do equity — must come with clean hands;[7] as to the particular transaction in review;[8] looks on that as done which ought to be done[9] — imputes intention to fulfill obligations; delights to do justice, and that not by halves. Nothing can call forth a court of equity into activity but conscience, good faith, and reasonable diligence.[10]

See further terms in this title, and, especially, ACCI-

[1] See Boone *v.* Chiles, 10 Pet. *210 (1836).

[2] [Abbott's Law Dict.

[1] 1 Story, Eq. § 25.

[2] See Gibson *v.* Chouteau, 13 Wall. 102 (1871).

[3] See Bispham, Eq. § 15; 1 Story, Eq. §§ 56–58.

[4] Smith, Manual Eq. 33.

[5] 107 U. S. 11; 110 *id.* 284, 291.

[6] 101 U. S. 406; 109 *id.* 512.

[7] 108 U. S. 225; 109 *id.* 526.

[8] 26 Wend. 166; 1 Black, 93.

[9] 3 Wheat. 578; 50 Conn. 111.

[10] 1 How. 189, 168; 95 U. S. 160. See generally 1 Story, Eq. §§ 59–74; 1 Pomeroy, Eq., Ch. I, § 363; early English equity (uses and contracts), 1 Law Quar. Rev. 162–74 (1885), O. W. Holmes, Jr.; common law and conscience in the ancient court of chancery, *ib.* 443–54 (1885), L. Owen Pike; the administration of equity through

DENT; ADEQUATE, 2; DISCOVERY, 6; ELECTION, 2; FICTION; FRAUD; HEARING; IGNORANCE; ISSUE, 4; MASTER, 4; MISTAKE; PARTY, 2; PATENT, 2; PEACE, 1, Bill of; PERFORMANCE, Specific; PREJUDICE, Without; QUIA TIMET; RECEIVER, 2; REFORM; RELIEF, 2; RESCISSION; SATISFACTION, (2); SEQUESTRATION, 2; SET-OFF; TRUST, 1; USE, 3.

EQUIVALENT.[1] 1, *adj.* (1) Equal in force or power, in effect or import: as, equivalent — terms, stipulations.

(2) Equally good: as, the equivalent chemical action of fluids.[2]

2, *n.* A device or machine operating on the same principle and performing the same functions, by analogous means or equivalent combination, as another device or machine.[3]

Only those things are equivalents which perform the same functions in substantially the same way. Thus, celluloid is not an equivalent for hard rubber.[4]

The substantial equivalent of a thing is the same as that thing itself. Two devices which perform the same functions in substantially the same way, and accomplish substantially the same result, are the same, though they differ in name and form.[5]

A patentee is protected against equivalents for any part of his invention. But a process is not infringed by the use of any number of its stages less than all of them.[6]

Equivalents may be claimed by the patentee of an invention consisting of a combination of old elements or ingredients, as well as of any other valid patented improvement, provided the arrangement of the parts comprising the invention is new, and will produce a new and useful result. The term as applied to such an invention is special in its signification and somewhat different from what is meant when applied to an invention consisting of a new device or an entirely new machine.[7]

An equivalent for an ingredient of a combination of parts that are old must be one which was known at the date of the original patent as a proper substitute for the ingredient left out. An equivalent in such case performs the same function as the other.[8] See COMBINATION, 1; PATENT, 2.

EQUIVOCAL. See AMBIGUITY.

ER. The Teutonic form of the Latin *or* in terminations.

Annexed to words of English origin. See OR, 1.

ERASURE. See ALTERATION, 2.

ERECT.[1] 1. To lift up, build, construct: as, to erect — a building, a fixture.

A house cannot be said to be erected until substantially completed; before that it is a structure, not a "building erected" for a purpose.[2]

Removing a building is not erecting it;[3] nor is elevating and materially enlarging it.[4] But erecting or repairing may include painting.[5]

An erection is a construction.[6]

A public grant conditioned on the "erection" of buildings is satisfied by the purchase of buildings already erected.[7] See STRUCTURE.

2. To found, form, institute, establish, create: as, to erect — a new county, a district for election or judicial purposes, a corporation.[8]

ERIE, LAKE. See LAKES.

ERMINE. 1. The *mustela erminea*, Armenian rat; the fur of which is pure white in winter time.

2. The dignity of judges, whose state robes, lined with the fur of the ermine, are regarded as emblematical of purity.[9] Whence **judicial ermine**, for judicial integrity. See GOWN, 2.

ERRATUM. L. Error.

In nullo est erratum. In nothing is there error. The emphatic words of a joinder of issue on an assignment of error, as originally expressed.

By this plea the defendant admits a fact regularly assigned.[10] The plea is in the nature of a demurrer.[11] See ERROR, 2 (3), Writ of.

ERRONEUS. See ERROR, 2 (2), Erroneous.

ERROR. 1. Lat. A wandering; a mistake; an error. Compare ERRATUM.

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common-law forms, *ib.* 455–65 (1885), S. G. Fisher; brief survey of equity jurisdiction, 1 Harv. Law Rev. 55–72, 111–131, 355–87 (1887), cases, C. C. Langdell.

[1] L. *æquus*, equal, *valere*, to be strong, be worth.

[2] Tyler *v.* City of Boston, 7 Wall. 330 (1868).

[3] See McCormick *v.* Talcott, 20 How. 405 (1857), Grier, Justice.

[4] Goodyear Vulcanite Co. *v.* Davis, 102 U. S. 230, 222 (1880), Strong, J.

[5] Union Paper-Bag Machine Co. *v.* Murphy, 97 U. S. 125 (1877), Clifford, J.

[6] Goodyear Co. *v.* Davis, *supra;* Crouch *v.* Boemer, 103 U. S. 797 (1880).

[7] Imhaeuser *v.* Buerk, 101 U. S. 655 (1879), Clifford, J.

[8] Gill *v.* Wells, 22 Wall. 2, 28 (1874), cases, Clifford, J. See Gage *v.* Herring, 107 U. S. 647 (1882); 1 Wall. 573; 8 *id.* 328.

[1] L. *erectus*, set up, upright: *erigere*, *eregere*, to raise or set up.

[2] McGary *v.* People, 45 N. Y. 161 (1871), Allen, J.

[3] Brown *v.* Hunn, 27 Conn. 332 (1858).

[4] Douglass *v.* Commonwealth, 2 Rawle, 264 (1830).

[5] Martine *v.* Nelson, 51 Ill. 423 (1869).

[6] Trask *v.* Searle, 121 Mass. 231 (1876); 2 Allen, 159.

[7] Kiefer *v.* German American Seminary, 46 Mich. 641 (1881).

[8] 1 Bl. Com. 469–71, 472, 474.

[9] [Webster's Dict.

[10] Burkholder *v.* Stahl, 58 Pa. 377 (1868).

[11] Bragg *v.* Danielson, 141 Mass. 195 (1886); 9 Mass. 532; 7 Wend. 55.

Communis error facit jus. A common error makes the law. Long-continued practice, though originally erroneous, establishes the rule of law.

A maxim or procedure, purely; briefly stated as the rule of *communis error*.

A received doctrine shall not be overturned or abandoned, even though its soundness in principle may be questioned. "It is more material that the law should be settled than how it is settled." [1]

"We are not inclined by a technical exposition of an act to unsettle rights honestly acquired and upon which many persons have rested for years." [2]

The executive branch of a government must necessarily construe the laws which it executes; and its construction, which has been followed for years, without interference by the law-making power, should not be departed from without the most cogent reasons. A long-continued practice under such circumstances ripens into an authoritative construction. The law, in its regard for the public good, goes so far, in some cases, as to hold that *communis error facit jus;* but courts should be slow to set up a misconception of the law as the law.[3]

Long acquiescence in repeated acts of legislation on particular matters is evidence that those matters have been generally considered by the people as properly within legislative control. Such acts are not to be set aside or treated as invalid, because upon a careful consideration of their character doubts may arise as to the competency of the legislature to pass them.[4]

See CONSENSUS, Tollit, etc.; EXPOSITIO, Contemporanea, etc.

2. Eng. (1) A mistake; an omission.

Clerical error. A failure to reduce the intent of parties to writing, not affecting the intent itself.

Attributable to carelessness or miswriting; and disregarded or corrected.

Also, a mistake of a clerk in preparing a record. See MISPRISION, 2.

(2) An unintentional deviation from the truth in a matter of fact, and from the law in a matter of opinion or decision.

Such irregularity, misconception, or wrong application of the law as directs that the proceeding should be reversed on appeal or writ of error.

[1] Forsythe, Hist. Lawyers, 395, quoting Lord Eldon.

[2] Kostenbader *v.* Spotts, 80 Pa. 437-38 (1876); 13 *id.* 561; 78 *id.* 308; Gelpcke *v.* Dubuque, 1 Wall. 175 (1863); Herndon *v.* Moore, 18 S. C. 354 (1882): 2 Whart. Ev. § 1242.

[3] Harrison *v.* Commonwealth, 83 Ky. 170 (1885); Robertson *v.* Downing, 127 U. S. 613 (1888), cases.

[4] Maynard *v.* Hill, 125 U. S. 204 (1888), Field, J., on the power of a legislature to grant a divorce by a special act; also, Cronise *v.* Cronise, 54 Pa. 261 (1867).

Applied where the practice of a colony differed from the requirements of the law of England as to a wife's acknowledging a deed,—1 Dallas, *13, 17.

Erroneous. Deviating from the law.

What is "illegal" lacks authority of or support from law. "Erroneous rulings" always mean such as deviate from or are contrary to law. "Erroneous" alone never designates a corrupt or evil act. "Erroneous and illegal" means deviating from the law because of a mistaken construction.[1]

An "erroneous judgment" is rendered according to the course and practice of the courts, but contrary to law. An "irregular judgment" is contrary to the course and practice of the courts.[2]

(3) A writ of error: as in saying that error lies or does not lie, that a judgment may be reversed or was reversed "on error," and in speaking of the plaintiff and the defendant "in error."

Assignment of error; specification of error. The statement of the error which an inferior tribunal is alleged to have committed; also, the paper containing such statement.

Spoken of as "cross," when made upon the same matter as is alleged for error by the opposite party; as "general," when upon more matters than one; and as "specific," when upon some one matter in particular. General assignments of error are not tolerated.

Court of errors. A court for correcting errors made in administering the law in subordinate tribunals. See PAPER, 5.

Error coram nobis; error coram vobis. When a writ was had to re-examine a judgment, in a civil or criminal cause, in the court of king's bench, by that court itself, it was called "a writ of error *coram nobis*," that is, error before us—the sovereign; when to re-examine a judgment rendered in the common pleas, in a civil case only, by the king's bench, it was called "a writ of error *coram vobis*," that is, error before you—the chief justice and associates.

The writ *coram vobis* was also brought before the same court in which the error was committed to supply or rectify a mistake of fact not put in issue or passed upon by the court; such as the death of a party when the judgment was rendered, coverture of a female party, infancy and failure to appoint a guardian, error in the process, or mistake of the clerk. But if the error was in the judgment itself the writ did not lie.

The two expressions are now applied, respectively, to a writ to review proceedings, not carried to judgment, had in the same court (before us), and to a writ issued to bring up for revision a record of what was done in an inferior court.

[1] [Thompson *v.* Doty, 72 Ind. 338 (1880), Elliott, J.

[2] Wolfe *v.* Davis, 74 N. C. 599 (1876), Reade, J. See Koonce *v.* Butler, 84 *id.* 228 (1881).

What was formerly done by the writ *coram nobis* is now attained by motion and affidavit.[1]

Error in fact. Such matter of fact, not appearing on the record, as renders the judgment entered unsupportable in law; as, infancy or coverture in a party.

A fact that might have been taken advantage of in the court below is not assignable for error; nor is a fact that contradicts the record.[2]

Error in law. Any substantial defect in the proceedings not cured by the common law nor by statute, injurious to and not waived by the complainant, and made to appear on the record, is assignable for reversal; also, any incorrect decision on a right of either party, as presented by the pleadings, special verdict, bill of exceptions, or opinion filed.

Reviewable errors in law are: those apparent upon the face of the record,—available on general demurrer or in arrest of judgment; and, those brought up by a bill of exceptions,—objections to the admission or rejection of evidence and errors in the charge of the court.

Error of fact. When a fact is unknown, or is erroneously supposed to exist.

Error of law. When a person is acquainted with the existence or non-existence of a fact, but is ignorant of the legal consequence, he is under an error of law.[3] See IGNORANCE.

No error. The form of the judgment of the court of appeals of Connecticut, affirming the decision of the lower court.

Writ of error. A commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse the same according to law.[4]

An original writ, and lies only where a party is aggrieved by some error in the foundation, proceedings, judgment, or execution, of a suit in a court of record.[5]

The supervisory court is called "the court of error."

In the nature of a suit or action, when to restore one to the possession of a thing withheld from him. Submits the judgment to re-examination; operates only upon the record — which is removed into the supervisory tribunal; is the more usual mode of removing suits at common law, and the more technically proper where a single point of law, and not the whole case, is to be re-examined.[1]

Must be regular in form and duly served. To operate as a *supersedeas* and stay of execution, must be issued and returned within a given period from the date of the judgment.[6]

On review nothing is error that is not made to appear on the face of the record. Error will be inferred only when the inference is inevitable. Every error apparent is open to re-examination.[8]

A writ of error lies in all cases where a court of record has given a "final" judgment, or made an award in the nature of a judgment, or where a judgment has been arrested, or, on an appeal from a justice, has been dismissed; also, on an award of execution.[4]

Proceedings in a court of error assimilate themselves to proceedings in a court of original jurisdiction. The writ of error in a general way recites the cause of complaint, and it is left to the assignments of error to specify it as a declaration specifies the cause of action. The plea *in nullo est erratum* raises the issue. Like a declaration, therefore, each assignment must be complete in itself, that is, be self-sustaining. Whatever is part of it must be parcel of it. The burden rests upon the plaintiff to make out his assignments affirmatively.[8] See ERRATUM.

A writ of error lies from inferior criminal jurisdictions to the court of king's bench, and from the king's bench to the house of peers; and may be brought for "notorious mistake" in the judgment or other part of the record, or for an irregularity, omission, or want of form, in the process. . . To reverse a judgment in the case of a misdemeanor, allowed, not of course, but on sufficient probable cause shown to the attorney-general,— then grantable of common right and *ex debito justitiæ*. But a writ to reverse an attainder in a capital case is only allowed *ex gratia;* and not without express warrant under the king's sign-manual, or at least by consent of the attorney-general.[6]

See APPEAL, 2; CERTIORARI; EXCEPTIONS, 4, Bill of; PROSECUTE, With effect; REVIEW, 2, Bill of; SUPERSEDEAS.

ESCAPE.[7] 1, *n.* (1) Flight from custody, of a person under lawful arrest.

[1] Pickett *v.* Legerwood, 7 Pet. 147-48 (1833); *Exp.* Lange, 18 Wall. 195 (1873), cases; Bronson *v.* Schulten, 104 U. S. 410, 416-17 (1881); 1 Flip. 343; 3 Chitty, Bl. Com. 406; 4 Crim. Law Mag. 364, 371; 34 Pa. 95.

[2] Tidd, Pr. 1169; 2 Bac. Abr. 492.

[3] [Mowatt *v.* Wright, 1 Wend. 360 (1828), Savage, C. J.

[4] Cohens *v.* Virginia, 6 Wheat. 409 (1821), Marshall, Chief Justice.

[5] Suydam *v.* Williamson, 20 How. 427 (1857), Clifford, J.

[1] Cohens *v.* Virginia, *ante*.

[2] Slaughter-House Cases, 10 Wall. 290 (1869), cases; Kountz *v.* Omaha Hotel Co., 107 U. S. 381-85 (1882); Murdock *v.* City of Memphis, 20 Wall. 621 (1875).

[3] 6 Wheat. 409-11, *ante;* 20 How. 427; 16 Wall. 363, 386; 100 U. S. 690.

[4] Pontius *v.* Nesbit, 40 Pa. 310 (1861).

[5] Burkholder *v.* Stahl, 58 Pa. 376 (1868), Thompson, C. J.; Bragg *v.* Danielson, 141 Mass. 195 (1886).

[6] 4 Bl. Com. 391; 4 Burr. 2550. See also 3 Dall. 327; 7 Cranch, 111; 61 Ala. 484; 3 Col. 293; 6 Fla. 289; 13 Ga. 148; 20 *id.* 535; 1 Wash. T. 319.

[7] F. *escaper*, to slip out of one's cape: L. *ex cappa*,— Skeat. F. *escamper*, to flee: Ger. *champf*, combat,— Webster.

(2) Allowing any person lawfully in confinement to leave the place.[1]

Actual escape. Complete corporal freedom. **Constructive escape.** Any unauthorized relaxation of custody.

Negligent escape. Effected without the keeper's knowledge or consent. **Voluntary escape.** Expressly consented to by the keeper.[2]

Any liberty given for the briefest period, and not sanctioned by law, is an escape. But the court must have had jurisdiction, the process have been regular, and the place and time proper. At common law an escape is a misdemeanor in the prisoner; and, if the offense is a felony, a voluntary escape is a like felony, and a negligent escape is a misdemeanor, in the officer. An escape resulting from an act of God or of the public enemy will be excused.[3]

Formerly, when imprisonment was the only mode to enforce satisfaction of a judgment for money, to permit an escape was to lose the amount of the debt. Hence, on an escape, the sheriff was held for the whole debt.[4]

An officer of the United States who voluntarily suffers a prisoner in custody under the law of the United States to escape shall be fined not more than two thousand dollars or imprisoned not more than two years, or both.[5]

2, *v.* To be passed by unobserved; to be overlooked.

"To escape taxation" does not mean to be taxed insufficiently, but to have avoided notice, to be passed unobserved, to have evaded taxation.[6]

3, *n.* Means of retreat. See DEFENSE, 1; FIRE, Escape.

ESCHEAT.[7] In feudal law, the determination of the tenure or dissolution of the bond between lord and tenant from extinction of the blood of the latter by natural or civil means.[8]

Thus, if the tenant died without heirs of his blood, or if his blood was corrupted by commission of treason or felony, whereby the inheritable quality was blotted out, the land "fell back" to the lord of the fee — the tenure being determined by breach of the condition.[9] See ATTAINDER.

The word, originally French or Norman, signifying chance or accident, now denotes obstruction of the course of descent, and determination of tenure, by some unforeseen contingency; in which case the land naturally results back, by a kind of reversion, to the original grantor.[1] See DESCENT.

2. In the United States, a reversion of property to the State in default of a person who can inherit it.

Depends upon positive statute, which makes the State the heir of the property. Nothing about it but the name is feudal.[2]

Escheator. An officer who takes charge of escheated estates for the government.

ESCROW.[3] An instrument delivered to a third person to hold till some condition is performed by the proposed grantee. A scrowl or writing not to take effect as a "deed" till the condition is performed.[4]

As defined by the common law, a written instrument delivered to a third person to take effect upon the happening of a contingency. Originally applied to a deed; then to written contracts generally.[5]

Nothing passes unless the condition is performed. There can be no delivery, as an escrow, to the grantee himself. When justice requires, it may take effect by relation back to the first delivery.[6] See DELIVERY, 4.

ESNECY. Eldership; the privilege of the eldest. The right in the oldest coparcener first to choose a purpart.

ESPLEES.[7] The products of the land: herbage, hay, grain; rents, services, etc.[8]

ESQUIRE.[9] 1. A title of dignity next below knight, and above gentleman.

2. A title acquired by virtue of office; as, justices of the peace, the higher officers of the courts, and others who bear any office of trust under the crown.

3. A title given to a member of the legal

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[1] 2 Bish. Crim. L. §§ 917, 1026; 1 Russ. Cr. 416; Colby Sampson, 5 Mass. *312 (1809), Parsons, C. J.

[2] 3 Bl. Com. 415, 290, 165. See also 32 Ark. 126; 8 ed. L. 151; 25 N. H. 258; 46 N. J. L. 358; 29 Pa. 446; 3 Head, 137.

[3] 4 Bl. Com. 129.

[4] Dow *v.* Humbert, 91 U. S. 300 (1875), cases.

[5] R. S. § 5409.

[6] Lehman *v.* Robinson, 59 Ala. 240 (1877).

[7] O. Eng. *eschete: F. eschet*, that which falls to one: *eshoir*, to happen. See CHEAT.

[8] 1 Bl. Com. 72.

[1] 2 Bl. Com. 244.

[2] Wallace *v.* Harmstad, 44 Pa. 501 (1863). See Hughes *v.* State, 41 Tex. 17 (1874); 4 Kent, 424; 1 Washb. R. P. 24, 27; 2 *id.* 443; Williams, R. P. 121.

[3] F. *escrowe*, scroll

[4] [2 Bl. Com. 307.

[5] Alexander *v.* Wilkes, 11 Lea, 225 (1883), Cooper, J.

[6] See County of Calhoun *v.* American Emigrant Co., 93 U. S. 127 (1876), cases; Shoenberger *v.* Hackman, 37 Pa. 94 (1860); Baum's Appeal, 113 *id.* 58, 65 (1886), cases; Daggett *v.* Daggett, 143 Mass. 520 (1887), cases; 28 Am. Law Reg. 697-99 (1880), cases; 19 Cent. Law J. 127-28 (1884), cases — Solic. Jour.; 4 Cranch, 219; 14 How. 73; 59 Cal. 309, 620; 14 Conn. 270; 34 *id.* 92; 14 Ga. 145; 34 Ill. 29; 77 *id.* 480; 29 Minn. 249; 30 *id.* 315; 2 Johns. 253; 26 N. Y. 492; 14 Ohio St. 309; Smith, Contr. 7.

[7] Es-plees'. L. *esples:* L. *explere*, to fill up.

[8] 8 Cranch, 249; 9 Barb. 293; 11 S. & R. *275.

[9] F. *escuyer, escuier*, a shield-bearer: *ecu, escu:* L. *scutum*, a shield.

profession, by virtue of length of enjoyment.[1]

4. In the United States, a title of courtesy. Abbreviated Esq., 'Squire or Squire.

ESSE. See IN ESSE.

ESSENCE. See TIME.

ESSOIGN.[2] In old law, an excuse for non-appearance.

"Essoign-day" was for hearing such excuses,—the first day of each term.[3]

ESTABLISH.[4] To settle certainly, fix permanently, what was before uncertain, doubtful, or disputed; as, to establish a boundary line.[5]

To set or fix firmly, settle or found permanently, erect something.[6]

Authority to establish a thing contains authority to do acts which will produce or bring into existence something; as, authority to establish a market.[6]

In a grant of power "to establish" a market, a dispensary, etc., means to permanently create or found.[7]

To establish a company for any business means to make complete and permanent provision for carrying on that business.[8]

A county seat is permanently established at a place when placed there with the intention that it shall remain.[9] See COUNTY.

The right to establish a market includes the right to shift it from place to place, as convenience demands; but gives no right to build one on the public highway.[10] Compare PERMANENT.

Power to establish includes the power to discontinue post-offices, unless the exercise is restrained by Congress.[11]

In the Constitution the word is used in somewhat different senses: "to establish justice" seems to mean to settle firmly, fix unalterably, dispense or administer justice; "to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcy," is equivalent to to make or to form, and not to fix or settle unalterably or forever; "to establish post-offices and post-routes" means to create, found, and regulate; to "establish this Constitution" signifies to create, ratify, confirm it.[12] See further RELIGION.

[1] See 1 Bl. Com. 406.

[2] F. *essoine*, excuse.

[3] See 3 Bl. Com. 277.

[4] F. *establir*: L. *stabilis*, steady, firm: *stare*, to stand.

[5] Smith *v.* Forrest, 49 N. H. 237 (1870), Nesmith, J.

[6] [Ketchum *v.* City of Buffalo, 21 Barb. 298, 296 (1854); 27 *id.* 260; 28 *id.* 65.

[7] Ketchum *v.* City of Buffalo, 14 N. Y. 361 (1856).

[8] Davidson *v.* Lanier, 4 Wall. 455 (1866).

[9] Newton *v.* Mahoning County, 100 U. S. 562 (1879); Mead *v.* Ballard, 7 Wall. 290 (1868); Wright *v.* Nagle, 101 U. S. 796 (1879); 13 Ill. 463.

[10] Wartman *v.* Philadelphia, 33 Pa. 210 (1859).

[11] Ware *v.* United States, 4 Wall. 632 (1866).

[12] 1 Story, Const. § 454.

ESTATE.[1] 1. Standing: condition, category, state, *status*.

2. Position; rank in life; degree: as, an addition of estate.[2] See ADDITION, 2; NECESSARIES.

Estates of the realm. The three branches of the English legislature: the lords spiritual, the lords temporal, and the commons.[3]

3. (1) (Subjective idea.) Estate in lands, tenements, and hereditaments: such interest as the tenant has therein.[4]

In Latin *status*, the condition or circumstances in which the owner stands with regard to his property.[4]

Does not import a fee or even a freehold, but any legal interest in land.[5]

The quantity of interest which a person has, from absolute ownership down to naked possession.[6]

The condition, in respect to property, of an individual: as, in speaking of the estate of an insolvent or of a deceased person. Here, indebtedness, as well as ownership, is part of the idea. Debts and assets together constitute the estate; if an estate consisted of assets only, the expression insolvent estate would be a misnomer.[7]

(2) (Objective idea.) The thing itself of which one is owner; any species of property, real or personal. Equivalent to the more technical expression, "things real and things personal." More specifically, realty, land, "landed estate."[8]

Sometimes excludes realty; sometimes is a word of mere local description, as, "my estate at" such a place. But when it can be construed to intend all one's realty it carries a fee, as, in devises.[9]

Unless limited by some special epithet or some association, construed to mean all one's property; but "real" or "personal" puts the matter beyond cavil.[10]

[1] F. *estat*: L. *status*: *stare*, to stand.

[2] State *v.* Bishop, 15 Me. 124 (1838).

[3] See 1 Bl. Com. 153, 157.

[4] 2 Bl. Com. 103; 66 Ga. 711; 2 Wall. 500.

[5] Inhabitants of Sunbury *v.* Inhabitants of Stow, 13 Mass. *464 (1816).

[6] Jackson *v.* Parker, 9 Cow. 81 (1828), Savage, C. J.; Moody *v.* Farr, 33 Miss. 195 (1857).

[7] See Abbott's Law Dict., *Estate*, 4; Davis *v.* Elkins, 9 La. 142 (1835).

[8] See Sellers *v.* Sellers, 35 Ala. 241 (1859).

[9] See Bates *v.* Sparrell, 10 Mass. 324 (1813); Godfrey *v.* Humphrey, 18 Pick. 539 (1837); Leland *v.* Adams, 9 Gray, 175 (1857), cases; Canedy *v.* Jones, 19 S. C. 201 (1882).

[10] Hooper *v.* Hooper, 9 Cush. 128 (1851); Archer *v.* Deneale, 1 Pet. 539 (1828); Cook *v.* Lanning, 40 N. J. E. 372 (1885). See also 3 Cranch, 97; 2 MacA. 70; 2 Cranch, C. C. 640; 16 Conn. 1; 46 Ill. 32; 55 Me. 287; 32 Miss. 107; 14 N. J. L. 58, 68; 14 N. J. E. 51; 40 *id.* 36-37, 372; 6 Johns. 185; 11 *id.* 365; 8 R. I. 384; 26 Vt. 260.

An estate may be viewed: I. As to the quantity of interest,— measured by the duration and extent; and is 1, freehold: which is (*a*) for the life of the tenant, or (*b*) of inheritance — absolute or fee-simple, and limited or fee-tail; 2, not of freehold: which is (*a*) for a term of years, (*b*) at will, (*c*) at sufferance; 3, upon condition, (*a*) expressed, or implied, (*b*) in pledge — mortgage, (*c*) by statute merchant or staple, (*d*) by *elegit*.

II. As to the time the interest is to be enjoyed. This is: 1, in immediate possession; and 2, in the future, or in expectancy — (*a*) a remainder, preceded by a particular estate, (*b*) a reversion, preceded by a remainder, and executed or vested, or executory and contingent, and (*c*) an executory devise.

III. As to the number and connections of the tenants. An estate is held 1, in severalty, 2, in joint-tenancy, 3, in coparcenary, 4, in common.[1]

IV. As to the tribunal in which that interest or right will be recognized and enforced. When that is a court of law, the estate is *legal;* when a court of equity, *equitable*. Otherwise the same rules apply to these estates: they are alike descendible, devisable, and alienable.[2]

See CONDITION; COPARCENARY; CURTESY; DESCENT; DOWER; ENTIRETY; EXECUTION, 3; FAST, 1; FEE, 1; FREEHOLD; LIFE; MERGER, 1; PERPETUITY, 2; PRIVY, 2; PROPERTY; REMAINDER; REVERSION; SEPARATE, 2; SEVERALTY; STAPLE; SUFFERANCE; TAIL; TENANT; TRUST, 1; VEST; USE, 2; YEARS, Estate for.

ESTIMATE. Implies a computation or calculation.

The particular idea intended to be expressed by the word must be determined by the subject-matter under consideration, together with the context of any pertinent instrument. Where a redeeming mortgagee stated in his affidavit that there was unpaid on the mortgage, "as near as he could estimate," a specified sum, it was held that this was equivalent to saying that he had computed the sum.[3]

Where a tract of land, "estimated to contain 1,000 acres," was sold by written agreement, for a price in gross, it was held that acquiescence for many years would raise a presumption that the purchaser understood that the sale was in gross; also, that where land is exchanged for other land the liability of the vendor for a deficiency should not be enforced with the same strictness as in the case of a sale for money. The evidence did not disclose any fraudulent assurance calculated to deceive the purchaser.[4]

ESTOPPEL.[5] 1. A stop; obstruction, bar; hindrance, preclusion.

2. That which concludes, and "shuts a man's mouth from speaking the truth."[6]

A man shall always be estopped by his own deed, and not permitted to aver or prove anything in contradiction to what he has once solemnly and deliberately avowed.[1]

A special plea in bar — when a man has done some act or executed some deed which estops or precludes him from averring anything to the contrary.[2]

Estoppel by deed. By some matter contained in a valid sealed instrument.

Estoppel by record. By adjudication of a competent court of record.

Viewed as an admission or determination under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterward drawn in question between the same parties or their privies. To litigate the fact again would be to impeach the correctness of the former decision. The conclusion being indisputable, so are the premises.

Collateral estoppel. The collateral determination of a question by a court having general jurisdiction over the matter.[4] See ADJUDICATION; RECORD.

Equitable estoppel, or estoppel in pais. An estoppel by virtue of some act or action not under seal nor of record in a court.

"Equitable" is the modern epithet,— derived from the courts of equity.

The doctrine that "what I induce my neighbor to regard as true is the truth as between us, if he has been mislead by my asseveration."[5]

Proceeds upon the ground that he who has been silent as to his alleged right when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent.[6]

Presupposes error upon one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage.[7]

The vital principle is, that he who by his language or conduct leads another to do what he would not

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[1] 2 Bl. Com. Ch. VII–XII; 1 Ld. Cas. R. P. ix; 2 *id.* ix.

[2] Avery *v.* Durfrees, 9 Ohio, 147 (1839); 5 Wall. 261; 16 *id.* 229; 28 *id.* 125; 95 U. S. 312.

[3] Van Buskirk *v.* Clark, 37 Hun, 208 (1885).

[4] Lawson *v.* Floyd, 124 U. S. 108 (1888), Miller, J.

[5] *F. estoper*, to impede, stop.

[6] Armfield *v.* Moore, 1 Busb. L. 161 (N. C., 1853): Lord Coke; Stebbins *v.* Bruce, 80 Va. 397 (1885).

[1] [2 Bl. Com. 295.

[2] 3 Bl. Com. 308.

[3] Burden *v.* Shannon, 99 Mass. 203 (1868), cases; Sawyer *v.* Woodbury, 7 Gray, 502 (1856).

[4] Small *v.* Haskins, 26 Vt. 223 (1854), Redfield, C. J.

[5] Kirk *v.* Hamilton, 102 U. S. 76 (1880), Harlan, J.

[6] Morgan *v.* Chicago & Alton R. Co., 96 U. S. 720 (1877), Swayne, J.; Bank of United States *v.* Lee, 13 Pet. 119 (1839).

[7] Morgan *v.* Chicago, &c. R. Co., *supra;* Merchants' Nat. Bank *v.* State Nat. Bank, 10 Wall. 645 (1870), cases, Leather Manuf. Bank *v.* Morgan, 117 U. S. 108–9 (1886), cases; Continental Nat. Bank *v.* Bank of Commonwealth, 50 N. Y. 583 (1872).

otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. . . . A change of position would involve fraud and falsehood. This remedy is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit.[1]

The primary ground of the doctrine is, that it would be a fraud to assert what one's previous conduct had denied, when on the faith of that denial others have acted.[2]

In application there must be some intended deception in conduct or declarations, or such gross negligence as amounts to constructive fraud. But conduct founded on ignorance of one's rights seldom works such result.[3]

One should be estopped from asserting a right of property, upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures. It is often applied where one owning an estate stands by and sees another erect improvements on it in the belief that he has the title or an interest in it, and does not interfere to prevent the work or inform the party of his own title. There is in such conduct a manifest intention to deceive, or such gross negligence as to amount to constructive fraud. The owner, therefore, in such a case, will not be permitted afterward to assert his title and recover the property, at least without making compensation for the improvements. But this salutary principle cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title, or with the fact that he had none.[4]

It never takes place where one party did not intend to mislead, and the other party is not actually misled.[5]

An estoppel by conduct involves: a misrepresentation or a concealment of a material fact, made with knowledge of the facts, to one who is ignorant of the truth, made with intention that he should act upon it, and leading him to act upon it.[6]

The representation must be credited as true, and the thing of value be parted with, the credit be given, or the liability be incurred, in consequence thereof.[7]

Where a party gives a reason for his conduct and decision touching a thing involved in controversy, he is estopped, after litigation has begun, from changing the ground and putting his conduct upon another and different consideration.[1]

The only case in which a representation as to the future can be held to operate as an estoppel is when it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made.[2]

Binds parties and privies,[3] but not, one not *sui juris*, as, an infant,[4] nor a married woman.[5]

The principle is a means of repose; it promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often secures justice where nothing else could.[6] It is meant to prevent fraud; is invoked to hold one to facts as he alleged them, although false, and not to prove them different from the allegation.[7]

The meaning is not that equitable estoppels are cognizable only in courts of equity, for they are commonly enforced in actions at law. But it does not follow, because equitable estoppels may originate legal as distinguished from equitable rights, that it may not be necessary in particular cases to resort to a court of equity to make them available. All that can properly be said is, that to justify a resort to a court of equity, it is necessary to show some ground of equity other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a court of law. In other words, the case shown must be one where the forms of law are used to defeat that which, in equity, constitutes the right.[8]

Is not applicable to the government in a criminal prosecution.[9]

See DISPARAGE, 2; FRAUD; GRANT, 2; LACHES; LEASE; RATIFICATION, 1; SALE, Conditional; STAND BY.

[1] Dickerson *v.* Colgrove, 100 U. S. 580 (1879), Swayne, J.; Baker *v.* Humphrey, 101 *id.* 499 (1879), cases.

[2] Hill *v.* Epley, 31 Pa. 334 (1858), Strong, J.; Gregg *v.* Von Phul, 1 Wall. 281 (1863), cases; Dair *v.* United States, 16 *id.* 4 (1872).

[3] Henshaw *v.* Bissell, 18 Wall. 271 (1873), cases, Field, J.; Fowler *v.* Parsons, 143 Mass. 406 (1887).

[4] Steel *v.* Smelting Co., 106 U. S. 456 (1882), Field, J. See Wendell *v.* Van Rensselaer, 1 Johns. Ch. *354 (1815), Kent, Ch.

[5] Brown *v.* Bowen, 30 N. Y. 541 (1864); Jewett *v.* Miller, 10 *id.* 406 (1852); Catlin *v.* Grote, 4 E. D. Sm. 304 (1855).

[6] Stevens *v.* Dennett, 51 N. H. 333 (1872), Foster, J.; Denver Fire Ins. Co. *v.* McClelland, 9 Col. 24 (1885); Griffith *v.* Wright, 6 *id.* 249 (1882); 41 N. H. 385; 43 *id.* 285; 11 *id.* 31; 30 N. Y. 541.

[7] Jones *v.* McPhillips, 82 Ala. 116 (1886), cases. Stone, Chief Justice.

[1] Ohio & Mississippi R. Co. *v.* McCarthy, 96 U. S. 267 (1877), cases, Swayne, J.

[2] Union Mut. Life Ins. Co. *v.* Mowry, 96 U. S. 547–48 (1877), cases, Field, J.

[3] Deery *v.* Cray, 5 Wall. 805 (1866); Ketchum *v.* Duncan, 96 U. S. 666 (1877).

[4] Sims *v.* Everhardt, 102 U. S. 313 (1880).

[5] Jackson *v.* Vanderheyden, 17 Johns. 167 (1819); Keen *v.* Coleman, 39 Pa. 299 (1861); Bigelow, Estop. 376; 27 Am. Law Reg. 50–52 (1888), cases.

[6] Daniels *v.* Tearney, 102 U. S. 420 (1880).

[7] Pendleton *v.* Richey, 32 Pa. 63 (1858); Keating *v.* Orne, 77 *id.* 93 (1874).

[8] Drexel *v.* Berney, 122 U. S. 253 (1887), Matthews, J. See also, generally, 17 Blatch. 14; 18 *id.* 33; 6 Biss. 373; 11 *id.* 209; 2 Flip. 699; 13 F. R. 208; 16 *id.* 479; 71 Ala. 247; 3 Col. 535; 50 Conn. 86; 2 Dak. 185; 1 Idaho, 469; 105 Ill. 322; 13 Bradw. 99; 72 Ind. 480; 76 *id.* 390; 30 Kan. 640; 29 Minn. 473; 74 Mo. 67; 42 N. Y. 447; 75 *id.* 561; 100 Pa. 262, 558; 13 R. I. 265; 76 Va. 314; 10 Wis. 453; 1 Sm. L. C. 651, note; 2 Pomeroy, Eq. §§ 801–21; Herman, Estoppel; 2 Whart. Ev., Index.

[9] Justice *v.* Commonwealth, 81 Va. 217 (1885), cases.

ESTOVERS.[1] Maintenance; support; necessaries. Compare BOTE.

Common of estovers; estovers. The liability of taking necessary wood from another's land for fuel, fences or other agricultural purpose.[2] See COMMON, 2, Right of.

ESTRAY.[3] An animal that has escaped from its owner, and wanders or strays about; at common law, a wandering animal whose owner is unknown.[4]

A wandering beast whose owner is unknown to the person who takes it up.[5]

Estrays are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them. . . Any beasts may be estrays that are by nature tame or reclaimable, and in which there is a valuable property, as, sheep, oxen, swine, and horses, which we in general call "cattle." . . For animals upon which the law sets no value, as a dog or a cat, and animals *ferœ naturæ*, as, a bear or a wolf, cannot be considered estrays. . . The finder is bound, so long as he keeps the animal, to feed and care for it; but he may not use it at labor.[6]

By early English law, estrays were the property of the king, or of his grantee — the lord of the manor where found. Modern statutes provide that they shall be impounded, for return to the owner, on payment of expenses.[7] See USE, 2.

ESTREAT.[8] An extract or copy of an original writing or record, — especially of a fine or amercement, certified to and to be levied by an officer.

A recognizance is "estreated" when forfeited by failure of the accused to comply with the condition, as by failure to appear: it is then "extracted," that is, taken from among the other records and sent to the exchequer, the party and his sureties having become, by breach of the condition, the king's absolute debtors.[9]

ESTREPEMENT.[10] Permanent injury, destruction; waste.

Writ of estrepement. This lay at common law, *after* judgment in a "real" action, and before possession was delivered by the sheriff, to stop any waste which the vanquished party might be tempted to commit.

Now, by an equitable construction of the statute of Gloucester, 6 Edw. I (1280), c. 13, and in advancement of the remedy, a writ of estrepement, to prevent waste, may be had in every stage, as well of such actions wherein damages are recovered, as of those wherein only possession is had; for, peradventure, the tenant may not be able to satisfy the demandant his full damages. It is, then, a writ of preventive justice.[1]

The same object being attainable by injunction, the writ became obsolete in England, and was impliedly abolished by Stat. 3 and 4 Wm. IV (1834), c. 27, § 36.

In Pennsylvania, after an action in ejectment has been begun, the plaintiff may have the writ to prevent destruction of the premises: he having first given a bond, with sureties, conditioned to indemnify the defendant against damage. The court hears the parties in a summary manner, and makes such order as seems just; and it may order an inspection of the premises.[2]

ET. L. And.

The original of &, which in old books is used for *et*.[3]

Et alius. And another. *Et alii.* And others (as plaintiffs). *Et alios.* And others (as defendants). Abbreviated *et al.*, and, sometimes, for the plural, *et als.*,[4] which, strictly, should stand for *et alios.*

Et al., in every-day use in writs, pleadings, styles of cases, and entries in minutes and dockets, means "and another," or "and others," as the case may be.[5]

Et cætera. And other things; and others; and the like; and so forth; and in other relations or capacities. Also, sometimes, and other persons. Abbreviated *etc.*, *&c.*

Used in pleadings to avoid repetitions, relates to things unnecessary to be stated.[6]

A recognizance "for defendant's appearance, &c.," at a time and place, was held to mean for appearance and non-departure.[7]

Added to the reservation of a way for a particular use, as "for the purpose of carting, &c.," is, from vagueness, without meaning or effect.[8]

In a warrant for land, "&c.," in the expression "Ingersoll, &c.," without explanation, was held to have no meaning, and disregarded.[9]

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[1] F. *estoffer*, to furnish, maintain.

[2] See 1 Bl. Com. 441; 2 *id.* 35; Van Rensselaer *v.* Radcliff, 10 Wend. 639 (1833); Livingston *v.* Ketcham, 1 Barb. 592 (1849).

[3] F. *estraier*, to wander: rove about the streets or ways: *estree:* L. *strata*, a street, way, — Skeat. L. L. *extravagare:* L. *extra*, on the outside, without; *vagare*, *vagari*, to wander, rove.

[4] Shepherd *v.* Hawley, 4 Oreg. 208 (1871), Prim, C. J.: Burrill's Law Dict.

[5] Roberts *v.* Barnes, 27 Wis. 425 (1871), Dixon, C. J.

[6] 1 Bl. Com. 297.

[7] See 1 Bl. Com. 297-98; 2 *id.* 14; 2 Kent, 359; 18 Pick. 426; 132 Mass. 29; 27 Conn. 473; 29 Iowa, 437; 60 Md. 88; 39 Mich. 451; 69 Mo. 205; 82 N. C. 175; 14 Tex. 430.

[8] F. *estrait:* L. *ex-trahere*, to draw out, extract.

[9] 4 Bl. Com. 253.

[10] Es-trēpé. F. *estreper* to destroy, strip: L. *ex-tirpare*, to root out.

[1] 3 Bl. Com. 225-26.

[2] 2 Brightly, Tr. & H. §§ 1857-58, cases.

[3] See 2 Ves. Sr. *153.

[4] 76 Va. 36; 77 *id.* xi; 6 Gratt.

[5] Renkert *v.* Elliott, 11 Lea, 262 (1883); Lyman *v.* Milton, 44 Cal. 633 (1872); 3 La. An. 313; 10 *id.* 164; 12 *id.* 282; 14 Pa. 161.

[6] Dano *v.* Missouri, &c. R. Co., 27 Ark. 568 (1872), McClure, C. J.

[7] Commonwealth *v.* Ross, 6 S. & R. *498 (1821).

[8] Meyers *v.* Dunn, 49 Conn. 76 (1881).

[9] Smith *v.* Walker, 98 Pa. 140 (1881).

May import other purposes of a like character to those already named.[1]

Et infra. See *Et supra.*

Et non. And not. See TRAVERSE, Absque hoc.

Et sequitur. And what follows. Plural, *et sequuntur.* Abbreviated *et seq.*

Refers to pages or paragraphs following a particular page or paragraph cited.

Et supra. And (that) above: the authority or quotation foregoing. Abbreviated *et sup.* Opposed, *et infra:* and (that or those) below, or following.

Et uxor, or uxores. And wife, or wives. Abbreviated *et ux.*

Denotes that a wife or wives are parties to a deed.

ETYMOLOGY. See DICTIONARY.

Legislative language is to be received, not necessarily according to its etymological meaning, but according to its probable acceptance, and especially in the sense in which the legislature is accustomed to use the same words. Illustrated in the expression to "connect" railroad tracks of different gauges.[2]

The courts construe words according to the common parlance of the country. Hence, a corporation engaged in removing petroleum from place to place is a "transportation" company.[3] See STATUTE.

EUNDO. See ARREST, 2.

EVANGELICAL. See CHARITY, 2; INDIGENT.

EVASION. A subtle endeavoring to set aside the truth or to escape the punishment of the law.[4]

Evasive. Tending to evade; avoiding: as, an evasive — affidavit, answer, plea, argument.

Parties are sometimes said to evade, or to seek to evade, the jurisdiction of a particular court, the operation of an obnoxious law, the payment of a tax, service of process.

EVENT. 1. That which comes to pass; result; end; final determination.

"The relator is to pay or receive costs, according to the event of the suit."[5]

2. Occurrence: as, an uncertain event. See AFTER; CONDITION; REMAINDER; WAGER, 2; WHEN.

3. Accident; casualty: as, a fortuitous event. See ACCIDENT, Inevitable.

EVERY. Originally, "everich" — ever each; each one of all.[1]

Includes all the separate individuals which constitute the whole, regarded one by one; as, in the expression, "every person not having a license shall be liable to a fine."[2]

In a statute "every railroad" may mean all railroads.[3] See ALL.

Compare A, 4; ANY; EACH.

EVICTION.[4] It is difficult to define this word with technical accuracy. Latterly, it has denoted what formerly it was not intended to express. In the language of pleading a party evicted was said to be expelled, amoved, put out. The word, which is from *evincere,* to dispossess by a judicial course, formerly denoted expulsion by the assertion of a paramount title, and by process of law. It is now popularly applied to every class of expulsion or amotion.[5]

A wrongful act by a landlord, which results in the expulsion or amotion of his tenant from the land.[6]

An act of a permanent character done by the landlord to deprive, and which has the effect of depriving, the tenant of the use of the demised thing or a part of it.[7]

To constitute an eviction which will operate as a suspension of the rent, it is not necessary that there should be an actual physical expulsion of the tenant from any part of the premises.[8]

Any act of a permanent character, done by the landlord, or by his procurement, with the intention and effect of depriving the tenant of the enjoyment of the premises demised, or a part thereof, to which he yields and abandons possession.[8]

A definition has sometimes been given by which, to constitute an eviction, there must be an amotion of the tenant from the demised premises by, or in consequence of, some act of the landlord in derogation of the rights of the tenant, and with intent to determine the tenancy, or to deprive the tenant of the enjoyment

[1] Schouler, Petitioner, 134 Mass. 427 (1883); Dickerson *v.* Stoll, 24 N. J. L. 553 (1854); Gray *v.* Central R. Co. of New Jersey, 11 Hun, 75 (1877). See 105 Mass. 21; 9 Kan. 153; 1 Cow. 114; 4 Daly, 68; 4 Metc., Ky., 211; 10 Mod. R. 152; 6 E. L. & E. 238.

[2] Philadelphia, &c. R. Co. *v.* Catawissa R. Co., 53 Pa. 59 (1866).

[3] Columbia Conduit Co. *v.* Commonwealth, 90 Pa. 309 (1879); L. R., 10 Ch. Ap. 156.

[4] Jacob's Law Dict.; 1 Hawk. Pl. Cr. 61.

[5] 3 Bl. Com. 254.

[1] Brown *v.* Jarvis, 2 De Gex, F. & J. *172 (1860), Campbell, Ld. Ch.

[2] State *v.* Penny, 19 S. C. 221 (1883), Simpson, C. J.

[3] Commonwealth *v.* Richmond, &c. R. Co., 81 Va. 367 (1886).

[4] L. *evictus: evincere,* to overcome, vanquish.

[5] Upton *v.* Townend, 84 E. C. L. *64, 80 (1855), Jervis, Chief Justice.

[6] [*Ibid.* *70, Crowder, J.

[7] *Ibid.* *72, Willes, J.

[8] Royce *v.* Guggenheim, 106 Mass. 203 (1870), Gray, J.; McAlester *v.* Landers, 70 Cal. 82 (1886), cases.

of the premises, or some part thereof. The emotion may be by physical expulsion by the landlord, or by abandonment by the tenant upon some act of the landlord which amounts to an eviction at the election of the tenant. The intent with which the act is done may be an actual intent accompanying and characterizing the act, or it may be inferred from the act itself. . . Generally the question as to what acts of the landlord, in consequence of which the tenant abandons the premises, amount to an eviction, is a question of law, and includes the question whether the acts constitute proof of the intent.[1]

Sometimes spoken of as "actual" or "constructive," and as "partial" or "total."

The idea that the ouster must be by process of law has long since been given up. The rule now is that covenants for quiet enjoyment or of warranty are broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible title. Moreover, the eviction may be "constructive" — caused by the inability of the purchaser to obtain possession by reason of the paramount title.[2]

Eviction from all or part or the premises suspends the entire rent for the time being. The tenancy is not thereby ended, but the rent and all remedy for its collection is suspended. To have the effect of suspending the rent the eviction must be effected before the rent becomes due, for rent already overdue is not forfeited. The rule is the same although the rent is payable in advance and the eviction occurs before the expiration of the period in which the rent claimed accrues.[3]

A lawful act upon an adjoining estate, done to improve that estate, is not an eviction.[4]

EVIDENCE.[5] That which demonstrates, makes clear, or ascertains the truth of the fact or point in issue.[6]

Originally, the state of being evident, that is, plain, apparent or notorious; but, by inflection, is applied to that which tends to render evident or to generate proof. Evidence is, then, any matter of fact the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact.[7]

Includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.[1]

In the technical sense, almost synonymous with instrument of proof. In the popular sense, conclusive testimony; that which produces full conviction.[2]

Evidence includes "testimony," which is a mode of proof; yet the two terms are often interchanged.[3]

"Proof" is applied, by accurate logicians, to the effect of evidence, not to the medium by which truth is established.[4]

"Evidence" includes the reproduction, before the determining tribunal, of the admissions of parties, and of facts relevant to the issue. "Proof," in addition, includes presumptions either of law or of fact, and citations of law. In this sense proof comprehends all the grounds on which rests assent to the truth of a specific proposition. Evidence, in this view, is adduced only by the parties, through witnesses, documents, or inspection; proof may be adduced by counsel in argument, or by the judge in summing up a case. Evidence is but a part of the proof: it is part of the material on which proof acts.[5] See PROOF; TESTIMONY.

What is required in the trial of an issue is judicial, as distinguished from moral, truth. . . No evidence which is not admitted on the trial is to be permitted by the determining tribunal to influence its conclusions. . . Absolute truth can be reached by us, from the limitation of our faculties, not objectively, as it really exists, but subjectively, as it may be made to appear to us. . . That formal proof may express real proof is the object of jurisprudence.[6]

Evidence, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself — such as the common experience and observation of mankind can approve as probable under the circumstances.[7]

Evidential; evidentiary. Furnishing, or relating to evidence: as, evidentiary facts.

Evidence, *v.* To render clear or evident; to establish by written testimony. Whence *evidenced.*

Evidences. Bills of exchange, promissory notes, government, municipal, and corporation bonds, and other instruments for the payment of money, are spoken of as "evidences of debt" or indebtedness.[8]

Evidence is considered with reference to its nature and principles, its object, and the rules which govern

[1] Skally *v.* Shute, 132 Mass. 370-77 (1882), cases, W. Allen, J.; 113 *id.* 481; 2 Greenl. Ev. § 243.

[2] Frits *v.* Pusey, 31 Minn. 370 (1884), cases, Mitchell, J.

[3] Hunter *v.* Reiley, 43 N. J. L. 482 (1881), cases, Scudder, J. See also 4 N. Y. 270; 3 Kent, 464.

[4] Royce *v.* Guggenheim, *ante.* See also 55 Ala. 71; 5 Conn. 497; 69 Ill. 212; 70 *id.* 541; 5 Ind. 393; 18 *id.* 428; 32 Iowa, 76; 15 La. An. 514; 25 Minn. 528; 31 *id.* 370; 43 Pa. 410; 91 *id.* 322; 22 Gratt. 130.

[5] L. *evidens,* visible: *evidere,* to see clearly.

[6] [3 Bl. Com. 367.

[7] 1 Best, Evidence, § 11.

[1] 1 Greenleaf, Evidence, § 1; 15 Ct. Cl. 606; 56 Ala. 98.

[2] McWilliams *v.* Rodgers, 56 Ala. 98 (1876), Stone, J.

[3] Coke, Litt. 283; 13 Ind. 399; 17 *id.* 372; 66 *id.* 123.

[4] 1 Greenl. Ev. § 1.

[5] 1 Wharton, Law of Evidence, § 3.

[6] 1 Whart. Ev. §§ 4-5.

[7] Daggers *v.* Van Dyck, 37 N. J. E. 132 (1883), Van Fleet, V. C.

[8] See R. S. § 5136.

in the production of testimony; also, with reference to the means of proof, or the instruments by which facts are established.[1] See NOTICE, Judicial.

Moral evidence. Matters of fact are proved by moral evidence alone; by which is meant, not only that kind of evidence which is employed on subjects connected with moral conduct, but all evidence not obtained from either intuition or demonstration. **Demonstrative or mathematical evidence.** Applies to mathematical truth, and excludes all possibility of error.[2] See further CERTAINTY, Moral; DEMONSTRATION; DOUBT, Reasonable.

Direct or positive evidence. Proof applied immediately to the fact to be proved, without any intervening process. **Circumstantial evidence.** Proof applied immediately to collateral facts, supposed to have a connection, near or remote, with the fact in controversy.[3]

Direct or positive evidence is evidence to the precise point in issue; as, in a case of homicide, that the accused caused the death. Circumstantial evidence is proof of a series of other facts than the fact in issue, which by experience have been found so associated with that fact, that, in the relation of cause and effect, they lead to a satisfactory and certain conclusion: as, when footprints are discovered after a recent snow, it is certain some animated being passed over the snow since it fell; and, from the form and number of the footprints, it can be determined with equal certainty whether they are those of a man, a bird, or a quadruped. Such evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the facts sought to be proved.[3]

Circumstantial evidence consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist.[4]

The advantage of circumstantial evidence is, that, as it commonly comes from different sources, a chain of circumstances is less likely to be falsely prepared and falsehood is more likely to be detected. The disadvantage is, that the jury have not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which they may be led to make hasty or false deductions: a source of error not existing in the consideration of positive evidence. Hence, each fact necessary to the inference must be distinctly and independently proved by competent evidence; and the inference must be fair and natural, not forced or artificial.[1]

Crimes are secret. Direct testimony is often wanting. The laws of nature and the relation of things to each other are so linked and combined together as to furnish a medium of proof as strong as direct testimony. . . . A body of facts may be proved, of so conclusive a character as to warrant a firm belief of fact, as strong as that on which discreet men are accustomed to act in relation to their most important concerns.[1]

In the abstract, circumstantial evidence is nearly, if not quite, as strong as positive evidence; in the concrete, it may be much stronger.[3]

Circumstantial evidence is often more convincing than direct testimony. A number of concurrent facts, like the rays of the sun, all converging to the center, may throw not only a clear light but produce a burning conviction. A cord of sufficient strength to suspend a man may be formed of threads.[3]

Prima facie evidence. Such evidence as in judgment of the law is sufficient to establish the fact, and, if not rebutted, remains sufficient for that purpose.[4]

Evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced.[5]

That which suffices for the proof of a particular fact until contradicted and overcome by other evidence.[6]

Primary or best evidence. The highest evidence of which a case in its nature is susceptible. That kind of proof, which, under any possible circumstances, affords the greatest certainty of the fact in question. **Secondary evidence.** Such evidence as, in the nature of the case, supposes that better evidence exists or has existed.[7]

A written instrument is itself always regarded as the primary or best possible evidence of its existence and contents. All evidence falling short of this in its degree is secondary; as, a copy of the instrument, or a witness's recollection of the contents.[7]

That the best evidence shall be produced means that no evidence shall be received which is merely "substitutionary" in its nature, as long as the "original" can be had. The rule excludes only that evidence which itself indicates the existence of more original sources of information. But where there is

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[1] 1 Greenl. Ev. § 3.

[2] [1 Greenl. Ev. § 13. See Chaffee v. United States, 18 Wall. 541 (1873); 58 Wis. 58.

[3] Commonwealth v. Webster, 5 Cush. 310-12 (1850), Shaw, C. J. See also People v. Cronin, 34 Cal. 202-3 (1867); People v. Morrow, 60 *id.* 144 (1882).

[4] People v. Kennedy, 32 N. Y. 146, 145 (1865), Denio, C. J.; 62 Wis. 63; 1 Bish. Cr. Proc. § 1069.

[1] Webster's Case, 5 Cush. 311, *ante;* Commonwealth v. Howe, 132 Mass. 259 (1882).

[2] Commonwealth v. Harman, 4 Pa. 271-73 (1846), Gibson, C. J.

[3] Thompson v. Bowie, 4 Wall. 473 (1866), Grier, J.

[4] Kelly v. Jackson, 6 Pet. *632 (1832), Story, J.; Lilienthal's Tobacco v. United States, 97 U. S. 268 (1877).

[5] Emmons v. Westfield Bank, 97 Mass. 243 (1867), Foster, J.

[6] Cal. Code Civ. Proc., § 1833; 70 Cal. 570.

[7] 1 Greenl. Ev. §§ 84, 82; 3 Bl. Com. 367.

no substitution, only a selection of weaker instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed. . . Until shown that the production of primary evidence is out of the party's power, no other proof of the fact is admitted. . . The distinction is one of law, and refers to the quality, not to the strength, of the proof. Evidence which carries on its face no indication that better remains behind is not secondary, but primary. If there are several distinct sources of information it is not ordinarily necessary to show that they have all been exhausted, before secondary evidence can be resorted to.[1]

The general test is immediateness, not authority. No primary testimony is rejected because of faintness.[2]

Secondary evidence is admissible when it is the best the party has it in his power to produce. The rule promotes the ends of justice and guards against fraud, surprise, and imposition. There may be degrees of secondary evidence.[3]

When the evidence is the best obtainable, it should be admitted, unless that would contravene some established rule of law. Thus, in an action against a common carrier for the loss of a pearl ring, the plaintiff was allowed to point out a pearl corresponding in size, color, and general appearance to the one lost, and an expert to testify to the value of the selected pearl.[4] See further COPY; LOST, 2; PHOTOGRAPH; PRODUCE, 1.

Presumptive evidence. Evidence afforded by circumstances from which, if unexplained, the jury may or may not infer or presume other circumstances or facts.[5] See PRESUMPTION.

Conclusive evidence. Such evidence as, being uncontradicted, controls the decision; also, such evidence as the law does not allow to be contradicted.

Parol evidence. Evidence which need not be in writing; evidence extrinsic to the language of an instrument, and brought forward to throw light upon its meaning. See further PAROL.

Hearsay evidence. The narrative of what one has heard from another, and not what he knows of his own personal knowledge. See further HEARSAY.

Relevant evidence. Such evidence as is applicable to the issue; evidence which will assist in arriving at the truth or falsity of the allegation; evidence which supports a party's theory of his case. **Irrelevant evidence.** Evidence which does not tend to support the issue; impertinent testimony.

Relevant evidence is also spoken of as *admissible*, and irrelevant as *inadmissible*, under the pleadings; that is, as proper, or improper, to be received.[1]

All evidence must have relevancy to the question in issue, and tend to prove it; if not a link in the chain of proof, it is not receivable.[2]

Where there is evidence before the jury — whether it be weak or strong — which *tends* to prove the issue on the part of either side, it is error for the court to wrest it from the exercise of their judgment. It should be submitted under instructions.[3]

But the court cannot tell the jury that *any* legal results follow from evidence which "tends" to prove the issue.[4]

If the evidence relates to the transaction under consideration, or is connected with it, and is not too remote, it is competent. "It is relevant to put in evidence any circumstance that tends to make the proposition at issue more or less improbable."[5]

The possibility of error goes to the weight of evidence, and is not a ground for rejecting it. The spirit of the law permits a resort to every reasonable source of information upon a disputed question of fact. Unless excluded by some positive exception, everything relative to the issue is admissible; and this is extended to every hypothesis pertinent to the issue.[6]

Material evidence. Evidence important to a just determination of the issue; capable of affecting the result. **Immaterial evidence.** Evidence not directly pertinent to the issue; not important enough to change the result.

Cumulative evidence. Evidence of the same kind to the same point.[7]

Additional evidence to support the same point, and of the same character with evidence already produced. From the Latin *cumulare*, to heap up.[8]

Evidence which simply repeats, in substance and effect, or adds to, what has been testified to.[9]

Evidence which merely multiplies witnesses to a fact

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[1] 1 Greenl. Ev. §§ 82, 84, cases; Clifton v. United States, 4 How. 247 (1846).

[2] 1 Whart. Ev. Ch. III; *id.* §§ 90, 677.

[3] Cornett v. Williams, 20 Wall. 226, 246 (1873), cases, Swayne, J.; Riggs v. Taylor, 9 Wheat. 486 (1824); Stebbins v. Duncan, 108 U. S. 43 (1882); 12 F. R. 402; 33 Mich. 88; 38 Ohio St. 125.

[4] Berney v. Dinsmore, 141 Mass. 44 (1886).

[5] 1 Greenl. Ev. § 13.

[1] See 3 Col. 12; 43 Pa. 170; 11 S. & R. 134.

[2] Thompson v. Bowie, 4 Wall. 471 (1866).

[3] Hickman v. Jones, 9 Wall. 201 (1869), Swayne, J.

[4] City of Providence v. Babcock, 3 Wall. 244 (1865); 1 *id.* 368; 8 *id.* 268.

[5] Fee v. Taylor, 83 Ky. 264 (1885), Holt, J.; 1 Whart. Ev. § 21.

[6] Bell v. Brewster, 44 Ohio St. 696, 697 (1887), Minshall, J.; 1 Whart. Ev. § 20.

[7] Parker v. Hardy, 24 Pick. 248 (1837), cases, Morton, Justice.

[8] People v. Superior Court, 10 Wend. 294 (1833), Savage, C. J.

[9] [Parshall v. Klinck, 43 Barb. 212 (1864), E. D. Smith, Justice.

before investigated, or only adds other circumstances of the same general character.[1] See TRIAL, New.

Competent evidence. That which the nature of the fact to be proved requires as the appropriate proof in the particular case: as, the production of a writing where its contents are the subject of inquiry; that is, the best evidence.[2] **Incompetent evidence.** Inappropriate, improper evidence.

Satisfactory or sufficient evidence. That amount of proof which ordinarily satisfies an unprejudicial mind, beyond reasonable doubt.[3]

The circumstances which will amount to this degree of proof can never be previously defined; the only test of which they are susceptible is, their sufficiency to satisfy the mind and conscience of a common man, and so convince him that he would venture to act upon that conviction in matters of the highest importance to his own interests.[3]

Questions respecting the competency and admissibility of evidence are entirely distinct from those which respect its sufficiency or effect. The former are conclusively within the province of the court; the latter belong exclusively to the jury.[4]

Minor terms descriptive of species of evidence: *affirmative* as opposed to *negative* evidence; *adminicular* or *ancillary* evidence; *corroborative* evidence; *extrinsic* as opposed to *intrinsic* evidence; *inculpatory* as opposed to *exculpatory* evidence; *newly* or *after-discovered* evidence; *rebutting* evidence; *state's* evidence by an accomplice; *substitutionary* evidence, *qq. v.*

The object of evidence being to prove the point in issue, fundamental rules regulating its production are: 1. The evidence must correspond with the allegations, and be confined to the point in issue. 2. It is sufficient if the substance of the issue be proved. 3. The burden of proving a proposition or issue rests upon the party holding the affirmative. 4. The best evidence of which the case is susceptible must be produced.[5]

The general rules of evidence are the same in civil and criminal cases.[6]

The mode of conducting trials, the order of introducing evidence, and the time when it shall be introduced, belong largely to the practice of the court where the fact is tried.[7]

The rules of practice in jury trials are necessarily somewhat flexible as to the order of proof, the number of witnesses, and the time, manner, and extent of the cross-examination. In ordinary cases the plaintiff begins and introduces all of his substantive evidence before the defendant opens his defense; so, the defendant introduces all his substantive evidence before the plaintiff rebuts. But the judge, in the exercise of a sound discretion, may relax either rule.[1]

The order of admissibility is regulated by the court. The Federal courts, in civil cases at common law, observe as rules of decision the rules of evidence of the State in which they sit, except when otherwise provided by the Constitution or an act of Congress.[2]

A party who objects or excepts to evidence must state his reasons therefor.[3]

See further ADMISSION, 2; ANSWER, 3; BOOK; CHARACTER; CHARGE, 2 (2, c); COMPROMISE; CRIME; DECLARATION, 1; DEED; DEMURRER; DEPOSITION; DOCUMENT; DOUBT; ESTOPPEL; EXAMINATION, 9; EXCEPTION, 4; FACT; HANDWRITING; INSPECTION, 2; INSANITY; LAW; LETTER, 3; NONSUIT; NOTICE, 1, Judicial; OFFER, 2; OPINION, 1; PRACTICE; PROCEDURE; REBUT; RECORD; RES, Gestæ; SCINTILLA; STENOGRAPHER; WEIGHT, 2; WITNESS.

EVIDENT. Clear to the mind; obvious; plain; apparent; manifest; notorious; palpable.

Under the constitutional provision that bail must be taken in capital cases except where the "proof is evident," bail will be denied if the evidence adduced on the application would sustain a verdict of murder in the first degree.[4]

EVIL. See MALICE; MALUM; WRONG.

EX. 1. The Latin preposition — out of, proceeding from, from, of, by, on, on account of, by virtue of, according to; also,— beyond. See EXTRA.

In composition intensifies or else has little effect upon the signification. Before a consonant becomes simply *e;* the *x* remains before the vowels and *c, p, q, s, t;* assimilates with a following *f;* is dropped before other consonants.

In French *es:* as, in estreat, estrepe, escrow.

2. Prefixed to the name of an official, denotes that he formerly held the office designated: as, ex-attorney-general, ex-judge, ex-minister, ex-marshal, ex-sheriff.

Prefixed to a word denoting a civil status or condition, indicates that the person referred to formerly occupied that relation: as, ex-convict, ex-partner, ex-wife.

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[1] Waller *v.* Graves, 20 Conn. 310-11 (1850), cases, Church, C. J. See also 2 Ark. 358; 42 Conn. 519; 27 Ga. 464; 28 Me. 383; 34 N. J. L. 156; 7 Barb. 278.

[2] [1 Greenl. Ev. §§ 2, 32; 107 U. S. 332.

[3] 1 Greenl. Ev. § 2; 30 Me. 481.

[4] 1 Greenl. Ev. § 2; 2 Pet. 44, 133, 149.

[5] 1 Greenl. Ev. § 50; Travelers' Ins. Co. *v.* Mosley, 8 Wall. 409 (1869).

[6] 4 Wheat. 472; 12 *id.* 469; 91 U. S. 488; 57 Wis. 157; 4 Bl. Com. 356.

[7] Wills *v.* Russell, 100 U. S. 623 (1879).

[1] First Unitarian Society *v.* Faulkner, 91 U. S. 417-18 (1875), Clifford, J.

[2] R. S. § 721: Act 1789; Potter *v.* Third Nat. Bank of Chicago, 102 U. S. 165 (1880), cases, Harlan, J.

[3] State *v.* Taylor, 36 Kan. 334 (1887), cases. French law of evidence, 19 Am. Law Rev. 880 (1885).

[4] *Exp.* Foster, 5 Tex. Ap. 645-47 (1879); *Exp.* Gilstrap, 14 *id.* 240, 264 (1883).

3. Prefixed to other words, denotes absence or privation of the notion conveyed by the simple word; without: as, ex-coupon, ex-dividend, ex-interest.

"Ex-dividend" is used of sales of stocks which reserve to the seller the dividend presently payable. See DIVIDEND, 3.

A sale of bonds "ex-July coupons" means a sale reserving the coupons, a sale in which the seller receives, in addition to the purchase-price, the benefit of the coupons, which benefit he may realize either by detaching them or receiving from the buyer an equivalent consideration.[1]

Ex abundantia cautela. Out of excessive care. See CAUTELA.

Ex æquo et bono. By what is fair and good: in justice and fair dealing. See ASSUMPSIT; EQUITY.

Ex antecedentibus, etc. See INTERPRETATIO.

Ex arbitrio judicis. By discretion of the magistrate or judge.

Ex colore. Under color of. See COLOR, 2.

Ex comitate. Out of courtesy. See COMITY.

Ex contractu. Out of a contract. See ACTION, 2.

Ex curia. Out of court.

Ex debito justitiæ. Out of an obligation of justice: as a matter of legal right. See DEBITUM; GRACE.

Ex delicto. Out of a fault or wrong. See ACTION, 2; DELICTUM.

Ex demissione. By demise, *q. v.* Abbreviated *ex dem.*

Ex dolo malo. Out of fraud. See DOLUS.

Ex facie. From appearance. See FACIES.

Ex facto. From a thing done. See FACTUM.

Ex gratia. Out of favor, by indulgence. See GRACE.

Ex hypothesi. Upon the supposition or theory.

Ex industria. From fixed purpose: intentionally.

Ex lege. From, or by force of, the law.

Ex maleficio. On account of misconduct: by reason of an illegal act. See MALEFICIUM.

Ex mero motu. Out of pure free-will. See MOTION, 1.

Ex mora. From delay, or default.

[1] Porter *v.* Wormser, 94 N. Y. 445 (1884), Andrews, J.

Ex necessitate. From necessity; necessarily.

Ex necessitate legis. From urgency of the law.

Ex necessitate rei. From urgency of the thing or case.

Ex nudo pacto. Out of an engagement without a consideration. See PACTUM.

Ex officio. By virtue of office. See OFFICIUM.

Ex parte. On behalf of. Abbreviated *ex p.*, and *exp.* See PARS.

Ex post facto. After the fact. See FACTUM, Ex post facto.

Ex proprio. Of his or its own.

Ex proprio motu. Of his own volition. See MOTION, 1.

Ex proprio vigore. Of its own inherent force. See VIGOR.

Ex relatione. On the information of. Abbreviated *ex rel.* See RELATION, 2.

Ex tempore. Extemporaneously.

Ex testamento. From the will. See TESTAMENTUM.

Ex turpi causa. Out of an unlawful engagement. See ACTIO, Ex turpi, etc.

Ex uno disce omnes. From one (act) learn all. Compare FALSUS, In uno, etc.

Ex vi termini. By force of the word.

Ex vi terminorum. From the very meaning of the language. See TERMINUS, 3.

Ex visceribus. From the vitals: from the inherent nature; of the essence.

Ex visceribus verborum. From the natural meaning of the words.

Ex visitatione Dei. By divine dispensation: from natural cause.

Ex voluntate. From free will.

EXACTION. A wrong done by an officer, or one in pretended authority, by taking a reward or fee for that which the law does not allow,— when he wrests a fee or reward where none is due.[1]

"Extortion" is where he extorts more than is due.[1] See EXTORTION; PAYMENT, Involuntary.

EXAMINATION.[2] A weighing, balancing: search, investigation; hearing, inquiry. Compare INSPECTION; VIEW.

Examined. Compared with the original: as, an examined copy, *q. v.*

[1] [Coke, Litt. 368; Jacob's Law Dict.

[2] L. *examinare*, to weigh carefully: *examen*, tongue of a balance.

Examining. Conducting an examination: as, the examining counsel.

Examiner. A person charged with the duty of making or conducting an examination: as, an examiner — in chancery or equity, of customs, of national banks, of patents, of titles, in divorce, lunacy, partition, *qq. v.*

1. **Examination of a bankrupt or of a debtor.** Interrogation as to the state of his property.[1]

2. **Examination of an accused person.** Investigation, by an authorized magistrate, of the grounds of an accusation of crime against a person, with a view to discharge him or to secure his appearance at trial, and to preserve the evidence.

Had before a justice of the peace, an alderman, or other magistrate, a United States commissioner, and, possibly, before a judge. On a *prima facie* case bail will be required, or a commitment made; otherwise, the accused is discharged. The examination may be waived. The accused has no right to the assistance of counsel; and, in many cases, he himself is not examined.

3. **Examination of an invention.** Of an alleged new invention, for which application for a patent has been made, to ascertain whether it is sufficiently new and useful, or whether it interferes with any other invention.[2] See PATENT, 2.

4. **Examination of a long account.** By a referee, of the proofs of the correctness of the items composing a long account.[3] See ACCOUNT, 1.

5. **Examination of a married woman.** Of a wife, separate and apart from her husband, to learn whether her acknowledgment of a mortgage, conveyance, or other deed is voluntary, without coercion of her husband. Also called her *private* or *separate* examination.[4]

Where a statute requires a "private" examination of the wife, to ascertain that she acts freely and not by compulsion of her husband, but prescribes no precise form of words to be used in the certificate of acknowledgment, it is sufficient if the words of the acknowledgment have the same meaning, and are in substance the same with those in the statute.[5]

Such statutes provide for privacy from the husband only. A certificate "privately examined apart from and out of the hearing" of the husband, can mean nothing less than that he was not present when she was examined, and satisfies a statute (of Maryland) requiring an examination "out of the presence."[1] See further ACKNOWLEDGMENT, 2.

6. **Examination of a national bank.** By an officer of the United States treasury, to discover whether the bank is complying with the law as to issues, reserve, etc.[2]

7. **Examination of a student-at-law.** This is preliminary to his admission to practice, as a test of qualification.

8. **Examination of a title.** A search to determine whether the title to land, proposed for conveyance or mortgage, is free from defects, and marketable, *q. v.*

Whence examiners of titles, and abstract or brief of title. See ABSTRACT, 2; CONVEYANCER; TITLE, 1.

9. **Examination of a witness.** The interrogation or questioning of a witness, to elicit his personal knowledge as to one or more facts.

Direct examination, or *examination in chief.* The first examination, on behalf of the party who calls the witness. Opposed, 1, to *examination in pais*, or on the *voir dire:* a preliminary questioning intended to test competency; 2, to *cross-examination:* by the adverse party, confined to the subject-matter elicited upon the direct examination.

Re-direct examination. Follows the cross-examination, and is confined to matters brought out under it.

Re-cross examination. Follows the re-direct examination, and is restricted to the new or additional information or answers given thereunder.

Re-examination. The re-direct or the re-cross examination in the same hearing; also, another and distinct examination in a subsequent trial.

Separate examination. Is of a witness apart from or out of the hearing of another or other witnesses.

Cross-examination, which is the right of the party against whom a witness is called, is a means of separating hearsay from knowledge, error from truth, opinion from fact, inference from recollection; of ascertaining the order of the events as narrated by the witness in his examination in chief, the time and place when and where they occurred, and the attending circumstances; and of testing the intelligence, memory, impartiality, truthfulness, and integrity of the witness.[3]

[1] See R. S. §§ 5086–87.
[2] R. S. § 4808.
[3] See Magown *v.* Sinclair, 5 Daly, 66 (1874).
[4] 1 Bl. Com. 444.
[5] Dundas *v.* Hitchcock, 12 How. 269 (1851).

[1] Deery *v.* Cray, 5 Wall. 807 (1866).
[2] See R. S. § 5240.
[3] The Ottawa, 3 Wall. 271 (1865), Clifford, J.

Cross-examination is "the crucial test" of truth. A witness may not be cross-examined as to facts and circumstances not connected with matters stated in his direct examination; if a party wishes to examine him as to such facts and circumstances he must call him as a witness in the subsequent progress of the case;[1] that is, "make him his own witness."

Greater latitude is allowed in the cross-examination of a *party* than in that of another witness. Still, this, in its course and extent, where directed to matters not inquired into in the principal examination, is largely subject to the control of the court in the exercise of a sound discretion,—as is the cross-examination of other witnesses.[2]

A party may ask questions to show bias or prejudice, or to lay a foundation to admit evidence of a prior contradictory statement.[3]

An adverse party may now generally be called in chief "as for cross-examination" whenever his testimony may be needed to make out a *prima facie* cause of action or defense.

The court may order the separate examination of a witness. Refusal to answer a proper question is a contempt of court. The court itself may examine. Prompting is not permitted. On the direct examination leading questions are generally prohibited. The extent and severity of an examination rests with the court. Examination is not allowed as to a conclusion of law, nor, in chief, as to motive, nor as to an opinion. Answers are privileged. The substance of a conversation or of an absent writing may be given. Vague impressions are inadmissible. Answers are according to recollection and belief. A witness may refresh his memory from memoranda.[4]

On cross-examination leading questions may be put. All such questioning is to be on the subject of the examination in chief. Collateral facts cannot be introduced to test memory. A witness is not compelled to criminate himself; nor to answer a question imputing disgrace, unless the question is material. May inquire as to religious belief, motive, veracity, bias, and the *res gestæ*. And may draw inferences from refusal to answer.[5]

Re examination is permitted as to a matter requiring explanation, and as to new matters introduced by the opposition. For this reason a witness may be recalled.[6]

Re-cross examination is discretionary with the court.[6]

See CALL; CONFRONT; CRIMINATE; EVIDENCE; EXPERT; IMPEACH, 3; PREJUDICE; QUESTION, 1; REFRESH; VOIR; WITNESS.

EXAMPLE. See DAMAGES, Exemplary; PRECEDENT.

[1] Philadelphia, &c. R. Co. *v.* Stimpson, 14 Pet. 461 (1840), Story, J.; Houghton *v.* Jones, 1 Wall. 704 (1863).

[2] Rea *v.* Missouri, 17 Wall. 542 (1873), cases, Bradley, J.; Schultz *v.* Chicago, &c. R. Co., 67 Wis. 617 (1886); Kaapp *v.* Schneider, 24 id. 71 (1869); 3 Dak. 78.

[3] Wills *v.* Russell, 100 U. S. 625 (1879), cases; Schuster *v.* Stout, 30 Kan. 531 (1883).

[4] 1 Whart. Ev. §§ 491-515, cases.

[5] 1 Whart. Ev. §§ 527-47, cases.

[6] 1 Whart. Ev. §§ 572-75, cases.

EXCAVATE. See DIGGING.

EXCEEDING. See MORE OR LESS.

Under an indictment for embezzlement, alleging the gross receipt of a sum "exceeding" a sum named, proof may be made of the receipt of any amount, although it exceed that sum.[1]

EXCELLENCY. "His Excellency" is the title given by the constitution of Massachusetts to the governor of that State; also, by custom, to the governors of the other States, and to the President of the United States.[2]

EXCEPTANT. See EXCEPTION.

EXCEPTIO. L. A keeping out; an exclusion; exception.

Exceptio probat regulam. The exception proves, that is, either confirms or tests, the rule: "proves," by not being within the reason; "tests" the form in which expressed, by observing whether exceptions must be allowed.

EXCEPTION. Something withheld, not granted or parted with; the exclusion of a thing, or the thing or matter itself as excluded; an objection made. Compare REGULAR.

Exceptant. One who takes or files objection to a thing done or proposed.

1. In a deed or contract, excludes from the operation of the words some part of the subject-matter then in being.

A clause in a deed whereby the donor or lessor, excepts somewhat out of that which he had granted by his deed.[3]

Always part of the thing granted, and the whole of the part excepted. A "reservation" is of a thing not in being, but newly created. The terms are often used in the same sense.[4] See RESERVE, 4.

2. In a statute, excludes from the purview a person or thing included in the words.

Exempts absolutely from the operation of the enactment. A "proviso" defeats the operation conditionally.[5]

[1] State *v.* Ring, 29 Minn. 78, 82 (1882).

[2] "The style of the Executive, as silently carried forward from the committee of detail, was still 'his Excellency;' this vanished in the committee of revision,"—2 Bancroft, Formation of the Const. 210, 187.

[3] [Darling *v.* Crowell, 6 N. H. 423 (1833).

[4] State *v.* Wilson, 42 Me. 21 (1856); Kister *v.* Reeser, 98 Pa. 5 (1881); Green Bay, &c. Canal Co. *v.* Hewitt, 66 Wis. 465-66 (1886); 24 Am. Law Reg. 716-22 (1886), cases; 2 McLean, 391; 41 Me. 311; 51 *id.* 498; 10 N. H. 310; 37 *id.* 167; 4 Johns. 81; 3 Wend. 635; 1 Barb. 407; 19 *id.* 192; 28 Ohio St. 568; 47 Pa. 197; 5 R. I. 419; 6 Abb. N. Cas. 321; 81 Va. 28.

[5] Waffle *v.* Goble, 53 Barb. 522 (1868).

If an exception occurs in the statutory description of an offense it must be negatived, or the party will be brought within the description; but if it comes by way of *proviso* and does not alter the offense, merely states what persons are to take advantage of it, then the defense must be specially pleaded or else be given in evidence under the general issue, according to circumstances.[1]

An exception ought to be of that which otherwise would be included in the category from which it is excepted. "Where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception, but when there is a clause for the benefit of the pleader, and afterward follows a *proviso* which is against him, he shall plead the clause and leave it to the adversary to show the *proviso*."[2]

See ACT, 8, Enact; GENERAL; PROVIDED; PROVISO.

8. In equity and admiralty practice, a formal allegation that a previous adverse proceeding is insufficient in law.

4. In common-law practice, a formal notice, following the denial of a request or the overruling of an objection, made in the course of a trial, that the exceptant intends to claim the benefit of his request or objection in future proceedings; as, upon a writ of error.[3]

It is also used to signify other objections in the course of a suit. Thus, there may be exception taken to bail or security, to the ruling of a judge or master, to an appraisement, award, decree, report, or return.

Bill of exceptions. An "exception" being an objection to or a protest against a ruling or decision of the court upon a question of law,— taken or stated at the time of the ruling, unless otherwise prescribed,— a "bill of exceptions" is a written statement of the exceptions duly taken by a party to the decisions or instructions of a judge in the trial of a cause, with so much of the facts, or other matter, as is necessary to explain the rulings.[4]

Every bill must be settled, allowed, and signed by the judge, in the manner, upon the notice, and within the time pointed out by statute.[4]

Its sole office is to make matters which are extrinsic, or out of the record, part of the record.[5]

If, in his directions or decisions, the judge who tries a cause mistakes the law by ignorance, inadvertence, or design, counsel, by statute of Westminster 2, 13 Edw. I (1286), c. 31, may require him publicly to "seal a bill of exceptions," stating the point in which he is supposed to err. Should the judge refuse to seal the bill, the party may have a writ commanding him to seal it, if the fact alleged be truly stated: and if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for a false return. This bill of exceptions is in the nature of an appeal, examinable, after judgment entered in the court below, in the next immediate superior court, upon a writ of error.[1]

The principles of the statute of Westminster have been adopted in all of the States; in the Federal courts, bills are still drawn as at common law under the statute.[2]

The object is to secure a record which may be reviewed. In theory, the bill states what occurred while the trial was going on. Exception must be taken at the moment a ruling is made, or before verdict.[3]

A bill should present only the rulings of the court upon some matter of law, as, the admission or rejection of evidence, and should contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearings of the rulings upon the issues.[4]

It is not usual to reduce the bill to form and to obtain the signature of the judge during the progress of the trial; the statute of Westminster did not require it. The exception need only be noted at the time it is made, and may be reduced to form within a reasonable time after the trial is over.[5]

It is sufficient if the judge simply signs the bill.[6]

It was early held that a bill must be signed within the term, unless by consent or special order. Otherwise the judge might be asked to sign a bill after his recollection of facts had faded, and parties might be burdened with unnecessary delay and expense. While the rule may have been established when short-hand reports were not usual, the Supreme Court considers the rule still obligatory.[7]

At common law, a writ of error might be had for an error apparent on the record or for an error in fact, but not for an error in law not appearing on the record; hence, anything alleged *ore tenus* and overruled could not be assigned for error. To remedy this evil was the object of the statute of Westminster. Under its provisions a bill of exceptions is founded on some objection in point of law to the opinion and direction of the court, either as to the competency of a witness, the admissibility or the legal effect of evidence, or

[1] Simpson *v.* Ready, 12 M. & W. *740 (1844), Alderson, B.

[2] United States *v.* Cook, 17 Wall. 177, 178 (1872), Clifford, J.,— quoting Treby, C. J., in Jones *v.* Axen, 1 Ld. Ray. 120 (1692), and Steel *v.* Smith, 1 B. & Al. 99 (1817).

[3] Abbott's Law Dict.

[4] Saint Croix Lumber Co *v.* Pennington, 2 Dak. 470 (1881), Shannon, C. J.; 1 N. M. 115.

[5] Kitchell *v.* Burgwin, 21 Ill. 45 (1858); 20 *id.* 225; 3 Col. 200, 235, 251; 5 Hill, 579; 7 Baxt. 56; 77 Va. 250.

[1] 3 Bl. Com. 372.

[2] Pomeroy *v.* Bank of Indiana, 1 Wall. 599 (1863).

[3] Railway Co. *v.* Heck, 102 U. S. 120 (1880), Waite, C. J.; Hanna *v.* Maas, 122 *id.* 26 (1887), cases, Gray, J.

[4] Lincoln *v.* Claflin, 7 Wall. 136 (1868), Field, J.; Worthington *v.* Mason, 101 U. S. 149 (1879); Moulor *v.* American Life Ins. Co., 111 *id.* 337 (1884); New York, &c. R. Co. *v.* Madison, 123 *id.* 526 (1887), cases.

[5] Hunnicutt *v.* Peyton, 102 U. S. 354 (1880), cases, Strong, J.

[6] Stanton *v.* Embrey, 93 U. S. 555 (1876), cases.

[7] Marine City Stave Co. *v.* Herreshoff Manuf. Co., 32 F. R. 824 (1887), cases.

other matter of law arising from facts not denied in which either party is overruled by the court. The seal attests that the exception was taken at the trial. If the bill contains matter false or untruly stated, the judge ought to refuse to affix his seal. The substance of the bill should be reduced to writing while the thing is transacting. An exception not tendered at the trial is waived.[1]

The statute of Westminster did not apply to criminal cases. At common law, no bill of exceptions was permitted in such cases; the right depends upon enactment.[2]

See CHARGE, 2 (2, *c*); ERROR, 2 (3), Writ of; SEAL, 2.

EXCESSIVE. Surpassing in amount, degree, or extent that which is usual, reasonable, proper or lawful in the particular case: as, excessive — bail, damage, distress, fine, taxation, *qq. v.*

To constitute bail excessive it must be *per se* unreasonably great and clearly disproportionate to the offense involved, or the peculiar circumstances appearing must show it to be so in the particular case.[3]

EXCHANGE.[4] A reciprocal contract for the interchange of property, each party being both a vendor and a vendee.[5]

(1) Of personalty: a commutation of goods for goods.[6]

The giving of one thing and the receiving of another thing.[7]

"A contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only."[8]

A "sale" is the giving of one thing for that which is the representative of all values — money.[9] The distinction between a "sale" and an "exchange" is rather one of shadow than of substance. In both cases the title is absolutely transferred; and the same rules of law are applicable to the transaction, whether the consideration is money or a commodity.[10] See SALE.

(2) Of realty: a mutual grant of equal interests, the one in consideration of the other.[11]

The estates exchanged must be equal in quantity; not in value, for that is immaterial, but in interest: as, a fee-simple for a fee-simple.[12]

Power to "sell and exchange" lands includes power to partition them.[1]

An exchange is as much within the statute of frauds as is a sale.[2]

At common law, the contract carried a warranty of title, with a right to re-enter one's original possession, if evicted from the later acquisition.[3]

A person seeking specific performance of a contract for an exchange of lands must prove: the contract; that the consideration has been paid or tendered; such part performance that a rescission would be a fraud on the plaintiff, and could not be compensated by a recovery of damages at law; and that delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party.[4] See DEED, 2.

2. An abridgment of bill of exchange: an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account. In common speech, a "draft."[4]

A written order or request from one party to another for the payment of money to a third person or his order, on account of the drawer.[5]

Originally invented among merchants in different countries, for the more easy remittance of money.

He who writes the letter is called the *drawer;* he to whom it is written, the *drawee;* he to whom it is payable, the *payee.*

When both drawer and drawee reside in the same country, the bill is termed an "inland" bill; when in different countries, a "foreign" bill.[6]

A *foreign* bill is usually drawn in three counter parts or duplicates, and numbered as the "first," "second," and "third" of exchange. The first instrument that reaches the drawee is paid. Each mentions the others, and all three together compose a "set" of exchange. The device obviates delays.[7]

Exchange is "at par" when the price of a draft is the face of it; "at a premium" or "above par," when the price is more than the face; "at a discount" or "below par," when the price is less than the face. The price paid is the "rate" of exchange.

"Arbitration of exchange:" converting the currency of one country into that of another, through the medium of an intervening currency. "Course of exchange:" the quotations for a given time. "Par of exchange:" the value of the money of one country in that of another,— either real or nominal. "Re-exchange:" the expense incurred on a bill dishonored

[1] Wheeler *v.* Winn, 53 Pa. 126 (1866), Woodward, C. J.

[2] Haines *v.* Commonwealth, 99 Pa. 419 (1882), Sharswood, C. J.

[3] *Exp.* Ryan, 44 Cal. 558 (1872), Wallace, C. J.; 6 Q. B. D. 206.

[4] F. *eschanger:* L. *ex-cambiare,* to barter, put one thing for another, change.

[5] See Bixby *v.* Bent, 59 Cal. 528 (1882).

[6] 2 Bl. Com. 446.

[7] 1 Pars. Contr. 521.

[8] Cal. Civil Code, § 1804; Gilbert *v.* Sleeper, 71 Cal. 392-93 (1886).

[9] 1 Pars. Contr. 521; 2 Bl. Com. 446.

[10] [Commonwealth *v.* Clark, 14 Gray, 372 (1860), Bigelow, J.

[11] 2 Bl. Com. 323.

[12] 2 Bl. Com 323; 7 Barb. 638; 21 Wis. 123.

[1] Phelps *v.* Harris, 101 U. S. 380 (1879).

[2] Purcell *v.* Miner, 4 Wall. 517 (1866).

[3] 2 Bl. Com. 323.

[4] 2 Bl. Com. 466; 61 N. Y. 255; 33 Ga. 188.

[5] [Cox *v.* Nat. Bank of New York, 100 U. S. 709 (1879), Clifford, J.

[6] 2 Bl. Com. 466.

[7] See Bank of Pittsburgh *v.* Neal, 22 How. 108 (1859).

in a foreign country, where made payable, and returned to the drawer.[1]

By the act of issuing a bill the drawer agrees that, if it is not paid according to its terms, he will pay it. His liability is fixed by due presentment, demand, and notice of dishonor.[2]

A bill payable at sight, or at a date subsequent to acceptance, must be duly presented for payment, or a party conditionally liable will be discharged.[3]

The acceptor is the principal debtor; the drawer and indorsers are sureties. Discounting a bill is neither acceptance nor payment. Acceptance is an engagement to pay the bill according to its tenor and effect when due. A bill is paid only when there is an intention to discharge and satisfy it.[4]

On the question of timely presentation for payment, the law of the place where a foreign bill is payable governs.[5]

Proof of failure of consideration is a good defense as between the immediate parties — drawer and acceptor, and payee and drawee. But as between remote parties, an action will not be defeated unless there is an absence or failure of the two considerations: that which the defendant received for his liability, and that which the plaintiff gave for his title. These remote parties are the payee and acceptor, or the indorser and acceptor. The rule presupposes that the payee or indorsee became the holder of the bill before it was overdue and without knowledge of facts which impeach the title as between the immediate parties.[6]

The essential characteristic of a draft or bill of exchange is the order of one party upon another for the payment of money. . . The instruments in suit are in strictness bank-checks. They have all the particulars in which such instruments differ or may differ from regular bills of exchange. They are drawn upon a bank having funds of the drawer for their payment, and they are payable upon demand, although the time of payment is not designated. A bill of exchange may be so drawn, but it usually states the time of payment, and days of grace are allowed upon it. There are no days of grace upon checks. The instruments here are also drawn in the briefest form possible in orders for the payment of money, which is the usual characteristic of checks. A bill of exchange is generally drawn with more formality, and payment at sight, or at a specified number of days after date, is requested, and that the amount be charged to the drawer's account. When intended for transmission to another State or country they are usually drawn in duplicate or triplicate, and designated as first, second, or third of exchange. A regular bill of exchange, it is true, may be in a form similar to a bank-check, so that it may sometimes be difficult, from their form, to distinguish between the two classes of instruments. But an instrument drawn upon a bank and simply directing payment to a party named of a specified sum of money, at the time on deposit with the drawee, without designating a future day for payment, is to be treated as a check. If the instrument designates a future day for payment, it is, according to the weight of authorities, to be deemed a bill of exchange, when, without such designation, it would be treated as a check. . . A check implies a contract on the part of the drawer that he has funds in the hands of the drawee for its payment on presentation. If it is dishonored the drawer is entitled to notice; but, unlike the drawee of a bill of exchange, he is not discharged from liability for the want of such notice, unless he has sustained damage or is prejudiced in the assertion of his rights by the omission.[1]

See further ACCEPT, 2; ASSIGNMENT, Equitable; CHECK; COLLECTION; CURRENT, Funds; FORGERY; INDORSE; DRAFT; DUE, 1; HONOR, 1; LETTER, Of credit; NEGOTIATE, 2; NOTE, Promissory; NOTING; PROTEST, 2.

8. A place where merchants and brokers meet for business, at specified hours. Contracted into 'Change.

Called "stock" exchange, "produce" exchange, "petroleum" exchange, "grain" exchange, "pork" exchange, etc., from the nature of the business in which contracts, for the purchase and sale of securities or commodities, are made. The distinctive word may designate the association itself, as well as the place where its meetings are held.

All the members of an exchange, considered together, usually constitute the board of exchange. Membership in a board may be qualified by any conditions the creators could lawfully impose. Thus, provision in the constitution of a board, whose members are limited in number and elected by ballot, that a member, upon failing to perform his contracts or becoming insolvent, may assign his seat to be sold and the proceeds be first applied for the benefit of members of the exchange to whom he is indebted, is lawful.[2]

Merchants may voluntarily associate together, and prescribe for themselves regulations to establish, define, and control the usages or customs that shall prevail in their dealings with each other. These are useful institutions, and the courts enforce their rules whenever parties deal with them, in which case the regula-

[1] See Adams *v.* Addington, 16 F. R. 91 (1883), cases.

[2] Cummings *v.* Kent, 44 Ohio St. 95-98 (1886), cases.

[3] Cox *v.* Nat. Bank of New York, *ante*.

[4] Swope *v.* Ross, 40 Pa. 188 (1861), Strong, J.

[5] Pierce *v.* Indseth, 106 U. S. 549 (1882).

[6] Hoffman *v.* Bank of Milwaukee, 12 Wall. 190-91 (1870), cases, Clifford, J. See generally Goodman *v.* Simonds, 20 How. 364 (1857); as to unification of the law, 2 Law Quar. Rev. 297-312 (1886).

[1] Bull *v.* Bank of Kasson, 123 U. S. 105, 109-11 (1887), cases, Field, J.

The instruments in suit read thus:

"$500. The First National Bank, Kasson, Minn., Oct. 15, 1881. Pay to the order of Mr. A. La Due five hundred dollars in current funds.

E. E. FAIRCHILD, Cashier.

To Ninth National Bank, New York City.

[Indorsed:] Pay to the order of M. Edison, Esq.

A. LA DUE.

M. EDISON.

[2] Hyde *v.* Woods, 94 U. S. 523 (1876), Miller, J.

tions become a part of the contract. Part of these regulations may be observed, and part discarded.[1]

See ARBITRATION; BARGAIN, Time; BROKER; CORNER; WAGER, 2.

EXCHEQUER.[2] The treasury department of the English government.

Established by William I; regulated by Edward I. Consisted of two divisions: one, for the receipt of revenue; the other, for the administration of justice in matters of revenue, and known as the *court* of exchequer, and presided over by the *chancellor* of the exchequer. This court originally had limited equity jurisdiction; then the chancellor, the Lord Chief Baron, sat apart in a hall called the exchequer *chamber*. Its present jurisdiction does not differ materially from other co-ordinate courts of common law.[3] See CHANCELLOR, 1, Of the Exchequer.

EXCISE.[4] An inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail trade.[5] Whence excise *duty*, excise *law*.

An inland imposition, sometimes upon the consumption of a commodity, and sometimes upon the retail trade; sometimes upon the manufacturer, and sometimes upon the vendor.[6]

A term of very general signification, meaning tribute, custom, tax, tollage, assessment.[7]

Though often synonymous with tax, may have a distinct signification. It is based on no rule of appointment or equality, as is a tax. It is a fixed, absolute and direct charge laid on merchandise, products or commodities, without regard to the amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and a special benefit occasioned to those by whom the charge is to be paid.[8]

Under the constitution of Massachusetts the legislature may impose reasonable excises upon "produce, goods, wares, merchandise and commodities" within the State; also, upon any business or calling, franchise or privilege conferred by or exercised therein.[1]

See COMMODITY; DUTY, 2; IMPOST; TAX, 2.

EXCLUSIO. See EXPRESSIO.

EXCLUSIVE. That which debars, deprives, or excepts: as, an exclusive right, privilege, or jurisdiction, which is possessed, enjoyed or exercised independently of another or others.[2] Opposed, inclusive.

See ENUMERATION; ONLY; POSSESSION, Adverse.

EXCULPATORY. See CULPA; FAULT.

EXCUSE. A reason for doing or not doing a thing.

Excusable. 1. Admitting of excuse; exempting from liability or responsibility: as, an excusable default, an excusable misdelivery by a carrier.

2. Done under circumstances of accident or necessity, and without legal malice: as, an excusable homicide, *q. v.*

Ignorance of a fact may excuse; ignorance of the law never excuses. Infants, lunatics, married women, and persons under duress or necessity are sometimes excused for acts done or sought to be enforced. See IGNORANCE; KNOWLEDGE, 1; NOTICE.

EXEAT. See EXIRE, Ne exeat.

EXECUTE.[3] To complete or perfect what the law directs to be done; to complete as an effective instrument.

1. Referring to a conveyance, mortgage, lease, will, contract, note, or other document, may mean, as in popular speech, to sign, or to sign and deliver; but in strict legal understanding, when said of a deed or bond, always means to sign, seal, *and* deliver.[4]

Until a promise has been performed it is termed "executory;" after performance, "executed." Obviously, one of two mutual promises may have become executed while the other yet remains executory; as where a seller pays the price, and the buyer promises delivery in the future. So, one or more of several connected promises of one party may be executed while his other engagements remain executory. What is usually meant by speaking of a contract as executory or executed is not that it is so as an entirety, but that the promise particularly under discussion is so. Thus, to speak of a sale for cash, of goods to be delivered in the future, as an executory contract, would be natural if the seller's obligation to deliver were the

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[1] Dillard *v.* Paton, 19 F. R. 624 (1884), Hammond, J. Goddard *v.* Merchants' Exchange, 9 Mo. Ap. 290 (1880), cases; Thorne *v.* Prentiss, 88 Ill. 99 (1876); 20 Cent. Law J. 444-50 (1885), cases; 45 Ill. 113; 80 *id.* 134; 18 Abb. Pr. 271; 2 Mo. Ap. 100; 20 Wis. 48; 47 *id.* 670.

[2] F. *eschequier*, chess-board — from the cloth that originally covered the table or counter.

[3] 3 Bl. Com. 44, 56.

[4] A misspelling of Old Dutch *aksūs*, *aksys:* F. *aise*, a tax, — Skeat; Webster.

[5] 1 Bl. Com. 318.

[6] Pacific Ins. Co. *v.* Soule, 7 Wall. 445 (1868), Swayne, J.; Tax on Capital of Banks, 15 Op. Att.-Gen. 219 (1877); Michigan Central R. Co. *v.* Collector, 100 U. S. 595 (1879).

[7] Portland Bank *v.* Apthorp, 12 Mass. 256 (1815), Parker, C. J.

[8] Oliver *v.* Washington Mills, 11 Allen, 274 (1865), Bigelow, C. J.; Commonwealth *v.* People's Savings Bank, 5 *id.* 431 (1863).

[1] Connecticut Ins. Co. *v.* Commonwealth, 133 Mass. 161 (1882).

[2] See 3 Story, C. C. 131; 2 Dall. 211; 8 Blackf. 361; 29 Kan. 541; 36 *id.* 366; 60 Md. 80; 93 N. Y. 328.

[3] F. *executer:* L. *ex-sequi*, to follow out, follow to the end, perform.

[4] See Hepp *v.* Huefner, 61 Wis. 151 (1884); 32 Ark. 453; 9 Cal. 430; 17 Ohio, 545; 12 Ired. L. 221; 37 Mich. 459; 22 Minn. 551.

matter chiefly in question; but if the controversy related to the buyer's payment the contract would be called executed. And "executed" is (although "executory" is not) applied to contracts in a sense relating to the completion of the written instruments in which they are embodied, and not to performance of their substance. In this sense "to execute" means to complete the paper as an effective instrument; to sign it, and to seal and deliver it whenever these formalities are essential to its inception.[1]

2. Referring to a power or trust: to perform or fulfill the requirements thereof; to give effect thereto according to the intent of the creator or of the law.

3. Referring to a decree, judgment, writ or process: for the officer addressed to carry out the command therein contained.

"Executed," indorsed on a writ, means that the officer complied with the mandate.[2]

4. Referring to a criminal: to put him to death. Whence to execute the sentence, and executioner. See DEATH, Penalty.

Executed. Completed, finished, performed, perfected; vested. **Executory.** Yet to be completed, incomplete, not yet effective, finished, perfected, or vested: as, an executed or executory — agreement, consideration, contract, devise, estate, remainder, sale, trust, use, writ, *qq. v.*

Executive. Carrying out; pertaining to the enforcement of the laws: as, the executive department, executive business; also, the officer who superintends the enforcement of the laws. See DEPARTMENT; DOCUMENT; GOVERNMENT; OFFICER; PRESIDENT.

Execution. 1. Doing or performing a thing required.

2. Completion of the obligation of an instrument by the final act of delivering it. See *Execute*, 1.

3. Putting the sentence of the law in force.[3]

The act of carrying into effect the final judgment of the court; also, the writ which authorizes this.[4]

A writ issuing out of a court, directed to an officer thereof, and running against the body or goods of a party.[5]

Dormant execution. A writ of execution which has been delivered to the proper officer, but is held in abeyance or unexecuted; a writ as to which action has been deferred by suggestion of the creditor.

A levy for any other purpose than to realize money is fraudulent as against a subsequent execution.

Equitable execution. The appointment of a receiver to take charge of property of an equitable nature.[1]

Execution-creditor. A creditor who has prosecuted his claim to execution; in distinction from a creditor who has obtained a judgment upon which he has not issued, from a mortgage creditor, and from a general creditor, *q. v.*

Writ of execution. A written command or precept to the sheriff or other ministerial officer, directing him to execute the judgment of the court.[2]

Process authorizing the seizure and appropriation of the property of a defendant for the satisfaction of the judgment against him.[3]

A judicial process, issuing upon some record enrolled in court; as, at common law, to repeal a patent.[4]

Execution is "the end and fruit of the law:" it gives the successful party the fruits of his judgment.[5]

At common law, the officer may be commanded to take — the body of the defendant, his goods, his goods and the profits of his lands, his goods and the possession of his lands, or, his body, goods, and lands.[6]

Property is held by the competent authority which first actually attaches it.[7] This is known as the rule in *Payne* v. *Drewe*.[8] See JURISDICTION, Exclusive.

At common law, all writs of execution were to be sued out within a year and a day after final judgment; otherwise, the judgment was presumed to have been satisfied. By statute, the lien of such judgment may be revived by a *scire facias*,[9] q. v.

All proceedings under a levy of execution have relation to the time of the seizure of the property.[10]

Writs of execution, named from the operative words in them when all kinds of processes were in Latin, are:

Fieri facias (abbreviated *fi. fa.*), that you

[1] Addison, Contr. *2, Am. ed., A. & W. (1888), note.
[2] Wilson v. Jackson, 10 Mo. 337 (1847); State v. Williamson, 57 *id.* 198 (1874).
[3] 3 Bl. Com. 412; 9 Ohio, 150.
[4] [Lockridge v. Baldwin, 20 Tex. 306 (1857).
[5] Brown v. United States, 6 Ct. Cl. 178 (1870).

[1] Davis v. Gray, 16 Wall. 217-22 (1872), cases.
[2] [Kelley v. Vincent, 8 Ohio St. 420 (1858).
[3] Lambert v. Powers, 36 Iowa, 20 (1872), Beck, C. J.
[4] [Stearns v. Barrett, 1 Mas. 164 (1816). See also Labette County Commissioners v. Moulton, 112 U. S. 223 (1884); 20 Ill. 155; 11 Wend. 635; 9 Ohio, 150.
[5] United States v. Nourse, 9 Pet. *28 (1835).
[6] 3 Bl. Com. 414. See 2 Tidd. Pr. 993.
[7] Taylor v. Carryl, 20 How. 594 (1857), cases; Covell v. Heyman, 111 U. S. 176 (1884), cases.
[8] 4 East, 547 (1804), Ellenborough, C. J.
[9] 3 Bl. Com. 421.
[10] Freeman v. Dawson, 110 U. S. 270 (1883), cases.

cause to be made out of the goods, or lands, or both the amount of the claim.

Applies to personalty, realty, chattels real, and choses in possession. May be concurrent with an attachment in execution. A single *fieri facias* may exhaust the personalty of the debtor, and an *alias fieri facias* be issued to sell his realty. But an *alias fieri facias* may denote a second or new levy upon either personalty or realty. A sale of realty upon a single *fieri facias* may also be by express authorization from the debtor.[1]

Levari facias (abbreviated *lev. fa.*), that you cause be levied — out of the land specified. Used to collect a charge upon land: as, a mortgage, mechanic's lien, municipal claim, taxes, and the like.

May issue after a *scire facias* has been determined in favor of the creditor, as, after judgment on a *scire facias* upon a mortgage.[1] See ADDENDA

Venditioni exponas (abbreviated *vend. ex.*), that you expose for sale — realty embraced in a levy made under a preceding *fieri facias*, and condemned under proceedings in extent, *q. v.*

Regarded as a completion of a previous execution, by which the property is appropriated, not as an original or independent proceeding.[2]

Attachment-execution. Reaches a chose in action, money and other property in the hands of a stranger, to which the defendant has no present right of possession; also called an "execution-attachment." See ATTACH, 2.

Liberari facias, that you cause to be delivered — to the creditor, such portion of the premises, not sold under a previous *levari facias*, as will satisfy the claim, according to the valuation of the inquest, to hold as his own free tenement. See EXTENT, 2.

Elegit, he has chosen. Delivers chattels to the creditor at an appraised value, and, if they are not sufficient, then one-half of the defendant's freehold, till the rents and profits pay the debt.

Then plaintiff "elected" this writ, rather than a *fieri facias*, or a *levari facias*, which last writs gave satisfaction only to the extent of chattels and present profits of lands. Authorized by statute of Westminster 2, c. 18. Prior thereto, possession of land could not be taken, the feudal principle being that service was not transferable to a stranger. The writ is still in use, enlarged or narrowed in operation.[3]

Mandamus-execution. Enforces payment of a judgment against a municipality. See further MANDARE, Mandamus.

Sequestration. Reaches the revenues of a corporation, a life-estate, or the property of an absconding debtor. See SEQUESTRATION, 2.

Capias ad satisfaciendum, that you take for satisfying. Process under which the officer arrests and detains the debtor till the judgment is satisfied. See CAPERE, Capias.

Testatum execution, certifies that the debtor has property in another county. Issues into another county than that in which the record remains. See TESTIS, Testatum.

Writs and processes of execution are: those which point out specifically the thing to be seized, and those which command the officer to make or levy certain sums of money out of the property of a party named. In the first class the officer has no discretion, but must do precisely what he is commanded. Therefore, if the court had jurisdiction to issue the writ it is a protection to the officer. In the second class the officer must determine at his own risk whether the property he proposes to seize is legally liable to be taken. For a mistake he is responsible to the extent of the injury. As to this he exercises judgment and discretion — as to who is the owner of the property, the kind that may be taken, and the quantity.[1]

If a writ be sued out of a court of competent jurisdiction, directing an officer to seize specifically described property, as in admiralty, replevin, or ejectment cases, it is a protection to the officer, when he is sued in trespass for executing it. If, however, it in general terms authorizes him to seize property, without a specific description, he acts at his own risk as regards the ownership of the property.[2]

See JURISDICTION, 2, Concurrent; LEVY, 2; MINISTERIAL, 1; WRIT.

EXECUTOR. He to whom another commits by will the execution of his last will and testament.[3] Feminine form, **executrix.** Correlative, *testator, testatrix.*

He so closely resembles an "administrator" that that term will not amount to a substantial misdescription in a deed or prosecution.[4]

Acting executor. Such executor, of two or more, as actually performs the duties of the trust.

General executor. An executor whose power is unlimited as to time, place, or subject-matter. **Special executor.** An executor who serves for a limited time, in a particular place, or as to a part of the estate.

[1] See 3 Bl. Com. 417.

[2] Mitchell *v.* St. Maxent's Lessee, 4 Wall. 243 (1866).

[3] 3 Bl. Com. 418; 2 *id.* 161; 4 Kent, 431, 436; Hutchinson *v.* Grubbs, 80 Va. 254 (1885); 8 Ala. 561; 10 Gratt. 332.

[1] Buck *v.* Colbath, 3 Wall. 343-44 (1865), Miller, J.

[2] Sharp *v.* Doyle, 102 U. S. 689 (1880), Miller, J.

[3] 2 Bl. Com. 503; 1 Ga. 330; 55 Md. 194; 21 Wend. 436; 60 Barb. 175; 5 Hun, 21; 5 Humph. 458.

[4] Sheldon *v.* Smith, 97 Mass. 35-36 (1867), cases: *id.* 401.

Instituted executor. Has the option to serve before another who is named as substitute — the **substituted executor.**

Rightful executor. The executor named in the will; the lawful executor. **Executor de son tort.** An executor of his own wrong: he who, without authority, does such acts as only the rightful executor may do.

At common law an executor *de son tort* is one who, without authority from the deceased or the court of probate, does such acts as belong to the office of an executor or administrator.[1]

Not unauthorized are, acts of kindness in providing for the family of the deceased or in preserving the estate.[2]

An executor *de son tort* is liable to all the trouble of an executorship without the profits or advantages.[3]

Sole executor. The one person named to serve as executor. **Co-executor, joint-executor.** One of two or more executors.

A wife, with her husband's consent, or a minor over seventeen, or other person of sound mind, may be an executor. He takes title from the will; is a personal representative, identified in interest with the testator; holds the estate in trust for creditors and legatees. His power being founded upon the special confidence the deceased had in him, he is not ordinarily required to furnish security for the faithful performance of the duties of the trust.

He is to do the things set forth in the will: to bury the deceased, prove the will, give notice of letters issued, make an inventory, collect the money and personal effects,[4] pay the debts and legacies, and file an account or accounts.

Contract rights pass to him, but not contract duties of a purely personal nature. He can buy no part of the estate; nor let assets lie unproductive; nor use the estate for his own benefit. He may be surcharged in his accounts.

He is held to the care of a man of ordinary prudence, and to the most scrupulous good faith.

If he honestly exercises a discretion conferred upon him by the will he cannot be held liable for a loss occasioned by an honest error of judgment.[5]

The act of one co-executor is the act of all: each is liable for the other's wrong, effected through negligence or connivance. All sue and are to be sued together. Death vests all rights and duties in the survivor.

The rule is that each co-executor has complete power to administer the estate. A payment therefore to one is payment to all.[1]

At common law executors have a joint authority and a joint interest in the property of the estate. They are esteemed in law as one person, and, as such, represent the testator, although each may be responsible only for his own acts.[2]

Whether an executor may be imprisoned for not paying over an amount due upon final account, the statutes and decisions of the States are not in accord. In Vermont and South Carolina, though refusal to pay is a contempt of court, imprisonment is not allowed under the constitutional inhibition against imprisonment for debt.[3]

See ADMINISTER, 4; ASSETS; BONA; CHARGE; COMMISSION, 8; DEVASTAVIT; DEVISAVIT; DONATIO; FUNERAL; GOODS; IMPROVIDENT; INVENTORY; LEGACY; LETTERS; PERISHABLE; POWER, 2; PROBATE; REPRESENTATIVE, (1); SETTLE, 4; TRUST, 1; VOUCHER; WITNESS.

EXEMPLARY. See DAMAGES.

EXEMPLIFICATION. An official transcript of a record, for use as evidence.

Primary evidence; in the United States courts, by act of May 26, 1790, which does not exclude other proof and is to be strictly followed. The seal of the court is essential. An exemplification of the record of the record of a deed is admissible; of a foreign will, or grant, may be proven by a certificate.[4] See further COPY; EVIDENCE, Secondary; FAITH, Full, etc.; LOST, 2; RECORD.

EXEMPTION.[5] The privilege of being excepted, excused, or freed from the operation of a law.

Used especially of goods not liable to seizure under the law of distress for rent;[6] of merchandise not subject to duties under the internal revenue laws;[7] of the property of bankrupts and insolvents excepted from sale under execution laws;[8] and of the property of a decedent not subject to administration.

Also, the property itself, in the aggregate.

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[1] Emery *v.* Berry, 28 N. H. 481 (1854), Eastman, J.

[2] See 29 Minn. 421-22; 17 Ark. 125; 5 Heisk. 194; 26 N. H. 495; 1 Baxt. 9; 30 Conn. 329; 12 Ga. 588; 38 *id.* 364; 26 Me. 361; 8 Miss. 437; 19 Mo. 196.

[3] 2 Bl. Com. 507.

[4] See generally Wall *v.* Bissell, 125 U. S. 387, 389 (1888), cases.

[5] Cooper *v.* Cooper, 77 Va. 203 (1883); 75 *id.* 747; 24 Gratt. 225; 28 *id.* 442; 32 *id.* 262.

[1] Stone *v.* Union Sav. Bank, 13 R. I. 25 (1880); 8 Ga. 388; 2 Williams, Exec. 946.

[2] Caskie *v.* Harrison, 77 Va. 94 (1882); Peter *v.* Beverley, 10 Pet. *533, 564 (1836); Wilson's Appeal, 115 Pa. 95 (1887); M'Cormick *v.* Wright, 79 Va. 533 (1884), cases; 24 Cent. Law J. 147 (1887), cases.

See generally Williams, Exec.; Schouler, Ex. & Adm., and Wills; 2 Kent, 409; 1 Pars. Contr. 127; Stacy *v.* Thrasher, 6 How. 58-60 (1848); Hill *v.* Tucker, 13 *id.* 466-67 (1851); Smith *v.* Ayer, 101 U. S. 327 (1879); Colt *v.* Colt, 111 *id.* 581 (1884); Glasgow *v.* Lipse, 117 *id.* 333 (1886); 9 Gratt. 559; 21 *id.* 200, 759.

[3] *Re* Bingham, 32 Vt. 335 (1859); Golson *v.* Holman, Sup. Ct. S. C. (1888): 26 Cent. Law J. 521-22 (1888), cases.

[4] See 2 Whart. Ev. Ch. III, §§ 95-119; 1 Greenl. Ev § 501; 7 W. Va. 413.

[5] L. *ex-imere*, to take out, remove, free.

[6] 3 Bl. Com. 6.

[7] R. S. § 3187.

[8] R. S. § 5045.

Exempt. Excepted from the burden or operation of law; also, a person so excepted, excused, or relieved.

Exemption laws. Specifically, laws which except a part of a debtor's property from seizure on execution, or other process, as not liable to the payment of his debts.

This property, in its nature and extent, varies in the different States. In some it extends only to the merest implements of household necessity; in others it includes the library of the professional man, however extensive, and the tools of mechanics; and in many it embraces the homestead in which the family resides. The creditor, when he parts with the consideration of his debt, knows that the property so exempt cannot be seized in payment.[1]

Exemption in favor of debtors is favored by liberal interpretations. The exemption law of a State bars an execution on a judgment in favor of the United States.[2]

Exemption laws seek to promote the general welfare of society by taking from the head of a family the power to deprive it of certain property by contracting debts which will enable creditors to take such property in execution. Parties ought not, therefore, to be permitted to contravene the policy of the law by contract.[3]

Waiver of the right, if permitted at all, must be in distinct and unequivocal terms, and not rest upon inference.[4]

Widow's exemption. For the benefit of the widow and children of a decedent.[5]

See AGRICULTURE; EXPRESSIO, Unius, etc.; HEIFER; HOMESTEAD; HORSE; IMMUNITY; IMPLEMENT; PRIVILEGE; TAX, 2; TEAM; TOOL; WAGON; WORKS.

EXEQUATUR. L. Let it be executed, performed, discharged.

1. In French practice, placed at the foot of a judgment obtained in another jurisdiction, authorized execution upon the judgment within the jurisdiction to which it was exemplified.

2. An order issued by the foreign department of a state to which a consul or commercial agent is accredited, that he be permitted to discharge the duties of his appointment.

Consuls on exhibiting proof of their appointment receive an *exequatur*, or permission to discharge their functions within the limits prescribed, which permission can be withdrawn for any misconduct.[1]

EXERCITOR. L. Exerciser: manager.

Exercitor maris. In civil law, he who equips a vessel; in English and American law, the managing owner of a vessel.[2]

EXHIBIT.[3] 1, *v.* To produce, offer, or expose for inspection: as, to exhibit an account, a balance, a bill in equity, a complaint or information, written interrogatories, a bill or note for payment.[4]

2, *n.* A document produced and identified for use as evidence, before a jury, referee, master, or in the course of pleading.

Where there are several such documents it is customary to identify them as "Exhibit A," "B," or A 1, A 2, etc.; and, when produced in evidence, to mark upon them also the date, and the stenographer's or commissioner's name.

A document cannot be proved as an exhibit when it requires more to substantiate it than proof of the execution or of the handwriting.[5]

"Ex. A" was held to mean "Exhibit A."[6]

EXHIBITION. Compare ENTERTAINMENT; LICENSE, 3; PRIZE-FIGHTING.

Unless skating rinks are so conducted as to be clearly shown to be "public performances or exhibitions," they cannot be brought within a statute requiring a license to be taken out for such "performances or exhibitions."[7]

EXIGENCY. Going forth; issuing: mandate; urgency. See EXIRE.

A sheriff must execute a writ addressed and delivered to him, according to its exigency, without inquiring into the regularity of the proceeding.

The "exigency of a bond" refers to the event upon the happening or not happening of which the bond is to become operative, by changing a contingent to an absolute liability.

EXIGENT. See OUTLAWRY.

EXIRE. L. To go away, go out; to issue.

Exit. It has gone forth; it has issued.

The *exit* of a writ means simply the issuing of that particular writ; and the word "exit," as a docket entry, indicates that the writ has in fact been formally issued.

Ne exeat. That he do not depart. A writ in equity practice issued to prevent a

[1] Nichols *v.* Eaton, 91 U. S. 726 (1875), Miller, J.

[2] Fink *v.* O'Neil, 106 U. S. 280 (1882), cases; R. S. § 916.

[3] Kneettle *v.* Newcomb, 22 N. Y. 249 (1860); Crawford *v.* Lockwood, 9 How. Pr. 547 (1854); Harper *v.* Leal, 10 *id.* 276 (1854). *Contra*, McKinney *v.* Reader, 6 Watts, 34 (1837); Case *v.* Dunmore, 23 Pa. 93 (1854); 24 *id.* 426; 31 *id.* 225.

[4] O'Neil *v.* Craig, 56 Pa. 161 (1867); Commonwealth *v.* Boyd, *ib.* 402 (1867). Exemptions of personalty, Kansas cases, 2 Kan. Law J. 146-49 (1885), cases.

[5] Hufman's Appeal, 81 Pa. 329 (1876); Nixon's Appeal, 6 W. N. C. 496 (1878).

[1] Woolsey, Intern. Law, § 100; 13 Pick. 528.

[2] See 3 Kent, 161.

[3] L. *ex-hibere*, to hold out or forth.

[4] See 3 Bl. Com. 450; Byles, Bills, 206; 2 Conn. 38.

[5] Lake *v.* Skinner, 1 Jac. & W. 9, 15 (1819); Plunkett *v.* Dillon, 4 Del. Ch. 222 (1871), cases. See generally Commercial Bank *v.* Bank of New York, 4 Hill, 519 (1842).

[6] Dugan *v.* Trisler, 69 Ind. 555 (1880).

[7] Harris *v.* Commonwealth, 81 Va. 240 (1885).

defendant from withdrawing his person and property beyond the jurisdiction of the court before a judgment and execution can be had against him.

In effect, a process to hold to bail, or to compel a party to give security to abide the decree. Not granted in the Federal courts unless a suit in equity is already commenced, and satisfactory proof is made that the defendant designs quickly to depart from the United States.[1]

The full form of the writ is *ne exeat republica;* the original in England was *ne exeat regno* or *regnum.*

The constitutions of the States declare that all persons have a natural right to emigrate from the State.[2]

EXISTING. See CREDITOR; PRE-EXISTING; PREVIOUS; PRIOR.

"Existing laws," in the saving clause of an act, refers to laws in force at the passage of the act.[3]

EXIT. See EXIRE, Exit.

EXONERATION; EXONERETUR. See ONUS, Exoneretur.

EXP. See EX, Parte.

EXPATRIATION.[4] Voluntarily leaving one's native or adopted country to become a citizen in another country.

Expatriate. To leave one's country, renouncing allegiance to it, with the purpose of making a home and becoming a citizen in another country.

Includes more, then, than changing one's domicil.[5]

Act of Congress of July 27, 1868, declares that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness;" disavows the claim made by foreign states that naturalized American citizens are still the subjects of such states; and enacts, further, that "any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic."[6]

The right is inalienable, and extends to individuals of the Indian race.[7]

The contrary is the English doctrine, expressed in the maxim *nemo potest exuere patriam.*[8]

[1] R. S. § 717; Lewis *v.* Shainwald, 7 Saw. 416-17 (1881), cases.

[2] 2 Kent, 34; 1 Bl. Com. 366; 2 Story, Eq. §§ 1465-74; 2 Daniel, Ch. Pr. 1698-1714; Adams *v.* Whitcomb, 46 Vt. 708 (1873).

[3] Lawrie *v.* State, 5 Ind. 526 (1854). See 63 Ill. 117; 88 Iowa, 215.

[4] L. *ex patria terra,* from one's fatherland.

[5] Ludham *v.* Ludham, 31 Barb. 489 (1860).

[6] R. S. §§ 1999, 2000; 9 Op. Att.-Gen. 356 (1859).

[7] United States, *ex rel.* Standing Bear *v.* Crook, 5 Dill. 453 (1879).

[8] 2 Kent, 36; Morse, Citizenship, § 179; 21 Am. Law Reg. 69-79 (1873); Canad. Law Times, Oct. 1883.

EXPECTANCY. A present, vested, contingent right to the future enjoyment of land. A future estate; an estate in expectancy, or, simply, an expectant estate or interest.

Expectant. Contingent as to enjoyment; also, the person entitled thereto.

An expectancy is always an estate in remainder, or a reversion. The idea is that the time of enjoyment is postponed — depends upon some subsequent circumstance or contingency. It is an executory estate, as opposed to an estate in actual, present possession — an estate executed.[1]

In New York, any present right or interest which by possibility may vest in possession at a future day.[2]

See BARGAIN, Catching.

EXPENDITURE. An actual payment of money.

To incur an expenditure is to make a payment, to expend money. To incur a liability and to incur an expenditure are different things.[3]

EXPENSE; EXPENSES. Vary in meaning with the intention of parties and testators, and the circumstances of particular cases.[4] See COSTS.

EXPERIMENT. See INVENTION.

EXPERT.[5] A person instructed by experience.[6]

A skilled or experienced person; a person having skill, experience or peculiar knowledge on certain subjects or in certain professions; a scientific witness.[7]

On questions of science, skill, trade, art or others of like kind, a person of skill, sometimes called an expert, may not only testify to facts, but may give his opinion. His qualification must first be shown to the court.[8]

Whether a witness who is called as an expert has the requisite qualifications to enable him to testify is a preliminary question for the court, the decision of which is conclusive, unless it appears upon the evidence to have been erroneous or to have been founded upon some error in law.[9]

[1] [2 Bl. Com. 163.

[2] 1 N. Y. Rev. St. 723, § 10; *ib.* 735, § 35; 7 Paige, 78; 20 Barb. 462. See also 17 F. R. 333; 10 Ohio St. 106; 1 Story, Eq. § 334.

[3] Improvement of South Pass, 16 Op. Att.-Gen. 139 (1878).

[4] See 1 Minn. 48; 1 Cliff. 158; 8 N. J. E. 506; 12 Ct. Cl. 179; 98 E. C. L. 199.

[5] L. *expertus,* practiced, experienced, skilled.

[6] Hyde *v.* Woolfolk, 1 Iowa, 167, 166 (1855): 2 Best Ev. 513; 54 Cal. 517.

[7] Heald *v.* Thing, 45 Me. 394 (1858): Burrill; 59 Me. 77; 41 N. H. 547; 50 *id.* 454; 48 Vt. 377.

[8] Congress, &c. Spring Co. *v.* Edgar, 99 U. S. 65 (1878), cases, Clifford, J.; 1 Greenl. Ev. § 440; 20 Johns. 75.

[9] Perkins *v.* Stickney, 132 Mass. 218 (1882).

An expert may be asked his opinion upon a case hypothetically stated, or upon a case in which the facts have been established; but he may not determine from the evidence what the facts are, to give an opinion upon them.[1]

When the subject of a proposed inquiry is not a matter of science but of common observation, upon which the ordinary mind is capable of forming a judgment, an expert may not state his opinion.[2]

An expert testifies as a specialist. He may be examined on foreign laws, and as to scientific authorities. Whether a conclusion belongs to him or not is for the court to say. He may give an opinion as to a condition known in his specialty; as, the opinion of a physician, surgeon, lawyer, scientist, practitioner in a business, artist, one familiar with a market, or with values generally, or cognizant of damage done. On sanity, friends and attendants may give their opinion. An expert may explain his opinion. His testimony is to be jealously scrutinized, particularly when given *ex parte*.[3]

The opinions of witnesses are constantly taken as to the result of their observations on a great variety of subjects. All that is required is that the witnesses should be able properly to make the observations, the result of which they give; and the confidence bestowed on their conclusions will depend upon the extent and completeness of their examination, and the ability with which it is made.[4]

The testimony of an expert has not the weight of testimony from observation. His statements are mere opinions, and entitled to such weight only as his experience justifies.[5]

The weight of authority is that he cannot be compelled to give a professional opinion without compensation.[6]

If specially feed, the jury may consider the effect on his credibility.[7]

See DESIGN, 2; HANDWRITING; INSANITY, 2 (6); INSPECTION, 2; SCIENCE.

EXPLOSION. Sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report.[8]

There is no difference in common use, between "explode" and "burst." . . The ordinary idea is that "explosion" is the cause, while "rupture" is the effect.[1]

An insurance against "loss or damage by fire" covers a loss arising in part from an explosion and in part from combustion of gunpowder.[2] See FIREWORKS.

EXPORT. To carry away: send out of a country. *Exports:* merchandise sent from one country to another.

As used in the Constitution, Art. 1, secs. 8, 10, does not include articles transported from one State into another.[3] See further IMPORT.

EXPOSE. To set out, bring into view; display, exhibit; show: as, to expose property to sale,[4] to expose the person.[5] See INDECENT.

EXPOSITIO. L. A setting out — the meaning of language; explanation; interpretation.

Contemporanea expositio optima et fortissima in lege. The explanation of the time is the fittest and strongest in law. Contemporaneous interpretation is the most satisfactory.

Words in constitutions, treaties, statutes, — old writings generally, will be given the sense and scope they had with the makers or framers. The courts will not disturb the construction put upon a doubtful law by long usage.[6]

Contemporaneous construction "can never abrogate the text, it can never fritter away its obvious sense, it can never narrow down its true limitations, it can never enlarge its natural boundaries."[7]

The contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous.[8] Compare ERROR, 1, Communis, etc.

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[1] Dexter *v.* Hall, 15 Wall. 9, 26 (1872), Strong, J.

[2] Milwaukee, &c. R. Co. *v.* Kellogg, 94 U. S. 472 (1876), cases; Connecticut Mut. Life Ins. Co. *v.* Lathrop, 111 *id.* 618 (1884); Carter *v.* Boehm, 1 Sm. L. C. 286, cases.

[3] 1 Whart. Ev. §§ 434–56, cases.

[4] Hopt *v.* Utah, 120 U. S. 437–38 (1887), cases.

[5] United States *v.* Pendergast, 32 F. R. 198 (1887).

[6] 1 Whart. Ev. § 379, cases: Sprague, 276; 5 South. Law Rev. 793–809 (1880), cases; 6 *id.* 706–18 (1880), cases; 12 Cent. Law J. 193 (1881), cases; 21 Am. Law Rev. 571–77 (1887), cases; Medico-Leg. J., Sept., 1883; 59 Ind. 15; 18 Abb. Pr. 207, 240.

[7] 1 Whart. Ev. §§ 456, 380; Harvey *v.* Packet Co., 8 Biss. 99 (1877). See generally Ware *v.* Starkey, 80 Va. 804 (1885); 18 Bradw. 343; 70 Iowa, 432, 474; 30 Minn. 411; 2 Utah, 189; 41 N. Y. 547; 43 Pa. 12; 3 Tex. Ap. 157.

[8] United Life, &c. Ins. Co. *v.* Foote, 23 Ohio St. 348 (1872).

[1] Evans *v.* Columbian Ins. Co., 44 N. Y. 151–52 (1870).

[2] Scripture *v.* Lowell Mut. Fire Ins. Co., 10 Cush. 356 (1852). See also 56 Md. 81; 21 Wend. 367; 3 Phila. 323; 19 C. B. N. S. 126.

[3] *Exp.* Martin, 7 Nev. 142 (1871); Woodruff *v.* Parham, 8 Wall. 131 (1868).

[4] Adams Express Co. *v.* Schlessinger, 75 Pa. 256 (1874); 12 Vt. 212.

[5] 2 Bishop, Cr. L. § 318; 46 N. J. L. 16.

[6] Ames *v.* Kansas, 111 U. S. 464 (1884).

[7] 1 Story, Const. § 407.

[8] United States *v.* Johnston, 124 U. S. 253 (1888), cases, Harlan, J.; Cohens *v.* Virginia, 6 Wheat. 418 (1821), Marshall, C. J.; Harrison *v.* Commonwealth, 83 Ky. 171 (1885); United States *v.* Saylor, 31 F. R. 548 (1887). See also 5 Cranch, 22; 12 Wheat. 210; 99 U. S. 265; 101 *id.* 461; 107 *id.* 406; 113 *id.* 571, 733; 116 *id.* 622; 31 F. R. 263; 6 Col. 92; 9 *id.* 93; 6 Conn. 89; 119 Ill. 345; 36 Kan. 111; 83 Ky. 103; 17 Mass. *144; 44 N. J. L. 22; 16 Ohio St. 519; 70 Pa. 208; 73 *id.* 84; 94 *id.* 249; 14 S. C. 195; 66 Wis. 468.

EXPRESS. 1. To declare in terms, state in words, mention distinctly, avow openly.

Express; expressed. Openly uttered and avowed; stated or mentioned in words, oral or written; made known; opposed to *implied:* left to implication or inference; as, express or an express or expressed — abrogation, *assumpsit* or undertaking, condition, consent, consideration, contract, covenant, dedication, malice, repeal, trust, warranty,[1] *qq v.* See also EXPRESSIO.

(2) Intended for a special service; contracting for expedition in the transportation of packages: as, express — company, business, facilities, matter.

Express car. See BURGLARY, p. 141, *n.* 2.

Express companies are organized to carry small and valuable packages rapidly, in such manner as not to subject them to the danger of loss and damage which attends the transportation of heavy and bulky articles of commerce.[2] See PACKAGE.

Express companies are common carriers. Originally formed to transport money, treasure, and other valuables, they have become carriers of goods and merchandise generally.[3]

Before railroads came into use, common carriers by land delivered parcels to the consignees. Railway companies were held bound only to carry goods to their destination, and put them safely in a warehouse. To remedy this defect in the railway transportation of packages of great value in small compass, express companies were instituted. They undertake to deliver to the consignee in person.[4]

The style "express forwarders" does not necessarily make them simple forwarders.[5]

What they are is to be determined by the nature of their business, not by contracts made respecting their liability.[6]

Express business. Involves the idea of regularity, as to route or time, or both. In the act of June 30, 1864, § 104 (13 St. L. 276), does not cover what is done by a person who carries goods at special request, not running regular trips nor on regular routes.[7]

The regulation of the business of an express company upon the property of a railroad company, in the absence of legislation, is for the parties themselves to determine. . . In a few States, by recent statutes or by judicial interpretation, railroad companies are required to furnish equal facilities to all express companies desiring to use their property. . . But the reason is obvious why special contracts are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at one time. As the things carried are to be kept in the personal custody of the messenger of the express company, a certain amount of car space must be set apart, and, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is "express" it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is inconsistent with the idea of an express business on trains free to all express carriers. Passenger trains are primarily for the transportation of passengers and their baggage. This must be done with reasonable promptness and comfort to the passenger. The express business is in a degree subordinate to the passenger business, and it is consequently the duty of the railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, etc. It by no means follows that because a railroad company can serve one express company in one way it can as well serve another company in the same way. . . As long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty when it affords the public all reasonable express accommodations. The company may choose its own means of carriage, always provided they are such as to insure reasonable promptness and security.[1]

See CARRIER, Common.

EXPRESSIO. L. Definite statement or enumeration; expression.

Expressio unius, exclusio alterius. The statement of one thing is the exclusion of another. Sometimes put, *inclusio unius*, etc.,— "including one excludes all others."[2] Still another form is, **expressum facit cessare tacitum:** the expressed controls the

[1] See 2 Bl. Com. 448; 101 U. S. 670.

[2] Southern Express Co. *v.* St. Louis, &c. R. Co., 10 F. R. 213 (1882), Miller, J. See 2 Redf. Railw. 15, Carriers, 50, § 38: American Union Express Co. *v.* Robinson, 72 Pa. 278 (1872).

[3] Southern Express Co. *v.* Cook, 44 Ala. 473 (1870).

[4] 2 Redf. Railw. 21; United States Express Co. *v.* Backman, 28 Ohio St. 151 (1875).

[5] Christenson *v.* American Express Co., 15 Minn. 283 (1870).

[6] Bank of Kentucky *v.* Adams Express Co., 93 U. S. 181–85 (1876).

[7] Retzer *v.* Wood, 109 U. S. 187 (1883).

[1] Express Cases: Railroad Companies (Memphis & L., St. Louis, I. M. & S., and Missouri, K. & T.) *v.* Express Companies (Southern and Adams), 117 U. S. 1, 29 (1886), Waite, C. J. Commented on, Pfister *v.* Central Pacific R. Co., 70 Cal. 183 (1886). See also 57 Me. 194; 115 Mass. 416; 4 Brewst. 563. *Contra*, 2 F. R. 465; 3 *id.* 593, 775; 4 *id.* 481; 6 *id.* 427; 8 *id.* 799; 10 *id.* 213, 869; 15 *id.* 568; 18 *id.* 671, 672; 19 *id.* 21.

[2] 12 F. R. 414; 6 Col. 83, 94.

unmentioned; an unequivocal statement prevails over an implication.[1]

Express mention of one act, condition, stipulation, class or number, person or place, implies the exclusion of another or others not mentioned. The maxim restricts what is implied by what is expressed, what is general by what is particular and specific.[2]

The mode provided in a constitution for its amendment is the only mode in which it can be amended. The ordinary rule is, that where power is given to do a thing in a particular way, there affirmative words, marking out the way, by implication prohibit all other ways.[3]

It would have been impracticable for the framers of the Constitution to have enumerated all the means by the use of which the powers expressly conferred upon the government of the United States should be exercised. A sovereign must have a choice of means by which to exercise sovereign powers.[4] See NECESSITY.

Offenses not mentioned in a treaty of extradition are excluded from its operation.[5]

A special provision in an act for levying a tax of a fixed per centum excludes the levy of a higher, although necessary, tax.[6]

The creation of specific means for exercising powers of municipal government excludes all other means.[7]

The charter of a corporation is the measure of its powers, and the enumeration of those powers implies the exclusion of others.[8]

A general statement of the duties for which a bond is given will be construed to include only such other duties of the same kind as were not specifically enumerated.[9]

The expression, in a policy of insurance, that a vessel should proceed to a port in Cuba and thence to Europe, implies that she should visit no other port in Cuba.[10]

An express guaranty of a bill or note cannot be converted into an indorsement.[11]

Where a party specifies an objection to the admission of evidence it must be considered that he waives or has no ground for other objections.[12]

The maxims express the principle of the rule that excludes such parol testimony as would vary the terms of a written instrument.

They also serve to prevent fraud and perjury.[13] They are never more applicable than when applied to the interpretation of a statute.[1]

See INCIDENT; REMEDY; SURPLUSAGE.

EXPRESSIONS, GENERAL. See CONSTRUCTION; DICTUM, 2; EXPRESSIO, Unius, etc.; OPINION, 8.

EXPULSION. See AMOTION; FRANCHISE, Disfranchise; EVICTION.

EXPUNGE. See ALTER, 2; CANCEL; SCANDAL, 2.

EXPURGATORY. See OATH.

EXTEND. To stretch or lengthen out; to continue, enlarge, expand. Compare ENLARGE; EXTENT; RENEW.

To extend a charter is to give one which now exists greater or longer time in which to operate than that to which it was originally limited.[2]

In its primary sense, when applied to a railroad track or other line, may import a continuation of the line without a break. But power to authorize a railway "to extend the location of its tracks" may be held to include the location of an additional track, not connected with existing tracks except by those of another corporation.[3]

For proper cause shown, a court will usually extend the time within which a thing was previously directed to be done; as, the taking of testimony.[4]

Extension. Imports the continuance of an existing thing.[5]

Since the act of March 2, 1861, c. 88 (12 St. L. 249), patents are granted for the term of seventeen years, and further extension is forbidden, except as to designs.[6]

In the construction of statutes a term of an inferior class will not be extended to a superior class. See GENERAL, 6.

Creditors extend, that is, increase the time of payment of their claims, by agreeing to wait a certain time after the claims become due.

EXTENT. 1. In common parlance, varies somewhat in meaning according to the subject to which it is applied, and as that changes, it may as well refer to time as to

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[1] 71 Ala. 87; 82 *id.* 629; 62 Cal. 639; 4 Wash. C. C. 185.

[2] Broom, Max. 651, 664.

[3] *Re* Constitutional Convention, 14 R. I. 651 (1883), cases. See also Smith *v.* Stevens, 10 Wall. 326 (1870).

[4] 2 Story, Const, § 1243.

[5] United States *v.* Rauscher, 119 U. S. 420 (1886).

[6] United States *v.* County of Macon, 99 U. S. 590 (1878).

[7] Mayor of Nashville *v.* Ray, 19 Wall. 475 (1873).

[8] Thomas *v.* West Jersey R. Co., 101 U. S. 82 (1879).

[9] South *v.* Maryland, 18 How. 402 (1855).

[10] Hearne *v.* Marine Ins. Co., 20 Wall. 493 (1874).

[11] Central Trust Co. *v.* Nat. Bank of Wyandotte, 101 U. S. 79 (1879).

[12] Evanston *v.* Gunn, 99 U. S. 665 (1878).

[13] See Smith *v.* McCullough, 104 U. S. 25 (1881); 109 *id.* 628; 18 Ct. Cl. 117, 457; 31 F. R. 220; 32 *id.* 50, 554; 4 Del. Ch. 135; 66 Ga. 108; 87 Ind. 291; 59 Iowa, 77; 36 Kan. 637; 34 La. An. 225; 98 Mass. 29; 117 *id.* 448; 10 Minn. 113; 30 *id.* 297; 44 N. J. L. 45; 3 N. Mex. 56; 73 N. Y. 440; 59 Pa. 178; 71 *id.* 88, 429; 75 *id.* 63, 195, 501; 80 *id.* 412; 19 S. C. 147; 80 Va. 327, 373, 374; 60 Wis. 252; 62 *id.* 41; 66 *id.* 382, 565; 67 *id.* 89; L. R., 3 Exch. 177; 2 Para. Cont., 6 ed., 515 (r, t).

[1] Coast-Line R. Co. *v.* City of Savannah, 30 F. R. 649 (1887).

[2] Moers *v.* City of Reading, 21 Pa. 201 (1853).

[3] South Boston R. Co. *v.* Middlesex R. Co., 121 Mass. 489 (1877), Morton, J. See also Volmer's Appeal, 118 Pa. 166 (1887); 19 W. N. C. 133.

[4] See James *v.* McMillan, 55 Mich. 136 (1884).

[5] Brooke *v.* Clarke, 1 B. & Al. *403 (1818).

[6] See R. S. § 4934.

space, or proportion; especially so, when applied to interests, as in patents, for a particular term of years.[1]

2. At common law, a writ of execution by which the defendant's body, lands, and goods may all be taken at once, to compel payment of a debt. At present, concerns lands only.

Originally enforced a recognizance or debt acknowledged on a statute merchant or staple. The sheriff caused the lands and tenements to be appraised to their full "extended" value that it might be known how soon the debt would be satisfied.[2] Compare STATUTE, Merchant.

Sometimes denotes a writ by which the creditor may obtain possession of the debtor's land till the debt be paid.[3] See INQUEST, Of lands.

EXTENUATION. See AGGRAVATION.

EXTINGUISH.[4] To put out or quench: to destroy, annihilate; to pay in full, satisfy: as, to extinguish a debt, an estate, a right to rent, a right of way, the rights of a corporation.

Extinguishment. Whenever a right, title or interest is destroyed or taken away by the act of God, operation of law, or act of the party.[5]

Extinguishing one debt by substituting another is always a question of intention.[6]

See RELEASE; MERGER, 1; SATISFY, 2.

EXTORTION.[7] That abuse of public justice which consists in an officer's unlawfully taking, by color of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due.[8] Whence extorsively.

Obtaining money or other valuable thing by compulsion, actual force, or the force of motives applied to the will.[9]

The wrongful exaction of money. The law, at the time of payment, creates an obligation to refund. Notice to refund is not necessary, therefore, unless to serve to rebut the inference that the payment was voluntary or made through mistake.[10]

No public officer may take other fees or rewards than such as are given by virtue of some statute.[1]

The taking or obtaining of anything from another by a public officer by means of illegal compulsion or oppressive exaction. The offense, by § 3169, Rev. St., is the same as extortion at common law.[2]

Compare EXACTION; BLACKMAIL; OPPRESSION. See PAYMENT, Involuntary; PROTEST, 1.

EXTRA. A Latin preposition and adverb, contracted from *extera* (*parte*): *exter*, or *exterus*, outward: *ex*, out.

1. On the outside: outside; without; beyond.

2. Except; besides.

3. In extra *costs*, extra *services*, extra *wages*, and the noun *extras*, supposed to be an abbreviation of "extraordinary:" beyond what is common, additional to what is due or expected.

See *Dermott* v. *Jones*, under CONTRACT, Executed.

Extra-dotal. Beyond dower. See DOTAL.

Extra-hazardous. Specially risky. See HAZARD.

Extra-judicial. Beyond the jurisdiction; not judicial; outside of, or out of, court: as, an extra-judicial — act, admission, decision, oath. See JUDGE; JUDICIAL.

Extra-official. Outside the duties of an office, *q. v.*

Extra-territorial. Beyond the territory, *q. v.*

EXTRACT. See COPY; ESTREAT; EVIDENCE, Secondary; REVIEW, 3.

EXTRADITION.[3] Surrender, by one government to another, of a person who has fled to the territory of the former to escape arrest and punishment under the criminal laws of the latter. Whence extradite, extraditable, non-extraditable.

International or foreign extradition. Exists between independent nations. **Inter-State extradition.** Exists between individual States of the same nation or union.

For a crime committed against the law of a State, extradition of the offender from a foreign country must be negotiated through the Federal government, conformably to the existing treaty.

1. As between nations, the surrender of a fugitive is a matter of conventional arrange-

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[1] Wilson v. Rousseau, 4 How. 698 (1846).

[2] 3 Bl. Com. 420.

[3] See 1 Troub. & H. (Pa.) § 1222.

[4] L. *extinguere*, to quench.

[5] Moultrie v. Smiley, 16 Ga. 348 (1854): 3 Bac. Abr.; 20 Ga. 403; 4 McCord, 101; 28 N. J. L. 20.

[6] Potter v. McCoy, 26 Pa. 462, 460 (1856). See 3 W. & S. 277; 4 Watts, 379; 6 Fla. 25; 35 N. H. 421; 12 Barb. 128; 29 Vt. 488.

[7] L. *extorquere*, to twist or wring out.

[8] 4 Bl. Com. 141; 3 Cow. 603.

[9] [Commonwealth v. O'Brien, 12 Cush. 90 (1853), Shaw, Chief Justice.

[10] United States Bank v. Bank of Washington, 6 Pet. 19 (1832). See also 3 Saw. 474; 14 F. R. 597; 35 Ark. 442: 2 Bish. Cr. L. § 390; 4 Conn. 480; 2 Sneed, 162; 7 Pick. 287.

[1] R. S. §§ 3169, 5481: United States v. Waltz, 3 Saw 474 (1875).

[2] United States v. Deaver, 14 F. R. 597 (1882), Dick, District Judge.

[3] L. *ex-tradere*, to deliver over.

ment, not a matter of right. The obligation is not imposed by the law of nations. Deliveries not provided for by treaty stipulation have been made in many cases, but always upon the principle of comity.[1]

The trespass of a kidnaper, unauthorized by either government, is not a case provided for in the treaties hitherto made, and the remedy for the trespass is by a proceeding by the government whose law he may have violated, or by the party injured. How far a forcible transfer, made with no reference to the existing treaty, may be set up against the right to try the accused, is for the State court to decide: it presents no question upon which the Supreme Court can review the decision.[2]

Treaties have been made between the United States and the following foreign states, for crimes specified and defined in the treaties themselves respectively:

Great Britain, Aug. 9, 1842 (8 St. L. 576).

France, Nov. 9, 1843 (8 St. L. 582); Feb. 24, 1845 (*ib.* 617); Feb. 10, 1858 (11 *id.* 741).

Hawaiian Islands, Dec. 20, 1849 (9 St. L. 961).

Swiss Confederation, Nov. 25, 1850 (11 St. L. 587).

Prussia and Germanic Confederation, June 16, 1852 (10 St. L. 964); Nov. 16, 1852 (*ib.* 964).

Bavaria, Sept. 12, 1853 (10 St. L. 1022).

Hanover, Jan. 18, 1855 (10 St. L. 1138).

Two Sicilies, Oct. 1, 1855 (11 St. L. 651).

Austria, July 3, 1856 (11 St. L. 691); re-declared Sept. 20, 1870 (17 *id.* 835).

Baden, Jan. 30, 1857 (11 St. L. 713); re-declared July 19, 1868 (16 *id.* 733).

Sweden and Norway, March 21, 1860 (12 St. L. 1225).

Venezuela, Aug. 27, 1860 (12 St. L. 1143).

Mexico, Dec. 11, 1861 (12 St. L. 1199); re-declared July 10, 1868 (15 *id.* 688).

Hayti, Nov. 3, 1864 (13 St. L. 711).

Dominican Republic, Feb. 8, 1867 (15 St. L. 473).

Italy, March 23, 1868 (11 St. L. 629); Jan. 21, 1869 (16 *id.* 767); June 11, 1884 (24 *id.* 1001).

Salvador, May 23, 1870 (18 St. L. 693, 796).

Nicaragua, June 25, 1870 (17 St. L. 815).

Peru, Sept. 12, 1870 (18 St. L. 719).

Orange Free State, Dec. 22, 1871 (18 St. L. 751).

Ecuador, June 28, 1872 (18 St. L. 756).

Belgium, March 19, 1874 (18 St. L. 804); June 13, 1882 (22 *id.* 972).

Ottoman Empire, Aug. 11, 1874 (19 St. L. 572).

Spain, Jan. 5, 1877 (19 St. L. 650); Aug. 7, 1882 (22 *id.* 991).

Netherlands, May 23, 1880 (21 St. L. 769).

Luxemburg, Oct. 29, 1883 (23 St. L. 808).

Japan, April 29, 1886 (24 St. L. 1015).[1]

Treaties have also been made with Indian tribes by which they stipulate to surrender persons accused of crime against the laws of the United States; and some provide for the mutual extradition of offenders.[2]

Treaties also provide for the mutual surrender of deserting seamen.

Most of the treaties prescribe the evidence required to authorize an order of extradition.

All hearings under treaty stipulation or convention shall be held on land, publicly, and in a room or office easily accessible to the public.[3] . . On the hearing of any case, upon affidavit being filed by the person charged, that he cannot safely go to trial without certain witnesses, what he expects to prove by each of them, that he is not possessed of sufficient means and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom the hearing is had may order that they be subpœnaed, the costs to be paid as similar fees are paid in the case of witnesses subpœnaed in behalf of the United States.[4] . . Fees and costs shall be certified to the secretary of state of the United States, who shall authorize payment of the same out of the appropriation to defray the expenses of the judiciary, and shall cause the amount to be reimbursed by the foreign government by whom the proceeding may have been instituted.[5] . . Where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any case, the same shall be received as evidence for all the purposes of such hearing if they shall be legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant, or other paper or copies thereof, so offered, are authenticated in the manner required by this act.[6]

The complaint made before the United States commissioner should show on its face that he who makes it is a representative of the foreign government.[7]

[1] *Re* Metzgar, 5 How. 188 (1847); United States *v.* Davis, 2 Sumn. 482 (1837); United States *v.* Rauscher, 119 U. S. 411 (1886); 12 Blatch. 391; 59 N. H. 110; 14 How. 112; 16 Alb. Law J. 444; 1 Kent, 36; Woolsey, Int. Law, §§ 77–80.

[2] Ker *v.* Illinois, 119 U. S. 436 (Dec. 6, 1886), Miller, J. Ker, who was charged with larceny in Cook county, Illinois, fled to South America. He was apprehended in Peru by one Julian (who had proper extradition papers), forcibly placed on board the United States vessel *Essex*, transferred at Honolulu to the *City of Sydney*, carried to San Francisco, and thence taken to Cook county, where he was convicted and sentenced. Same case, 110 Ill. 627; 51 Am. R. 706; 35 Alb. L. J. 69.

As to abducting an escaped criminal from another State, see Mahon *v.* Justice, Jailer, etc., 127 U. S. 700 (1888), in which case Mahon, residing in West Virginia, was, by persons acting as private citizens, forcibly and without process conveyed back to Kentucky, to be tried for murder. The circuit court of Kentucky, and, later, the Supreme Court of the United States, refused to discharge him upon a writ of *habeas corpus*.

[1] See generally R. S. §§ 5270–80; 23 Cent. Law J. 247 (1886) — London Times.

[2] See 11 St. L. 612, 703.

[3] Act 3 August, 1882, sec. 1: 22 St. L. 215.

[4] *Ibid.*, sec. 3.

[5] *Ibid.*, sec. 4.

[6] *Ibid.*, sec. 5. Sec. 2 prescribes the fees to be paid to commissioners. Sec. 6 repeals Act 19 June, 1876 R. S. § 5271.

[7] In re Herris, 32 F. R. 583 (1887).

Most of the treaties exclude "political offenses" from their operation, that is, offenses incidental to and forming part or a political disturbance.[1]

Some treaties also provide that a citizen or subject of the country on which the demand is made shall not be surrendered.

Under the Ashburton Treaty of 1842, between Great Britain and the United States, a fugitive who has been surrendered to this country cannot lawfully be tried for any other offense than that for which he was extradited — at least until he has had an opportunity to return to the country from which he was taken. National honor requires that good faith be kept in this regard.[2]

Act of 33 and 34 Vict. (1870) c. 52, sec. 3, provides that a fugitive shall not be surrendered to a foreign state unless provision is made "by the law of that state, or by arrangement," that, "until he has been restored or had an opportunity of returning to her Majesty's dominions," he shall not "be detained or tried in that foreign state for any offense committed prior to his surrender, other than the extradition crime."[3]

2. Extradition as between the States, Territories, and the District of Columbia, is regulated by the Constitution and by statutes. The former provides that "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."[4]

The words "treason, felony, or other crime" embrace every act forbidden and made punishable by a law of the State. The words "treason and felony" were introduced to guard against any restriction of the word "crime," and to prevent the provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice. According to these usages, even where the obligation to deliver the fugitive was admitted, persons who fled on account of "political offenses" were almost always excepted; and the nation upon which the demand is made also uniformly exercises a discretion in weighing the evidence of the crime, and the character of the offense. . . And as the States, although united as one nation for certain specified purposes, are yet, as far as concerns their internal government, separate sovereignties, independent of each other, it was deemed necessary to show, by the terms used, that this compact was not to be regarded as an ordinary treaty for extradition between nations altogether independent of each other, but was intended to embrace political offenses against the sovereignty of the State, as well as all other crimes. And as treason was "felony" it was necessary to insert those words, to show, in language that could not be mistaken, that political offenders were included in it. For this was a compact binding the States to aid each other in executing their laws and preserving order within their respective confines. . . As early as 1643, certain plantations in New England pledged themselves to deliver up fugitives from justice found within their borders. The advantages derived from this compact doubtless suggested the introduction into the Articles of Confederation of the provision that "If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offense. Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State." (Art. IV, sec. 2-3.) The colonies, having learned from experience the necessity of this provision for the internal safety of each of them, and to promote concord and harmony among all their members, incorporated it in the Constitution substantially in the same words, but substituting the word "crime" for "high misdemeanor," thereby showing the deliberate purpose to include every offense known to the law of the State from which the party charged had fled. . . The compact gives the right to the executive authority of the State to demand the fugitive from the executive authority of the State in which he is found. The right to "demand" implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled. This is the construction put upon this Article in the act of Congress of 1793, a statute passed by many who had been framers of the Constitution.

If the duty of providing by law the regulations necessary to carry the compact into execution had been left to the States, each State might have required different proof to authenticate the judicial proceeding upon which its demand was to be founded; and as the duty of the governor of the State in which the fugitive is found is merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the State or of Congress to authorize it. These difficulties presented themselves in 1791, in a demand by the governor of Pennsylvania upon the governor of Virginia, and both of them

[1] 2 Steph. Hist. Cr. L. Eng. 70; 2 Law Quar. Rev. 177-87 (1886), cases; Kentucky *v.* Dennison, *post*.

[2] United States *v.* Rauscher, 119 U. S. 411-33 (Dec. 6, 1886), cases, Miller, J.; Waite, C. J., dissenting. Same case, 26 Am. Law Reg. 241-46 (1887), cases; 25 Cent. Law J. 267 (1887); 35 Alb. Law J. 204-8 (1887), cases, S. T. Spear. See also 19 Cent. Law J. 22-24 (1884), cases. Evidence under treaty with Great Britain, *Exp.* McPhun, 30 F. R. 57 (1887). Our state department and extradition, 20 Am. Law Rev. 540 (1886).

[3] See also *Exp.* Coy, 32 F. R. 911 (1887), Turner, J.; *ib.* 917, cases; *Re* Miller, 23 *id.* 32 (1885), cases. Clarke, Extrad. XXXVI; Spear, Inten. Extrad. 158-59; 14 Alb. Law J. 85-99 (1876); 6 Can. Law J. 227; 8 Blatch. 131. See generally 10 Am. Law Rev. 617 (1876); 17 *id.* 315-49 (1883).

[4] Constitution, Art. IV, sec. 2, cl. 2.

brought the subject before the President, who immediately submitted the matter to the consideration of Congress. This led to the act of February 12, 1793. Difficulty as to authenticating the judicial proceeding was removed by the Article in the Constitution which declares that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." (Art. IV, sec. 1.) The provision for the delivery of fugitives was doubtless in mind when this power was given to Congress.

The act of 1793, as re-enacted in the Revised Statutes, reads as follows: "Sec. 5278. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any State or Territory to which such person has fled, and produces a copy of the indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in apprehending, securing, and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory." "Sec. 5279. Any agent, so appointed, who receives the fugitive into his custody, shall be empowered to transport him to the State or Territory from which he fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars, or imprisoned not more than one year." (1 St. L. 302, ch. 7, §§ 1, 2.)

The judicial acts which are necessary to authorize the demand are plainly specified in the foregoing enactment; and the certificate of the executive authority is made conclusive as to their verity when presented to the executive of the State where the fugitive is found. He has no right to look behind them, or to question them, or to look into the character of the crime specified in the judicial proceeding. His duty is merely ministerial — to cause the party to be arrested and delivered to the agent of the State where the crime was committed. The words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which the compact between the United States and each State created, when Congress had provided the mode of carrying it into execution. There is no power delegated to the general government to use coercive means to compel the governor of a State to discharge his duty in this respect.[1]

It is within the power of each State, except as her authority may be limited by the Constitution, to declare what shall be offenses against her laws, and citizens of other States, when within her jurisdiction, are subject to those laws. In recognition of this right, the words of the clause in reference to fugitives from justice were made sufficiently comprehensive to include every offense against the demanding State, without exception as to the nature of the crime. The demand may be made upon the governor of a Territory. Upon the executive of the State in which the accused is found, rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding State. He does not fail in his duty if he makes it a condition precedent to surrender that it be shown by competent proof that the accused is in fact a fugitive from such State.[1]

The accused is entitled to have the lawfulness of his arrest inquired into, by a court of the State or of the United States, by a writ of *habeas corpus*. . . It must appear to the governor of the State on whom the demand is made that the person demanded is substantially charged with a crime against the laws of the demanding State, by an indictment or an affidavit, certified as authentic by the governor of the latter State; and that the person is really a fugitive from the justice of that State. The first of these prerequisites is a question of law, always open upon the face of the papers to judicial inquiry, on an application for a discharge. The second is a question of fact, which the governor upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. A certified copy of the law alleged to have been broken need not be furnished. The courts of the United States take judicial notice of the laws of all the States. To be a "fugitive from justice" it is not necessary that the accused should have left the State after an indictment found, or to avoid a prosecution anticipated or begun, but simply that, having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another.[2]

[1] Commonwealth of Kentucky v. Dennison, Governor of Ohio, 24 How. 66, 99–110 (1860), Taney, C. J. This was a motion for a rule on Dennison to show cause why a *mandamus* should not be issued by the Supreme Court, commanding him to cause one Lago to be surrendered to the authorities of Kentucky. Lago, a free man of color, after being indicted for assisting a slave to escape, fled to Ohio. The governor of that State, on the advice of the attorney-general, refused to deliver up the fugitive, on the ground that the act for which Lago was indicted was neither "treason," nor "felony" nor any "other crime," either at common law or under the laws of Ohio.

[1] *Exp.* Reggel, 114 U. S. 642, 650, 652 (1885), Harlan, J. Reggel was indicted in Pennsylvania for obtaining goods by false pretenses, and fled to Utah.

[2] Roberts *v.* Reilly, 116 U. S. 80, 94–97 (1885), Matthews, J. Roberts petitioned the District Court for the Southern District of Georgia for a discharge, alleging that he was illegally restrained of his liberty by Reilly, agent of the State of New York, in which

A State may legislate in aid of the enactments of Congress.[1] And, as seen above, the courts of a State may pass upon the legality of an arrest.[2]

The provision is a national police regulation.[3]

See FUGITIVE; REQUISITION; EXPRESSIO, Unius, etc.

EXTRAORDINARY. 1. The utmost; the highest under the circumstances: as, extraordinary care or diligence. See CARE; NEGLIGENCE.

2. Out of the common order; not usual or regular: as, extraordinary jurisdiction, remedies. See CHANCERY, 1; MINISTER, 8.

Poverty or financial embarrassment is not an "extraordinary circumstance," within the meaning of a statute excusing laches in proceeding with a cause.[4]

As between ship-owner and insurer, the former is bound to provide against *ordinary*, while the latter insures against *extraordinary* perils. By "extraordinary" is not meant what has never been previously heard of, or is within former experience, but what is beyond the ordinary, usual, or common.[5]

EXTRAVAGANT. See IMPROVIDENT; SPENDTHRIFT.

EXTREME. See CRUELTY; PENALTY.

EXTREMIS. See IN EXTREMIS.

EXTRINSIC. See EVIDENCE.

EYE. See MAYHEM; SECURITY, Personal.

F.

F. 1. Was anciently branded upon the ear or face of a person guilty of falsity, fighting, or of a felony admitted to clergy.

Abolished by 7 and 8 Geo. IV (1827), c. 28, s. 6.

2. Stands for words sometimes abbreviated: as, first, French.

F. F. *Fieri facias.* See EXECUTION, 8, Writs of.

F. J. First judge or justice.

FABRICATE. In a statute against "fabricating" a voting paper, imports an act done with criminal intent; implies fraud or falsehood, a false or fraudulent concoction, by one knowing that it is wrong and contrary to law.[1] Compare FORGE, 2.

FAC. See FACERE.

FACE. 1. As a thing is made: impression; expression; appearance, *q. v.*: as, the face of a bill, bond, note, check, draft, judgment, record.

A purchaser must look at the face of a bond,[2] *q. v.* A contract, on its face, may be *ultra vires*.[3]

2. The sum, less interest, which appears to be due by an instrument or record: as, the face of a judgment.[4]

3. Presence; sight; front; view: as, for parties or witnesses to meet face to face; that is, front to front, and, perhaps, facing the court or jury. See CONFRONT; CONTEMPT.

4. Mere appearance or aspect; phase; semblance, likeness: as, an act intended to give an honest face to a transaction. See INTENTION.

FACERE. L. To make, do, perform. Compare FIERI.

Fac simile. Made like in appearance; a copy.

Said of counterfeits, designs, signatures, trade-marks, *qq. v.*

Facias. That you make or cause to be made. See EXECUTION, 8, Writs of.

Facies. Appearance; view. See PRIMUS, Prima, etc.

Factum. A thing done; a fact. See FACTUM.

Qui facit per alium, facit per se. He who acts through another acts by himself. The act of the agent is the act of the principal — within the scope of the employment.

The authorized act of an agent is imputed to his employer.

An act done by one under the command and direction of the owner of a vessel, with his approbation and for his benefit, is as much his own act in contemplation of law as if done by himself. To this extent at least the maxim applies. And it is not material whether the act is done in his absence from, or his presence in, the scene.[5] See AGENT; CONTRACTOR.

Roberts stood indicted for the larceny of railroad bonds.

[1] *Exp.* Ammons, 34 Ohio St. 518 (1878); Wilcox *v.* Nolz, *ib.* 520 (1878), cases.

[2] Robb *v.* Connolly, 111 U. S. 624, 637 (1884).

[3] See generally *Re* Leary, 10 Bened. 208, 205-22 (1879); 18 Blatch. 430; 8 Law. 370; 2 Flip. 183; 16 F. R. 93; 7 Op. Att.-Gen. 6; 8 *id.* 306, 396, 521; 63 Ind. 344; 50 Iowa, 106; 34 Ohio St. 71-79; 4 Tex. Ap. 662; 60 Wis. 594; 18 Alb. Law J. 146-51; 2 West Coast Rep. 599.

Rules proposed by Inter-State Conference, 36 Alb. Law J. 220 (Sept. 10, 1887). The new extradition bill, 57 *id.* 88-93 (1888), A. T. Spear.

[4] Whalen *v.* Sheridan, 10 F. R. 662 (1880); Müller *v.* Ehlers, 91 U. S. 251 (1875).

[5] Moses *v.* Sun Mut. Ins. Co., 1 Duer, 170 (1852); The Titania, 19 F. R. 105 (1883).

[1] Aberdare *v.* Hammett, L. R., 10 Q. B. 165-66 (1875).

[2] 1 Wall. 93; 5 *id.* 734.

[3] 96 U. S. 267.

[4] See Osgood *v.* Bringolf, 32 Iowa, 270 (1871).

[5] United States *v.* Gooding, 12 Wheat. 472 (1827). Story, J. See also 1 Bl. Com. 474; 91 U. S. 312; 48 Ark

FACT. Anything done, or said; an act or action; an actual occurrence; a circumstance; whatever comes to pass; an event. See FACTUM.

Subjects of jurisprudence are facts and laws: facts are the source and cause of laws. From facts proceed rights and wrongs. By fact is meant anything the subject of testimony. Perception is a fact. If any emotion is felt, as joy, grief, anger, the feeling is a fact. If the operation of the mind is productive of an effect, as intention, knowledge, skill, the possession of this effect is a fact. If any proposition be true, whatever is affirmed or denied in it is a fact.[1]

"Fact" and "truth" are often used in common parlance as synonymous; as employed in pleadings they are widely different. A fact in pleading is a circumstance, act, event or incident; a truth is a legal principle which declares or governs the facts and their operative effect.[2]

An act, deed, circumstance, or event is none the less a fact because reached as a conclusion of law.[3] See CIRCUMSTANCES, 1.

After the fact; before the fact. See ACCESSARY; FACTUM, Ex post, etc.

Collateral fact. A fact not directly connected with the matter under consideration.

Material fact. Such a fact as influences action in favor of or against a thing about to be done; such a fact as is essential to the right of action or defense. **Immaterial fact.** A fact not important to a determination; not essential to a conclusion; not necessary to be alleged, nor to be proved if alleged.

In fire insurance any fact is material, the knowledge or ignorance of which would naturally influence an insurer in making the contract, in estimating the degree and character of the risk, or in fixing the rate of insurance.[4] See CONCEAL, 5.

Verbal fact. (1) A fact which, if stricken out, would have the effect produced by striking out the controlling member (*verb*) of a sentence, or the controlling sentence from its context.

(2) A declaration accompanying a thing done, explanatory of it, unfolding its nature and quality; as, what is said about sickness or affection, where either is the subject of inquiry.[5]

In fact. In reality; in a matter of fact. Opposed, *in law:* in a matter of law; empowered by law; imputed in law: as, an attorney in fact, and an attorney at-law; error or fraud in fact and in law. See ATTORNEY; ERROR, 2 (2); FRAUD; PAIS.

"Fact" is contrasted with "law." Law is a principle, fact is an event; law is conceived, fact is actual; law is a rule of duty, fact is that which accords with or contravenes the rule.[1]

Questions, issues, conclusions, and errors are of law or of fact, or of mixed law and fact.

Facts, not evidence, are to be pleaded; and are proven by moral evidence. Questions of fact are said to be solved by the jury, questions of law by the court.

See DEMURRER; IGNORANCE; INQUIRY; JURY; KNOWLEDGE, 1; LAW; MISTAKE; NOTICE, 1; PRESUMPTION; RES, Gestæ; ULTIMATE.

FACTOR.[2] An agent who is commissioned by a merchant or other person to sell goods for him and receive the proceeds.[3]

A commercial agent, transacting the mercantile affairs of other men, in consideration of a fixed salary or certain commission, and, principally, though not exclusively, in the buying and selling of goods.[4]

An agent employed to sell goods or merchandise, consigned or delivered to him, by or for his principal, for a compensation called his "factorage" or commission.[5]

Often called a "commission merchant" or "consignee;" and the goods received by him a "consignment." When, for an additional compensation in case of sale, he undertakes to guarantee the payment of the debt due by the buyer, he is said to receive a *del credere* commission; that is, a commission of trust or credit.[6]

A factor or commission merchant may buy and sell in his own name, and he has the goods in his possession. A "broker" cannot ordinarily buy and sell in his own name and has no possession of the goods.[6]

Domestic factor. A factor who resides in the same country with his principal. A **foreign factor** resides in a different country.

A factor may sell sufficient of the merchandise to reimburse himself for advances, or to meet liabilities incurred, unless he has agreed not to do so, or the consignor is ready to reimburse him. He must obey the orders of his principal.[7]

330; 22 Ind. 471; 15 La. An. 456; 1 Pick. 476; 10 Mass. 155; 3 Gray, 361; 11 Metc. 71; 18 Me. 127; 58 N. H. 53; 9 Pa. 13; 98 *id.* 9; Story, Ag. § 440; Whart. Max. 165.

[1] Ram on Facts, Ch. I.

[2] Drake *v.* Cockroft, 4 E. D. Smith, 37 (1855), Woodruff, J. See Lawrence *v.* Wright, 2 Duer, 674-75 (1853).

[3] Levins *v.* Rovegno, 71 Cal. 277 (1886).

[4] Boggs *v.* American Ins. Co., 30 Mo. 68 (1860); Clark *v.* Union Mut. Fire Ins. Co., 40 N. H. 338 (1860).

[5] See Reaver *v.* Taylor, 1 Wall. 642 (1863); Travelers' Ins. Co. *v.* Mosley, 8 *id.* 404-5 (1869), Swayne, J.

[1] [Abbott's Law Dict.

[2] L. *facere*, q. v.

[3] Cotton *v.* Hiller, 52 Miss. 13 (1876), Simrall, C. J.

[4] Lawrence *v.* Stonington Bank, 6 Conn. 527 (1827), Hosmer, C. J.

[5] Story, Agency, §§ 33, 37; Duquid *v.* Edwards, 50 Barb. 295 (1867); Whart. Ag. § 784; *Exp.* White, L. R., 6 C. Ap. 408 (1871); 1 Pars. Contr. 78; 1 Bl. Com. 427.

[6] Slack *v.* Tucker, 23 Wall. 330 (1874), Bradley, J. See also Perkins *v.* State, 50 Ala. 156 (1873).

[7] Brown *v.* M'Gran, 14 Pet. 494 (1840).

To the extent of advances and charges, he has a lien, a special property, in the merchandise; and he may pledge articles to the amount of that lien. He may protect his possession by a suit against a trespasser. He cannot sell to his own creditor in payment of his debt; nor can he delegate his authority without assent of the principal. Before he has effected a sale, the principal may reclaim possession by paying advances, interest thereon, and expenses.[1] The principal may sue and be sued on a contract made by the factor in his own name.[2]

If guilty of gross negligence in conducting the business, he forfeits all claim to compensation for his services.[3] See further AGENT.

Factor's Act. Statute of 6 Geo. IV (1826), c. 94. Empowered a factor to pledge the goods, and protected persons who believed him to be the real owner.

Statute of 5 and 6 Vict. (1842) further enabled him, as if the true owner, to enter into any agreement respecting the goods by way of "pledge, lien or security," excepting as to antecedent debts; and this, notwithstanding the lender is aware that the borrower is a factor only. Similar legislation exists in the States.

Factorizing process. Trustee process; garnishment,[4] *q. v.*

FACTORY. A contraction of "manufactory,—a building, or collection of buildings, appropriated to the manufacture of goods."

Includes the building, the machinery necessary to produce the particular goods, and the engine or other power requisite to propel such machinery.[5] See CONTAINED.

FACTUM. L. A thing done; a deed; a fact. Compare FAIT.

De facto. In point of fact: actual. Opposed, *de jure:* by right, rightful.

Said of a blockade (*q. v.*) actually maintained;[6] of actual duress;[7] of a wife or husband whose marriage may be annulled;[8] of a person in office under apparent right or under color of right—as by an appointment or election not strictly legal;[9] and of a vacancy (*q. v.*) in an office; of a government (*q. v.*) actually in power in place of the lawful government;[1] of increase of stock.[2]

Ex facto jus oritur. Out of the fact the law arises: the law attaches to facts.

Ex post facto. From an after fact—a subsequent matter; after the fact or act.

"No State shall . . pass any . . ex post facto Law."[3]

That is, a law concerning, and after, a fact, or thing done, or action committed.[4]

Relates to penal and criminal proceedings, which impose punishments or forfeitures, not to civil proceedings which affect private rights retrospectively.[5]

Embraces only such laws as impose or affect penalties or forfeitures. A retrospective act is not therefore necessarily such a law.[6] See RETROSPECTIVE.

Includes every law: (1) That makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) That aggravates a crime, or makes it greater than it was when committed. (3) That changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. (4) That alters the rule of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, to convict the offender.[7]

A law which imposes a punishment for an act not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.[8]

The term necessarily implies a fact or act done, "after" which the law in question is passed. Whether it is *ex post facto* or not relates, in criminal cases, to which alone the phrase applies, to the time at which the offense charged was committed. If the law complained of was passed after the commission of the offense, it is as to that *ex post facto*, though whether of the class forbidden by the Constitution may depend on other matters. But so far as this depends on the *time* of its enactment, it has reference solely to the

[1] Warner *v.* Martin, 11 How. 223 (1850), cases; United States *v.* Villalonga, 23 Wall. 42 (1874); Mechanics', &c. Ins. Co. *v.* Kiger, 103 U. S. 355 (1880); Steiger *v.* Third Nat. Bank, 2 McCrary, 508 (1881); Goodenow *v.* Tyler, 1 Am. L. C. 788, 797; Laussatt *v.* Lippincott, *ib.* 805, 812; 73 Ill. 103; 5 S. & R. 540; 70 E. C. L. 418; 2 Kent, 622.

[2] Higgins *v.* McCrea, 116 U. S. 680 (1886), cases.

[3] Fordyce *v.* Pepper, 16 F. R. 516, 520-21 (1883), cases.

[4] See Drake, Attach. § 451.

[5] Schott *v.* Harvey, 105 Pa. 227 (1884). See 76 Va. 1012; 8 Md. 495.

[6] 1 Kent, 44.

[7] 15 Gray, 471.

[8] 1 Bl. Com. 435; 4 Kent, 36.

[9] 2 Kent, 295; 1 Bl. Com. 371; 27 Minn. 298; 3 Mont. 420; 55 Pa. 468.

[1] 92 U. S. 133; 96 *id.* 185; 97 *id.* 616; 43 Ala. 213; 49 Miss. 703; 47 Pa. 170.

[2] 95 U. S. 668.

[3] Constitution, Art. I, sec. 10. See 2 Bancroft, Const. 213.

[4] Calder *v.* Bull, 3 Dall. 390-91 (1798), Chase, J.

[5] Watson *v.* Mercer, 8 Pet. 110 (1834), cases, Story, J.

[6] Locke *v.* New Orleans, 4 Wall. 172 (1866).

[7] Calder *v.* Bull, *supra;* State *v.* Hoyt, 47 Conn. 532 (1880).

[8] Cummings *v.* Missouri, 4 Wall. 326 (1866), Field, J.; 9 Wall. 38.

date at which the offense was committed to which the new law was sought to be applied. . . Any law passed after the commission of an offense which "in relation to that offense or its consequences, alters the situation of a party to his disadvantage," is an *ex post facto* law, and forbidden.[1]

Does not involve a change of place of trial.[2]

Illustration: a State may not disqualify from further employment as such, teachers and clergymen who took part in the late rebellion.[3]

A statute which simply enlarges the class of persons who may be competent to testify is not *ex post facto* as to offenses previously committed. Such alteration in the law relates to the mode of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure.[4]

Factum probandum. The fact to be proved.[5]

Ipso facto. By the fact itself; by the mere fact; from the effect of the fact or act.

The mere fact of a collision between trains is evidence *ipso facto* of negligence.[6] Attaining twenty-one years of age *ipso facto* emancipates from the disabilities of infancy.

Non est factum. It is not his deed. The name of the issue joined in an action on a specialty, by a defendant who denies that he executed the instrument.[7]

FACULTY. A special privilege or license granted to a person permitting him to do something which otherwise the law would not allow.

FAILURE. 1. The state or condition of being wanting; a falling short; deficiency or lack; defect, want, absence; default; defeat.

Failure of consideration. Want or absence of a legal consideration.

This may be either partial or total.[8] See CONSIDERATION.

Failure of evidence. Absence of legal evidence.

Total failure of evidence. Not only the utter absence of all evidence, but also failure to offer proof, either positive or inferential, to establish one or more of the many facts, the establishment of all of which is indispensable to the finding of the issue for the plaintiff.[1]

Failure of issue. Want or non-existence of descendants; more particularly, lack of issue who may take an estate limited over by an executory devise.

This may be *definite* or *indefinite*. See further DIE, Without children.

Failure of justice. Defeat of right and justice from want of legal remedy.

Failure of record. Neglect to produce a record relied upon in a plea.

Failure of title. Defect or want of title.

When discovered before the money has been paid, the purchaser may deduct an amount equal to the value of the land of which he is deprived.

Failure of trust. Defeat of a proposed trust from want of constituting facts or elements or of law to effectuate the object.

2. Default; omission; neglect; non-performance, *q. v.*; as, failure to perform a contract, *q. v.*

3. Inability to pay debts, from insolvency; suspension of payment: as, failure in business, a failing debtor.

Failing circumstances. In a statute, may imply that the insolvent is about failing and closing his affairs, knowing his inability to continue in business and meet his payments.[2] See BANKRUPTCY; INSOLVENCY.

FAIR. 1, *adj.* Equal; just; proper; reasonable; equitable. See EQUITY.

Fair abridgment. A real substantial condensation of copyrighted materials, as the result of labor and judgment. See ABRIDGE.

Fair average crop. Takes into account the nature of the season and unforeseen events beyond the control of a prudent, faithful overseer.[3]

Fair criticism. See REVIEW, 3.

Fair knowledge or skill. A reasonable degree of knowledge or measure of skill.[4]

Fair preponderance. Of evidence — a preponderance perceptible upon fair consideration.[5]

Fair sale. A sale conducted with fairness as respects the rights of the parties affected.[6]

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[1] Kring *v.* Missouri, 107 U. S. 225, 227, 235, 238, 250 (1882), Miller, J. Approved, Hopt *v.* Utah, *infra*.

[2] Gut *v.* Minnesota, 9 Wall. 37 (1869).

[3] Locke *v.* New Orleans, *ante*.

[4] Hopt *v.* Utah, 110 U. S. 589-90 (1884), Harlan, J. See Pacific Coast Law J., May 26, 1883; 25 Am. Law Reg. 680-95 (1886), cases.

[5] 1 Greenl. Ev. § 13.

[6] 91 U. S. 492.

[7] See 3 Bl. Com. 305; 1 Litt. 158; 6 Rand. 86; Gould, Pl. 300-2.

[8] See Torinus *v.* Buckham, 29 Minn. 131 (1882).

[1] Cole *v.* Hebb, 7 Gill & J. 28 (Md., 1835).

[2] Utley *v.* Smith, 24 Conn. 310 (1855); Bloodgood *v.* Beecher, 35 *id.* 482 (1868).

[3] Wright *v.* Morris, 15 Ark. 450 (1855).

[4] Jones *v.* Angell, 95 Ind. 382 (1883).

[5] [State *v.* Grear, 29 Minn. 225 (1882); Bryan *v.* Chicago, &c. R. Co., 63 Iowa, 466 (1884); City Bank's Appeal, 54 Conn. 274 (1886); 86 Pa. 268.

[6] [Lalor *v.* M'Carthy, 24 Minn. 419 (1878).

Fairly. Equitably; reasonably.

In "fairly merchantable," conveys the idea of mediocrity in quality, or something just above that.[1]

May be deemed synonymous with "equitably."[2]

But is not synonymous with "truly:" language may be truly yet unfairly reported.[3] See FAITHFULLY.

Fairness. In speaking of a sale, "fairness and good faith" refers to the fair dealing which usually characterizes business transactions.[4]

2, *n.* In English law, a species of market held by grant from the crown.[5]

In the United States, "fairs" are governed by the law as to partnerships and sales. See MARKET.

FAIT. F. A fact. Compare FACTUM.

Before or at full age an infant may avoid a matter *in fait;* and a matter of record, during majority.[6]

Wife *de fait:* a wife *de facto.*

FAITH. Belief; confidence; reliance; credence; trust, *q. v.* Fair intent of purpose; honesty, openness, uprightness; sincerity; fidelity to a representation, promise, or duty.

Good faith. Honest, lawful intent; the condition of acting without knowledge of fraud and without intent to assist in a fraudulent or otherwise unlawful scheme. **Bad faith.** Guilty knowledge or willful ignorance.

The corresponding Latin expressions are *bona fides,* and *mala fides.* See FIDES.

A creditor,[7] holder, possessor,[8] purchaser,[9] or transferee in good faith is one who has loaned money or purchased property fairly, in the usual course of business, and without being cognizant of, or implicated in, any intent which the borrower or seller may have had to evade the claims of his creditors or to defraud some person interested in the matter.[10]

The title of a person who takes negotiable paper before it is due, for a valuable consideration, can only be defeated by showing bad faith in him, which implies guilty knowledge or willful ignorance of the facts impairing the title of the party from whom he received it. The burden of proof lies on the assailant of the taker's title.[11]

A purchaser in good faith of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin, unless it is absolutely void for want of power in the maker to issue it, or its circulation is by law prohibited by reason of the illegality of the consideration. His transferee, with notice of the infirmities, may equally recover.[1]

A party who, before its maturity and for a valuable consideration, purchases mercantile paper from the apparent owner thereof, acquires a right thereto which can only be defeated by proof of bad faith or of actual notice of such facts as impeach the validity of the transaction.[2]

A holder in good faith is a purchaser for value without notice, or his successor.[3]

The bad faith in the taker of negotiable paper which will defeat a recovery by him must be something more than a failure to inquire into the consideration upon which it was made or accepted, because of rumors or general reputation as to the bad character of the maker or drawer.[4] See further NEGOTIATE, 2; NOTICE, 1; LOST, 2.

One who buys at a voluntary sale from his debtor, crediting the consideration on a pre-existing debt, is not a *bona fide* purchaser for value: he advances nothing, and, if the title fails, loses nothing.[5]

The highest good faith is exacted of a person dealing with a trustee respecting the trust property. See TRUST, 1; FIDUCIARY.

Full faith and credit. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[6]

For the history of this provision, see EXTRADITION, page 441.

A record must be authenticated as prescribed by act of May 26, 1790.[7] The records and judicial proceedings of the courts of any State (authenticated as herein prescribed) "shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from which they are taken."[8]

The judgments of the courts of the United States have invariably been recognized as upon the same

[1] Warner *v.* Arctic Ice Co., 74 Me. 479 (1883).

[2] Satcher *v.* Satcher, 41 Ala. 40 (1867).

[3] Lawrence *v.* Finch, 17 N. J. E. 239 (1865).

[4] Morgan *v.* Hazlehurst Lodge, 53 Miss. 683 (1876).

[5] See 1 Bl. Com. 274.

[6] 1 Pars. Contr. 333.

[7] See 66 Ga. 722; 30 Minn. 272.

[8] See 31 Md. 454; 8 Wheat. 79; 12 Tex. 223; 24 *id.* 379.

[9] See 71 Ala. 221; 44 Conn. 459; 65 Barb. 231; 7 Johns. Ch. 65; 2 Utah, 52.

[10] [1 Abbott's Law Dict. 536; 111 U. S. 80.

[11] Hotchkiss *v.* Tradesmen's, &c. Nat. Banks, 21 Wall. 359 (1874), cases; Dresser *v.* Missouri, &c. Co., 93 U. S. 94–96 (1876), cases: Collins *v.* Gilbert, 94 *id.* 754 (1876), cases.

[1] Cromwell *v.* County of Sac, 96 U. S. 51, 59 (1877), cases, Field, J.; Bowditch *v.* New England Life Ins. Co., 141 Mass. 296 (1886).

[2] Swift *v.* Smith, 102 U. S. 444 (1880), Strong, J.

[3] McClure *v.* Township of Oxford, 94 U. S. 432 (1876), Waite, C. J.

[4] Goetz *v.* Bank of Kansas City, 119 U. S. 560 (1887), Field, J. See, in general, 22 Cent. Law J. 427–42 (1886), cases.

[5] Overstreet *v.* Manning, 67 Tex. 661 (1887); 61 *id.* 648.

[6] Constitution, Art. IV, sec. 1.

[7] Caperton *v.* Ballard, 14 Wall. 241 (1871).

[8] Act 26 May, 1790, c. 11; Act 27 March, 1804, c. 56; R. S. § 905.

footing, so far as concerns the obligation created by them, with domestic judgments of the States.[1]

A judgment duly rendered in one State is conclusive as to the merits of the case in every other State.[2]

But want of jurisdiction over the party, or matter, may be shown *dehors*, and even in contradiction of the record.[3]

The Federal courts give the judgment of a State court the force and effect to which it is entitled in the courts of the State.

No greater effect can be given to any judgment of a court of one State in another State than is given to it in the State where rendered. Any other rule would contravene the policy of the provision of the Constitution and laws of the United States on that subject.[4]

The evils which would result from a general system of re-examination of the judicial proceedings of other States are apparent. The framers of the Constitution intended to attribute to the "public acts, records, and judicial proceedings" of each of the States positive and absolute verity, so that they cannot be contradicted, or the truth of them denied, any more than in the State where they originated.[5]

The duty to follow the courts of a State, upon questions arising upon the construction of its own statutes, rests upon comity. . . The provision relates only to the conclusiveness of judgments as between parties and privies.[6] See COMITY; LAW, Foreign.

The Federal courts, exercising their *original* jurisdiction, take notice, without proof, of the laws of the several States; but, as no State court is charged with a knowledge of the laws of another State, in the Supreme Court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment is under review, continues matter of fact.[7]

Faithfully. When a public officer gives a bond conditioned faithfully to discharge his official duties, "faithfully" implies that he has assumed the measure of responsibility laid on him by law had no bond been given. Everything is unfaithfulness which the law does not excuse.[8]

"Fairly and impartially," in the expression "faithfully, fairly, and impartially," add something to the force of the word "faithfully," and should not be omitted from a statutory form of an oath of office.[1]

A bond that one will "well, truly, firmly, and impartially" perform the duties of an office, is not invalid as varying from the statutory form "for the faithful performance of his duties."[2]

FALCIDIAN LAW, or PORTION. In the reign of Augustus, on motion of Publius Falcidius, it was enacted (40 B. C.) that a testator could not bequeath away from his heir more than three-fourths of his estate.[3]

In principle, adopted in Louisiana, and perhaps elsewhere.

FALL. A life estate is sometimes said to "fall into," that is, to merge with, the fee.

FALSA. See FALSUS.

FALSE. Somewhat more than erroneous, untrue, or illegal: distinctively characterizes a wrongful act known to involve an error or untruth.[4]

As, false or a false — action, answer, claim, date, imprisonment, oath, swearing, testimony or witness, personation, pretenses, representation, return, token, signature, weights and measures, writing, *qq. v.* Compare SHAM.

Falsehood. Any untrue assertion or proposition; a willful act or declaration contrary to the truth.[5]

Does not necessarily imply a lie or willful untruth.[6]

See COMMENDATIO, Simplex; CONCEAL; CRIMEN, Falsi; DECEIT; ESTOPPEL; FALSUS, In uno; FRAUD; OATH; PERJURY.

Falsely. Applied to forging an instrument, implies that the writing is false, not genuine, fictitious, not true,— without regard to the truth or falsehood of the statement it contains,— the counterfeit of something which is or has been genuine, which purports to be a genuine instrument when it is not such.[6] See further COUNTERFEIT: FORGERY.

Falsify. 1. To represent a fact falsely.

2. To tamper with a document by interlineation, obliteration, or otherwise. See ALTERATION, 2; RECORD.

3. To prove a thing to be false, particularly an item of debit in an account.

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[1] Embry *v.* Palmer, 107 U. S. 10-11 (1882), cases.

[2] M'Elmoyle *v.* Cohen, 13 Pet. 326 (1839).

[3] Thompson *v.* Whitman, 18 Wall. 462-64 (1873), cases; Pennoyer *v.* Neil, 95 U. S. 729 (1877); 30 Gratt. 266.

[4] Board of Public Works *v.* Columbia College, 17 Wall. 529 (1873); Robertson *v.* Pickrell, 111 U. S. 611 (1883); Chicago, &c. R. Co. *v.* Wiggins Ferry Co., 119 *id.* 622 (1887).

[5] 2 Story, Const., 3 ed., § 1310.

[6] Wiggins Ferry Co. *v.* Chicago, &c. R. Co., 3 McCrary, 609, 613 (1882), cases; 11 F. R. 381, 384.

[7] Chicago, &c. R. Co. *v.* Wiggins Ferry Co., 119 U. S. 622 (1887).

[8] State *v.* Chadwick, 10 Oreg. 468 (1881); 16 Op. Att.-Gen. 318.

[1] Perry *v.* Thompson, 16 N. J. L. 73 (1837).

[2] Mayor of Hoboken *v.* Evans, 31 N. J. L. 343 (1865).

[3] See Hadley, Rom. Law, 322.

[4] See People *v.* Gates, 13 Wend. 320-21 (1835).

[5] Putnam *v.* Osgood, 51 N. H. 207 (1871); Roso. Cr. Ev. 362.

[6] [State *v.* Young, 46 N. H. 270 (1865).

Falsification. Applied to some item among debts which is wholly false or in some part erroneous.[1] See further SURCHARGE.

FALSUS; FALSA. L. Deceptive; erroneous; false.

Crimen falsi. The offense of deceiving or falsifying. See further CRIMEN, Falsi.

Falsa demonstratio non nocet. An erroneous designation does not impair. See further DEMONSTRATIO.

Falsa grammatica non vitiat chartam. Bad grammar does not invalidate an instrument. See further GRAMMAR.

Falsus in uno, falsus in omnibus. False in one (particular), false in all. Deliberate falsehood in one matter will be imputed to related matters.

If the circumstances respecting which testimony is discordant be immaterial, and of such a nature that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind, rather than from deliberate error. But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances, are bound upon principles of law, morality, and justice, to apply the maxim *falsus in uno, falsus in omnibus.*[2]

The maxim is applied to discredit the testimony of witnesses; it is the foundation of the old rule which excluded the testimony of infamous persons. Holds good where the party calling the witness is cognizant of the falsehood, or where the falsehood affects the credibility of the witness's testimony. Never applied to misstatements which are wholly inadvertent, or attributable to the ordinary fluctuations of memory. Proper where the special falsity is of a nature to imply falsity as to the whole case; and where contradictions are so numerous as to show imbecility of memory.[3]

He who would embezzle a ship's furniture would not hesitate to embezzle the cargo.[4]

FAME. Report or opinion generally diffused; repute, reputation; public estimation; name.

Defame. To maliciously injure a name; to slander. Whence defamation, *q. v.*

Good fame. Favorable reputation. **Ill-fame.** Evil fame or name; ill-repute.

"Ill-fame" distinctively describes a person who visits gaming houses, bawdy-houses, and other forbidden resorts, as well as the resorts themselves. While in popular parlance the term designates bawdy-houses, with no reference to their "fame," some courts allow proof of the fact to be aided by proof of the fame.[1] See further HOUSE, Of ill-fame.

Infamous. Not of good repute; incompetent to testify by reason of conviction of crime. Whence infamy, *q. v.*

FAMILY.[2] Originally, servants; in its modern comprehensive meaning, a collective body of persons living together in one house, or within the curtilage.[3]

In popular acceptance includes parents, children, servants — all whose domicil or home is ordinarily in the same house and under the same management and head.[4]

In its limited sense signifies father, mother, and children; in its ordinary acceptation, all the relatives who descend from a common root; in its most extensive scope, all the individuals who live together under the authority of another, including even servants.[5]

The most comprehensive definition is, a number of persons who live in one house and under one management or head.[6]

No specific number of persons is required; nor that they eat where they live, nor that they be employed in or about the house.[6]

Children, wife and children, blood relatives, or the members of the domestic circle; according to the connection.[7]

Includes children over age, if they have no home elsewhere.[8]

Family arrangement. An arrangement between members of a family as to the disposition of their property.

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[1] [Bailey *v.* Westcott, 6 Phila. 527 (1868), Sharswood, J.; 2 Barb. 592; 2 Edw. Ch. 23.

[2] The Santissima Trinidad, 7 Wheat. 339 (1822), Story, J.

[3] See 1 Whart. Ev. § 412; 30 F. R. 577; 18 Fla. 462; 97 Mass. 406; 62 Miss. 28; 91 Mo. 439; 14 Neb. 101; 44 N. Y. 172; 15 Wend. 602; 81 Va. 154; 3 Wis. 645.

[4] The Boston, 1 Sumn. 356 (1833).

[1] See 1 Bish. Cr. L. § 1088; 2 Greenl. Ev. § 44; 38 Conn. 467; 132 Mass. 2; 74 Me. 158; 29 Minn. 196, 195.

[2] L. *familia*, household: domestics: *famulus*, a servant.

[3] Wilson *v.* Cochran, 31 Tex. 680 (1869); Roco *v.* Green, 50 *id.* 488 (1878).

[4] Cheshire *v.* Burlington, 31 Conn. 329 (1863); 51 Mich. 494.

[5] Galligar *v.* Payne, 34 La. An. 1058 (1882), Bermudez, C. J.: 15 Rep. 464.

[6] Poor *v.* Hudson Ins. Co., 2 F. R. 438 (1880).

[7] Spencer *v.* Spencer, 11 Paige, 160 (1844), Walworth, Ch. See also Muir *v.* Howell, 37 N. J. L. 39 (1883), cases; Race *v.* Oldridge, 90 Ill. 252 (1878); 3 Woods, 494; 53 Iowa, 707; 56 *id.* 389; 125 Mass. 377; 128 *id.* 334; 137 *id.* 55.

[8] Stilson *v.* Gibbs, 53 Mich. 280 (1884); Exemp. Law

Family Bible. Containing entries of family incidents,— births, marriages, and deaths, made by a parent, since deceased, will be received in evidence.[1] See PEDIGREE.

Family council, or meeting. In Louisiana, a meeting of the relatives or friends of a minor or other person incompetent to act for himself, may be held, by judicial appointment, to advise upon the interests of such person.[2]

Family physician. The physician who usually attends and is consulted by the members of a family as their physician.[3]

It is not necessary that he should invariably attend and be consulted by each and all the members of the family.[3]

Family use. Such use as is appropriate to the individual needs of the members of a household, and to the needs of the household in its collective capacity.[4]

To supply water for family use in a city includes supplying city buildings, such as a jail, and hospitals, poorhouses, schools, and other institutions.[4]

Groceries kept by a merchant as part of his stock are not "provisions found on hand for family use," within the meaning of an exemption law.[5]

Head of a family. The person who controls, supervises or manages the affairs about a house.

Where there is a husband or father, he is ordinarily the head; but there may be a head where there is no marriage relation.[6] Compare HOUSEHOLDER; PATER.

FARE. See BRIDGE; CARRIER; FERRY; PASSENGER; RAILROAD; TOLL, 2.

FARM.[7] 1. Provision; rent; tenure by rent. 2. Land rented; land devoted to purposes of agriculture.

Farm, or *feorme*, is an old Saxon word signifying provision. It came to be used instead of rent or render, because anciently the greater part of rents were reserved in provisions — corn [grain], poultry, etc., till the use of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of rent or *feorme*; though at present, by a gradual departure from the original sense, the word "farm" signifies the very estate or lands so held upon farm or rent.[1]

That which is held by a person who stands in the relation of a tenant to a landlord.[2]

An indefinite quantity of land, some of which is cultivated.[3]

"Farm" and "homestead farm" are words of large import. In England, farm commonly implies an estate leased. The word is collective, consisting of divers things gathered into one, as a messuage, land, meadow, pasture, wood, common, etc. In the United States, it is a parcel of land used, occupied, managed, and controlled by one proprietor.[4] See CROP.

"To farm," in a lease of mineral lands, means to bring the minerals up to light for purposes of commerce, and make them profitable to lessor and lessee.[5]

See AGRICULTURE; EXEMPTION; IMPLEMENT; PLANTATION; TOOL.

Fee-farm. To let lands to farm in fee-simple, instead of for life or years; also, the land itself so held on perpetual rent.

Fee-farm rent. A rent-charge issuing out of an estate in fee.[6] Compare, FEUD, To feu.

To farm let. A technical expression in a lease creating a term for years.

Usual, but not essential.[7]

To farm out. To rent for a term of years; also, to give over something to another for a share of the income or profit: as, to farm out revenues, or taxes.

FARO. See GAME, 2.

FASHIONS. See PERISHABLE.

FAST. 1. As descriptive of days, see HOLIDAY.

2. Referring to an estate — real, of the nature of realty.[8]

3. Moving more than a specified number of miles, as eight, per hour.[9]

[1] See 1 Whart. Ev. § 219; 1 Greenl. Ev. § 104; 53 Ga. 535; 30 Iowa, 301.

[2] See La. Civ. Code, Art. 305-11; 6 Mart. 455.

[3] [Price *v.* Phœnix Ins. Co., 17 Minn. 519 (1871); Reid *v.* Piedmont, &c. Ins. Co., 58 Mo. 424 (1874).

[4] Spring Valley Water Works *v.* San Francisco, 52 Cal. 120 (1877).

[5] State *v.* Conner, 73 Mo. 575 (1881).

[6] See 17 Ala. 486; 41 Ga. 153; 90 Ill. 250; 110 *id.* 533; 11 Iowa, 266; 48 *id.* 186: 52 *id.* 431; 53 *id.* 706; 20 Mo. 75; 45 *id.* 483; 69 *id.* 415; 51 N. H. 253; 9 Wend. 426; 5 S. C. 493; 33 Gratt. 18.

[7] A. S. *feorm*, food, property, use: L. L. *firma*, a feast, tribute: *firmus*, durable. From the "fixed" rent,— Skeat. L. *firmus: firmare*, to make fast. Farms were at first enclosed or fortified with walls; or, the leases were made more certain by signature,— Webster.

[1] 2 Bl. Com. 318, 57.

[2] [Lane *v.* Stanhope, 6 T. R. 353 (1795), Kenyon, C. J.; 4 Best & S., Q. B. 931.

[3] Commonwealth *v.* Carmatt, 2 Binn. *238 (1810), Tilghman, C. J.

[4] Aldrich *v.* Gaskill, 10 Cush. 158 (1852), Shaw, C. J.; Black *v.* Hill, 32 Ohio St. 318 (1877): Shep. Touch. 93.

[5] [Price *v.* Nicholas, 4 Hughes, 619 (1878).

[6] 2 Bl. Com. 43; De Peyster *v.* Michael, 6 N. Y. 497 (1852); 2 Washb. R. P., 4 ed., 274.

[7] 2 Bl. Com. 317.

[8] See 6 Johns. 185; 9 N. Y. 502.

[9] Indianapolis, &c. R. Co. *v.* Peyton, 76 Ill. 340 (1875).

4. In Georgia, describes a bill of exceptions by which the proceedings in an injunction case, or other case in equity of an extraordinary nature, may be reviewed by the supreme court without the delay incident to ordinary cases.[1]

FAT CATTLE. See PERISHABLE; PROVISIONS.

FATHER. See ANCESTOR; BASTARD; CHILD; CONSANGUINITY; DESCENT; MOTHER; NAME, 1; PARENT. Compare PATER; PARTUS.

FAUCES TERRÆ. L. The jaws of the land: projecting headlands inclosing an arm of the sea.[2] See SEA.

FAULT. 1. An improper act due to ignorance, negligence or willfulness,[3] *qq. v.* Compare CULPA; DELICTUM.

In averments in pleadings, has substantially the same meaning as "negligence."[4]

Attributed to a carrier, may mean actual negligence.[5]

2. Defect; blemish.

With all faults. In the absence of fraud in the vendor, a sale "with all faults" covers such defects as are not inconsistent with the identity of the goods as those described.

Parol evidence is admissible to show the meaning in trade.[6]

FAVOR. See CHALLENGE, 8; PREFER, 2; PREJUDICE.

FEALTY.[7] The oath or obligation of a vassal, under the feudal system, to be faithful to his lord and defend him against all enemies.[8]

The original of the oath of allegiance, *q. v.* See also FEUD.

FEAR. See AFFRAY; DEFENSE, 1; DURESS; INFLUENCE; QUIA TIMET; ROBBERY.

FEASANCE.[9] A doing; a performing or performance.

Gratuitous feasance. A voluntary service — rendered or undertaken.

The essence of bailment by mandate, *q. v.*

Malfeasance. The doing of an act wholly wrongful and unlawful. **Misfeasance.** A default in not doing a lawful act in the proper manner — omitting to do it as it should be done. **Non-feasance.** Any omission to perform a required duty at all, or a total neglect of duty.[1]

Misfeasance may amount to non-feasance; as, in cases of gross negligence.[2] See TRUSTEE.

See DAMAGE, Feasant; DEFEASANCE; TORT, 2, Feasor.

FEBRUARY. See HOLIDAY; YEAR, Leap-year.

FEDERAL.[3] 1. Pertaining to a league or compact between independent sovereignties. 2. Composed of states which retain only a portion of their original sovereignty; relating to the constitution, treaties, or laws, or the power or government of the organization thereby formed.

Appropriate to our General Government, the government of the United States, considered as a Union of States or local governments. The word "National" recognizes the State governments and the government of the Union as distinct systems.[4]

In the second sense are the common expressions Federal or federal — amendments, Constitution, courts, elections, decisions, judges, laws and statutes, question, government, officer. In these phrases the word of contrast is "State:" as, State constitutions, courts, laws, etc. See those titles.

FEDERALIST. A publication issued from 1787 to 1789, and consisting of papers, written by Hamilton, Madison, and Jay, intended to prepare the people for accepting the Constitution.

Of its eighty-five numbers, Jay wrote five, Madison twenty-nine, and Hamilton fifty-one. "They form a work of enduring interest, because they are the earliest commentary on the new experiment of mankind in establishing a republican form of government for a country of boundless dimensions."[5]

In itself a complete commentary on the Constitution. The opinions expressed in it have always been considered as of great authority. Its intrinsic merit entitles it to high rank; and the part which two of its authors [Madison, the chief author, and Hamilton] performed in framing the Constitution, put it very much in their power to explain the views with which it was framed. These essays, published while the

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[1] See Sewell *v.* Edmonston, 66 Ga. 353 (1881).

[2] 5 Wheat. 106; 1 Story, 259; 1 Kent, 367.

[3] See 5 Ct. Cl. 489.

[4] Rogers *v.* Overton, 87 Ind. 411 (1882).

[5] School District *v.* Boston, &c. R. Co., 102 Mass. 555 (1869).

[6] Whitney *v.* Boardman, 118 Mass. 247–48 (1875), cases; 4 Pars. Contr. 590.

[7] L. *fidelitas: fides*, confidence, trust, faith.

[8] 1 Bl. Com. 367; 2 *id.* 45, 53; 44 Pa. 499.

[9] F. *faire:* L. *facere*, to make, do.

[1] Coite *v.* Lynes, 33 Conn. 114–15 (1865), Butler, J.

[2] Story, Agency, § 218; 1 Woolw. 374–75; 3 Pet. 223.

[3] L. *fœdus*, a league, treaty, compact.

[4] See United States *v.* Cruikshank, 92 U. S. 549 (1875).

[5] 2 Bancroft, Formation Const. 336.

Constitution was before the nation for adoption or rejection, and written in answer to objections founded upon the extent of its powers, and on its diminution of State sovereignty, are entitled to more consideration where they frankly avow that the power objected to is given, and defend it.[1]

FEE. 1. (1) In feudal law, an allotment of land in consideration of military service; land held of a superior, on condition of rendering him service, the ultimate property remaining in him. Opposed to *allodium*. See ALLODIAL.

The districts of land allotted by the conquering general to his superior officers, and by them dealt out again in smaller parcels, were called *feoda*, feuds, fiefs, or fees — a conditional stipend or reward.[2] See, at length, FEUD.

"Fee," at its origin, related to the quality of the estate. It now denotes the quantity of interest the owner has in land.[3]

(2) An estate of inheritance — the highest and most extensive interest a man can have in a feud.

Fee-simple. An absolute inheritance, clear of any condition, limitation or restriction to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral.[4]

"Fee," with or without the adjunct "simple," is used in contradistinction to the fee-conditional of the common law, and to fee-tail created by statute.

Tenant in fee-simple, or tenant in fee, is he that has lands, tenements, or hereditaments, to hold to him and his heirs forever — generally, absolutely and simply; without mentioning what heirs, but referring that to his own pleasure or to the disposition of the law.[4]

The term "fee" alone implies an inheritable estate. "Simple" or "absolute" adds nothing to the comprehensiveness of the original term. In modern estates, fee, fee-simple, and fee-simple absolute are synonymous.[4]

"An estate in fee-simple is where a man has an estate in land or tenements to him and his heirs forever."

Limitation of the power of sale for a limited period, as for five years, is not inconsistent with a fee-simple estate.[5]

Called a "fee-simple" because it signifies a pure inheritance, clear of any qualification or condition. It is an estate of perpetuity, and confers an unlimited power of alienation.[1]

That "heirs" or other appropriate word of perpetuity in a deed conveying land is essential to pass a fee-simple estate is not a rule admitting of no exception. When, for example, a mortgage evidences an intention to pass the entire estate as security, and express provisions cannot otherwise be carried into effect, the instrument will pass such an estate, although no formal word of perpetuity is employed.[2]

A "fee limited" is an estate of inheritance clogged or confined with a condition or qualification of some sort. This may be one of the following estates:

Base, qualified, or determinable fee. Has a qualification subjoined thereto, and terminates whenever the qualification is at an end.[3]

As, a grant "to A and his heirs, tenants of the manor of Dale," that is, as long as they continue tenants. This estate is a fee, because it may endure forever, yet the duration depends upon a circumstance, and this debases the purity of the donation.[3]

Conditional fee. At common law, a fee restrained to particular heirs, exclusive of others; as, to the heirs "of a man's body," by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the "heirs-male of his body," in exclusion of collaterals, and of lineal females.

Called "conditional" from the condition, expressed or implied in the donation, that if the donee died without such particular heirs, the land should revert to the owner. Such fees were strictly agreeable to the nature of feuds, when they first ceased to be mere estates for life, and had not yet become absolute estates in fee-simple. . . As soon as the grantee had issue born, his estate was supposed to become absolute; at least to enable him to alien the land, and thereby bar not only his own issue, but also the donor of his reversion; to subject the land to forfeiture for treason; and to charge the land with incumbrances, so as to bind the issue. If the tenant did not in fact alien the land, the course of descent was not altered by fulfillment of the condition; the land, by the terms of the donation, could descend to none but the heirs "of his body," and, therefore, in default of them, reverted to the donor. Hence, to subject the land to the ordinary course of descent, the donees of these conditional fee-simples aliened as soon as issue was born, and afterward repurchased the lands, which gave them a fee-simple absolute that would descend to the heirs in

[1] Cohens v. Virginia, 6 Wheat. 418 (1821), Marshall, Chief Justice.

[2] 2 Bl. Com. 45, 104-6.

[3] Wendell v. Crandall, 1 N. Y. 495 (1848); Taul v. Campbell, 7 Yerg. 325 (1835).

[4] 2 Bl. Com. 106, 105.

[5] Jecko v. Taussig, 45 Mo. 169 (1869).

[6] Libby v. Clark, 118 U. S. 255 (1886), Miller, J., quoting 4 Com. Dig., Estates, 1.

[1] 4 Kent, 5; 1 Barb 575; 11 Wend. 277; 12 Johns. 177; 52 Me. 261; 54 *id.* 426; 2 Oreg. 32; 42 Vt. 690; 23 N. J. E. 308.

[2] Brown v. National Bank, 44 Ohio St. 273 (1886), cases, Owen, C. J.

[3] [2 Bl. Com. 109. See also 8 Law Quar. Rev. 709 (1887); 5 Dill. 411; 94 Ill. 93; 19 Allen, 168; 1 Wharf 427; 1 Barb. 575; 11 *id.* 28; 35 Wis. 36.

general, according to the course of the common law. The courts favored "this subtle finesse of construction," to shorten the duration of these conditional estates. But the nobility, to perpetuate possessions in their own families, procured the enactment of the statute *de donis conditionalibus*, 13 Edw. I (1286), c. 1. This statute revived, in some sort, the ancient feudal restraints, by enacting that the will of the donor should be observed, and that the tenements should go to the issue, if any; if none, should revert to the donor.[1] See further DONUM, De donis.

A "fee-simple" is the largest estate a man can have in lands, being an absolute estate in perpetuity. The essential matter is that such an estate is so brought into existence that it *may* continue forever. Where an estate is granted subject to some condition in the instrument creating it, or to some condition implied by law to be thereafter performed, it is called a "conditional fee." A "determinable fee" embraces all fees which are determined by some act or event expressed, in their limitation, to circumscribe their continuance, or inferred by law as bounding their extent. In its broader sense, a determinable fee embraces what is known as a conditional fee. When it becomes an established fact that the event which may terminate the estate will never occur, a determinable fee enlarges into a fee-simple absolute. So, when the condition upon which a conditional fee rests has been performed, the estate becomes an absolute fee.[2]

Fee-tail. Upon the construction of the statute of *de donis*, the judges held that the donee had no longer a conditional fee-simple, but a particular estate, which they denominated a "fee-tail;" and the donor had the ultimate fee-simple, expectant on the failure of issue; *i. e.*, the reversion.[3]

The term "fee-tail" was borrowed from the feudists, among whom it signified any mutilated or truncated inheritance, from which the heirs general were "cut" off; being from a verb *tailare*, to cut.[3]

Estates tail general. Where lands and tenements are given to one and the "heirs of his body begotten." *Estate tail-special.* Where the gift is restricted to certain heirs of the donee's body; as, to the "heirs of his body, to be begotten by his present wife."

An estate in general or special tail given to a man and the heirs-male of his body begotten is an "estate in tail-male general;" given to a man and the heirs female of his body begotten, is an "estate tail-female."[4]

Estate tail after possibility of issue extinct. Where one is tenant in special tail, and a person, from whose body the issue was to spring, dies without issue, or, having left issue, that issue becomes extinct.[1]

As the word "heirs" is necessary to create a fee, "body," or some other word of procreation, is necessary to make a fee-tail.[2]

"Issue forever," and "posterity," have been held not less extensive than "heirs of the body." "Children," or equivalent words, will not create the estate. Where such estates are forbidden, estates which formerly would have been deemed such are now held to be estates in fee-simple, and words will be given this construction if possible.[3]

Growth of the estate tail: (1) Permission was granted the heirs of the tenant to succeed him as their deceased ancestor. (2) "Heirs" acquired a breadth of meaning sufficient to admit collaterals. (3) Collaterals were excluded by limiting the estate to a man and the "heirs of his body." (4) This limitation was construed to be a conditional gift — the condition being "issue;" and, a child being born, the estate became a fee-simple, alienable, etc. (5) The statute *de donis* created the estate tail as it at present exists.

See FEUD; RECOVERY, Common; SHELLEY'S CASE; TAIL. See also ABEYANCE; DEMESNE; DESCENT; ESCHEAT; FARM, Fee-farm; FELONY; HEIR.

2. Compensation for services,[4] paid to an attorney, an officer of the law, a physician, or an expert.

A sum of money paid to a person for a service done by him to another.[5]

A recompense allowed by law to an officer for his labor and trouble.[6]

Contingent fee. Compensation payable upon an event more or less uncertain, as, upon success in a lawsuit.

An attorney may contract with his client for a contingent fee, but the law will see that the transaction is fair, and that no undue advantage has been taken of the necessities or the ignorance of the client.[7]

County commissioners may employ counsel to collect a claim due the county, for a reasonable compensation only.[7]

An agreement to pay for services of a legitimate character in prosecuting a claim against the United States, in an executive department, violates neither law nor public policy. When the amount of compensation is not agreed upon, evidence of what is ordinarily charged in cases of the same character is admissible.[8]

[1] 2 Bl. Com. 110-11; Pierson *v.* Lane, 70 Iowa, 62 (1882); 3 Kent, 11.

[2] Fletcher *v.* Fletcher, 88 Ind. 420 (1883); Nebraska, ...

[3] 2 Bl. Com. 112; 11 Wend. 278.

[4] 2 Bl. Com. 113-14.

[1] 2 Bl. Com. 124.

[2] 2 Bl. Com. 114.

[3] Brand *v.* Elzey, 83 Ky. 442-43 (1885), Holt, J.

[4] 3 Bl. Com. 28.

[5] Bloor *v.* Huston, 28 E. L. & E. 360 (1854), Maule, J.

[6] Harbor Master *v.* Southerland, 47 Ala. 517 (1872); 2 Bac. Abr. 463; Musser *v.* Good, 11 S. & R. 248 (1824); Camp *v.* Bates, 13 Conn. 79 (1838); Williams *v.* State, 2 Sneed, 162 (1854).

[7] County of Chester *v.* Barber, 97 Pa. 455, 463 (1881), cases.

[8] Stanton *v.* Embrey, 93 U. S. 557 (1876), cases: Taylor *v.* Bemiss, 110 *id.* 45 (1883).

But a contract for lobbying services stands upon a different footing.[1]

Docket fee. A fee payable to counsel, as part of the costs of record, usually for the use of the successful party.

In Federal practice, "docket fees" in civil cases are a lump sum substituted for the small "fees" formerly allowed attorneys and solicitors, chargeable to and collectible from their clients. This sum is only taxable as costs against the losing party "in cases where by law costs are recoverable in favor of the prevailing party."[2]

In a law case where there is a final trial before a jury, the attorney's fee of twenty dollars, allowed by Rev. St. §§ 823-24, is always to be taxed; and it is for the court to determine who is the prevailing party.[3]

A solicitor for an intervenor in an equity case who prevails is not entitled to the fee; the termination not being such "a final hearing in equity" as is meant by the statute. A special master in chancery is not a referee within the statute.[4] See MARSHAL, 1 (2); PREVAIL.

At common law, an attorney's fee was not recoverable by an action. The reason was, fees were originally given as a gratuity, an *honorarium*, expressive of gratitude. The rule is traceable to the relation between patron and client in ancient Rome: the patron practiced for honor and influence. See HONORARIUM.

Fee-bill. A schedule prescribing the charges to be paid by litigants for the various orders, notices, pleadings, writs, depositions, hearings, transcriptions, etc., had or procured in the conduct of causes.

Some of these charges are payable in advance; others abide (*q. v.*) the event of the suit. The schedule is prepared by or in pursuance of legislative enactment, or by order of the particular court. See FOLIO.

The term is also used to designate the maximum charges the members of a bar association may make.

See ATTORNEY; COSTS; EXPERT; RETAINER; SALARY.

FEED. Referring to cattle and hogs, may mean to make fit for market by feeding.[5]

FEEDER. See RAILROAD.

FEIGNED. See ISSUE, 2.

FELLOW. See PARTNER; SERVANT.

FELO DE SE. L. 1. A felon (*q. v.*) of himself. He that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death; a self-murderer.[1] See further SUICIDE.

2. A destroyer of itself; a thing that defeats its own purpose.

In this category are: a construction of a proclamation,[2] or instrument,[3] in effect nugatory of the purpose thereof; a bill for peace which makes litigation;[4] a decree which, instead of removing a cloud from a title, places another upon it; unauthorized action by a court.[5]

FELONY.[6] An offense which, at common law, occasioned a total forfeiture of lands or goods, or both, and to which capital or other punishment could be added, according to the degree of guilt. . . In general acceptation, comprises every species of crime which occasioned at common law the forfeiture of lands and goods.[7]

The term is incapable of definition, and descriptive of no offense. It conveys no distinct idea. Its origin has puzzled law-writers. It comprehended two descriptions of punishment, the one capital, with the forfeiture of lands and chattels; the other not capital, with forfeiture of chattels only, and burning in the hand, to which imprisonment could be added.[8]

A vague term, definable by the statutes and decisions of each State for itself.[9]

In general, includes capital and State's prison offenses.[10]

The laws of the United States contain no definition.[11]

Tested by the common law, the term has no determinate meaning, and can apply to no case in this country except treason, where limited forfeiture of estate is allowed. But, technically, that is a crime of a higher grade than felony, although it imports also felony. If it be conceded that capital punishment imports a felony, there can be no felonies, at common law, except capital crimes. But that test is untechnical and founded in error. The notion of "moral degradation" by confinement in a penitentiary has grown into a general understanding that that constitutes any offense a felony. This modern idea has come into general use by force of State legislation on the subject.[12]

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[1] Trist *v.* Child, 21 Wall. 450 (1874).

[2] Goodyear *v.* Sawyer, 17 F. R. 2 (1883): R. S. §§ 823, 824, 983. See generally Coy *v.* Perkins, 13 F. R. 111, 113-16 (1882), cases; *Re* Rand, 18 *id.* 99 (1883).

[3] Williams *v.* Morrison, 32 F. R. 682 (1887), Thayer, J.

[4] Central Trust Co. *v.* Wabash, &c. R. Co., 32 F. R. 664 (1887), Thayer, J.

[5] Brockway *v.* Rowley, 66 Ill. 102 (1872).

[1] 4 Bl. Com. 189; 2 *id.* 499; 3 C. B. 461.

[2] 2 Black, 678.

[3] 9 Mo. 152; 36 Pa. 136.

[4] 18 How. 266.

[5] 30 Minn. 204.

[6] *Fee*, feud; and *lon*, price or value,—4 Bl. Com. 95. L. L. *felonem*, from *felo*, *fello*, a traitor, rebel,—Skeat.

[7] [4 Bl. Com. 94-98; 3 Col. 68; 10 Mich. 182; 23 N. Y. 257; 99 *id.* 216.

[8] Lynch *v.* Commonwealth, 88 Pa. 192 (1878), Agnew, Chief Justice.

[9] Bruguier *v.* United States, 1 Dak. 7 (1867).

[10] See State *v.* Felch, 58 N. H. 2 (1876), cases; 20 Cal. 117; 48 Me. 218; 94 Ill. 501; 55 Ala. 241; 4 Ohio St. 562.

[11] See R. S. § 4090.

[12] United States *v.* Coppersmith, 2 Flip. 551-58 (1880).

From an early day, and as a necessity, the State legislatures have passed laws defining and enumerating felonies as those crimes punishable by confinement in the penitentiary; and such confinement has come to be the test in nearly every State.[1]

The term as used in acts of Congress is not susceptible of definition.[1]

As a rule, the grade of the offense is determined by the nature of the punishment prescribed. A crime which might be punished by imprisonment in a State's prison was a felony, in New York, prior to the adoption of the Penal Code.[2]

Offenses made felonies by statute are called *statutory felonies*, in contradistinction to *common-law felonies* — murder, manslaughter, rape, arson, burglary, theft, and robbery.

The common-law procedure in the prosecution and punishment, without forfeiture, continues as the characteristic by which felony is distinguished from treason on the one hand and from misdemeanor on the other.

Felon. One who has committed a felony.

Felonious; feloniously. Generally, so indispensable in an indictment for felony, that no other word will be recognized as equivalent.[3]

See ASSAULT; CRIME; DAMAGES; HOMICIDE; INFAMY; MISPRISION.

FEMALE. See FEME; GENDER; VENTER; WOMAN.

FEME; or FEMME. F. A woman; a wife.

Feme is the older form: L. *femella*, *femina*, a young woman. Plural, *femes*, *femmes*.

Feme covert, or feme-covert. A married woman.

By marriage, husband and wife are one person in law. Under his protection and "cover," she does everything; and is therefore called in law-French a *feme-covert;* while her condition is called "coverture," [4] *q. v.*

Feme sole, or feme-sole. A single woman: one who has never been married, who has been judicially separated from her husband, or whose marriage has been dissolved by divorce from, or by the death of, the husband.

Feme-sole trader. A married woman who trades on her own account as if unmarried.

Originated in a custom of London. Recognized in several States by statutes which enable the wives of mariners at sea, and wives whose husbands from any cause, as, drunkenness or profligacy, desert them, or refuse or neglect to provide for them.

A judicial decree is not a prerequisite. The statutes being designed to suspend the marital rights of the husband in consequence of the acts enumerated, and to relieve the wife from her marital obligations, the establishment of those acts is all that is required of her. The statutes are remedial, and to be interpreted benignly.[1] Compare EARNINGS, Separate.

Her privileges extend no further than to contracts connected with her trade.[2]

A married woman who, in matters of property, is independent of her husband, is a *feme sole* as to such property, and may deal with it as if she were unmarried.[3] See HUSBAND.

FENCE. A line of obstacle, composed of any material that will present the desired obstruction.[4]

Partition fence. As contemplated in a statute, a fence on the line between two proprietors, where there is no road, alley, or other thing which would prevent the erection of such a fence.[5] See WALL.

Fences are regulated by local laws. Boundary fences are to be built on the line, and, when made as intended by law, the cost is borne equally between the parties. A partition fence is presumed to be the common property of both owners.[6]

In some States, steam railway companies are required by statute to protect their tracks by fences. Failure to comply with its contract to fence renders a company liable for injuries to children and animals, consequent thereon.[7]

A statute requiring a railroad to maintain fences and cattle-guards on the sides of its road, and, if it does not, making it liable in double the amount of

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cases, Hammond, J. See United States *v.* Staats, 8 How. 44–45 (1850); United States *v.* Watkids, 7 Saw. 90–94 (1881), cases; People *v.* Lyon, 99 N. Y. 210 (1885).

[1] United States *v.* Coppersmith, *ante*.

[2] People *v.* Lyon, 99 N. Y. 216 (1885).

[3] See Reed *v.* State, 14 Tex. Ap. 664 (1883); State *v.* Yates, 21 W. Va. 763 (1883); 64 N. C. 273; 34 N. H. 510; 2 Utah, 457.

[4] 1 Bl. Com. 442; 2 *id.* 292, 433, 497; 32 Barb. 258; 63 Ill. 162; 21 How. 589.

[1] Black *v.* Tricker, 59 Pa. 13, 16 (1868), Thompson, C. J.; 2 S. & R. 189; 6 W. & S. 346; 14 W. N. C. 191.

[2] McDowall *v.* Wood, 2 N. & Mc. *242 (S. C., 1820); Newbiggin *v.* Pillans, 2 Bay, 165 (S. C., 1798); *ib.* 113.

[3] Taylor *v.* Meads, 34 L. J. Ch. 207 (1865); 21 Cent. Law J. 47–49 (1885), cases; 24 Am. Law Reg. 353–68, 659–62 (1885), cases; 1 Story, Eq. § 243; 2 Kent, 150.

[4] [Allen *v.* Tobias, 77 Ill. 171 (1875), Breese, J.

[5] Hewit *v.* Jewell, 59 Iowa, 38 (1882), Seevers, C. J.: Iowa Code, § 1495; 58 Iowa, 256; Jacobs *v.* Moseley, 91 Mo. 462 (1886).

[6] See 15 Conn. 526; 50 Iowa, 237; 59 *id.* 38; 2 Me. 72; 11 Mass. 294; 2 Metc., Mass., 180; 28 Mo. 556; 12 Mo. Ap. 558; 3 Wend. 142; 32 Pa. 65; 2 Greenl. Ev. § 617; 2 Washb. R. P. 79; 3 Kent, 438.

[7] See Hayes *v.* Michigan Central R. Co., 111 U. S. 228 (1884); 50 Conn. 128; 62 Ga. 679; 68 Ind. 297; 22 Kan. 359; 63 Me. 308; 24 Minn. 394; 25 *id.* 328; 31 Miss. 157; 46 *id.* 573; 69 Mo. 91, 215; 6 Mo. Ap. 397; 18 Hun, 108; 18 Pa. 290; 1 Thomp. Neg. 501, cases.

damages occasioned thereby to animals, does not deprive it of its property without due process of law or deny it the equal protection of the laws. The additional damages are by way of punishment for negligence; and the sufferer may receive them, rather than the State.[1]

In California, fences erected upon the line between the roadway of a railroad and the land of coterminous properties are not part of the "roadway" to be included by the State board in its valuation of the property of the corporation, but are "improvements" assessable by the local authorities of the proper county.[2]

At common law, the owner of land was not bound to fence it. In Massachusetts, prior to the statute of 1841, c. 125, there was no provision for fences along railroads, and the common law as to the owners and occupiers of adjoining lands applied. Neither had a right to trespass, himself or by his servants or cattle, on the land of the other, and neither could require the other to prevent trespasses by maintaining a fence.[3]

Constructing a barbed-wire fence along a highway is not in itself an actionable wrong, in the absence of statutory inhibition, although animals may attempt to enter the enclosure. If the land owner keeps in good order such fences as are usually built, there is no liability for injury to animals. He is not bound to use boards in constructing a wire fence. But he must not let a fence of any kind become a trap for passing animals, which may be allured from the road to the inadequately fenced enclosure, by the presence of other animals or by the sight of pasture.[4]

See APPENDAGE; CLOSE, 3; ENCLOSURE; OBSTRUCT, 1; TIMBER.

FEOD. See FEUD.

FEOFFMENT. 1. The gift of a feud; infeudation. See FEUD.

Enfeoff. To give a feud.

Feoffor. The grantor of a feud.

Feoffee. The grantee of a feud.

2. The gift of any corporeal hereditament,[5] by delivery of possession upon or within view of the land.[6]

The most ancient method of conveyance. The aptest word was "*do*" or "*dedi*," I give or have given. As the personal abilities of the feoffee were the inducement, his estate was confined to his person, and subsisted for life. By a feoffment, later, a fee-simple was frequently created. With livery of seisin (*q. v.*), the feoffee had an estate at will.[6] At present, land is transferred only by deed or will.

[1] Missouri Pacific R. Co. *v.* Humes, 115 U. S. 512 (1885).

[2] Santa Clara County *v.* Southern Pacific R. Co., 118 U. S. 414 (1886).

[3] Boston, &c. R. Co. *v.* Briggs, 132 Mass. 26 (1882), cases.

[4] Sisk *v.* Crump, 112 Ind. 504 (1887); also Haughey *v.* Hart, 62 Iowa, 96 (1883). In general, 22 Cent. Law J. 196 (1886), cases.

[5] 2 Bl. Com. 310.

[6] 2 N. H. 260.

FERÆ NATURÆ. See ANIMAL.

FERMENTED. See LIQUOR.

FEROCIOUS. See ANIMAL.

FERRY.[1] A place where persons and things are taken across a stream or body of water, in boats, for hire.[2]

May refer to the water traversed or to the landing-place or places.[3]

Ferry franchise. A right conferred to land at a particular point upon a stream, and to secure toll for the transportation of passengers and property from that point across the stream.[4]

The essential element is the exclusive right to transport persons, their horses, vehicles, and personal goods, from one shore to the other, over the intervening water, for the toll.[5]

Ferriage. The price or fare to be paid for crossing a ferry; also, the transportation itself.[6]

Ferryman. At common law, one who had the exclusive right of transporting passengers over rivers or other water-courses, for hire, at an established rate.[7]

The grant of a ferry franchise in its nature implies the taking of toll. The only ferries known in some places, as in Massachusetts, are *toll* ferries.[8]

The ordinary ferry is a substitute for the ordinary bridge, for the accommodation of the public generally. The *railroad* ferry is a substitute for the railroad bridge, being the continuation of the railroad tracks across a stream of water; it is not a grant of an exclusive ferry franchise.[9]

One may lawfully transport his own goods in his own boat where another has an exclusive right of ferry.[10]

A State may impose a license fee, directly or through a municipal corporation, upon the ferry-

[1] A. S. *ferian*, to convey across, carry, go.

[2] [Akin *v.* Western R. Co., 20 Barb. 310 (1857); Same *v.* Same, 20 N. Y. 376 (1859); Newton *v.* Cubitt, 12 C. B. *58 (1862); 14 Bradw. 381.

[3] Schuylkill Bridge Co. *v.* Frailey, 13 S. & R. *424 (1825); State *v.* Hudson, 23 N. J. L. 209 (1851).

[4] [Mississippi Bridge Co. *v.* Lonergan, 91 Ill. 513 (1879); 23 *id.* 369; 2 Gilm. 169.

[5] [Broadnax *v.* Baker, 94 N. C. 678 (1886), cases, Smith, C. J.; s. c. 55 Am. R. 633. Approved, Mayor of New York *v.* Starin, 106 N. Y. 11 (1887).

[6] [People *v.* San Francisco, &c. R. Co., 35 Cal. 619 (1868).

[7] Clarke *v.* State, 2 McCord, 48 (S. C., 1822).

[8] Attorney-General *v.* Boston, 123 Mass. 468 (1877), cases.

[9] Mayor of New York *v.* New England Transfer Co., 14 Blatch. 168 (1877), cases.

[10] Alexandria, &c. Ferry Co. *v.* Wisch, 73 Mo. 655 (1881). See also 3 Bl. Com. 219; 2 *id.* 37; 5 Cal. 470; 20 Geo. 529; 42 Me. 20; 11 Mich. 53; 58 Miss. 796; 20 N. Y 370; 77 Va. 218-19; 2 Dill. 332.

keepers living in the State, for boats which they use in conveying, from a landing in the State, passengers and goods across a navigable river to a landing in another State.[1]

Any person who invades the rights of the owner of a ferry franchise by running a ferry himself, is liable for any damages he causes the owner, and may be restrained from a continuance. But, probably, the courts would not restrain the operation of a ferry demanded by public convenience simply because the rightful owner of the franchise neglects or refuses to use it. Such franchise does not include the carrying of merchandise without the presence of the owners; this is the business of a common carrier, and may be done without interference with such franchise. The grant of a franchise may be perpetual.[2]

See BRIDGE; CARRIER, Common; COMMERCE; FRANCHISE, 1; LICENSE, 3; NUISANCE; TOLL, 2; TONNAGE; VEHICLE.

FEU. See FEUD.

FEUD.[3] Land held of a superior, on condition of rendering him service. Opposed to *allodium*, the absolute or ultimate property, which continued to reside in the superior.[4] See ALLODIAL.

A tract of land held by a voluntary and gratuitous donation, on condition of fidelity and certain services.[5]

The constitution of feuds originated in the military policy of the Celtic nations, a policy which was continued in their acquisitions after the fall of the Roman empire. To secure those acquisitions, large districts of land were allotted by the conquering general to his superior officers, and by them, in smaller parcels, to the inferior officers and most deserving soldiers. These allotments were called *feods*, *feoda*, *feoffa*, *feus*, *fiefs*, *fiefs*, and *fees* — conditional stipends or rewards. The condition annexed was, that the possessor should do service faithfully, at home and in war, to him by whom they were given; for which purpose he took the oath of fealty (*q. v.*), and for a breach of this condition and oath, by not performing the stipulated service or by deserting the lord in battle, the lands were to revert to him who granted them.[6]

Allotments, thus acquired, mutually engaged such as accepted them to defend them; and, as they all sprang from the same right of conquest, no part could subsist independently of the whole; wherefore, all givers as well as all receivers were mutually bound to defend each other's possessions. But as that could not be done effectually in a tumultuous, irregular way, government, and, to that purpose, subordination, was necessary. Every receiver of lands was therefore bound, when called upon by his benefactor, or the immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to and under command of his immediate benefactor or superior; and so upward to the prince or general himself; and the several lords were also reciprocally bound, in their respective gradations, to protect the possessions they had given.[7]

Feudal; feodal. Relating to a feud or feuds: as, feudal services or tenures, the feudal law or system.

Feudalism. The feudal system; the principles and constitution of feuds.

Feudalize. To reduce to feudal tenure.

Feudary. Held by or concerning feudal tenure: also, the tenant of a feud.

Feudatory; feudatary. A feudal proprietor, or person who received a feud.

Feudist. One versed in feudal law.

Feudal system. A system of military tenure of landed property, adopted by the general assembly of the principal landholders of the realm (Brittany) for self-protection.

Prevailed from the ninth to the thirteenth centuries, attaining maturity under the Conqueror — 1066-1087. Something similar had been in use among the Saxons. The fundamental maxim was, all lands were originally granted by the sovereign, and are, therefore, held mediately or immediately of the crown.

The grantor was the proprietor or lord; the king was "lord paramount;" his immediate tenants were "lords mesne" — tenants *in capite*, in chief; their tenants were "tenants paravail:" they made profit (avail) out of the land.

At first, grants were held at the will of the lord; then, for a certain period; next, by the grantee and one or more sons; about 1000 A. D., they became hereditary.

Ceremonies observed were: presentation of the prospective tenant; the grant — *dedi et concessi*, I have given and granted; corporal investiture — putting a robe on the tenant, before witnesses; homage or manhood — professing to "become his (the lord's) man . . . of life, and limb and earthly honor." The service to be rendered was called the rent. See DELIVERY, 1.

The grant was made upon the personal ability of the grantee to serve in war, and do suit at court. Hence, he could not alien, nor exchange, nor devise, nor encumber, without consent of the lord. For those reasons, also, women and monks were never made grantees.

The grantor assumed to protect the grantee in his enjoyment of the land, and was to supply other land of equal value if the tenant was deprived of the grant.

The services were: *frees* — such as a freeman or soldier might perform; or *bases* — fit for one of servile rank. In quantity and time they were also certain or uncertain.

[1] Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 370 (1882), Woods, J.

[2] Mayor of New York *v.* Starin, 106 N. Y. 1, 9 (1887), cases.

[3] L. *fides*, faith, and Teut. *ead*, *odh*, or *od*, property, estate in land, — or, *vieh*, cattle, property; *i. e.*, land held on pecuniary consideration: A. S. *feah*, cattle.

[4] [2 Bl. Com. 105.

[5] Wallace *v.* Harmstad, 44 Pa. 499 (1863).

[6] 2 Bl. Com. 45-46.

[7] 2 Bl. Com. 45-46.

The tenure was: 1. *Frank-tenure:* on consideration of military service and homage. When such service was free but uncertain, the tenure was termed "knight-service," or "tenure in chivalry"—the most honorable of all. When the service was both free and certain, as fealty, or fealty and rent, the tenure was termed "free-socage." 2. *Villeinage:* "pure," when the service was base and uncertain; and "privileged," when the service was base but certain. The last species was called "villain socage." See SOCAGE.

Inseparably incident to tenure in chivalry were: aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat, *qq. v.*

Under the great survey, made in 1086, the realm was divided into sixty thousand knight's fees, corresponding to the number of men in the army.

Personal service was gradually changed into pecuniary assessments; and, finally, by statute of 12 Chas. II (1661), military tenures were abolished.[1]

In the United States, while lands are generally declared to be allodial, feudal principles, adopted as part of the common law of England, continue to be recognized.

The feudal system, to perpetuate estates in the same family, favored the heir-at-law. Hence, English courts have placed the narrowest construction on the words of wills.[2]

The Revolution threw off the dominion of the mother country, and established the independent sovereignty of the colonies or States. In Pennsylvania, for example, an act was passed, November 27, 1779, for vesting the estates of the late proprietaries in the Commonwealth. The manors and lands which had been surveyed for them were excepted, and a pecuniary compensation provided. The "province" had been a fief, held immediately of the crown. The Revolution, and subsequent legislation, emancipated the soil from the chief characteristic of the feudal system. After this change, the proprietaries held their lands as other citizens—under the Commonwealth, by a title purely allodial. Lands are now held mediately or immediately of the State, but by titles cleared of the rubbish of the dark ages, excepting only the feudal names of things no longer feudal. . . The State sold her lands for the best price she could get, and conferred upon the purchasers the same absolute estate she held, excepting the fifth part of any gold or silver found, and six acres in the hundred for roads; and these have been reserved, as everything else has been granted, by *contract*. Her patents acknowledge a pecuniary consideration, and stipulate for no fealty, escheat, rent-service, or other feudal incident. The State is the lord paramount as to no man's land. When any of it is wanted for public purposes, the State, in virtue of her political sovereignty, takes it, but she compels herself, or those who claim under her, to make full compensation to the owner.[3]

[1] See 2 Bl. Com. 43-102; 4 *id.* 418-39; 1 *id.* 410; 1 Washb. R. P. 18.

[2] Bosley *v.* Bosley's Executrix, 14 How. 397 (1852).

[3] Wallace *v.* Harmstad, 44 Pa. 500 (1863), Woodward, J.; Hubley *v.* Vanhorne, 7 S. & R. 188 (1821), Gibson, J.; 3 *id.* 447; 9 *id.* 333. See Green, Short Hist. Eng. Peop. 128-14.

Subinfeudation. Subletting part of a feud; carving smaller holdings out of a feudal estate.

Since this deprived the superior lord of his profits of wardship, marriage, and escheat, which fell into the hands of the middle lord, it was restricted by Magna Charta, c. 32 (9 Hen. 3, 1225), and by Quia Emptores (18 Edw. 1, 1290) entirely suppressed, and alienation, in the modern sense, introduced.[1]

To feu; a feu. A right to the use of lands, houses, and other heritable subjects, in perpetuity, in consideration of an annual payment in grain or money, called *feu-duty*, and certain other contingent burdens. Whence, also, *feu farm*, *feu holding*.

Practically, a sale for a stipulated annual payment equivalent to chief rent. Modern feu-duties are generally paid in money. On this footing almost all the house property in towns, and suburban-villa property, in Scotland, is held.[2] Compare FARM, Fee farm.

See also ABEYANCE; ATTAINDER; ATTORNMENT; DEMESNE; DESCENT, Canons of; ESCHEAT; FEE, 1; FEOFFMENT; PRIMOGENITURE; PUEBLO; RELIEF, 1; TENURE, 1; VILLAIN; WARD, 3.

FI. FA. See EXECUTION, 3, Writs of.

FIAT. See FIERI.

FICTION.[3] That which is feigned, assumed, pretended. The legal assumption that something is true which is or may be false; an assumption of an innocent and beneficial character, made to advance the ends of justice. Compare ESTOPPEL; PRESUMPTION.

An allegation in legal proceedings that does not accord with the actual facts; and which may therefore be contradicted for every purpose except to defeat the beneficial end for which the fiction is allowed.[4]

Fictions of law are highly beneficial and useful; especially as "no fiction extends to work an injury:" the proper operation being to prevent mischief or remedy an inconvenience that might result from a general rule. The maxim is, *in fictione juris semper subsistit æquitas*.—in a fiction of law equity always subsists; a legal fiction is consistent with justice.[5]

But not admitted, where life, liberty, or personal safety is in jeopardy.[6]

Illustrative examples: that the king was the original proprietor of all lands.[7] That an original *capias* had been granted, when a *testatum capias* issued into

[1] 2 Bl. Com. 91; 44 Pa. 498.

[2] Chamber's Encyclopedia.

[3] L. *fictio: fingere*, to invent.

[4] [Strafford Bank *v.* Cornell, 2 N. H. 337 (1821).

[5] 3 Bl. Com. 43, 283. See Best, Presump., 27; 2 Burr. 1062.

[6] 4 Bl. Com. 230.

[7] 4 Bl. Com. 418.

another county.[1] That a summons issues in an amicable action. That a person bailed is in the custody of his bail. That a feigned issue is based upon a wager made. That what ought to be done is done, and relates back to the time when it was to be done.[2] The doctrine of abeyance.[3] That a term of court consists of a single day.[4] That a writ of error actually removes the record, instead of a transcript of the record.[5] That every person knows what is passing in the courts.[6] That the possession of one who has a right of lien is the possession of the law.[7] That the law takes no notice of a fraction of a day.[8] The doctrine of equitable conversion.[9] The doctrine of representation in an agent, and in a decedent; and some features of the early action of ejectment.

Fiction makes several corporations out of what is really one, in order to give each State control over the charters it grants.[10]

Fictio, in old Roman law, is properly a term of pleading, and signifies a false averment which the defendant was not allowed to traverse; as, that the plaintiff was a Roman citizen, when in truth he was a foreigner. The object was to give jurisdiction. . . Legal fiction may be used to signify an assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged while its operation is modified. The "fact" is that the law has been wholly changed; the "fiction" is that it remains what it always was. . . Fictions are particularly congenial to the infancy of society. They satisfy the desire for improvement, while they do not offend the disrelish for change. Thus they become invaluable expedients for overcoming the rigidity of law.[11]

Fictitious. 1. Not real; feigned: as, a fictitious — action, case, issue, name, party, payee.

A fictitious case is a suit brought upon facts with respect to which no real controversy exists.

Any attempt, by a mere colorable dispute, or where the appellant has become the sole party in interest, to get up a case for the opinion of the court, where there is no real and substantial controversy, is an abuse reprehended by all courts, and punishable as a contempt.[12]

2. Imaginary; unsubstantial: as, fictitious bail, *q. v.*

3. Not made in good faith: as, a fictitious bid, *q. v.*

[1] 3 Bl. Com. 283.
[2] 3 Bl. Com. 438.
[3] 2 Bl. Com. 107.
[4] Newhall *v.* Sanger, 92 U. S. 766 (1875).
[5] Hunnicutt *v.* Peyton, 102 U. S. 356 (1880).
[6] 3 Pars. Contr. 232.
[7] 3 Pars. Contr. 234.
[8] 3 Pars. Contr. 504 (g).
[9] 1 Pars. Contr. 134.
[10] Horne *v.* Boston, &c. R. Co., 18 F. R. 50 (1883).
[11] Maine, Ancient Law, 24-25.
[12] Lord *v.* Veazie, 8 How. 255 (1850), Taney, C. J; Cleveland *v.* Chamberlain, 1 Black, 426 (1861); Bartmeyer *v.* Iowa, 18 Wall. 134-35 (1873).

FIDES. L. Trust, confidence, reliance; credence, belief, faith.

Bona fides. Good faith. *Bona fide.* In, with, or by good faith. **Mala fides.** Bad faith. *Mala fide.* In, with, or by bad faith. **Uberrima fides.** The best faith, the severest good faith. *Uberrima fide.* With the strictest good faith. See FAITH, Good, Bad.

Fidei commissum (pl. commissa). A thing committed to one's faithfulness; a bequest or devise in trust; a trust.

Fidei commissarius. The beneficiary under a donation in trust; a *fidei* or *fide* commissary; a *cestui que trust.*

A *fidei commissum* (usually created by a will) was the disposal of an inheritance, in confidence that the transferee would convey it or dispose of the profits at the will of another. It was made the business of a particular magistrate, the *prætor fidei commissarius*, to enforce observance of this confidence. The right thereby given was looked upon as vested, and entitled to a remedy. These *fidei commissa* were the originals of modern uses and trusts.[1] See USE, 3.

Fide-jussio or **fidejussio.** A giving or being surety; suretyship; bail.

Fidejussor. A surety; bail in admiralty.

He is absolutely bound to pay the costs and condemnation at all events.[2]

Admiralty may take a fidejussory caution or stipulation in cases *in rem*, and in a summary manner award execution to the prevailing party. Delivery of property on bail being given, is implied.[3]

Fides servanda. Faith must be kept; the good faith of a transaction will be given effect.

A maxim with regard to sales of personalty. If there is no express warranty, general rules of implication should be adopted with this maxim in view. A warranty will be implied only when good faith requires it.[4]

FIDELITY. See FAITH; FIDES; INSURANCE; TRUST, 1.

FIDUCIARY.[5] Held, founded, resting upon an actual trust: as, a fiduciary — capacity or character, contract or relation, debt, debtor, creditor.

Fiducial. Of the nature of a trust.

[1] 2 Bl. Com. 327; 1 Story, Eq. § 321; 2 *id.* §§ 965-67; 1 Pomeroy, Eq. § 151. See 3 La. An. 432; 2 How. 619; 15 *id.* 357.
[2] 3 Bl. Com. 291, 108.
[3] Brig Alligator, 1 Gall. 149 (1812); United States *v.* Ames, 99 U. S. 40 (1878).
[4] McCoy *v.* Artcher, 3 Barb. 330 (1848); 28 *id.* 594; 1 Metc., Mass., 551.
[5] L. *fiduciarius: fiducia*, confidence: *fides*, q. v

A fiduciary debt is founded or arises upon some confidence or trust, as distinguished from a debt founded simply upon contract.[1]

A fiduciary relationship is one in which, if a wrong arises, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*.[2]

In the New York laws allowing arrest as a remedy for debts incurred in a fiduciary capacity, "fiduciary" imports trust, confidence; refers to integrity or fidelity rather than to credit or ability; contemplates good faith rather than legal obligation.[3]

A debt contracted in a fiduciary capacity was not released by a discharge in bankruptcy.[4] This applied to technical trusts only, not to trusts implied from contracts of agency or bailment.[5]

"Fiduciary" and "confidential" relation seem to be used by the courts and law-writers as convertible expressions. It is a peculiar relation which exists between client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and *cestui que trust*, executors or administrators and creditors, legatees, or distributees, appointer and appointee under powers, partner and part-owners. In these and like cases the law, to prevent undue advantage from the unlimited confidence, affection, or sense of duty which the relation creates, requires the utmost of good faith in all transactions between the parties.[6]

See FRAUD; INFLUENCE; TRUST, 1.

FIEF. See FEUD.

FIELD. 1. A lot in a town may be a field.[7] But a one-acre lot used for cultivating vegetables is a "garden."[8] See AGRICULTURE.

2. "In the field," said of a soldier, means in the military service for the purpose of carrying on a particular war.[9]

FIERI. L. To be done; to be made. Compare FACERE.

Fiat. Let it be done. An order or allowance by a judge or court.

Fiat justitia. Let justice be done.

Fieri facias. Cause to be made. See EXECUTION, 3, Writs of.

In fieri. In course of being done; not yet completed. Opposed, *in esse*, q. v.

FIFTEENTH AMENDMENT. See CITIZEN.

FIGHT. Does not necessarily imply that both parties should give and take blows. It is sufficient that they voluntarily put their bodies in position with that intent.[1] See COMBAT; DUEL; MAYHEM; PRIZE-FIGHTING.

FIGURES. Numerals.

Arabic, 1893; Roman, MDCCCXCIII.

The objection to using Arabic figures in formal documents is that they may be readily altered. In some States they are not allowed in complaints and indictments, except in setting forth copies. It is considered better to date formal instruments by writing the day and year in words; and to write in words in the body of a bill, note, or receipt the sum for which it is given. See DESCRIPTION, 4; FOLIO, 2; FORGERY; WORDS.

FILE.[2] 1. At common law, a thread, string or wire, upon which writs or other exhibits are fastened for safe-keeping and ready reference.[3]

2. To exhibit or present to a court in the regular way: as, to file a bill in equity, a libel in admiralty or divorce, a petition, answer, exception, writ of error.

Also, to leave a paper with an officer for action or preservation; and, to indorse a paper, as received into custody, and give it its place among other papers,—to file away.

Files. Collections of papers, orderly arranged; also, papers under official custody.

On file. Kept in an orderly collection; in its proper place.

Filing a paper consists in placing it in the proper official custody, by the party charged with this duty, and the making of the proper indorsement by the officer.[4]

A paper is filed when delivered to the proper officer, and by him received, to be kept on file.[5]

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[1] Crisfield *v.* State, &c., 55 Md. 194 (1880), Robinson, J.

[2] *Re* West of England Bank, *Exp.* Dale, 11 Ch. D. 778 (1879), Fry, J.; Connecticut Mut. Ins. Co. *v.* Central Nat. Bank, 104 U. S. 68 (1881).

[3] Stoll *v.* King, 8 How. Pr. 299 (1853), cases; Frost *v.* M'Carger, 14 *id.* 137 (1857); Sutton *v.* De Camp, 4 Abb. Pr. 484 (1868); 1 Code R. 86, 87; 5 Duer, 86.

[4] R. S. § 5117.

[5] Chapman *v.* Forsyth, 2 How. 208 (1844); Hennequin *v.* Clews, 111 U. S. 681 (1884); Woodward *v.* Towne, 127 Mass. 42 (1879), cases; 104 *id.* 248; 15 Gray, 547-49; 16 Conn. 223; 77 N. Y. 497; 18 Rep. 468; 9 Bened. 495-97, cases; 5 Biss. 324.

[6] Robins *v.* Hope, 57 Cal. 497 (1881): 1 Story, Eq. § 218. As to fiduciary depositors in banks, see Naltner *v.* Dolan, 108 Ind. 500 (1886): 26 Am. Law Reg. 29-30 (1887), cases.

[7] State *v.* McMinn, 81 N. C. 587 (1879); Commonwealth *v.* Josselyn, 97 Mass. 412 (1867).

[8] Simons *v.* Lovell, 7 Heisk. 510 (1872).

[9] Sargent *v.* Ludlow, 42 Vt. 729 (1870).

[1] State *v.* Gladden, 73 N. C. 155 (1875); Tate *v.* State, 46 Ga. 148 (1872).

[2] L. *filum*, a thread.

[3] [Gorham *v.* Summers, 25 Minn. 86 (1878); 27 *id.* 18, 23; 16 Ohio St. 548; 14 Tex. 339.

[4] Phillips *v.* Beene, 38 Ala. 251 (1863).

[5] Peterson *v.* Taylor, 15 Ga. 484 (1854); Powers *v.* State, 87 Ind. 148 (1882); Amy *v.* Shelby County, 1 Flip. 104 (1872); 6 Ind. 309; 2 Blackf. 247; 2 Iowa, 91; 29 *id.*

An allegation that "no certificate has been filed" in the office of the register, is equivalent to "has not been left for record."[1]

An affidavit of claim is "filed with" a declaration when both are filed at the same time. And this is not affected by their being detached, or by the place of deposit in the office.[2] See LODGE, 1 (2).

In modern practice, "the file" is the manner adopted for preserving papers; the mode is immaterial. Such papers as are not for transcription into records are folded similarly, indorsed with a note or index of their contents, and tied up in a bundle — "a file."

FILIAL. See EMANCIPATION; PARENT.

FILIATION. The relation or tie between a child and its parent, especially its father; also, ascertainment of paternity, affiliation.

Affiliation. Judicial determination of paternity — that a man is the father of a bastard. See FILIUS.

The mother's testimony must be corroborated.[3]

FILIUS. L. A child; a son.

Filius nullius. The child of nobody. **Filius populi.** The child of the people. A bastard, *q. v.*

FILUM. L. A thread; a line — the middle line of a stream or road.

The imaginary line drawn through a stream or highway at which the titles of the opposite owners presumably meet.[4]

Filum aquæ. The line of the water; water-line.

Ad filum aquæ. To the line of the water.

Medium filum aquæ. The middle line of the water. See RIPARIAN.

Filum viæ. The line of the way.

Medium filum viæ. The middle line of the road.

FINAL.[5] 1. Pertaining to the end; to be paid at the close of a cause: as, final costs. Opposed, *interlocutory*, q. v.

2. The last: as, a final account, balance, settlement, *qq. v.*

3. Putting an end to; conclusively determined in a particular court: as, a final — adjudication, decree, disposition, judgment, order, sentence, *qq. v.* Opposed, *interlocutory:* ending or concerning some intermediate matter or issue; also opposed to *preliminary*, as in final injunction, *q. v.* Compare DEFINITIVE.

A final judgment or decree puts an end to the action by declaring that the plaintiff has or has not entitled himself to recover the remedy for which he sues.[1]

A judgment or decree which determines the particular case is final.[2]

A decree is final when the court has completed its adjudication of the cause.[3]

It has long been well settled that a judgment or decree, to be final, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance in the appellate court, the court below would have nothing to do but to execute the judgment or decree it had already rendered. It has not always been easy to decide when decrees in equity are final within this rule, and there may be some apparent conflict in the cases on that subject, but in the common-law courts the question has never been a difficult one. If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the court below cannot be brought before the Supreme Court on a writ of error.[4]

Thus, a decree of sale in a foreclosure suit, which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds, is final for purposes of appeal.[5]

FIND. 1. To come lawfully into the possession of lost or abandoned personalty.

The finder has a clear title against all the world except the true owner, who has not shown any intention to abandon.[6] He stands in the place of the owner, is a trustee for the owner. The place of finding creates no exception. After the original owner is known and accessible, any keeping with intention to appropriate is larceny. Reasonable diligence to learn who the rightful owner is should be used. Necessary expenses incurred in preserving the property or in discovering the owner are a lien.[7]

Thus, as between the finder and the owner of a paper-sack in which bank-notes are found, the notes are the property of the finder;[8] so, also, as between

468; 135 Mass. 580; 138 *id.* 196; 55 Mo. 301; 65 *id.* 590; 13 Barb. 326; 2 Caldw. 468; 14 Tex. 339.

[1] Wood *v.* Union Gospel Church Association, 68 Wis. 13 (1885).

[2] Hossler *v.* Hartman, 82 Pa. 53 (1876).

[3] 1 Whart. Ev. § 414.

[4] See 3 Kent, 427, 428, 432, 434.

[5] L. *finalis; finis*, limit, end.

[1] 3 Bl. Com. 398, 452.

[2] Weston *v.* Council of Charleston, 2 Pet. 464 (1829), Marshall, C. J.

[3] Green *v.* Fisk, 103 U. S. 519 (1880), Waite, C. J.

[4] Bostwick *v.* Brinkerhoff, 106 U. S. 3 (1882), cases, Waite, C. J.; Dainese *v.* Kendall, 119 *id.* 54 (1886), cases.

[5] Grant *v.* Phœnix Ins. Co., 106 U. S. 431 (1882). See St. Louis R. Co. *v.* Southern Express Co., 108 *id.* 28 (1883); 17 Johns. 548; 59 Cal. 557; 50 Me. 401; 14 Blatch. 130.

[6] 2 Bl. Com. 9; 2 Kent, 290.

[7] Durfee *v.* Jones, 11 R. I. 588 (1877), cases; Griggs *v.* State, 58 Ala. 425 (1877), cases; N. Y. & Harlem R. Co. *v.* Haws, 56 N. Y. 178 (1874); Armory *v.* Delamirie, 1 Sm. L. C. 636–66, cases.

[8] Bowen *v.* Sullivan, 62 Ind. 288–91 (1878), cases.

the finder and the keeper of a hotel in which money or other thing of value is found.[1]

The owner of a tannery neglected to remove all of the hides he had placed in the vats. The land was sold, and, forty years later, a laborer discovered the hides. *Held*, that the representative of the owner was entitled to them.[2]

Property is not lost, in the sense of the rule, if it was intentionally laid on a table, counter, or other place, by the owner, who forgot to take it away. In such case the proprietor of the premises is entitled to the custody. Whenever the surroundings show that the article was deposited in its place, the finder has no right of possession against the owner of the building. An article casually dropped is also within the rule.[3]

See ABANDON, 1; ESTRAY; REWARD, 2; TREASURE-TROVE; TROVER.

2. A corporation engaged in business within a State is said to be "found" doing business there.[3]

To give the Federal courts jurisdiction *in personam* over a foreign corporation, in the absence of a voluntary appearance, it must appear, as a fact, that the corporation is carrying on business in such foreign State or district; that such business is transacted or managed by some agent or officer representing the corporation, and some local law must make the corporation amenable to suit there.[4]

The presence of the chief officers of a corporation in a State other than that of its creation does not change its residence, nor does the fact that the officers take into such State corporate property for exhibition and advertisement, bring the corporation into the State as an "inhabitant," or so that it can be "found" there.[5]

Corporations are citizens of the State under whose laws they are created. They cannot, by engaging in business in another State, acquire a residence there.[6]

3. "Find" and "found," said of a defendant as to whom a summons or other process has been issued, have a technical meaning, the equivalent of the Latin *inventus*, come upon, met.[7]

Opposed, "not found:" *non est inventus*, he has not been found; abbreviated *n. e. i.*

"Not found" is an abridged form of return which usage sanctions. It imports that the defendant was not found within the meaning of the precept, that is, after proper effort to find him in the due execution of the precept.[1] See RESIDE.

4. To arrive at as a conclusion; to conclude or terminate formally: as, to find an indictment, a verdict.

If the grand jury are satisfied of the truth of an accusation, they indorse upon it "a true bill." The indictment is then said to be "found." To this at least twelve jurors must agree. Opposed, "not found."[2]

Finding. The decision of a judge, arbitrator, jury, or referee.

Finding against evidence. A finding which negatives the existence of a fact admitted by the pleadings; also, a finding not sustained by the evidence.[3]

General finding; special finding. Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.[4]

The parties are concluded by the propositions of fact which the evidence, in the opinion of the court, establishes. Whether general or special, the finding has the same effect as the verdict of a jury; and its sufficiency to sustain the judgment is the only matter for review.[5] — the "sufficiency" of the finding, not of the facts, is meant.[6]

Special finding. A statement of the ultimate facts on which the law must determine the rights of the parties.[7]

The finding of a referee should have the precision of a special verdict; it should specify with distinctness the facts found, and not leave them to be inferred.[8] See VERDICT, Special.

FINE.[9] 1. An amicable composition or agreement of a suit, actual or fictitious, by leave of the king or of his justices, whereby

[1] Hamaker *v.* Blanchard, 90 Pa. 379 (1879), cases, Trunkey, J.

[2] Livermore *v.* White, 74 Me. 452 (1883), cases.

[3] R. S. § 739; *Exp.* Schollenberger, 96 U. S. 378 (1877); Blackburn *v.* Selma, &c. R. Co., 2 Flip. 535 (1879); Robinson *v.* Nat. Stock-Yard Co., 12 F. R. 361 (1882); Mohr Distilling Co. *v.* Insurance Cos., *ib.* 474, 476 (1882), cases; Merchants' Manuf. Co. *v.* Grand Trunk R. Co., 18 *id.* 358, 360 (1882), cases.

[4] United States *v.* American Bell Telephone Co., 29 F. R. 17 (1886), cases, Jackson, J.; 32 *id.* 437.

[5] Carpenter *v.* Westinghouse Air Brake Co., 32 F. R. 434 (1887), Brewer, J.

[6] Fales *v.* Chicago, &c. R. Co., 32 F. R. 678-79 (1887), cases

[7] Carter *v.* Youngs, 42 N. Y. Supr. Ct. 172 (1877), Sanford, J.

[1] International Grain Ceiling Co. *v.* Dill, 10 Bened. 96 (1878), Choate, J.

[2] 4 Bl. Com. 305.

[3] Silvey *v.* Neary, 59 Cal. 98 (1881); Harris *v.* Harris, *ib.* 620 (1881).

[4] R. S. § 649.

[5] R. S. § 700; Ryan *v.* Carter, 93 U. S. 81 (1876), cases; Tyng *v.* Grinnell, 92 U. S. 469 (1875), cases; 18 Wall. 254; 103 U. S. 556; 112 *id.* 604.

[6] Walnut *v.* Wade, 103 U. S. 688 (1880).

[7] Norris *v.* Jackson, 9 Wall. 127 (1869), cases.

[8] Mason Lumber Co. *v.* Buchtel, 101 U. S. 637 (1879).

[9] L. *finis*, end.

lands in question become, or are acknowledged to be, the right of one of the parties.[1]

It put an "end" to controversies concerning the matter. The plaintiff began an action of covenant upon a supposed agreement to convey to him. The defendant (the deforciant) then applied to the court for leave to settle the matter; which he did by acknowledging that the lands were the right of the complainant. The "note" of the fine was an abstract of the writ of covenant, and the concord; it named the parties, the land, and the agreement. The "foot" or conclusion recited the parties, day, year, place, and before whom acknowledged or levied. The party levying the fine was called the "cognizor;" he to whom it was levied, the "cognizee." The proceeding was a solemn conveyance on record, and bound parties, privies, and strangers — after five years.[1]

The object oftenest sought by "levying a fine" was the barring of an estate tail. The statute of fines, 11 Hen. VII (1496), c. 1, and 32 Hen. VIII (1541), c. 36, were abolished by 3 and 4 Wm. IV (1833), c. 74, which substituted a disentailing deed by the tenant in tail.[2]

The object of a fine was to quiet titles more speedily than by the ordinary limitation of twenty and twenty-five years. One of two contesting claimants could compel an assertion or abandonment of the pretensions of his adversary in one-fifth the usual period of delay. . . In use in New York down to 1830.[3]

Compare RECOVERY, Common. See ACKNOWLEDGMENT, 2.

2. A pecuniary punishment for an offense, inflicted by sentence of a criminal court. A penalty; a forfeiture.[4]

A sum of money imposed by a court according to law, as a punishment for the breach of some penal statute. Never applied to damages or compensation for loss.[5]

A pecuniary penalty.[6]

A "fine" is an amercement imposed upon a person for a past violation of law; "exemplary damages" have reference rather to the future than the past conduct of the offender, and are given as an admonition not to repeat the offense.[7]

Excessive fines shall not be imposed.[8]

This applies to national, not to State, legislation. The Supreme Court cannot, on *habeas corpus*, revise a sentence on the ground that the fine is excessive.[1]

See AMERCE; PARDON; PUNISH.

FINGER. See MAYHEM.

FINIS. See FINAL; FINE.

FINISHED. See FINAL; PERFECT.

Moving into a house may not estop the owner to deny that it was finished, within the meaning of his acceptance of an order "to be paid when the house is finished."[9]

FIRE. A policy of insurance against fire includes every loss necessarily following directly from the occurrence of a fire.[2] See CAUSE, 1, Proximate; EXPLOSION; INSURANCE; LIGHTNING.

Fire-arm. A weapon acting by the force of gunpowder.[4] See ARMS, 2; LOADED; WEAPON.

Fire department. A city which is authorized to maintain water-works and a fire department, and which collects taxes for those purposes, is not responsible for the negligence of its fire department in permitting private property to be burned.[5]

Fire-escape. An act which directs that certain buildings shall be provided with fire-escapes by the "owners," does not apply to an owner in fee, not in possession, who has leased the premises, but to the tenant. Being a penal statute, it cannot be extended by implication to parties who do not clearly come within its terms.[6]

Fire ordeal. See ORDEAL.

Fireworks. Percussion caps, designed for signaling railway trains are "explosive preparations," within the meaning of a statute regulating the keeping of such articles, although they may not be "fireworks" as the latter term is known to commerce.[7]

Set on fire. A statute giving damages against any one who shall "set on fire" the woods of another, does not apply to an accidental firing by a locomotive engine, without negligence.[8]

See ARSON; NECESSITY; RES, Perit, etc.; SALVAGE; TAKE, 8.

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[1] 2 Bl. Com. 349–57.

[2] Williams, Real Prop. 47–49.

[3] McGregor *v.* Comstock, 17 N. Y. 162, 166 (1858); 6 *id.* 495. See also Guthrie *v.* Owen, 10 Yerg. 341 (1837).

[4] Hanscomb *v.* Russell, 11 Gray, 374 (1858), Metcalf, J.

[5] Atchison, &c. R. Co. *v.* State, 22 Kan. 15 (1879), Valentine, J.; Jockers *v.* Borgman, 29 *id.* 122 (1883), cases, Horton, C. J.

[6] New Mexico *v.* Baca, 2 N. M. 190 (1882). See also 1 Ind. 315; 4 Iowa, 300; 6 Neb. 87; 4 Lans. 140; 15 Rich. 90; 14 Tex. 398.

[7] Schafer *v.* Smith, Sup. Ct. Ind. (1877): 4 Cent. Law J. 272.

[8] Constitution, Amd. Art. VIII.

[1] *Exp.* Watkins, 7 Pet. *574 (1833); Pervear *v.* Massachusetts, 5 Wall. 480 (1866). As to the power in associations to impose fines upon members, see 27 Am. Law Reg. 370–74 (1888), cases.

[2] Robbins *v.* Blodgett, 121 Mass. 584 (1877).

[3] Brady *v.* North Western Fire Ins. Co., 11 Mich. 445 (1863).

[4] Atwood *v.* State, 53 Ala. 509 (1875); Evins *v.* State, 46 *id.* 88 (1871); Hutchinson *v.* State, 62 *id.* 3 (1878); Williams *v.* State, 61 Ga. 417 (1878).

[5] Robinson *v.* Evansville, 87 Ind. 334, 336–37 (1882): 85 *id.* 130; 17 B. Mon. 720: 19 Ohio St. 19; 16 Gray, 297; 104 Mass. 87; 122 *id.* 311; 69 Pa. 420; 38 Conn. 368; 53 Mo. 159; 18 Wis. 83; 33 *id.* 314; 39 Iowa, 575; 51 Ala. 139; Dill. Munic. Corp. § 774.

[6] Schott *v.* Harvey, 105 Pa. 222 (1884); Lea *v.* Kirby, 10 Cin. Law Bul. 449.

[7] Bliss *v.* Lilley, 113 E. C. L. 133 (1862).

[8] Missouri, &c. R. Co. *v.* Davidson, 14 Kan. 349 (1875). Liability of railroad companies for causing fires, 4 South. Law Rev. 703–69 (1878), cases.

FIRM. See PARTNERSHIP; SIGNATURE; TRADE-MARK.

FIRST. 1. Preceding all others; foremost, earliest, preferred: as, first — mortgage, occupant, purchaser, taker, term; first of exchange, *qq. v.*

2. In a will, may not import precedence of one bequest over another.[1]

Compare PRIMA; PRIMARY.

FISCAL. See CONFISCATE; FORFEITURE.

FISH; FISHERY. 1. The right to take fish at a certain place or in particular waters is a "fishery."

Common of fishery or piscary.[2] A liberty of fishing in another's waters. **Free fishery.** The exclusive right of fishing in a public river. **Several fishery.** The owner of this is also owner of the soil, or derives his right from such owner; a separate fishery.[3]

A *common of fishery* is not an exclusive right, but is enjoyed in common with certain other persons. A *free fishery* is a franchise, obtained by grant or prescription, and is distinct from ownership in the soil.[4]

The right to take fish in waters upon the soil of a private proprietor, for one's own use, is not an easement, but a right of profit in lands. It can be acquired only by grant or prescription. But neither prescription, nor custom, nor dedication raises a general right in the public to enter upon private land to fish in the waters thereon.[5]

Each State owns the bed of all tide-waters within its jurisdiction, unless it has granted them away; also, the tide-waters themselves, and the fish in them, as far as capable of ownership while running. The ownership is that of the people in their united sovereignty. The title thus held is subject to the paramount right of regulating navigation, granted to the United States. The fisheries remain under the exclusive control of the State. The State has the right, in its discretion, to appropriate its tide-waters and the beds to be used by its people as a common for taking and cultivating fish [oysters], so far as may be done without obstructing navigation. Such appropriation is a regulation of the use by the people of their common property. The right in the people comes from citizenship and property combined. It is a property right, not a mere privilege or immunity of citizenship. As the State may grant the exclusive use of any part of its common property to one of its citizens, so it may confine the use to its own citizens.[6]

Oysters are fish, within the meaning of a covenant not to retail fish.[7]

Oysters which have been taken, and thus become private property, may be planted in a place subject to the flow of the tide and where there are none naturally, and remain private property.[8]

The owner has the same absolute property in oysters that he has in inanimate things or in domestic animals. Oysters planted in public waters will not be considered abandoned to the public unless planted where oysters naturally grow. If they interfere with the rights of navigation, they may be removed as a nuisance; but a private person, not the owner, may not convert them to his own use.[9]

In the exercise of its police power, a State may grant to individual citizens the exclusive right to plant and to remove oysters under the public waters.[10] See AQUA, Currit, etc.

Fish commissioner. An act of Congress approved February 9, 1871, provides for the appointment of a commissioner of fish and fisheries, with power to preserve and increase food fishes throughout the United States.[11] Some of the States have a board of commissioners, with like powers.

An act approved January 20, 1888, amends the foregoing act so that it reads: There shall be appointed by the President, by and with the advice and consent of the Senate, a person of scientific and practical acquaintance with the fish and fisheries to be a commissioner of fish and fisheries; that he shall receive a salary at the rate of five thousand dollars a year, be removable at the pleasure of the President, and shall not hold any other office or employment under the authority of the United States or any State.[12]

Fish laws. See GAME, 1; SEA.

2. Referring to a bill in equity or to interrogatories, "fishing" imports seeking to pry into the title or individual affairs of an adverse party.

A "fishing bill" is a bill in which the plaintiff shows no cause of action, and endeavors to compel the defendant to disclose a cause in the plaintiff's favor.[13]

A bill in equity that seeks a discovery upon general, loose, and vague allegations is styled a "fishing

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[1] Everett *v.* Carr, 59 Me. 330 (1871): 57 *id.* 523.

[2] L. *piscarius*, relating to fishes or fishery: *piscis*, a fish.

[3] [2 Bl. Com. 34, 39-40; 15 Op. Att.-Gen. 663.

[4] 3 Kent, 329. See 1 Whart. 132.

[5] Cobb *v.* Davenport, 32 N. J. L. 225-26 (1868), Depue, J. See also Cole *v.* Eastman, 133 Mass. 67 (1882), Devens, Justice.

[6] McCready *v.* Virginia, 94 U. S. 394-97 (1876), cases, Waite, C. J. See also Boggs *v.* Commonwealth, 76 Va. 989 (1882); M'Candlish *v.* Commonwealth, *ib.* 1004 (1882).

[7] Caswell *v.* Johnson, 58 Me. 166 (1870).

[8] Fleet *v.* Hegeman, 14 Wend. 42 (1835); State *v.* Sutton, 2 R. I. 434 (1853); Lowndes *v.* Dickerson, 34 Barb. 586 (1861).

[9] State *v.* Taylor, 27 N. J. L. 119 (1858), Green, C. J. See also Johnson *v.* Loper, 46 *id.* 321 (1884).

[10] People *v.* Thompson, 30 Hun, 457 (1883).

[11] R. S. § 4395.

[12] 25 St. L. 1.

[13] [Carroll *v.* Carroll, 11 Barb. 298 (1851), Mitchell, J.

bill;" any such bill will be at once dismissed upon that ground alone.[1]

A party has no right to any discovery except of facts, deeds, and other writings necessary to the title under which he claims.[2] See DISCOVERY, 6.

FIT. See CULTIVATION; DISCRETION, 2.

FIX.[3] 1. To render finally liable: as, to fix bail, *q. v.*

2. To set for trial or hearing: as, to fix a case on a list.

3. To prescribe the rule by which a thing is to be determined: as, a constitutional direction that the general assembly shall fix the compensation of all officers.[4]

A salary is "fixed" when it consists of a stipulated rate for a definite period. Pay or emolument is fixed when the amount is agreed upon and the service defined.[5]

A salary, pay or emolument is fixed by law when the amount is named in a statute; and, by regulation, when named in a general order, promulgated under provision of law, and applicable to a class or classes of persons.[6]

FIXTURE. A thing fixed or affixed to another thing.

A thing fixed in a greater or less degree to realty.[6]

Anything annexed to the freehold; that is, fastened to or connected with it.[7]

A chattel annexed to the freehold, but removable at the will of the person who annexed it.[8]

Does not necessarily import a thing affixed to the freehold. The word is modern, and generally understood to comprehend any article which a tenant has the power of removing.[9]

As a rule, articles, to become fixtures, must either be fastened to the realty or to what is clearly a part of it, or they must be placed upon the land with a manifest intent that they shall permanently remain there, and should be peculiarly fitted to something that is actually fastened upon it, and essential to its profitable enjoyment.[1]

If the building, or permanent fixture, is erected upon or attached to the realty by the owner of the realty, it is not the subject of conveyance as personalty, even by the owner of the freehold. . . If a building is erected without the assent of the landowner, it becomes at once a part of the realty, and is the property of the owner of the freehold. A building, resting upon blocks and not firmly attached to the freehold, placed upon another's land by his assent, continues to be personalty even though there is no express agreement that the owner shall remove it.[2]

Articles that may assume the character of realty or personalty, according to circumstances, are "fixtures" — things substantially and permanently affixed to the soil, though in their nature removable. The old notion of physical attachment is, by some courts, regarded as exploded. Whether a structure is a fixture depends upon the nature and character of the act by which the structure is put in its place, the policy of the law connected with its purpose, and the intent of those concerned in the act. Other courts still hold that it is essential that the article should not only be annexed to the freehold, but that it should clearly appear that a permanent accession was intended.[3]

A thing is deemed to be affixed to land when attached by the roots, imbedded in it, permanently resting upon it, or permanently attached to what is thus permanent.[4]

The persons between whom questions ordinarily arise in relation to fixtures are: vendor and vendee, including mortgagor and mortgagee; heir and executor; landlord and tenant; executor of tenant for life, and reversioner or remainder-man.

The rule of the common law is that whatever is once annexed to the freehold becomes part of it, and cannot afterward be removed, except by him who is entitled to the inheritance. The rule, however, was never inflexible or without exceptions. It was construed most strictly between executor and heir, in favor of the latter; more liberally between tenant for life or in tail and remainder-man or reversioner, in favor of the former; and with much greater latitude between landlord and tenant, in favor of the tenant. But an exception of a much broader cast, and almost as ancient as the rule itself, is of fixtures erected for purposes of *trade*. Upon principles of public policy, and to encourage trade and manufactures, fixtures erected to carry on a business have been allowed to be removed by the tenant during his term, and are deemed personalty for many other purposes.[5]

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[1] *Re* Pacific Railway Commission, 32 F. R. 263 (1887), Sawyer, Cir. J.; 1 Story, Eq. Pl. § 325, cases.

[2] 2 Story, Eq. § 1490; Lewis *v.* Shainwald, 7 Saw. 413 (1881), cases.

[3] L. *fixum: figuere*, to fasten, attach.

[4] Cricket *v.* State, 18 Ohio St. 21 (1868).

[5] [Hedrick *v.* United States, 16 Ct. Cl. 101 (1880), Davis, J.

[6] [2 Kent, 343.

[7] Elwes *v.* Mawe, 2 Sm. L. C. 177, 187, cases.

[8] [Hallen *v.* Runder, 1 Crom., M. & R. 276 (1834), Parke, B.

[9] Sheen *v.* Rickie, 5 M. & W. *182 (1839), Parke, B. See also Rogers *v.* Gilinger, 30 Pa. 189 (1858); 2 W. & S. 116.

[1] Farmer's Loan, &c. Co. *v.* Hendrickson, 25 Barb. 489 (1857), Strong, P. J.

[2] Washburn, Real Prop. 3.

[3] Washb. R. P. 6 (18); Hill *v.* Sewald, 53 Pa. 273-75 (1866); Meigs's Appeal, 62 *id.* 33 (1869); Capen *v.* Peckham, 35 Conn. 93-94 (1868); Voorhees *v.* McGinnis, 48 N.Y. 282 (1872); Stout *v.* Stoppel, 30 Minn. 58 (1882), cases.

[4] Cal. Civil Code, § 660.

[5] Van Ness *v.* Pacard, 2 Pet. *143, 147 (1829), Story, J. As between vendor and vendee, see Fratt *v.* Whittier

As between mortgagor and mortgagee, the mortgagor may remove that which is not a fixture, and which was placed upon the ground after the mortgage was executed.[1]

The law imposes no obligation on a landlord to pay the tenant for buildings erected on the demised premises. The common-law rule is that all buildings become part of the freehold. The innovation on this rule has extended no further than the right of removal while the tenant is in possession.[2]

Rolling-stock is inseparably connected with its railroad in its entire length, and is part of the security of lienholders.[3]

Trees reared in nursery grounds for sale as merchandise possess none of the legal characteristics of fixtures. Fixtures are articles which have an existence independent of the freehold, and are afterward annexed to and become part of it.[4] See EMBLEMENTS.

But there is no universal test for determining whether an article, personal in nature, has acquired the character of realty. In each case regard is to be had to the nature of the chattel itself, the injury that would result from its removal, and the intention in placing it upon the premises with reference to trade, agriculture, or ornament.[5] See MACHINERY; STORE.

FLAG. See LAW, Of the flag.

The act of April 4, 1818, as re-enacted in Rev. St. §§ 1791-92, directs that the flag of the United States shall be thirteen horizontal stripes, alternate red and white; that the union thereon shall be thirty-seven stars, white in a blue field; that on the admission of a new State one star shall be added, such addition to take effect on the fourth of July next succeeding such admission.

FLAGGING. See PAVE.

FLAGRANS. L. Burning, flaming up: in actual execution or commission. Whence flagrant, flagrancy.

Flagrante bello. War raging: during hostilities. See WAR.

Flagrante crimine or delicto. While the offense is being perpetrated: in the very act. See DELICTUM, Flagrante.

FLAT. A place within a river, cove, creek, or harbor, more or less under water; "a shallow or shoal water."[1]

FLEE. See FUGITIVE.

Flee to the wall. Signifies that a person must use every reasonable means of escape before he may kill a man who assails him with apparently felonious intent.

To excuse homicide on the plea of self-defense it must appear that the slayer had no other possible (or at least probable) means of escaping from his assailant.[2] See DEFENSE, 1; RETREAT.

FLEET. A celebrated prison in London. Named from a river or ditch near by. Used chiefly for debtors and bankrupts, and for persons charged with contempt of the courts of chancery, exchequer, and common pleas. Abolished in 1842; and torn down in 1845.[3]

FLOAT. A certificate authorizing the holder to enter a certain amount of land.[4]

Floating debt. That mass of valid claims against a corporation, for the payment of which there is no money in the treasury specifically designated, nor any taxation or other means of raising money particularly provided.[5] Compare FUNDING.

FLOGGING. Beating with lashes; whipping, *q. v.*

Abolished in the army by act of August 5, 1861;[6] in the navy by act of June 6, 1872.[7]

FLOOD See ACT, 1. Of God; ALLUVION.

FLOOR. A section of a building between horizontal planes.

The words, used in a lease, the "first floor" are equivalent to the "first story" of the building, and naturally include the walls, unless other words control such meaning. A covenant by a lessee not to underlet any part of the premises is not broken by his allowing a third person, in consideration of an annual payment, to place a sign upon the outside wall, for a stated time.[8]

FLOTSAM. Floating. Goods lost by shipwreck which continue to float on the

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56 Cal. 126, 128-33 (1881), cases; 23 Cent. Law J. 485 (1886), cases. See also Carpenter *v.* Walker, 140 Mass. 419 (1886); Hedderick *v.* Smith, 103 Ind. 203 (1885), cases; 25 Am. Law Reg. 24-28, 664-66 (1886), cases.

[1] Cope *v.* Romeyne, 4 McLean, 384 (1848).

[2] Kutter *v.* Smith, 2 Wall. 497, 499 (1864), Miller, J.

[3] Milwaukee, &c. R. Co. *v.* St. Paul R. Co., 2 Wall. 644 (1864); *ib.* 645-49, Mr. Carpenter's brief. See also Freeman *v.* Dawson, 110 U. S. 270 (1883), cases.

[4] Hamilton *v.* Austin, 36 Hun, 141-42 (1885), Follett, J.

[5] Coburn *v.* Litchfield, 132 Mass. 448 (1882), cases, Morton, C. J.; Thomas *v.* Davis, 76 Mo. 76 (1882); 6 Am. Law Rev. 412-26 (1872), cases; 2 Flip. 200; 70 Ala. 230; 9 Cal. 119; 9 Conn. 67; 16 Ill. 421, 482; 18 Ind. 231; 35 *id.* 387; 8 Iowa, 544; 21 *id.* 177; 44 *id.* 60; 10 Kan. 314; 54 Me. 266; 14 Mass. 352; 30 Minn. 58; 16 Miss. 444; 42 *id.* 71, 732; 43 *id.* 349; 32 Mo. 206; 76 *id.* 119; 5 Mo. Ap. 293; 3 Neb. 131; 8 *id.* 192; 3 Nev. 82; 6 *id.* 248; 7 *id.* 37; 41 N. H. 503; 57 *id.* 514; 14 N. J. L. 395; 24 *id.* 287; 38 id. 457; 24 N. J. E. 260; 20 Wend. 656; 10 Barb. 157, 496; 11 *id.* 43; 35 *id.* 58; 51 *id.* 45; 12 N. Y. 170; 20 *id.* 344; 35 *id.* 379; 48 *id.* 278; 66 *id.* 489; 93 *id.* 311; 1 Ohio St. 524; 22 *id.* 563; 2 R. I. 15; 26 Gratt. 752; 17 Vt. 408; 28 *id.* 428; 34 Wis. 671; 6 Am. L. Rev. 412; 17 Am. Dec. 686, 690.

[1] Stannard *v.* Hubbard, 34 Conn. 376 (1867).

[2] 4 Bl. Com. 184; 3 *id.* 3-4.

[3] Cowell; Tomlins; Hayden, Dict. Dates.

[4] Marks *v.* Dickson, 20 How. 504 (1857).

[5] [People *v.* Wood, 71 N. Y. 374 (1877), Folger, J. See Cook *v.* Saratoga Springs, 23 Hun, 59 (1880).

[6] R. S. § 1342, art. 98.

[7] R. S. § 1642, art. 49.

[8] Lowell *v.* Strahan, 145 Mass. 8 (1887), W. Allen, J.

water. Compare JETSAM. See DRIFT-STUFF; WRECK.

FLOWERS. See LARCENY; PERISHABLE.

FOAL. See PARTUS.

FOEDAL. See FEUD.

FŒDUS. See FEDERAL; CONFEDERATION.

FŒNUS NAUTICUM. L. Marine interest.

Sometimes designates a loan of money to be employed in an adventure by sea, upon condition to be repaid with extraordinary interest, in case the voyage is safely performed.[1] See INSURANCE, Marine.

FŒTICIDE. See HOMICIDE.

FOLIO.[2] 1. A leaf.

References to old law-books are by the folio, instead of the page. See A, 1, par. 2.

2. A certain number of words, established by usage or law, as a unit of measurement for estimating the length of a document.

Originated in some estimate of the number of words that a folio ought to contain.

The number has varied, in different jurisdictions, from seventy-two, to ninety, and one hundred.

By the act of February 26, 1853, § 3, a folio is one hundred words, counting each figure a word.[3]

FOLLOW. See PROSECUTE; PROSEQUI; PURSUE; SUIT.

Follow copy. See TELEGRAPH.

Follow a fund or property. See IDENTITY, 2.

Follows the person. See PROPERTY, Personal.

FOOT. See POSSESSIO, Pedis.

Foot-way. See BRIDGE; SIDEWALK.

FOR. 1. On account of, by reason of, because of; in behalf of; as agent for.[4] See AGENT.

2. May mean "during."

As, in Neb. code, § 947, which requires public notice of the time and place of the sale of realty upon execution to be given "for at least thirty days" before the day of sale, by advertisement in some newspaper. One publication thirty days before the sale would not, therefore, be sufficient.[5]

For account. See CONCERN.

For collection. See COLLECTION, 2.

For cause. See CAUSE, 2.

For that. Introduces a positive allegation. *For that whereas* introduces a recital.

For use. A, "for use, etc.," for the benefit of some other, the assignor. See USE, 2.

For whom it may concern. In an insurance policy, for all persons who may have an insurable interest. See further AUCTION; CONCERN.

FORBEARANCE. Suspension of an existing demand.[1]

Delay in enforcing a right.

In statutes against usury, giving additional time, after the time originally limited for the return of a loan has passed.[2]

An agreement to forbear bringing a suit for a debt due, although for an indefinite time, and even although it cannot be construed to be an agreement for perpetual forbearance if followed by actual forbearance for a reasonable time, is a good consideration for a promise.[3] See CONSIDERATION, 2; SURETY.

FORCE.[4] Compare VIGOR; VIS.

Strength; power.

1. Strength applied or exerted; power in action or motion; active power; compulsion; resistance; also, unlawful violence,—violence, *q. v.*

Actual force. Force applied in point of fact. **Implied force.** Force inferred from the doing of an unlawful act. See BATTERY; CASE, 3; KIDNAPING; RAPE; ROBBERY.

Enforce. To constrain, or compel; to give effect to: as, to enforce an order of court; Congress may enforce constitutional prohibitions by appropriate legislation; to enforce a contract.

Power to enforce the collection of a fine implies power to give a receipt which will discharge the party.[6]

Enforcement Act of 1870. See RIGHT, 2, Civil (2).

Force and arms. Charges violence in declarations and indictments for trespasses; as, in trespass for entering a close.[6] See HAND, 2; TRESPASS.

Force and fear. Is ground for annulling a contract, when the fear would affect a mind of ordinary firmness. See DURESS.

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[1] [2 Bl. Com. 458.

[2] L. *in folio: folium*, a leaf, sheet.

[3] 10 St. L. 168: R. S. § 828. See Amy *v.* Shelby County, 1 Flip. 104 (1872); Cavender *v.* Cavender, 3 McCrary, 384 (1882); Jerman *v.* Stewart, 12 F. R. 275 (1882); 38 Mich. 639.

[4] Strong *v.* Sun Mut. Ins. Co., 31 N. Y. 105 (1865).

[5] Lawson *v.* Gibson, 18 Neb. 139 (1885). See also Whitaker *v.* Beach, 12 Kan. 493 (1874); 16 Ohio, 562.

[1] Goodman *v.* Simonds, 20 How. 370 (1857), cases.

[2] [Dry Dock Bank *v.* American Life Ins., &c. Co., 3 N. Y. 355 (1850).

[3] Howe *v.* Taggart, 133 Mass. 287 (1882), cases.

[4] F. *force;* L. *fortis*, strong, powerful.

[5] People *v.* Charisterson, 59 Ill. 158 (1871).

[6] 2 Chitty, Pl. 846, 850; 2 Steph. Com. 364; 3 *id.* 372.

Force to force. Resistance to unlawful violence,— allowed to the extent of the violence. See ASSAULT; BATTERY; DEFENSE, 1.

Irresistible force. Human agency in its nature and power absolutely uncontrollable.[1] See ACCIDENT; ACT, 1, Of God; CARRIER, Common; ENEMY, Public.

Forced; forcible; forcibly. (1) Against the will or consent: as, a forcible abduction, dispossession, entry and detainer, sale, *qq. v.*

(2) Against the will and under express protest: as, a forced payment, *q. v.*

"Forcibly" doing an act is merely doing the act with force.[2]

"Violently" may not be equivalent to "by force," in an indictment for rape.[3]

All civil injuries are either without force or violence, as in cases of slander and breach of contract; or else are coupled with force and violence, as in cases of battery and false imprisonment.[4]

The government of the United States may, by means of physical force, exerted through its official agents, execute on every foot of American soil the powers and functions that belong to it. This power does not derogate from a State the right to execute its laws at the same time and place. The one does not exclude the other, except where both cannot be exercised at the same time; then the Federal authority prevails.[5] See WAR.

(3) Arrived at by violence done to language; strained; unnatural: as, a forced construction, *q. v.*

2. Power to persuade or convince, or impose an obligation; legal effect or operation; binding effect; validity; efficacy. See VOID.

By force of. By virtue of; by reason of; in consequence of.[6]

FORECLOSURE. A closing up, shutting out, barring, preclusion.

1. Specifically, the extinguishment of a mortgagor's equity of redemption beyond possibility of recall.[7]

A mortgage is foreclosed in the sense that no one has the right to redeem it, or to call the mortgagee to account under it.[8]

In no sense can the term be applied to a mortgage until *sale* of the property has been effected.[9]

Foreclosure takes place where a mortgagor has forfeited his estate by non-payment of money due upon the mortgage, but still retains his equity of redemption. In that case, the mortgagee may file a bill of foreclosure to compel the debtor to redeem his estate presently (as, within six months), or, in default, to be forever closed or barred from the right. This is known as strict foreclosure. In Indiana, Kentucky, Maryland, New York, South Carolina, Tennessee, Virginia, and other States, the mortgagee obtains a decree for a sale of the land, the proceeds to be applied to satisfying incumbrances in the order of their priority.[1]

A suit to foreclose a mortgage, not seeking a personal judgment, is essentially a proceeding *in rem*.[2] See MORTGAGE; REDEMPTION.

2. Also applied to the suit by a pledgee to extinguish the pledgor's right to redeem the personalty, after default made; and to proceedings to collect charges or liens upon other specific property, as, a foreclosure of a mechanic's lien.

FOREIGN.[3] 1. That which belongs or pertains to another country, nation, or sovereignty; or to another State, or division of a State.[4]

As, foreign or a foreign — administrator, allegiance, assignment, attachment, charity, coin, commerce or trade, corporation, county, court, creditor, decree, divorce, document, domicil, exchange or bill of exchange, factor, guardian, judgment or sentence, law, minister, patent, port, vessel, voyage, *qq. v.*

Foreigner. A citizen or subject of another country or nation; an alien, *q. v.*

A naturalized citizen is no longer a foreigner.[5]

See BANKRUPTCY; CITIZENSHIP; COPYRIGHT; PATENT, 3.

2. Irrelevant; impertinent; extrinsic; not germane: as, matter or testimony foreign to the issue. Compare ALIUNDE; DEHORS.

FOREMAN. The presiding member of a jury, grand or petit.

From the persons summoned and accepted as grand jurors, the court appoints the foreman, who has power to administer oaths to witnesses.[6] The first

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[1] Story, Bailm. § 25.

[2] United States *v.* Bachelder, 2 Gall. 19 (1814), Story, J. See 115 Mass. 563.

[3] State *v.* Blake, 39 Me. 324 (1855).

[4] 3 Bl. Com. 118.

[5] *Exp.* Siebold, 100 U. S. 395 (1879), Bradley, J.

[6] Fischer *v.* Hope, &c. Ins. Co., 40 N. Y. Super. 299 (1876).

[7] [2 Bl. Com. 159.

[8] Puffer *v.* Clark, 7 Allen, 85 (1863), Hoar, J.

[9] Duncan *v.* Cobb, 32 Minn. 464 (1884).

[1] See Hatch *v.* White, 2 Gall. 154 (1814), Story, J.; Sprague *v.* Martin, 29 Minn. 229 (1882); Du Val *v.* Johnson, 39 Ark. 188 (1882); 44 Ohio St. 275; 4 Kent, 180; 2 Washburn, R. P. 261, note; Williams, R. P. 409; Daniel, Ch. Pr. 1204.

[2] Martin *v.* Pond, 30 F. R. 18 (1887), cases.

[3] F. *forain*, alien, strange: L. *foras*, out of doors, abroad.

[4] See Cherokee Nation *v.* Georgia, 5 Pet. *56 (1831).

[5] Spratt *v.* Spratt, 1 Pet. *349 (1828).

[6] [R. S. § 809; United States *v.* Plumer, 3 Cliff. 71 (1867).

person drawn and accepted upon a petit jury becomes its foreman. A jury speaks through its foreman.

FOREST. Forests were waste grounds, belonging to the king, replenished with beasts of chase, which are under his protection.[1]

For the preservation of the king's game there were particular laws, privileges, courts, and offices belonging to the king's forests. Part of the king's ordinary revenue consisted of fines levied for offenses against the forest laws.[1] See GAME, 1.

FORESTALLING. Buying or contracting for merchandise or victual on its way to market; dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price when there: any of which practices makes the market dear to the fair dealer.[2]

So described in statute 5 and 6 Edw. VI (1552), c. 14.

At common law, such practices were an offense against public trade; otherwise, since 7 and 8 Vict. (1844) c. 24. Compare ENGROSS, 2; MONOPOLY; REGRATING.

FOREVER. Compare PERMANENT.

Used of the location of a county seat, may mean until changed by law.[3]

In a conveyance, was held not to impart inheritable quality.[4]

FORFEIT.[5] 1. To divest or to suffer divestiture of property, without compensation, in consequence of a default or offense. 2. To pay money as a mulct, or for a default or wrong.

To take away all right from one person and transfer it to another.[6]

In a contract that a party shall "forfeit" a specified sum on a breach, equivalent to "penalty."[7]

Forfeitable. Admitting of divestiture or loss by way of punishment or for neglect; opposed to **non-forfeitable**: as, a forfeitable or non-forfeitable policy of insurance.

Forfeiture. Lands or goods whereof the property is gone away or departed from the owner.[8]

A punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone or the public together with himself has sustained.[1]

Forfeitures were called *bona confiscata* by the civilians, because they belonged to the *fiscus* or imperial treasury; and now, by us, *foris facta*, that is, such whereof the property is gone away or departed from the owner.[9] Compare CONFISCATE.

Forfeitures of estates were for breaches of the condition that the tenant should not do any act incompatible with the estate.[8]

A penalty by which one loses his rights and interest in his property.[4]

Property rights are forfeitable: by commission of crime; by alienation contrary to law (as, in mortmain, to an alien); by non-performance of a condition; by waste; and by bankruptcy.[8]

Goods and chattels were totally forfeited by conviction of treason, misprision of treason, felony, petit larceny, flight upon charge of treason, etc.[6]

In theory, the guilty person wholly abandoned his connection with society.[7]

At common law, a forfeiture transferred title to the sovereign. In a statute, may mean that the State by indictment shall recover a sum to be levied of the person's property as a "fine."[8]

"Forfeiture" has frequently been spoken of as equivalent to conveyance or grant.[8]

Forfeitures are not favored. They are often the means of oppression and injustice. Hence, the courts are prompt to seize upon any circumstances that indicate an election to waive a forfeiture; as, the course of action of an insurance company. Where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made.[10]

Equity never lends its aid to enforce a forfeiture or penalty.[11]

A clause of forfeiture in a law is construed differently from a similar clause in an engagement between individuals. A legislature always imposes a forfeiture

[1] 1 Bl. Com. 289; 2 *id.* 38, 414-16; 3 *id.* 73; 4 *id.* 415, 420, 423, 432, 437.

[2] [4 Bl. Com. 158; 10 Phila. 361.

[3] Casey *v.* Harned, 5 Iowa, 14 (1857); 1 La. An. 315.

[4] Dennis *v.* Wilson, 107 Mass. 593 (1871), cases.

[5] F. *forfait*, a crime punishable by fine, a fine: L. L. *foris-facere*, to trespass. lit. "to do beyond:" *foris*, out of doors, abroad, beyond; *facere*, to do,—Skeat; 1 Bl. Com. 299.

[6] [Walter *v.* Smith, 5 B. & Ald. 157 (1822), Best, J.

[7] Taylor *v.* The Marcella, 1 Woods, 304 (1873); 17 Barb. 360; 15 Abb. Pr. 273.

[8] [1 Bl. Com. 299.

[9] 2 Bl. Com. 267.

[10] 1 Bl. Com. 299. See 1 Kent, 67; 1 Story, 134; 13 Pet. 157.

[11] 2 Bl. Com. 153.

[4] Gosselink *v.* Campbell, 4 Iowa, 300 (1856).

[5] See 2 Bl. Com. 267; 20 How. Pr. 370.

[6] 2 Bl. Com. 421.

[7] 3 Bl. Com. 299; 4 *id.* 381.

[8] Commonwealth *v.* Avery, 14 Bush, 638 (1879).

[9] Wallach *v.* Van Riswick, 92 U. S. 211 (1875), cases, Strong, J.

[10] Knickerbocker Life Ins. Co. *v.* Norton, 96 U. S. 239, 242 (1877), cases, Bradley, J.; Ins. Co. *v.* Eggleston, *ib.* 577 (1877); Olmstead *v.* Farmers' Mut. Fire Ins. Co., 50 Mich. 206 (1883).

[11] Marshall *v.* Vicksburgh, 15 Wall. 149 (1872), cases; McCormick *v.* Rossi, 70 Cal. 474 (1886); Manhattan Life Ins. Co. *v.* Smith, 44 Ohio St. 167 (1886).

as a punishment inflicted for a violation of some duty enjoined by law; whereas individuals can only make it a matter of contract.[1]

Provisions for forfeiture are regarded with disfavor and construed with strictness — when applied to contracts, and the forfeiture relates to a matter admitting of compensation or restoration; but there is no leaning against a forfeiture intended to secure the construction of public works where compensation cannot be made for the default, nor where the forfeiture is imposed by positive law.[2]

Where an act works a forfeiture of goods, the government may at once seize them.[3] Where an absolute forfeiture is the penalty, title accrues in the government when the penal act is committed. But where the forfeiture is in the alternative (property, or its value), title does not vest till an election is made.[4]

Where property is seized for condemnation for forfeiture, some notification of the proceedings, beyond the mere seizure, may be necessary.[5]

Failure to pay a premium of life insurance (*q. v.*) at the time specified involves an absolute forfeiture, for which, unless waived by the company, relief cannot be had.[6] See WAR.

Forfeitures for common-law offenses have been generally abolished.

See ATTAINDER; BOND; CHARTER, 2; CONDITION; DOWER; FELONY; LAND, Public; PARDON; PENALTY; RECOGNIZANCE; SEARCH-WARRANT.

FORGE.[7] 1. A mechanical contrivance by which iron is made or manufactured from the ore.

But a blacksmith's forge is not a "forge or furnace for manufacturing iron."[8]

2. To make in the likeness of something else.[9] Compare FABRICATE.

Forger. A person guilty of forgery.

Forgery. At common law, the fraudulent making or alteration of a writing to the prejudice of another man's right.[10]

"The word is taken metaphorically from the smith, who beateth upon his anvil and forgeth what fashion and shape he will."[11]

In common speech, also, the altered instrument itself.

The fraudulent making of a false writing, which, if genuine, would be apparently of some legal efficacy.[1]

May be committed as to any writing, which, if genuine, would operate as the foundation of another man's liability, or the evidence of his right.[2]

Imports a false making (which includes every alteration of or addition to a true instrument) — a making *malo animo*, of any written instrument for the purpose of fraud and deceit: with intent to deceive.[3]

In general terms, forgery is the false making or material alteration of, or addition to, a written instrument for the purpose of fraud and deceit. It may be — the making of a false writing purporting to be that of another; the alteration in some material particular of a genuine instrument by a change of its words or figures; the addition of some material provision to an instrument otherwise genuine; the appending of a genuine signature to an instrument for which it was not intended. The false writing may purport to be the instrument of a person or firm existing or fictitious; or of a person having the same name as the accused. As a rule, it must purport to be the writing of another than the person who made it.[4]

May be committed by making a note in the name of a fictitious person, in an assumed name, or in the name of a bank which does not exist. It is not necessary that the note be one which, if genuine, would be a valid and binding obligation. It is sufficient that the instrument purports to be good. To relieve from the character of forgery, the want of validity must appear upon the face of the paper itself.[5]

It is immaterial whether the forgery is committed by means of printing, stamping, an engraved plate, or by writing with a pen.[6]

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[1] Maryland *v.* Baltimore, &c. R. Co., 3 How. 552 (1845), Taney, C. J.

[2] Farnesworth *v.* Minnesota, &c. R. Co., 92 U. S. 68 (1875), Field, J.; 2 Story, Eq. § 1326.

[3] Henderson's Spirits, 14 Wall. 56 (1871), cases; Thatcher's Spirits, 108 U. S. 682 (1880).

[4] The Mary Celeste, 2 Low. 356 (1874), cases.

[5] Windsor *v.* McVeigh, 93 U. S. 274 (1876).

[6] New York Life Ins. Co. *v.* Statham, 93 U. S. 24, 30 (1876): 100 Pa. 180. As to fire insurance, see Smith *v.* St. Paul Fire & Mar. Ins. Co., 3 Dak. T. 80 (1882).

[7] *F. forge:* L. *fabrica*, a workshop; *faber*, a workman, smith: *fa-*, to make.

[8] [Rogers *v.* Danforth, 9 N. J. E. 296 (1853).

[9] State *v.* McKenzie, 42 Me. 394 (1856).

[10] 4 Bl. Com. 247; L. R., 1 C. C. R. *203.

[11] 3 Coke, Inst. 169.

[1] 2 Bishop, Cr. L. §§ 524, 528, note.

[2] 3 Greenl. Ev. § 103, cases.

[3] Rex *v.* Coogan, 2 East, P. C. 852-53 (1803): Commonwealth *v.* Ayer, 3 Cush. 152 (1849); Garner *v.* State, 5 Lea, 215 (1880); State *v.* McKiernan, 17 Nev. 228 (1882).

[4] Commonwealth *v.* Baldwin, 11 Gray, 198 (1858), Thomas, J.

[5] United States *v.* Turner, 7 Pet. *134 (1833); United States *v.* Mitchell, Baldw. 366 (1831); 11 F. R. 55.

[6] Benson *v.* McMahon, 127 U. S. 467-71 (1888), cases. Benson, by falsely representing himself in the City of Mexico as Marcus Meyer, agent for Henry E. Abbey, under whom Adelina Patti was to appear at the Teatro Nacional, in December, 1886, sold $25,000 to $30,000 worth of tickets of admission. In February, 1888, Benson was arrested in the city of New York, and committed for his return to Mexico, in accordance with the extradition treaty of 1861, the circuit court having refused to release him upon a writ of *habeas corpus*. "About the only contest" made by him before the Supreme Court was that the tickets were not forgeries, mainly because the name of Mr. Abbey, who was represented as having authorized their issue and sale, was not "in writing," *i. e.*, made in script, by the use of a pen. *Ib.* 464-65.

The crime is generally defined to be "the fraudulent making or alteration of a writing to the prejudice of another man's rights." The intent to defraud is its essence. There must be a possibility of some person being defrauded. Where the effect, if successful, would be to defraud a particular person, he should be named in the indictment, if known; if otherwise, a general allegation of the intent should be made. The question of intent is for the jury; but such intent, to be proved, must be alleged. The nature of the offense is a species of false pretenses or fraud; hence the importance of setting forth the intent, and the name of the person, if known.[1]

It is sufficient if the forgery would have the effect of defrauding a particular person. A person may not fraudulently sign his own name (in this case to a money-order) although identical with the name of the person who should have signed.[2]

Forgery of a bill or note is by counterfeiting a signature, or by filling up a paper with a genuine signature, so as to make it appear to be signed as maker, or indorser, or other party.[3]

"False, forged, and counterfeit," in the act of February 25, 1862 (12 St. L. 347), necessarily implies that the instrument so characterized is not genuine, but only purports to be, or is in the similitude of, such instrument.[4]

"False or forged," applied to an instrument in writing, means that the instrument is counterfeit or not genuine,— that some one has attempted to imitate another's personal act, and, by means of such imitation, to cheat and defraud.[5]

To falsely make an affidavit is one thing; to make a false affidavit is another. It is the false making that is forgery.[6]

Making and uttering an instrument as agent, under a false assumption of authority, is not forgery.[6]

In charging forgery, the variance or the omission of a letter, to be material, must change the word attempted to be written into another word having a different meaning. The rigor of the old English law in this respect was due to the barbarous punishments imposed. The insertion or omission of a word or words will not create a variance unless the sense is thereby altered. Illustrations of harmless changes are: "*to* H. C. P. or order," "B. A. *or* bearer," "pay *to* bearer," "undertood" for understood, "Fayelville" for Fayetville, "Jna." for Jno.[7]

Money paid under a mistake of fact can be recovered. Hence, where one pays money on forged paper by discounting or cashing it, he can always recover it, provided: that he has not himself contributed materially to the mistake by his own fault or negligence; and that by an immediate or sufficiently early notice he enables the party to whom he paid it to indemnify himself as far as possible. The doctrine is favored that even negligence in making the mistake is no bar to a recovery.[1]

See ALTER, 2; COUNTERFEIT; FAITH, Good; GENUINE; MISTAKE; OBLIGATION, 2; ORDER.

FORGIVE. See CONDONE; MERCY; PARDON.

FORGOTTEN PROPERTY. See FIND, 1.

FORM. 1. Established method of expression or practice; a fixed way of proceeding. Compare COURSE, 2.

2. The model of an instrument or legal proceeding; a formula.[2] See BLANKS.

Opposed to *substance*. That without which the right sufficiently appears to the court is "form." Whatever is wanting or imperfect, by reason whereof the right appears not, is a defect of substance.[3]

Matter of form is whatever relates, not to the purpose or object of an instrument, or to a right involved in, or affected by, it, but merely to the language or expression, without affecting the issue presented, the evidence requisite, the right of a party, or a step necessary in furtherance of legal proceedings.

Formal. Belonging or essential to the form or frame of a thing; not of the substance: as, a formal defect or irregularity, a formal party, *q. v.*; also, according to regular method of procedure. Opposed, *substantial, real.* See DEMURRER.

Form of action. The peculiar technical mode of framing the writ and pleadings appropriate to the particular injury which the action is intended to redress.[4]

Forms of action. The classes into which actions at law are divided. Distinguishable, by peculiarities in the writs and pleadings, at common law, as account, annuity, *assumpsit*, covenant, debt, detinue, ejectment, replevin, trespass on the case; in some juris-

[1] State *v.* Gavigan, 36 Kan. 326 (1887), Horton, C. J.

[2] United States *v.* Long, 30 F. R. 679 (1887).

[3] 2 Daniel, Neg. Inst., 2 ed., § 1341; 11 Gratt. 822.

[4] United States *v.* Howell, 11 Wall. 432, 437 (1870).

[5] State *v.* Wilson, 28 Minn. 54 (1881), Mitchell, J.; State *v.* Young, 46 N. H. 270 (1865); Mann *v.* People, 15 Hun, 155 (1878), cases; State *v.* McKiernan, 17 Nev. 228 (1882), cases.

[6] United States *v.* Cameron, 3 Dak. T. 140 (1882).

[7] People *v.* Phillips, 70 Cal. 64–66 (1886), cases.

[1] 2 Daniel, Neg. Inst., 2 ed., § 1369, cases; Collins *v.* Gilbert, 94 U. S. 754 (1876), cases; Frank *v.* Lanier, 91 N. Y. 116 (1883), cases.

See also 4 Wash. 726; 66 Ga. 53; 19 Iowa, 299; 29 *id.* 493, 495; 52 *id.* 68; 2 Me. 365; 50 *id.* 409; 3 Gray, 441; 114 Mass. 318; 16 Minn. 473; 46 N. H. 267; 1 Wend. 200; 9 *id.* 141; 17 *id.* 229; 91 N. Y. 113; 15 Ohio, 721; 1 Ohio St. 187; 2 Binn. 529; 3 Phila. 351; 32 Pa. 529; 89 *id.* 432; 37 Tex. 592; 2 Bish. Cr. L. § 495, 2 Cr. Pr. § 398; 3 Chitty, Cr. L. 1022; 2 Whart. Cr. L. § 1418; 2 Arch. Cr. Pr. 797; 4 Cr. L. Mag. 545, 865.

[2] See Webster's Dict.

[3] [Heard *v.* Baskerville, 1 Hob. *233; 109 U. S. 274.

[4] Broom, Com. Law, 118 (*m*).

dictions are or have also been included, injunction, *mandamus*, *scire facias*.

In Kansas there is but one form of action, called a civil action. The plaintiff, for cause of action, states the actual facts, without common-law forms or fictions.[1]

In Pennsylvania, by an act approved May 25, 1887 (P. L. 271), the forms of action are *assumpsit*, to which the plea of the general issue is "non assumpsit," with the privilege of pleading payment, set off, and the statute of limitation; and trespass, in which the only plea is "not guilty."

Where the common law forms have been abolished, the principles governing them at common law are frequently invoked.

Where the formal distinctions between actions are abolished, the declaration states the facts which constitute the cause of action. . . When the facts are plainly and distinctly stated, the action will be regarded as either in tort or in contract; having regard, first, to the character of the remedy such facts indicate; and, second, to the most complete and ample redress which, upon the facts stated, the law can afford.[2] See ACTION, 2; CODE.

Form of the statute. The provision or enactment, the prohibition or direction, of a statute.

Against the form of the statute. A technical phrase used in an indictment for a statutory offense; the "conclusion against the statute."

"Against the form of the statute in such case made and provided" is the usual expression, but any equivalent expression will be sufficient — any phrase which shows that the offense charged is founded on some statute.[3]

Formality. Established order or method, rule of proceeding or expression. Opposed, informality.[4]

Compare REFORM; UNIFORM. See MANNER; SUBSTANCE; TECHNICAL.

FORMA. L. Form; formality; character.

Occurs in the phrases *in forma pauperis*, and *pro forma*, qq. v.

Formaliter. In form; formally.

FORMEDON. A writ which lay for a person who, being interested in an estate-tail, was liable to be defeated of his right by a discontinuance of the estate.

He claimed *per formam doni*. It was in the remainder, reverter, or descender. Abolished by 3 and 4 Wm. IV (1834), c. 27.[5]

[1] St. Louis, &c. R. Co. *v.* Chenault, 36 Kan. 55 (1886); Losch *v.* Pickett, *ib.* 222 (1887); Kansas, &c. R. Co. *v.* Rice, *ib.* 599 (1887): Civ. Code, § 10.

[2] New Orleans, &c. R. Co. *v.* Hurst, 36 Miss. 667 (1859); Gulf, &c. R. Co. *v.* Levy, 59 Tex. 548 (1883).

[3] United States *v.* Smith, 2 Mas. 150 (1820), Story, J.

[4] 16 S. & R. 118.

[5] See 2 Bl. Com. 193; 3 *id.* 191.

FORMER. See ACQUITTAL; ADJUDICATION; CONVICTION; RECOVERY.

FORNICATION.[1] Illicit carnal intercourse by an unmarried person with a person of the opposite sex.[2]

Sexual intercourse between a man, married or single, and an unmarried woman, as to the unmarried party.[3]

Illicit carnal connection is called by different names according to the circumstances which attend it. Unaccompanied with any facts which tend to aggravate it, it is "simple fornication." When it causes the birth of an illegitimate child, it is "fornication and bastardy." When the person who commits it is married, it is "adultery." When the parties are related within certain degrees of consanguinity or affinity, it becomes "incest." Where it is preceded by fraudulent arts (including a promise of marriage) to gain the consent of the female, who is under the age of consent, and of good repute, it is "seduction." But the body of all these offenses is the illicit intercourse; in each case, the essential fact which constitutes the crime is fornication. On an indictment for any offense, below the grade of felony, of which illicit connection forms an essential part, the defendant may be found guilty of fornication.[4]

In a few States, fornication is not punishable by statute.

To charge another with fornication is actionable *per se*.[5] See SLANDER.

See ADULTERY; BAD, 1; BAWD; MERETRICIOUS; POLYGAMY; PROSTITUTION, 2.

FORNIX. L. Fornication.

Originally, a vault, an arch, — a brothel.

Fornix et cætera. Fornication and the rest: fornication and bastardy, *qq. v.*

FORO. See FORUM.

FORSWEAR. To swear falsely.

Does not necessarily import perjury, *q. v.* One may swear to what is not true before an officer not qualified to administer an oath.[6]

FORT. Implies something more than a mere military camp, post, or station; a fortification or a place protected from attack by some such means as a moat, wall, stockade, or parapet.[7] See LAND, Public.

FORTE ET DURE. See PEINE.

[1] From *fornix*, q. v.

[2] [Montana *v.* Whitcomb, 1 Monta. 362 (1871), Wade, Chief Justice.

[3] Hood *v.* State, 56 Ind. 271 (1877), Perkins, C. J. See also 3 Monta. 54; 51 Wis. 461; 4 Bl. Com. 65.

[4] Dinkey *v.* Commonwealth, 17 Pa. 129-30 (1851), Black, C. J.

[5] Page *v.* Merwin, 54 Conn. 434 (1886).

[6] See Heard, Libel & Sl. §§ 16, 34; 1 Johns. 505; 2 *id.* 10; 13 *id.* 48, 80; 12 Mass. 496; 2 Har. & J. (Md.) 368.

[7] United States *v.* Tichenor, 8 Saw. 153 (1882), Deady, J.; s. c. 12 F. R. 424.

FORTHCOMING. Describes a bond given to a sheriff, conditioned that property seized by him shall be produced or forthcoming when lawfully required.[1]

Also said of a person released on bail, *q. v.*

FORTHWITH. Has a relative meaning, and will imply a longer or a shorter period, according to the nature of the thing to be done.[2]

1. Immediately; without delay; directly.[3]

2. Within reasonable time; with convenient celerity; with reasonable diligence.[4]

With due diligence, under the circumstances.[5]

As soon as, by reasonable exertion confined to the object, an act may be done.[6]

In some matters of practice, within twenty-four hours.[7]

See IMMEDIATELY; INSTANTER; POSSIBLE; TIME, Reasonable.

FORTUITOUS. Resulting from chance, or unavoidable cause; casual; inevitable: as, a fortuitous collision or event.[8] See ACCIDENT.

FORTUNE-TELLING. See WITCHCRAFT.

FORTY DAYS. See QUARANTINE, 1.

FORUM. The place where court was held in cities of the Roman empire; the place where redress is to be sought; place of jurisdiction; jurisdiction; a judicial tribunal, *q. v.*; a court; the bar of a court.

From *fero*, to lead out of doors: what is outside; an outside space; a public place, a market place. Compare CURIA; LOCUS.

Foro. In the court of. Whence *foro cœli*, *foro conscientiæ*, etc.

Forum cœli. The court of heaven.

Forum conscientiæ. The bar of conscience, *q. v.*

Forum contractus. The court of the place where a contract is made.

Forum domesticum. The home tribunal.

Forum domicilii. The court of one's domicil, *q. v.*

Forum rei. 1. The court of the defendant — of the place where he resides.

2. The court of the thing — of the locality where a thing in controversy is or is found.

Forum rei gestæ. The court of the thing done — at the place of the transaction.

Forum rei sitæ. The court of the place where a thing is situated. See PLACE, 1; RES.

Forum seculare. A secular court.

FORWARDER. A person who receives and transports merchandise at his own expense of time and money, in consideration of a compensation paid him by the owner or consignee; and who has no concern in the means of transportation, nor any interest in the freight; a "forwarding merchant."[1]

He is a warehouseman and agent for a compensation to forward goods.[2]

An agreement "to forward" goods may still amount to a contract for carrying.[3] See CARRIER, Common.

FOSSIL. See MINERAL.

FOUND. See FIND; OFFICE; TROVER.

FOUR. Has no technical meaning.

Four corners. All parts; the whole.

Take by the four corners: construe an instrument as a whole.

Four seas. The waters surrounding England.

Within the four seas: within her territorial jurisdiction.

On all-fours. Said of cases precisely alike. See ALL-FOURS.

FOURTEENTH AMENDMENT. See CITIZEN.

FOURTH OF JULY. See HOLIDAY.

FOWL. See ANIMAL; CRUELTY, 3; DAMAGE, Feasant; NUISANCE; TRESPASS; WORRY.

FOX HUNTING. See CRUELTY, 3.

FRACTION. See DAY.

FRAIS. F. Cost, price; expense.

Frais jusqu'a bord. Expenses to the board (vessel); free on board.

In an invoice of imported goods, excludes cartage and commissions paid to the shipping merchant who receives and places the goods on board ship for exportation. Such charges are not dutiable.[4] See FREE, On board.

FRANCE. See LAW, Civil; SALIC.

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[1] See 61 Ga. 520; 11 Gratt. 522.

[2] Moffat *v.* Dickson, 3 Col. 314 (1877), Elbert, J.

[3] See Inman *v.* Western Ins. Co., 12 Wend. 460 (1834); Whitemore *v.* Smith, 50 Conn. 379 (1882); Hull *v.* Mallory, 56 Wis. 356 (1882); 22 E. C. L. 527; L. R., 4 Q. B. D. 471.

[4] See Burgess *v.* Boetefeur, 7 Mar. & G. *494 (1844); Bennett *v.* Lycoming Ins. Co., 67 N. Y. 277 (1876), cases; 44 Ohio St. 427.

[5] Edwards *v.* Lycoming Ins. Co., 75 Pa. 378 (1874).

[6] [3 Chitty, Gen. Pr. 112.

[7] Champlin *v.* Champlin, 2 Edw. *329 (N. Y., 1834).

[8] See Story, Bailm. § 25.

[1] See Story, Bailm. § 502, cases.

[2] Bush *v.* Miller, 13 Barb. 488 (1852); Angell, Car. § 75.

[3] Blossom *v.* Griffin, 13 N. Y. 575 (1856).

[4] Bartels *v.* Redfield, 16 F. R. 337 (1883); *ib.* 841; Robertson *v.* Downing, 127 U. S. 607 (1888).

FRANCHISE.[1] 1. A royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.[2]

A special privilege conferred by government upon individuals, and which does not belong to citizens of the country generally, of common right.[3]

A generic term covering all rights granted to a corporation by the legislature. Whence "corporate franchises."[4]

A corporate franchise is a legal estate vested in the corporation as soon as it is *in esse*. Not a mere naked power, but a power coupled with an interest.[5]

A privilege conferred by the immediate or antecedent legislation of an act of incorporation, with conditions expressed or necessarily inferential from its language, as to the manner of its exercise and for its enjoyment.[6]

To ascertain how it is brought into existence, the whole charter must be consulted.[6]

Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government or directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security.[7]

Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the legislative department, and they cannot be assumed or exercised without legislative authority. Thus, no private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, or exercise the right of eminent domain or corporate capacity, without authority from the legislature, direct or derived.[1]

The word is used as synonymous with privilege and immunity of a personal character; but in law imports something which the citizen cannot enjoy without legislative grant. What members obtain in a religious, benevolent, or scientific association incorporated under general or special laws, is membership.[2]

A corporation is itself a franchise belonging to the members of the corporation, and the corporation, itself a franchise, may hold other franchises. The different powers of the corporation are franchises.[3]

The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in, and to be exercised by, the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises. The franchise to be a corporation is not a subject of sale and transfer, unless made so by a statute, which provides a mode for exercising it.[4]

Often synonymous with rights, privileges, and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a "franchise." But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are the rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth for the bed of its road, or water for its engines, and the like. These are positive rights or privileges without the possession of which the road could not be successfully worked. But immunity from taxation is not a franchise.[5]

The franchises of a railroad company are in a large measure designed to be exercised for the public good, which exercise is the consideration for granting them. The company cannot, therefore, render itself incapable of performing its duties, or absolve itself from the obligation, without the consent of the State.[6]

A franchise is property and nothing more;[7] it is in-

[1] Frăn'-chĭz. F. *franchise*, privileged liberty: *franc*, free.

[2] 2 Bl. Com. 37; 127 U. S. 40.

[3] Bank of Augusta *v.* Earle, 13 Pet. 595 (1839), Taney, Chief Justice.

[4] Atlantic & Gulf R. Co. *v.* Georgia, 98 U. S. 365 (1878), Strong, J.

[5] Dartmouth College *v.* Woodward, 4 Wheat. 700 (1819), Story, J.; Society for Savings *v.* Coite, 6 Wall. 606 (1867). See also 3 Kent, 458; 73 Ill. 547; 45 Mo. 20; 15 Johns. 387.

[6] Woods *v.* Lawrence County, 1 Black, 409 (1861), Wayne, J.

[7] California *v.* Pacific R. Co., 127 U. S. 40 (1888), Bradley, J.

[1] California *v.* Pacific R. Co., *ante*.

[2] Board of Trade *v.* People, 91 Ill. 82 (1878), cases, Scott, J.

[3] Pierce *v.* Emery, 32 N. H. 507 (1856), Perley, C. J.

[4] Memphis R. Co. *v.* Commissioners, 112 U. S. 619 (1884), cases, Matthews, J.; Willamette Manuf. Co. *v.* Bank of British Columbia, 119 *id.* 191 (1886).

[5] Morgan *v.* Louisiana, 93 U. S. 223 (1876), cases, Field, J.; East Tennessee, &c. R. Co. *v.* County of Hamblen, 102 U. S. 275-77 (1880), cases; State *v.* Maine Central R. Co., 66 Me. 512 (1877).

[6] Thomas *v.* West Jersey R Co., 101 U. S. 83-84 (1879), cases, Miller, J.; Baisley *v.* St. Louis, &c. R. Co., 119 Ill. 72-73 (1886).

[7] West River Bridge Co. *v.* Dix, 6 How. 534 (1848); 23 Cal. 422; 17 Conn. 40; 25 *id.* 30.

corporeal property. As such it is liable for debts and subject to the right of eminent domain.[1]

The ordinary franchise of a railway company is to condemn, take, and use lands for the purpose of a public highway, and to take tolls from those who use it as such. Land, in itself, is not a franchise. A franchise is an incorporeal hereditament; a liberty proceeding from the commonwealth.[2]

A grant of a corporate franchise by an act of legislation, accepted by the grantee, is a *contract* between the State and the grantee, the obligation of which a subsequent legislature cannot impair.[3]

Exclusive rights to public franchises are not favored; if granted they will be protected, but they are never presumed.[4]

A corporation cannot dispose of its franchises to another corporation without legislative authority.[5]

A grant of corporate franchises is necessarily subject to the condition that the privileges conferred shall not be abused, or be employed to defeat the ends for which they were conferred; and that when abused or misemployed, they may be withdrawn by proceedings consistent with law. . . A corporation is subject to such reasonable regulations as the legislature may from time to time prescribe, as to the general conduct of its affairs, serving only to secure the ends for which it was created, and not materially interfering with the privileges granted to it.[6]

See BONUS; GRANT, 3; MONOPOLY; RAILROAD; TAX, 2; TOLL, 2; WARRANTUM.

2. In a popular sense, the political rights of subjects and citizens are called franchises: as, the electoral franchise — the right of suffrage.[7]

The right of voting for a member to serve in parliament is called the "parliamentary franchise;" the right of voting for an alderman or town councilor, the "municipal franchise."[8]

Elective franchise. The right of choosing governmental agents.[9]

Enfranchise. 1. To make free of a city or state. 2. To invest with political freedom and capacity.

Disfranchise. To deprive of a franchise conferred; to suspend or withdraw the exercise of a corporate or political right or privilege.[1]

FRANK.[2] Free.

Frankalmoign. Tenure in consideration of religious services (alms).[3]

Frankpledge. Surety for general good behavior, anciently required of freeborn persons.

Franktenement. A freehold. See FEUD.

To frank. To send free.

Franking privilege. The liberty of sending postal matter through the mails free of charge.

Has existed, in theory, for the public good. The act of January 31, 1873, repealed former laws, from and after July 1, 1873.[4] The act of March 3, 1875, secs. 3, 5, 7, permits members of Congress, and certain executive officials, to send free, public documents (*q. v.*), acts of Congress, and seeds supplied by the commissioner of agriculture.[5] The acts of March 3, 1877, sec. 7, and of March 3, 1879, sec. 1, provide that the privilege shall be enjoyed until the first Monday of December following the expiration of the individual's term of office[6] — the fourth of March.

The privilege is also spoken of as the member's "frank."

FRATERNITY. See ASSOCIATION; COMMUNITY, 3.

FRATRICIDE. See HOMICIDE.

FRAUD.[7] Craft, cunning; cheating, imposition, circumvention.

An artifice to deceive or injure.[8]

An intention to deceive.[9]

Defraud. To cheat; to deceive; to deprive of a right by an act of fraud.

To withhold from another what is justly due him, or to deprive him of a right, by deception or artifice.[10]

Fraud, in the Roman civil law, meant any cunning, deception, or artifice, used to circumvent, cheat, or deceive another. This corresponds to "positive fraud" in modern law.[11]

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[1] 2 Washb. R. P. 24; 1 Redf. Ry. §§ 1, 4, 10, cases.

[2] Shamokin Valley R. Co. *v.* Livermore, 47 Pa. 468 (1864), Agnew, J.

[3] Chincleclamonche Lumber, &c. Co. *v.* Commonwealth, 100 Pa. 444 (1882); The Binghamton Bridge, 3 Wall. 51 (1865).

[4] Wright *v.* Nagle, 101 U. S. 796 (1879).

[5] Branch *v.* Jesup, 106 U. S. 484, 478 (1882).

[6] Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574, 580 (1885), Harlan, J. See also 66 Cal. 106-7; 36 Conn. 266; 47 *id.* 602; 21 Ill. 69; 37 *id.* 547; 95 *id.* 575; 30 Kan. 657; 13 Bush, 185; 28 La. An. 493; 45 Md. 379; 15 N. Y. 170; 27 *id.* 619; 68 *id.* 555; 1 Oreg. 37; 39 Tex. 478; 77 Va. 212.

[7] Pierce *v.* Emery, 32 N. H. 507 (1856), Perley, C. J.

[8] Mozley & Whiteley's Law Dict.

[9] See State *v.* Staten, 1 Coldw. 255 (1869).

[1] See People *v.* Medical Society, 24 Barb. 577-78 (1857).

[2] F. *franc*, free.

[3] See 2 Bl. Com. 101; 2 Kent, 281.

[4] 17 St. L. 421.

[5] 1 Sup. R. S. 154.

[6] 1 Sup. R. S. 288, 454.

[7] From *fraus*, q. v.

[8] Byles, Bills, 133.

[9] Lord *v.* Goddard, 13 How. 211 (1851), Catron, J. On definitions of, see 3 Law Quar. Rev. 419-28 (1887), cases.

[10] Burdick *v.* Post, 12 Barb. 186 (1851); People *v.* Kelley, 35 *id.* 452 (1862).

[11] [1 Story, Eq. § 186. See 2 Steph. Hist. Cr. Law Eng. 121.

The common law asserts as a general principle that there shall be no definition of fraud.[1]

The courts have never laid down as a general proposition what shall constitute fraud, or any rule, beyond which they will not go, lest other means of avoiding equity should be found.[2]

In the sense of a court of equity, fraud properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.[3]

Consists in deception practiced, in order to induce another to part with property or surrender some legal right, and which accomplishes the end desired.[4]

Consists in the suppression of the truth — *suppressio veri*, or in the assertion of what is false — *suggestio falsi*.

No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed; and if they are knowingly false, and willfully made, the fact that they are material is proof of an attempted fraud, because their materiality, in the eye of the law, consists in their tendency to influence the conduct of the party who has an interest in them, and to whom they are addressed.[5]

Fraud is sometimes said to consist of "any kind of artifice employed by one person to deceive another." But the term admits of no positive definition, and cannot be controlled in its application by fixed rules. It is to be inferred or not, according to the special circumstances of every case.[6]

Actual, positive, moral fraud; fraud in fact. Fraud as a matter of fact, involving moral turpitude and intentional wrong. **Implied, constructive, legal fraud; fraud in law.** Fraud as a conclusion of law, and may exist without imputation of bad faith or immorality.[7]

When a party intentionally misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage over him, there is a "positive fraud" in the truest sense. There is an evil act with an evil intent. And the misrepresentation may be as well by deeds or acts, as by words; by artifice to mislead, as well as by positive assertions.[8]

By "constructive frauds" are meant such acts or contracts, as, although not originating in any actual evil design, or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and, therefore, are prohibited by law, as within the same reason and mischief, as acts and contracts done *malo animo*. The doctrine is founded in an anxious desire of the law to apply the principle of preventive justice, so as to shut out the inducements to perpetrate a wrong, rather than to rely on mere remedial justice, after a wrong has been committed.[1]

An "actual fraud" is something said, done, or omitted by a person with the design of perpetrating what he must have known to be a positive fraud. "Constructive frauds" are acts, statements, or omissions which operate as virtual frauds on individuals, or which, if generally permitted, would be prejudicial to the public welfare, and yet may have been unconnected with any selfish or evil design.[2]

A breach of duty is a constructive fraud.[3]

In the sense of bankrupt acts, "a debt fraudulently contracted by a person occupying a fiduciary relation" involves positive fraud, involving moral turpitude or intentional wrong.[4]

Fraud in fact in the transfer of chattels consists in the intention to prevent creditors from recovering their just debts, by an act that withdraws the debtor's property from their reach. And an act that, though not fraudulently intended, yet has a tendency to defraud creditors, if it vests the property of the debtor in his grantee, is void for legal fraud. Legal fraud is tantamount to actual fraud. Actual fraud is for the jury; legal fraud, where the facts are undisputed or are ascertained, is for the court.[5]

Fraudulent. Infected with fraud, actual or legal; as, a fraudulent — bankruptcy, claim, concealment, conveyance or gift, possession, representation, *qq. v.* Compare VOID.

When an act charged in an indictment is fraudulent, it is not necessary to use the word "fraudulent" in the indictment itself.[6]

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[1] 2 Pars. Contr. 769.

[2] [1 Story, Eq. § 186.

[3] [1 Story, Eq. § 187.

[4] Alexander *v.* Church, 53 Conn. 562 (1885), Park, C. J., quoting Cooley, Torts, 474; Judd *v.* Weber, 55 Conn. 377 (1887), Loomis J.

[5] Claflin *v.* Commonwealth Ins. Co., 110 U. S. 95 (1884), Matthews, J.; 27 Me. 308; 7 Bing. 105; 56 N. H. 401; 58 *id.* 245; 3 B. & Ad. 114.

[6] Fenner *v.* Dickey, 1 Flip. 36 (1861), Wilson, J.

[7] [Neal *v.* Clark, 95 U. S. 709 (1877), Harlan, J.

[8] [1 Story, Eq. § 192. See also Ackerman *v.* Ackerman, 44 N. J. L. 175 (1882), Depue, J.; 29 Conn. 588, note.

[1] 1 Story, Eq. § 258. See People *v.* Kelly, 35 Barb. 457 (1862).

[2] Smith, Manual of Equity, 71.

[3] Baker *v.* Humphrey, 101 U. S. 502 (1879).

[4] Neal *v.* Clark, 95 U. S. 704 (1877); Hennequin *v.* Clews, 111 *id.* 676, 679-81 (1884), cases; Strang *v.* Bradner, 114 *id.* 559 (1885).

[5] McKibbin *v.* Martin, 64 Pa. 356 (1870), Sharswood, J.; Hanson *v.* Eustace, 2 How. 688 (1844).

See generally Bigelow, Law of Fraud, 137, *et seq.*, cases; Willink *v.* Vanderveer, 1 Barb. 607 (1847); Birchell *v.* Strauss, 28 *id.* 293 (1858); People *v.* Kelly, 35 *id.* 456 (1862); Vulcan Oil Co *v.* Simons, 6 Phila. 564 (1868); 2 Pomeroy, Eq. § 858; 2 Ala. 5 3; 5 *id.* 601; 7 Ark. 171; 6 Ga. 614; 47 *id.* 109; 27 Me. 308; 29 N. H. 354; 3 Den. 236.

[6] United States *v.* Caruthers, 15 F. R. 309 (1882).

Fraudulently. With a deliberately planned purpose and intent to deceive and thereby gain an unlawful advantage.[1]

The ordinary means of fraud are false representations and concealments. The more numerous is the implied or constructive class — which includes all frauds on public policy: agreements to influence testators, to facilitate or restrain marriages, in restraint of trade, for public offices, to suppress criminal proceedings, champertous and other corrupt considerations; all frauds by persons in confidential relations: as, by a guardian, adviser, minister of religion, attorney, doctor, agent, trustee, executor, administrator, debtor, creditor, surety; all frauds upon persons peculiarly liable to be imposed upon: as, bargains with expectant heirs, remaindermen, reversioners, common sailors; and all virtual frauds on individuals irrespective of any confidential relation or liability to imposition: as, forbidden practices at auctions, misuse of the Statute of Frauds, clandestine marriages, frauds on marital rights, frauds under 13 Eliz. c. 5, 96, fraudulent dealing with trustees, appointments, etc.[2]

The fraud must relate directly and distinctly to the contract, if a contract and must affect its very essence. If the fraud be such that had it not been practiced the contract would not have been made, the fraud is *material*. Whether it is or is not material, in a given case, is a question for a jury, possibly under instructions.[3]

The length of time that the intent to defraud precedes the act is not material, provided there is the relation of design and its consummation. Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself. The circumstances of the discovery must be fully stated and proved, and the delay which had occurred shown to be consistent with the requisite diligence.[4]

Fraud binds the injured person, as a cause of action, only from the time of discovery.[5]

The bar of the statute of limitations does not begin to run until the fraud is discovered. Where ignorance has been produced by affirmative acts of the guilty party in concealing the facts, the statute will not bar relief, provided that suit is brought within proper time after the discovery. Nor is relief barred where the party injured has remained in ignorance without fault or want of diligence on his part.[6]

The weight of authority is, that, *in equity*, where the injured person remains in ignorance of fraud without want of care on his part, the bar does not begin to run until the fraud is discovered, though there be no special circumstances or efforts in the guilty party to conceal knowledge. On the question as it arises in actions *at law*, there is a decided conflict of authority. Some courts make concealed fraud an exception on purely equitable principles. The English courts, and the courts of Connecticut, Massachusetts, Pennsylvania, and other States, hold that the doctrine is equally applicable to cases at law.[1] See LIMITATIONS, Statute of.

A court of equity has an undoubted jurisdiction to relieve against every species of fraud. 1. The fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition. 2. It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other. 3. It may be presumed from the circumstances and condition of the parties contracting, — from weakness or necessity. 4. It may be inferred from the nature and circumstances of the transaction, as being an imposition and deceit on persons not parties to the agreement.[2]

There is no fraud *in law* without some moral delinquency; there is no actual legal fraud which is not also a moral fraud. This immoral element consists in the necessary guilty knowledge and consequent intent to deceive — sometimes designated by the technical term the "scienter." The very essence of the legal conception is the fraudulent intention flowing from the guilty knowledge. . . There may be actual fraud *in equity* without any feature or incident of moral culpability. A person making an untrue statement, without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in equity. . . Forms of fraudulent misrepresentations in equity are: 1. Where a party makes a statement which is untrue, and has at the time actual knowledge of its untruth. 2. Where he makes an untrue statement and has neither knowledge nor belief as to the truth. 3. Where he makes an untrue statement and has no knowledge of the truth, and there are no reasonable grounds for his believing it to be true. 4. But where he makes a statement of fact which is untrue, honestly believing it to be true, and this belief is based upon reasonable grounds which actually exist, there is no fraud. Yet, 5, in that case, if he afterward discovers the truth, and suffers the other party to continue in error, and to act upon the belief that no mistake has been made, this, from the time of discovery, becomes a fraudulent representation. 6. If a statement of fact actually untrue is made by a person who honestly believes it to be true, but under such circumstances that the *duty* of knowing the truth rests upon him, which, if fulfilled, would have prevented him from making the statement, such misrepresentation may be fraudulent in equity.[3]

[1] Bank of Montreal *v.* Thayer, 2 McCrary, 5 (1881), McCrary, Cir. J.

[2] See 1 Story, Eq. Ch. VI; Smith, Man. Eq. Ch. IV; 2 Pars. Contr. Ch. XII.

[3] 2 Pars. Contr. 770; Bishop, Contr. §§ 641, 652.

[4] Wood *v.* Carpenter, 101 U. S. 143, 140 (1879), cases, Swayne, J.

[5] Dresser *v.* Missouri, &c. R. Co., Construction Co., 96 U. S. 94–96 (1876), cases.

[6] Bailey *v.* Glover, 21 Wall. 347–50 (1874), cases, Miller, J.: Fritschler *v.* Koehler, 83 Ky. 82 (1885).

[1] Tyler *v.* Angevine, 15 Blatch. 541–42 (1879), cases, Blatchford, J.

[2] Chesterfield *v.* Janssen, 2 Ves. Sr. *155 (1750), Hardwicke, L. C. Same case, 1 L. C. Eq., 4 Am. ed., 773.

[3] 2 Pomeroy, Equity, §§ 884–89, cases.

Fraud avoids a contract *ab initio* — vitiates all contracts whether intended to operate against a party, a stranger, or the public generally. The guilty party cannot allege his own fraud in order to avoid his own act; and he may be liable in damages where real injury is done. The agreement cannot be adopted in part: all must be disaffirmed or none.[1]

Fraud is never presumed. The burden of proving it rests upon him who alleges it. It is a question of fact to be determined from all the circumstances in each case.[2]

Allegations of fraud must be specific in time, place, persons, etc., so that the defendant may meet the charge, and the court see whether ordinary diligence to discover the fraud has been used.[3]

Being a term which the law applies to certain facts, where, upon the facts, the law adjudges fraud, it need not be expressly alleged.[4]

Gross negligence tends to show fraud.[5]

All avenues that facilitate the detection of fraud are to be kept open and free from bars and estoppels.[6]

The presence of fraud is a fact, the evidence of which must satisfy an unprejudiced mind beyond a reasonable doubt.[7]

Circumstantial evidence is, in most cases, the only proof that can be adduced.[8]

While the common law affords reasonable protection against fraud in dealing, it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or of careless indifference to the ordinary and accessible means of knowledge.[9]

A court of equity will not grant relief when the complainant has a complete, effectual, direct, certain and adequate remedy in a court of common law.[10]

Statutes make many different acts frauds, and provide for punishment by criminal proceedings. Remedies available at law are: an action on the case in the nature of a writ of deceit for damages; and an action for money received, by which the tort is waived. Remedies in equity: rescission of the contract; specific performance; injunction; declaration of trust *ex maleficio*.[1] See those titles.

See particularly CAVEAT, Emptor; CONCEAL, 5; COVIN; DECEIT; EQUITY; ESTOPPEL; FORGERY; GUILTY; IDENTITY, 2; INFLUENCE; INNOCENCE; INSOLVENCY; MISTAKE; RATIFICATION; REFORM; REPRESENTATION, 1; RESCISSION; TRUST, 1.

Statute of Frauds. Statute of 29 Charles II (1678), c. 3 — "An Act for the Prevention of Frauds and Perjuries."

Its object was to prevent the facility to perpetrate frauds and the temptation to commit perjury, held out by the enforcement of obligations depending for their evidence upon the unassisted memory of witnesses, by requiring certain transfers of land and certain cases of contracts to be reduced to writing and signed by the parties to be charged therewith, or by their agents thereunto lawfully authorized in writing.

Its policy is to impose such requisites upon private transfers of property, as, without being hinderances to fair transactions, may be either totally inconsistent with dishonest practices, or tend to multiply the chances of detection.[2]

Every day's experience more fully demonstrates that the statute was founded in wisdom, and absolutely necessary to preserve the titles to real property from the chances, the uncertainty, and the fraud attending the admission of parol testimony. When courts of equity have relaxed the rigid requirements of the statute, it has always been for the purpose of hindering the statute, made to prevent frauds, from becoming the instrument of fraud.[3]

The substance of the statute has been re-enacted in the States; and other points, coming within its general policy, have been added.[4]

I. As applying to Realty. The statute enacts that all leases, estates, and interest in lands, made without writing signed by the parties or their agents lawfully authorized in writing, shall have the force and effect of estates at will only (sec. 1); except leases not exceeding three years from the making, which reserve at least two-thirds of the improved value of the land (sec. 2); and that no lease, estate, or interest shall be assigned, granted, or surrendered unless by writing signed by the assignor, grantor, etc., or his agent authorized in writing, except assignments, etc., by operation of law (sec. 3).[5] See under FRUCTUS.

II. As applying to Equity. Enacts that all declarations or creations of trusts of land shall be in writing signed by the declarant or creator (sec. 7), except trusts arising by construction of law, or transferred by act of law (sec. 8); that all grants or assignments of trusts

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[1] Foreman *v.* Bigelow, 4 Cliff. 543-49 (1878), cases, Clifford, J. See also Feltz *v.* Walker, 49 Conn. 96 (1881), cases, Carpenter, J.

[2] Hager *v.* Thompson, 1 Black, 91 (1861); Humes *v.* Scruggs, 94 U. S. 28 (1876); 2 Pars. Cont. 784.

[3] See Stearns *v.* Page, 7 How. 829 (1849); Moore *v.* Greene, 19 *id.* 70 (1856); Badger *v.* Badger, 2 Wall. 95 (1864); Ambler *v.* Choteau, 107 U. S. 591 (1882).

[4] Stimson *v.* Helps, 9 Col. 36 (1885); Kerr, Fraud, &c. 866, cases.

[5] First Nat. Bank of Carlisle *v.* Graham, 100 U. S. 702 (1879), cases.

[6] Pendleton *v.* Richey, 32 Pa. 63 (1858); 11 Wend. 117; 4 Kent, 269.

[7] Young *v.* Edwards, 72 Pa. 267 (1872).

[8] Rea *v.* Missouri, 17 Wall. 543 (1873); Craig *v.* Fowler, 59 Iowa, 208 (1882); Moore *v.* Ullman, 80 Va. 311 (1885), cases.

[9] 2 Kent, 484, cases; Senter *v.* Senter, 70 Cal. 622-24 (1886), cases.

[10] Green *v.* Spaulding, 76 Va. 411, 417 (1882); 1 Story, Eq § 33.

[1] See Pasley *v.* Freeman, 2 Sm. L. C. 92-113, cases.

[2] 1 Greenl. Ev. § 262; 2 Whart. Ev. § 853; 3 Pars Contr. 3.

[3] Purcell *v.* Miner, 4 Wall. 517 (1866), Grier, J.

[4] Browne, Stat. Fr., Appendix.

[5] 2 Bl. Com. 297; 2 Whart. Ev. §§ 854-68, 883.

shall also be in writing, signed by the grantor or assignor (sec. 9); and that estates *pur autre vie* may be taken in execution for debt, or be deemed assets by descent for the payment of debts (sec. 10).[1]

III. As applying to Common Law. Enacts that no action shall be brought whereby: (1) To charge an executor or administrator upon any special promise to answer for damages out of his own estate.[2] (2) To charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another. See PROMISE, Original; GUARANTY, 2. (3) To charge any person upon any agreement made upon consideration of marriage. See SETTLEMENT, Marriage. (4) To charge any person upon any contract or sale of lands, or any interest in or concerning them. See LAND. (5) To charge any person upon any agreement that is not to be performed within one year from the making thereof,— *unless*, in each case (1-5), the agreement or some note or memorandum thereof is in writing and signed by the party to be charged therewith or by his agent thereunto lawfully authorized in writing (sec. 4).[3]

If the performance of the contract depends upon a contingency which may happen within a year, the contract need not be in writing. It is sufficient if the possibility of performance exists.[4]

(6) That in a contract for the sale of goods, wares, or merchandise, for the price of ten pounds or upward, the buyer must actually receive and accept part of the goods, etc., or give something in earnest or in part payment, or the parties, or their agents, sign some note or memorandum of the bargain (sec. 17).[5] See EARNEST; PAYMENT, Part.

(7) That judgments against lands shall bind purchasers from the day of signing, and against goods when the writ of execution is delivered to the sheriff (secs. 14, 15).

(8) Provides for additional solemnities in the execution of wills.[6] See WILL, 2, Statute of wills.

The provisions as to the transfer of interests in land, and to promises, which at common law could be effected by *parol*, that is, without writing, comprise all that in professional use is meant by the statute.

The theory is that the writing required in any case will secure an exact statement and the best evidence of the terms and conditions of a promise made.[7] See AGREEMENT; PAROL, Evidence.

See also PERFORMANCE, Part; VERBUM, Verba illata.

Statute of 9 Geo. IV (1829), c. 14, called *Lord Tenterden's Act*, enlarged the application of the Statute of Frauds, by rendering a written memorandum necessary in cases of a promise: to bar the Statute of Limitations; by an adult to pay a debt contracted during his infancy; as to a representation of ability in trade, upon the strength of which credit is to be given; and as to contracts for the sale of goods, not yet made or finished, amounting to ten pounds or upward.[1]

FRAUS. L. A cheating; deceit; imposition: fraud. Compare DOLUS.

Fraus est celare fraudem. It is a fraud to conceal a fraud. Concealment (*q. v.*) may amount to fraud.

Fraus latet in generalibus. Fraud lurks in general expressions.

Pia fraus. Pious fraud: evasion of law to advance the interests of a religious institution. See MORTMAIN.

FREE. Not subject to restraint or control; having freedom of will; at liberty; also, that on which no charge is made. Compare FRANK.

1. Liberated from control of parent, guardian, or master; *sui juris:* said of a child, ward, apprentice.

2. Individual; exclusive; privileged; independent; opposed to common: said of a fishery, a warren, and formerly of a city or town, *qq. v.* See also MUNICIPIUM.

3. Clear of offense, guiltless, innocent; also, released from arrest, liberated: used of persons acquitted or released from imprisonment.

4. Open to all citizens alike: as, a free school, *q. v.*

5. Not arbitrary or despotic; assuring liberty; defending individual rights against encroachment by any person or class: as, a free government, free institutions.[2]

6. Certain; honorable; becoming a freeman; opposed to base: as, free-socage, *q. v.*

7. That for which no charge is made for use; opposed to toll: as, a free bridge, *q. v.*

Not gained by purchase: as, free admission, free passage.

Free on board. In a contract for the sale and delivery of goods "free on board" vessel, the seller is under no obligation to act until the buyer names the ship to which the delivery is to be made: until he knows that he could not put the articles on board.[3] Compare FRAIS.

8. Neutral: as in saying that "free ships make free goods."

Freely. Without constraint, coercion, or compulsion.[4] See DURESS; WILL, 1.

[1] 2 Bl. Com. 337, 259; 2 Whart. Ev. § 903.

[2] 2 Bl. Com. 466; 3 Pars. Contr. 19.

[3] 3 Bl. Com. 159; 3 Pars. Contr. 19, 29, 31, 35; 2 Whart. Ev. §§ 878-80; Mahan *v.* United States, 16 Wall. 146 (1872); Becker *v.* Mason, 30 Kan. 700-2 (1883), cases.

[4] Stowers *v.* Hollis, 83 Ky. 548-49 (1886), cases; Doyle *v.* Dixon, 97 Mass. 211 (1867): 93 Am. Dec. 85-90, cases.

[5] 2 Bl. Com. 448; 3 Pars. Contr. 39; 2 Whart. Ev. § 869; 1 Law Q. Rev. 1-24 (1884); 37 Alb. L. J. 492 (1888).

[6] 2 Bl. Com. 376, 500, 515; 2 Whart. Ev. §§ 884-900.

[7] Browne, Stat. Fr. § 316.

[1] Smith, Contr. 95; Reed, St. Frauds.

[2] Webster's Dict.

[3] Dwight *v.* Eckert, 117 Pa. 508 (1888), cases.

[4] Dennis *v.* Tarpenny, 20 Barb. 374 (1855); Meriam *v.* Harsen, 2 Barb. Ch. 209 (1847).

Freedman. One made free; a manumitted slave. See CITIZEN, Amendments; LIBERTY, 1.

Freeman. One born or made free as to civil rights.

In the constitutions of Pennsylvania of 1776 and 1790, "freemen" described citizens who were capable of electing or being elected representatives of the people in the Provincial Council or General Assembly. The term with this meaning was brought by William Penn from England. A freeman is one in possession of the civil rights enjoyed by the people generally. This freedom of civil rights was termed his "free-law," and was liable to forfeiture for disloyalty and infamy. . . . The language of the amended constitution of 1838 was "white freeman." [1]

In those constitutions, referring to the right of suffrage, does not include females.[2]

Freehold. The possession of soil by a freeman. Such estate as requires actual possession of the land. Such estate in lands as is conveyed by livery of seisin, or, in tenements of an incorporeal nature, by what is equivalent thereto; as, by receipt of rent.[3]

An estate in real property, of inheritance or for life; or, the term by which it is held.[4]

Any estate of inheritance or for life, in real property, whether it be a corporeal or incorporeal hereditament.[5]

Also, the land itself. See ABATEMENT, 1; WASTE, 1.

Freeholder. The actual owner of land.

He was originally a suitor of the courts, a juror, voted for members of parliament, and could defend his title to land.[6]

Such as holds a freehold estate, that is, lands or tenements, in fee-simple, fee-tail, or for term of life.[7]

One who owns land in fee, or for life, or for some indeterminate period. The estate may be legal or equitable.[8]

One who has title to real estate, irrespective of the amount or value thereof.[9]

A freeholder whose estate is worth a specified sum, clear of incumbrances, is, by the law of some localities, privileged from arrest in civil actions; and he may not be required to furnish security for the performance of a legal obligation. See further ARREST, 2.

[1] McCafferty *v.* Guyer, 59 Pa. 115-18 (1868), Agnew, J.
[2] Burnham *v.* Luning, 9 Phila. 241 (1871).
[3] [2 Bl. Com. 104, 209.
[4] Gage *v.* Scales, 100 Ill. 221 (1881), Craig, C. J.
[5] 4 Kent, 24.
[6] 2 Bl. Com. 120.
[7] Bradford *v.* State, 15 Ind. 353 (1860): Jacob.
[8] State *v.* Ragland, 75 N. C. 13 (1876), Rodman, J.
[9] [People *v.* Scott, 8 Hun, 567 (1876), Talcott, J

Freehold estates are: 1. Of inheritance — (*a*) absolute, as tenancy in fee-simple; (*b*) limited: qualified or base, and conditional — later, fees-tail. 2. Not of inheritance. These are chattel interests in lands. They are for life, and either conventional or legal; the lowest species is the estate for the life of another.[1] See CONDITION; FEE, 1; FEUD; SHELLEY'S CASE.

FREIGHT. Merchandise transported or to be transported; also, compensation for that service.

In its widest sense, may include fare, for it is that "with which anything is *fraught* or laden for transportation;" and, by a figure of speech, the price paid for the transportation.[2]

The burden or loading of a ship, or the cargo which she has on board; likewise, the hire agreed upon between the owner or master of a vessel for the carriage of goods from one port or place to another.[3]

Goods carried; and the price to be paid for the carriage, or for the hire of a vessel under a charter-party or otherwise.[4]

Compensation for the carriage of goods.[5]

In policies of marine insurance, freight means the earnings or profit derived by the ship-owner or the hirer from the use of the ship himself, or from letting it to others, or from carrying goods for others. Does not include cargo or goods laden on board, which are insured under the term goods, cargo, merchandise, or word of like import; nor profit which the owner of the cargo expects to derive from the transportation.[6]

Affreightment. The contract for the use of a vessel.

Dead freight. Money paid or due for unoccupied capacity in a vessel.[7]

The amount of freight to be paid rests upon contract expressed in the charter-party or bill of lading, or else is implied in law — for a reasonable sum.[8]

In the absence of a different stipulation, freight is only payable when the merchandise is in readiness

[1] 2 Bl. Com. 120; 80 Va. 844.
[2] Pennsylvania R. Co. *v.* Sly, 65 Pa. 211 (1870), Sharswood, J.
[3] [Brittan *v.* Barnaby, 21 How. 533 (1858), Wayne, J.
[4] [Lord *v.* Neptune Ins. Co., 10 Gray, 112 (1857), Shaw, C. J. See also 1 Mas. 12; 3 *id.* 344; 1 Sprague, 219; 1 Ware, 188; 13 East, 325; L. R., 7 C. P. 348.
[5] Palmer *v.* Gracie, 4 Wash. 123 (1821).
[6] [Minturn *v.* Warren Ins. Co., 2 Allen, 91 (1861), Bigelow, C. J.
[7] See Gray *v.* Carr, L. R., 6 Q. B. *523 (1871); Phillips *v.* Rodie, 15 East, 264 (1812).
[8] Palmer *v.* Gracie, 4 Wash. 123 (1821).

to be delivered to the person having the right to receive it.[1]

Freight *pro rata itineris* not being earned where, from necessity, cargo is accepted before arrival at the port of destination, in a case of average, there can be no contribution on it.[2]

Freighter. He who loads a vessel, under a contract of hire or of affreightment.[3]

The ship-owners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas, or other unavoidable casualty; and the freighter undertakes that, if the goods be delivered at the place of destination, he will pay the stipulated freight. . . If the ship be disabled from completing her voyage, the owner may still entitle himself to the whole freight by forwarding the goods by some other means to their destination; but he has no right to any freight if they be not so forwarded, unless the forwarding be dispensed with, or there be a new bargain made. If the ship-owner will not forward them, the freighter is entitled to them without paying anything. The general property in the goods is in the freighter; the ship-owner has no right to withhold the possession from him, unless he has either earned his freight or is going on to earn it.[4]

See AVERAGE; CHARTER, 1, Party; COMMERCE; DISPATCH; FRAIS; INSURANCE, Marine; LADING, Bill of; RESTITUTIO; SEAWORTHY.

FRENCH. Law-French, which is used in old law-books and legal proceedings, exhibits many terms and idioms not employed in classic French.

Under William the Norman and his sons, all the public proceedings of the courts, including arguments and decisions, were expressed in Norman law-French. In the thirty-sixth year of Edward III (1363), it was enacted that all pleas should be shown, answered, debated, and judged in the English tongue, but be entered and enrolled in Latin, which, being a dead language, was immutable. However, the practitioners and reporters continued to take notes in the customary law-French. This law-French differs as much from modern French as the diction of Chaucer differs from the diction of Addison. English and Norman being concurrently used for several centuries, the two idioms assimilated and borrowed from each other.[5]

"The constitution of the *aula regis*, and the judges themselves, were fetched from Normandy; in consequence, proceedings in the king's courts were carried on in Norman."[6]

Norman-French, as employed about the courts, was often intermixed with scraps of Latin and pure English.[7] See LATIN.

[1] Brittain *v.* Barnaby, 21 How. 533 (1858).

[2] The Joseph Farwell, 31 F. R. 844 (1887).

[3] See 3 Kent, 173; 3 Johns. 105.

[4] Hunter *v.* Prinsep, 10 East, 394 (1808), Ellenborough, C. J. Approved, The Tornado, 108 U. S. 347, 349 (1883), Blatchford, J.

[5] [3 Bl. Com. 317-18.]

[6] 4 Bl. Com. 416.

[7] 2 Hume, Hist. Eng. 115.

FREQUENT, *v.* A single visit to a place, or once passing through a street, cannot be said to be a "frequenting" that place or street.

May be used in contradistinction to "found," which applies to the case of a person apprehended in a building or inclosed ground, where the necessary inference would be that the purpose was unlawful, in which case it would be enough to show that the party was in the place only once.[1]

Webster's definition "visiting often, resorting to often or habitually," expresses the popular understanding. What amounts to "frequenting" a street must depend upon circumstances.[2]

FRESH. See SUIT, 1.

FRESHET. See ACT, 1, OF GOD; BED, 2; WATER-COURSE.

FRIDAY, GOOD. See HOLIDAY.

FRIEND. Compare AMI; AMICUS.

One favorably disposed to another person.

Friend of the court. A disinterested by-stander who furnishes information to the judge trying a cause, or to a court, on a matter of law or fact of which notice may be taken without proof. Usually, a member of the bar of the court. See AMICUS, Curiæ.

Next friend. One who acts for another who is not *sui juris:* a representative for the special office of carrying on a suit in court.

An infant sues by his "next friend," and defends by his guardian *ad litem*. Similarly, a married woman, who has an interest which conflicts with the interest of her husband, may sue him by her "next friend" — any acquaintance. The next friend may be held for the costs of unsuccessful litigation; and he may be required to file his authority to appear.[3]

FRIVOLOUS. Is applied to an answer, plea, or objection which upon its face is clearly insufficient in law, and apparently made for purposes of delay or to embarrass an adversary.

An answer is frivolous when it controverts no material allegation in the complaint, and presents no tenable defense;[4] when it sets up a matter which may be true in fact, but forms no defense. A *sham* or *false* answer may be good in form, but false in fact.[5] See SHAM.

To constitute a pleading frivolous, it must be ap-

[1] Clark *v.* The Queen, 14 Q. B. D. 98 (1884), Grove, J.; Vagrant Act, 5 Geo. IV (1825), c. 83.

[2] *Ibid.* 101-2, Hawkins, J.

[3] See 3 Bl. Com. 300; Herzberg *v.* Sachse, 60 Md. 433 (1883).

[4] Lefferts *v.* Snediker, 1 Abb. Pr. o. s. 42 (1854); Brown *v.* Jennison, 3 Sandf. L. 732 (1851); Lerdall *v.* Charter Oak Ins. Co., 51 Wis. 430 (1881); 7 *id.* 383.

[5] People *v.* McCumber, 18 N. Y. 321 (1858).

parent on mere inspection, without examination or research, that it is utterly invalid.[1]

When it needs argument to prove that an answer or demurrer is frivolous, it is not frivolous.[2]

A pleading seen to be frivolous, upon bare inspection, will be stricken off by the court.[3]

FROM. Compare AFTER; AT; TO.

1. Is taken inclusively according to the subject-matter; as, in a grant of power to construct a railroad "from" a place.[4]

"From" a street may mean from any part of the street; not, necessarily, from its inner or nearest line.[5]

"From the city" was held to mean from any point within the city.[6]

2. In computing time "from" a day, the rule is to exclude that day.[7] See DAY.

3. Descent "from" a parent means by act of the parent.[8] See DESCENT.

4. An indictment that charges stealing corn "in" the field may be fatally defective under a statute which makes stealing "from" a field a felony.[9]

FRUCTUS. L. Fruit, fruits; increase; profit.

Fructus industriales. Cultivated fruits. **Fructus industriæ.** Fruit of labor, or industry; emblements, the products of planting and cultivation. **Fructus naturales.** Nature's growths; natural fruits: increase by the unassisted powers of nature; as, the fruits of uncultivated trees, the young of animals, and wool.

Although the cases are not uniform, there is abundant authority for holding that crops, such as corn, wheat, rye, potatoes, and the like, called *fructus industriales*, are regarded as the representatives of the labor and expense bestowed upon them, and as chattels, while yet growing; and, hence, as such, go to the executor, may be seized upon execution as chattels, and be sold or bargained by parol; while growing grass and trees and the fruit on them, called *fructus naturales*, are a part of the soil of which they are the natural growth, descend with it to the heir, and, until severed, cannot be seized upon execution, and, under the statute of frauds, cannot be sold or conveyed by parol. But if the owner of the fee, by a conveyance in writing, sells these natural products of the earth, which grow spontaneously without cultivation, to be taken from the land, or sells the land reserving them to be cut and removed by himself, the law regards this action as equivalent to an actual severance.[1] See CROP; EMBLEMENTS; FRUIT.

Fructus legis. The fruit of the law — execution.

Fructus pendentes. Hanging fruits. **Fructus stantes.** Standing fruits; fruits united to the thing which produces them.

See USUS, Fructus.

FRUIT. Increase; profit; product; enjoyment.

Natural fruits. The natural product of trees, bushes, and other plants. **Artificial fruits.** Such things as interest on money, loaned or due.

Figurative expressions are: fruits of crime; that execution is the fruit of a judgment.

See FRUCTUS; EMBLEMENTS; LARCENY; PERISHABLE.

FUGITIVE. Used only in the sense of a "fugitive from justice:" a person who commits a crime within a State, and withdraws himself from its jurisdiction without waiting to abide the consequences of his act.[2]

Acts of limitation of criminal prosecution do not apply to persons "fleeing from justice."[3]

"Fleeing from justice" (act of 1790) is, leaving one's home or residence or known place of abode, with intent to avoid detection or punishment for some public offense against the United States. An offender may flee by secreting himself, or by not being usually and publicly known as being within the district.[4]

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice," etc., are the words of the Constitution relating to extradition of offenders.[5]

There must be an actual fleeing. "Who shall flee" does not include a person who was never in the place from which he is said to have fled.[6]

Defendant may plead either specially or generally; if specially, the government may reply "He fled," etc. Defendant may not demur.[7] See at length EXTRADITION.

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[1] Cahoon v. Wisconsin R. Co., 10 Wis. *298 (1860), cases.

[2] Cottrill v. Cramer, 40 Wis. 559 (1876), Ryan, C. J.

[3] Taylor v. Nyce, 3 W. N. C. 433 (Pa., 1877).

[4] Union Pacific R. Co. v. Hall, 91 U. S. 343 (1875), cases.

[5] City of Pittsburgh v. Cluley, 74 Pa. 261 (1873).

[6] Appeal of West Penn. R. Co., 99 Pa. 161 (1881). See also 33 Me. 67; 52 *id.* 252; 7 Allen, 487; 7 Barb. 416; 9 Wend. 346; 3 Head, 596; 2 Mas. 137.

[7] Sheets v. Selden, 2 Wall. 190 (1864); Best v. Polk, 18 *id.* 119 (1873). See also 19 Conn. 376; 52 Ga. 244; 24 Ind. 194; 13 B. Mon. 460; 18 Me. 198; 9 N. H. 304; 24 Barb. 9; 9 Cranch, 104; 1 Gall. 248.

[8] Gardner v. Collins, 2 Pet. *91 (1829); Case v. Wildridge, 4 Ind. 54 (1853).

[9] State v. Shuler, 19 S. C. 140 (1883).

[1] Kimball v. Sattley, 55 Vt. 291 (1883), cases, Veazey, J.; *ib.* 540; 118 Mass. 125; 40 Md. 212.

[2] [*Re* Voorhees, 32 N. J. L. 150 (1867), Beasley, C. J.

[3] See Act of 1790, § 32: R. S. § 1043; Act of 1804, § 3: R. S. § 1046.

[4] United States v. O'Brian, 3 Dill. 383 (1874), Dillon, Cir. J.

[5] Constitution, Art. IV, sec. 2, cl. 2.

[6] Jones v. Leonard, 50 Iowa, 106 (1878). See also United States v. Smith, 4 Day, 128 (1809); United States v. White, 5 Cranch, C. C. 44 (1836).

[7] United States v. Cook, 17 Wall. 168 (1872); United States v. Norton, 91 U. S. 566 (1875); 3 Crim. Law Mag. 787–810 (1882), cases on points of practice.

FULFILL. See PERFORM.

FULL. Not wanting in any essential quality; complete; entire; whole; perfect; adequate.

Full age. The age of twenty-one years; majority. See AGE.

Full blood. Whole blood. See BLOOD.

Full court. All the members of a court sitting together.

Full defense. A general defense. See DEFENSE, 2.

Full faith and credit. Entire confidence and efficacy. See further FAITH, Full.

Full price. A price which is fair or reasonable. See PRICE.

Full proof. Proof to the exclusion of a reasonable doubt. See PROOF.

Fully. See ADMINISTER, 4.

In full. 1. Completed, filled up, not blank; as, an indorsement (*q. v.*) which names the indorsee.

2. For all that is due, and not on account: as, a receipt in full, satisfaction in full, *qq. v.*

FUNCTUS. See OFFICIUM, Functus, etc.

FUND; FUNDS.[1] A deposit of resources; stock or capital; money invested for a specific object; revenue: as, the fund of a bank, or of a trust.[2]

"Funds," as employed in commercial transactions, usually signifies money.[3]

A "fund" is merely a name for a collection or an appropriation of money.[4]

While the restricted meaning of "funds" is cash on hand, the broader meaning includes property of every kind, when such property is specially contemplated as something to be used or applied in the payment of debts. Thus, for example, as employed in a statute, may comprehend all the resources of a corporation.[5]

Current funds. Current money; currency, *q. v.*

Funded debt. The term "fund" was originally applied to a portion of the national revenues set apart or pledged to the payment of a particular debt. And a "funded debt" was a debt for the payment of the principal or interest of which some fund was appropriated.[1]

Funding. Has been applied to the process of collecting together a variety of outstanding debts against corporations, the principal of which was payable at short periods, and borrowing money upon the bonds or stocks of the corporation to pay them off; the principal of such bonds or stocks being made payable at periods comparatively remote. The word is never used to describe an ordinary debt growing out of a transaction with an individual and represented by a single instrument.[1]

Fundholder. A person to whose custody money is committed, or into whose care trust funds come. Compare STAKEHOLDER.

No funds. No resources or assets, as when it is said that a trustee has "no funds;" also no money on deposit to one's credit, as when a draft drawn upon a bank is returned "no funds."

If a formal demand is made, during banking hours, by the holder of a note, at the bank where it is payable, and there are no funds, it is the duty of the bank to say that there are "no funds;" and there is then a breach of the contract on the part of the maker, and notice thereof would bind the indorsers. There is no necessity for a personal demand upon the maker elsewhere. But if no such demand is made, and the note is only sent or placed in the bank for collection, then the maker has till the close of business hours to make payment. Sending a note through the clearing-house is not a formal demand for immediate payment made during business hours, but is equivalent to leaving the note at the bank for collection from the maker on or before the close of banking hours.[2] See ASSIGNMENT, Equitable.

Public funds. The stock of a public debt; securities of government.[3]

Sinking fund. Money, arising from particular taxes or duties, appropriated toward the payment of the principal and interest of a public loan.[4]

See IDENTITY, 2; MARSHAL, 2.

FUNDAMENTAL. See CONSTITUTION.

Alterations in a charter which are not "fundamental," and are authorised by the legislature, may be effectually accepted by a majority of the stockholders — a majority *per capita* or of the shares voted, as the case may require. Alterations which actually

[1] F. *fond*, a merchant's stock: L. *fundus*, bottom. Whence "fundamental."

[2] See Webster's Dict.

[3] Galena Ins. Co. *v.* Kupfer, 28 Ill. 335 (1862). See 91 N. Y. 65; 24 N. J. E. 358.

[4] People *v.* N. Y. Central R. Co., 34 Barb. 135 (1861).

[5] Miller *v.* Bradish, 99 Iowa, 280 (1896), Seevers, J.

[1] Ketchum *v.* City of Buffalo, 14 N. Y. 367, 379 (1865), Selden, J.

[2] Nat. Exchange Bank *v.* Nat. Bank of North America, 132 Mass. 148 (1882).

[3] See 1 Bl. Com. 331.

[4] See Ketchum *v.* City of Buffalo, 14 N. Y. 367 (1865); Union Pacific R. Co. *v.* Buffalo County, 9 Neb. 453 (1880); Bank for Savings *v.* Mayor of New York, 102 N. Y. 313, 325 (1886).

change the nature and purposes of the corporation, or of the enterprise for the prosecution of which it was created, are "fundamental." [1]

FUNERAL. See BURIAL.

"Funeral expenses" may include the cost of carriage-hire, vault, and tombstone, besides the cost of shroud, coffin, grave, etc.[2]

But not, charges for dinner and horse-feed furnished to persons attending the funeral. See EXECUTOR.[3]

FURNITURE. That which furnishes, or with which anything is furnished or supplied. Whatever may be supplied to a house, a room, or the like, to make it habitable, convenient, or agreeable. Goods, vessels, utensils and other appendages, necessary or convenient for housekeeping. Whatever is added to the interior of a house or apartment for use or convenience.[4]

Relates, ordinarily, to movable personal chattels; but is very general, in meaning and application, and the meaning changes, so as to take the color of, or to accord with, the subject to which it is applied.[5]

Household furniture. Those vessels, utensils, or goods, which, not becoming fixtures, are designed, in their manufacture, originally and chiefly for use in the family, as instruments of the household and for conducting and managing household affairs. Does not include a trunk or a cabinet box.[6]

Embraces everything about a house that has been usually enjoyed therewith, including plate, linen, china, and pictures.[7]

A bequest of household furniture ordinarily comprises everything that contributes to the convenience of the householder or to the ornament of the house. Does not include the furniture of a school-room in a boarding-school.[8]

As used in a bequest, includes bronzes, statuary, and pictures placed in various parts of the house to render it more agreeable as a place of residence, if comporting with the testator's means and the general style of furnishing the house.[9] See CONTAINED; IMPLEMENTS.

Furniture of a ship. Includes everything with which a ship requires to be furnished or equipped to make her seaworthy.[1] See APPURTENANCE.

FURS. See PERISHABLE.

FURTHER. Additional: as, further — assurance, compensation, proof, *qq. v.*; also, subsequent or later: as, a further hearing, *q. v.*

"Any further tax," used with relation to some other tax, must mean any additional tax besides that referred to, and not any further like tax.[2]

FUTURE. That which may or will be hereafter: as, future — advances, damage, earnings, estate, *qq. v.* See also DEVISE, Executory; EXPECTANCY; REMAINDER; SALE; TIME; USE, 2.

Futures. The expression "dealing in futures" has grown out of those purely speculative transactions in which there is a nominal contract of sale for future delivery, but where in fact none is ever intended or executed. The nominal seller does not have or expect to have the stock or merchandise he purports to sell, nor does the nominal buyer expect to receive it or to pay the price. Instead, a percentage or "margin" is paid, which is increased or diminished as the market rates go up or down, and accounted for to the buyer. This is simply speculation and gambling; mere wagering on prices within a given time.[3]

"One person says: I will sell you cotton (for example) at a certain time in the future for a certain price. You agree to pay that price, knowing that he has no cotton to deliver at the time, but with the understanding that, when the time for delivery arrives, you are to pay him the difference between the market value of the cotton and the price you agreed to pay, if cotton declines, and, if it advances, he is to pay you the difference between what you promised to give and the advanced market price."[4]

There is no gambling unless both sides gamble; and from the intent or belief of one party it is not fair to presume a like intent or belief as to the other party.[5]

See further WAGER, 2.

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[1] Mower *v.* Staples, 32 Minn. 286 (1884), cases, Berry, Judge.

[2] Donald *v.* McWhorter, 44 Miss. 29 (1870); Matter of Luckey, 4 Redf. 95 (1879); 14 S. & R. 64.

[3] Shaeffer *v.* Shaeffer, 54 Md. 633 (1880). See, in general, McClellan *v.* Filson, 44 Ohio St. 188–89 (1886), cases.

[4] Bell *v.* Golding, 27 Ind. 179 (1866), Ray, C. J. See also Crossman *v.* Baldwin, 49 Conn. 491 (1882).

[5] [Fore *v.* Hibbard, 68 Ala. 412 (1879), Manning, J.

[6] Towns *v.* Pratt, 33 N. H. 350 (1856), Sawyer, J.

[7] Endicott *v.* Endicott, 41 N. J. E. 96 (1886); M'Micken *v.* M'Micken University, 2 Am. Law Reg. 489 (1863); 2 Jarm. Wills, 862; 63 N. H. 295.

[8] Hoopes's Appeal, 60 Pa. 227 (1869), cases, Sharswood, J.

[9] Richardson *v.* Hall, 124 Mass. 227 (1878), Colt, J. See also 33 Me. 535; 14 Mich. 506; 1 Johns. Ch. 399, 1 Robt. 21; 13 R. I. 20; 30 Vt. 224; 2 Munf. 234; 5 *id.* 272; 18 Wis. 163; 1 Ves. Sr. 97; 1 Jarman, Wills, 591, 596, note; 2 Williams, Ex. 1017.

[1] Weaver *v.* The S. G. Owens, 1 Wall. Jr. 369, 359 (1849), Grier, J.

[2] Gordon *v.* Appeal Tax Court, 3 How. 147 (1845).

[3] King *v.* Quidnick Company, 14 R. I. 138 (1883), Stiness, J. See also Hatch *v.* Douglas, 48 Conn. 127 (1880), Carpenter, J.

[4] Cunningham *v.* Nat. Bank of Augusta, 71 Ga. 403 (1883), cases, Blanford, J.; Mutual Life Ins. Co. *v.* Watson, 30 F. R. 653 (1887).

[5] Bangs *v.* Hornick, 30 F. R. 98 (1887), cases. See generally Marshall *v.* Thurston, 3 Lea, 740 (1879), cases; Bartlett *v.* Smith, 13 F. R. 263 (1882); Irwin *v.* Millar, 110 U. S. 499, 508–11 (1884), cases; Kirkpatrick *v.* Adams, 20 F. R. 297, 298 (1884); Beadles *v.* McElrath, Sup. Ct. Ky. (1887): 3 S. W. Rep. 152, note.

G.

G. In a few words, originally beginning with *u* or *w*, prefixed to the form which comes through the French, as, in guard for ward; in law-French, equivalent to our *w*.

Whence, also, the doublets gage and wage, guaranty and warranty, guardian and ward, garnish and warn; also seen in warden, warren, and award.[1]

G. S. General statutes.

GAGE. See G; MORTGAGE.

GAIN. See BET; EARNINGS; INCOME; LUCRUM; PROFIT.

GALLON. The gallon of our commerce conforms to the old wine-measure of two hundred and thirty-one cubic inches.[2]

GALLOWS.[3] A beam laid over and fastened to one or two posts, from which a criminal, condemned to death, is suspended. See DEATH, Penalty.

GAMBLE. To play a game of chance or skill for stakes, or to bet on the result of the game; to game or play for money.

Gambler. One who follows or practices games of chance or skill with the expectation and purpose of thereby winning money or other property.[4]

Common gambler. Applied to a person who furnishes facilities for gambling,—one who, for gambling purposes, keeps or exhibits any gambling table, establishment, device or apparatus.[5]

Gambling. Anything which induces men to risk their money or property without other hope of return than to get for nothing a given amount from another person.[6]

Gambling device. An invention to determine who wins and who loses among those that risk their money on a contest or chance of any kind.[7]

Gambling house. Keeping a structure of any kind for purposes of gambling, is an indictable offense at common law.[1]

Gambling policy. A policy of life insurance issued to a person who has no pecuniary interest in the life insured.[2]

See further GAME, 2; HOUSE, 1.

GAME. 1. Wild animals pursued for amusement or profit. In its most comprehensive sense includes beasts, birds or fowl, and fishes.

Game laws. Statutes regulating the taking or killing of animals of a wild nature. Another designation is *Game and Fish Laws.* See FISH, 1.

Game laws are designed to preserve insectivorous birds, and the breeds of fowl and quadrupeds valuable to man for food and for sport. The details of these regulations must be sought for in the statutes of the several States.[3] See PROPERTY, Qualified.

In English law, a "chase" is the liberty of keeping beasts of chase or royal game in an uninclosed space, protected even from the owner of the land, with right to hunt them thereon. A "park" is an inclosed chase, extending over a man's own grounds. A "forest," in the hands of a subject, is the same as a chase. At common law, it was once unlawful to kill beasts of park or chase, except as to such persons as possessed one of these franchises.[4]

In 1831 the law was modified to enable any one to obtain a license to kill game, on the payment of a fee.[5]

See CRUELTY, 3; WARREN.

Game; games; gaming; gambling. A device or play the terms of which are that the winner shall receive something of value from the loser. The act of playing a game for stakes.

"Gaming," without the prefix "unlawful," seems usually to imply something of an unlawful nature, by betting on the sport. "Persons may play at a game which is not in itself unlawful, without gaming; but if money is staked it becomes gaming."[6]

"Gaming" is the risking of money, between two or more persons, on a contest or chance of any kind, where one must be the loser and the other the gainer.[7]

Implies something which in its nature de-

[1] See Ayers *v.* Findley, 1 Pa. 501 (1845), Gibson, C. J.; Webster's Dict.

[2] Duty on Ale, &c., 16 Op. Att.-Gen. 359 (1879); R. S. § 2504, Sch. D.

[3] Gāl'-lus. Mid. Eng. *galwes*, pl. of A. S. *galga*, cross, gibbet.

[4] Buckley *v.* O'Niel, 113 Mass. 193 (1873), Ames, J.

[5] People *v.* Sponsler, 1 Dak. 291–95 (1876), cases.

[6] Brua's Appeal, 55 Pa. 296 (1867), cases; Smith *v.* Bouvier, 70 *id.* 325 (1872); 14 Bush, 741; 49 Mich. 387; 78 E. C. L. 535.

[7] [Portis *v.* State, 27 Ark. 362 (1872); State *v.* Bryant, Mo. Sup. Ct. (1887): 2 S. W. Rep. 836; 2 Whart. Cr. L. § 1466.

[1] People *v.* Sponsler, *ante;* 2 Whart. Cr. Law, § 1466.

[2] Gambs *v.* Covenant Life Ins. Co., 50 Mo. 47 (1872).

[3] See 19 Kan. 127; 128 Mass. 410; 7 Mo. Ap. 553; 60 N. Y. 10; 95 U. S. 465; L. R. 2 C. P. 558.

[4] 2 Bl. Com. 38, 416.

[5] See Appleton's New Am. Cyc. VIII; Wharton's Law Dict.

[6] Bishop, Stat. Crimes, § 960, quoting Campbell, C. J., in Regina *v.* Ashton, 16 E. L. & E. 346 (1882). See Ansley *v.* State, 36 Ark. 67 (1880); *Re* Lee Tong, 18 F. R. 253 (1883).

[7] Portis *v.* State, 27 Ark. 362 (1872), Bennett, J.

pends upon chance, or in which chance is an element.[1]

"Gaming" is an offense against the public police or economy. It tends to promote idleness, theft, and debauchery among those of the lower class; and among persons of a superior rank it has frequently been attended with the sudden ruin and desolation of families, and an abandoned prostitution of every principle of honor and virtue, and often has ended in self-murder itself.[2]

Playing at a game of chance for mere recreation is lawful.[3]

"Illegal gaming" implies gain and loss between the parties by betting, such as would excite a spirit of cupidity.[4]

A "game of chance" is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, adroitness, and honesty have no office at all, or are thwarted by chance. In a "game of skill" nothing is left to chance.[5]

A "gaming table" is any table kept and used for playing games of chance. It need not be necessary to the game, nor made in any particular way.[6]

"Gaming" implies games. "To game" is to play at any sport or diversion; to play for a stake or prize; to use cards, dice, billiards, or any other instrument according to certain rules with a view to win money or any other thing waged upon the issue of the contest; to practice playing for money or any other stake; to gamble. "Game" embraces every contrivance or institution intended to furnish sport, recreation, or amusement. When a stake is laid upon the chances, the game becomes "gaming." "Games" become unlawful by being prohibited by statute.[7]

In common usage, "betting" and "gaming" are employed interchangeably; yet not always so. If two persons play at cards for money, they are said to be gambling or gaming. They are gambling because they lay a wager or make a bet on the result of the game. To say that they are betting is equally appropriate. If two persons lay a wager upon the result of a pending election, it will be said that they are betting, not gaming. There is no gaming in which the element of the wager is wanting, but there is betting which the term gaming does not commonly embrace. It is so common to apply gaming or gambling to any species of immoral betting that the precise meaning intended in a given case can be learned only from the connection. The terms are often applied to transactions which are illegal in the sense only of being immoral, but which involve the element of wager, as in the case of option contracts. But while such contracts are probably not gaming in the sense of any criminal law, there could be nothing to prevent their being legislated against under that head, when they are of the nature of gaming and embody its evils. . . Base-ball and horse-races are games, and any "pooling" scheme in betting thereon is gaming, and the place where the pools are sold is a pooling room or place.[1]

The means or device for either gaming or gambling may be — backgammon,[2] bagatelle,[3] billiards,[4] candy prize-packages,[5] cards,[6] cock-fighting,[7] dog-fights,[8] faro,[9] gift-enterprises[10] (*q. v.*), horse-racing,[11] keno,[12] loto,[13] poker or draw-poker,[14] pool,[15] raffle with dice,[16] rondo,[17] stocks,[18] tan, tantan,[19] ten-pins.[20]

A discharge will not be granted to an insolvent debtor who has spent property in gaming: his is fraudulent insolvency.[21] Property so acquired is an asset, which may not be spent in gaming; and the mode of acquisition cannot be inquired into.[22]

Money lost by gaming is not recoverable.[23]

Statutes which allow gaming are to be strictly construed.[24]

See BET; LICENSE, 3; LOTTERY; MORALS; OR, 2; POOLING-TABLE; SPECULATION; STAKEHOLDER; WAGER, 2.

GANANCIAL. "Ganancial property," in Spanish law, is the community of *gains*, acquisitions, profits, made during marriage out of the property of either husband or wife or of both.[25]

[1] Bew *v.* Harston, L. R., 3 Q. B. 456 (1878), Cockburn, C. J. See also Bell *v.* State, 5 Sneed, 509 (1858).

[2] 4 Bl. Com. 171.

[3] 4 Chitty, Bl. Com. 171.

[4] People *v.* Sergeant, 8 Cow. 141 (1828).

[5] State *v.* Gupton, 8 Ired. L. 273 (1848), Ruffin, C. J.

[6] Toney *v.* State, 61 Ala. 3 (1878); Whitney *v.* State, 10 Tex. Ap. 377 (1881); Walz *v.* State, 33 Tex. 335 (1870).

[7] People *v.* Weithoff, 51 Mich. 203, 210 (1883), Cooley, J.

[1] People *v.* Weithoff, *ante*.

[2] 55 Ala. 198.

[3] 22 Gratt. 22.

[4] 22 Ala. 54; 49 *id.* 87; 40 Ill. 294; 15 Ind. 474; 50 *id.* 181; 60 *id.* 457; 75 *id.* 586; 39 Iowa, 42; 41 *id.* 550; 34 Miss. 606; 8 Cow. 139; 28 How. Pr. 247; 17 Ohio St. 32.

[5] 3 Heisk. 488.

[6] 36 Ark. 67.

[7] 8 Metc. 232; 11 *id.* 79; 1 Humph. 486; 4 Sneed, 614; 3 Keb. 465; 3 Camp. 140.

[8] 1 Carr. & P. 613.

[9] 4 Cranch, C. C. 707, 719; 5 *id.* 378, 390; 53 Cal. 246.

[10] 5 Sneed, 507; 3 Heisk. 488.

[11] 23 Ark. 726; 30 *id.* 426; 9 Col. 214; 4 Harr., Del., 554; 69 Ga. 609; 23 Ill. 493; 51 *id.* 184, 473; 9 Ind. 35; 1 Allen, 563; 51 Mich. 212; 18 Me. 337; 16 Minn. 299; 4 Mo. 536, 599; 31 *id.* 35; 1 N. M. 621; 13 Johns. 88; 8 Gratt. 593; L. R., 6 Q. B. 514, 130.

[12] 48 Ala. 122; 27 Ark. 355, 360; 7 La. An. 651.

[13] 1 Mo. 722.

[14] 2 Monta. 437; 32 Gratt. 884.

[15] 39 Mo. 420; 51 Mich. 203, 214; 120 Mass. 273; 8 Lea, 411; L. R., 6 Q. B. 514.

[16] 26 Ala. 155; 15 Ark. 71; 5 Rand. 652; 14 Gray, 26, 309; 21 Tex. 692.

[17] 15 Ark. 259.

[18] 70 Pa. 325.

[19] 70 Cal. 516; 18 F. R. 253.

[20] 29 Ala. 32; 32 N. J. L. 158; 11 Ired. L. 273. See generally 2 Whart. Cr. L. § 1465; Cooley, Const. Lim. 749; 29 Me. 457; 8 Gray, 488; 38 N. H. 426.

[21] R. S. §§ 5132, 5110.

[22] *Re* Marshall, 1 Low. 462 (1870).

[23] 2 Bish. Cr. L. § 507.

[24] Alcardi *v.* Alabama, 19 Wall 639 (1873).

[25] Cutter *v.* Waddingham, 22 Mo. 256, 265 (1855), Leonard, J.

"The right to *gananicas* is founded in the partnership which is supposed to exist between husband and wife, because, she bringing her fortune in *dote*, gift and paraphernalia, and he his in the estate and property which he possesses, it is directed that the gains, which result from the joint employment of this mass, be equally divided."[1]

That property which husband and wife, living together, acquire during matrimony by a common title, lucrative or onerous; or that acquired by either or both, by purchase or industry; also, the fruits of the separate property which each brings to the matrimony or acquires by lucrative title during the continuance of the partnership. The gain is common to both.[2]

GAOL. See JAIL.

GARDEN. See CURTILAGE; FIELD, 1; MESSUAGE.

GARDENING. See AGRICULTURE.

GARNISH.[3] 1. To warn, make aware, notify. 2. To attach property or a debt due or belonging to a defendant.

Garnishee. One warned by legal process in respect to the interest of a third party in property held by him.[4]

One in whose hands money or goods have been attached: he is "warned" not to pay the money nor to deliver the property to the defendant.[5]

The best reporters do not use garnishee as the verb.[6] The person warned is garnisheed; the fund or property is garnished.

Garnishment. The process of warning or citation.[4]

Originally, a notice to a person not a party to a suit, to appear in court and explain his interest in the subject-matter of the litigation or to furnish other information.

Now, the act or proceeding of attaching money or property belonging to a judgment debtor but in the possession of a third person. Otherwise known as "factorizing," "garnishee," or "trustee process."

In the nature of an equitable attachment of the debt or assets of the principal defendant in the hands of a third person. Its object is to reach such assets and apply them in discharge of the principal debt.[7]

The office of a garnishment is to apply the debt due by a third person to the defendant in a judgment to the extinguishment of that judgment, or to appropriate effects belonging to a defendant in the hands of a third person to its payment.[1]

There must be a debt due from the garnishee to the defendant in the judgment, payable at the time of the service of the writ, or to become payable. The debt must be at least a cause of action.[2]

The person warned becomes a mere stakeholder, with a right to such defense against the new claimant as he has against the judgment-debtor. The proceeding is substantially an attachment, *q. v.* It arrests the property in the hands of the garnishee, interferes with the owner's or creditor's control over it, subjects it to the judgment of the court, and thus operates as a seizure. It is effected by serving notice as directed by statute.[3]

GAS COMPANIES. See MONOPOLY; POLICE, 2.

GASOLINE. See OIL.

GATES. See WAY, Right of.

GAVELKIND.[4] A particular custom in vogue in Kent (though perhaps general till the Conquest) which ordained that all sons alike should succeed to their father's estate.

The estate was not subject to escheat for attainder; the tenant could alien by enfeoffment at fifteen, and could devise by will. It was a species of socage tenure modified by custom.[5]

GAZETTE. Originally, a piece of money current at Venice; next the price at which sheets of news were sold; then the sheets themselves.[6]

The official publication of the English government; also called the "London Gazette."

It is evidence of acts of state, and of all political acts performed by the Queen; orders of adjudication in bankruptcy are also published in it.

"When the defendant cannot be found to be served with a subpœna in chancery, a day for him to appear, being first appointed, is inserted in the Lon-

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[1] [Cutter *v.* Waddingham, *ante*.

[2] [Cartwright *v.* Cartwright, 18 Tex. 634 (1857), Hemphill, C. J.

[3] F. *garnir:* A. S. *warnian*. See G.

[4] [Smith *v.* Miln, 1 Abb. Adm. 380 (1848), Betts, J.

[5] [Welsh *v.* Blackwell, 14 N. J. L. 348 (1834): 3 Jacob, 175; Pennsylvania R. Co. *v.* Pennock, 51 Pa. 254 (1865).

[6] 22 Alb. Law J. 181 (1880).

[7] Bethel *v.* Judge of Superior Court, 57 Mich. 381 (1885), Champlin, J.

[1] Strickland *v.* Maddox, 4 Ga. 394 (1848); Western R. Co. *v.* Thornton, 60 *id.* 306 (1878); Curry *v.* Woodward, 50 Ala. 260 (1873); Harris *v.* Miller, 71 *id.* 32 (1881); Rose *v.* Whaley, 14 La. An. 374 (1859); Schindler *v.* Smith, 18 *id.* 479 (1866); Perkins *v.* Guy, 2 Monta. 20 (1873); Oregon R. & Nav. Co. *v.* Gates, 10 Oreg. 515 (1882); Godding *v.* Pierce, 13 R. I. 533 (1882); Steen *v.* Norton, 45 Wis. 414 (1878); Bickle *v.* Chrisman, 76 Va. 691 (1882).

[2] Lane's Appeal, 105 Pa. 65 (1884).

[3] Miller *v.* United States, 11 Wall. 297 (1870), Strong, J.; Schuler *v.* Israel, 120 *id.* 506 (1887); 24 Am. Law Reg. 625–34 (1885), cases. Inter-State exemptions, 21 Cent. Law J. 425–28 (1885), cases.

[4] "Gave all kinde,"—1 Coke, Litt. 140 *a*.

[5] See 1 Bl. Com. 75; 2 *id.* 84; Williams, R. P. 124–26.

[6] Trench, Glossary.

don Gazette. In default of appearance, the bill will be taken *pro confesso*." [1]

GENDER. See MAN.

In the Revised Statutes, and in acts and resolutions of Congress, passed subsequently to February 25, 1871, words imparting the masculine gender may be applied to females.[2]

GENEALOGY. See AFFINITY; CONSANGUINITY; PEDIGREE.

GENERAL. 1. Relating to a whole *genus* (q. v.) or kind, to a whole class or order; [3] whether of persons, relations, things, or places.

Opposed (1) to *local*, *private*, or *special* (see 6, below): as, general or a general — custom, jurisdiction, law, practice, restraint, statute, usage, *qq. v.*

Opposed (2) to *partial:* as, a general assignment, *q. v.*

Opposed (3) to *particular:* as, general average, a general challenge, a general lien, *qq. v.*

Opposed (4) to *private* or *individual:* as, a general ship, *q. v.*

Opposed (5) to *specific:* as, a general — intent, legacy, malice, *qq. v.*

Opposed (6), and chiefly, to *special:* as, general or a general — agent, appearance, appointment, charge, covenant, damage, demurrer, deposit, deputy, issue, executor, finding, guaranty, guardian, monition, occupant, order, owner, property, return, return-day, rule, session, sessions, tail, traverse, verdict, warranty, *qq. v.*

2. Belonging to, concerning, or affecting two or more persons or classes of persons, or persons in the same category; and opposed to *individual:* as, general — assets, creditors, meeting, partners, *qq. v.*

3. Common; obtaining among acquaintances or in the community at large: as, general — credit, reputation, *qq. v.*

4. Representing or pertaining to the public at large, whether constituting a State or the United States; State, or National: as, the general assembly, a general election, the general government, *qq. v.*

5. Over all others; chief, superior, head: as, in attorney-general, postmaster-general, solicitor-general. Contradistinguished from *deputy*, *district*, *local*, *special*.

6. Inclusive of many species or individuals; comprehensive; generic: as, a general — term, word, expression.

Maxims: general words are taken in their general sense; general expressions are restrained within the subject-matter; special provisions derogate from general provisions; a general clause does not extend to things included in a prior special clause.

Deceivers deal in general expressions; fraud lurks in general expressions; error attends upon general expressions.

"Where general words follow an enumeration of particular cases, such words apply only to cases of the same kind as those expressly mentioned." Thus, a land-warrant is not to be included in an act punishing forgery of "an indenture, certificate of public stock, or debt, treasury note, or other public security." [1] See NOSCITUR, A sociis.

The meaning of general words will be restricted to carry out the legislative intent.[2]

Where particular words, in a statute, are followed by words of a general character, the latter are to be restricted to the objects particularly mentioned. If the act begins with words which speak of things or persons of an inferior degree and concludes with general words, the latter are not to be extended to a thing or person of a higher degree. If a particular class is mentioned and general words follow, they must be treated as referring to matters of the same kind, thus subordinating general terms to the preceding particulars.[3]

"General words in any instrument or statute are strengthened by exceptions, and weakened by enumeration." [4]

See further EJUSDEM GENERIS; VIDERE, Videlicet.

GENERIC. See GENERAL; GENUS.

GENTLE. Imports that a horse is docile, tractable, and quiet; not, that he has received special training.[5]

GENTLEMAN. "One who bears court armor, the grant of which adds gentility to a man's family." [6]

Originally, a man of gentle blood; now, a person of any rank from the upper to the lowest verge of the middle classes.[7]

A journeyman butcher may be described as a gentleman.[8]

On a jury list, as, "A. B., gent.," implies that the person has either no occupation or no occupation known to the officials who made out the list. See ADDITION, 2.

[1] 3 Bl. Com. 445.

[2] R. S. § 1. See also Atchison, County Judge *v.* Lucas, 83 Ky. 464 (1885).

[3] Brooks *v.* Hyde, 37 Cal. 376 (1869).

[1] United States *v.* Irwin, 5 McLean, 183–84 (1851).

[2] Reiche *v.* Smythe, 13 Wall. 165 (1871).

[3] Barbour *v.* Louisville, 83 Ky. 100 (1885), Holt, J.

[4] Sharpless *v.* Philadelphia, 21 Pa. 161 (1853), Black, C. J.; 66 Wis. 395.

[5] Bodurtha *v.* Phelon, 3 Allen, 348 (1861).

[6] 1 Bl. Com. 406: Coke, 2 Inst. 668.

[7] [Smith *v.* Cheese, 1 C. P. D. 61 (1875), Grove, J.

[8] *Re* European Bank, L. R., 7 Ch. Ap. 300 (1872).

GENUINE. Belonging to the original kind or stock; native; hence, not false, fictitious, simulated, spurious, or counterfeit: as, a genuine note.[1]

Genuineness. Of an instrument — predicates that it is the act of the party as represented; that the signature is not spurious, that nothing has been added to or taken away from it that would lay the party changing the instrument or signing the name liable to forgery.[2]

See COUNTERFEIT; FALSE; FORGE, 2; SPURIOUS.

GENUS. L. Kind; class; nature.

Used in the phrases *alieni generis*, *ejusdem generis*, *in genere*, *sui generis*, qq. v. See also GENERAL.

GEOGRAPHICAL NAMES. See TRADE-MARK.

GESTÆ. See RES, Gestæ.

GIFT. See GIVE.

The gratuitous transfer of personalty.[3]

The transfer of property without consideration.[4]

The thing itself so transferred.

An immediate, voluntary and gratuitous transfer of his personal property by one to another, the transfer being executed by delivery.[5]

A word of the largest signification, applied to either realty or personalty.[6]

As a general rule, delivery is essential.[7]

A true and proper gift is always accompanied with delivery of possession — after which the gift is executed in the donee; and it is not in the donor's power to retract it, unless it be prejudicial to creditors, or the donor was under some legal incapacity, as, infancy, coverture, duress, or was imposed upon. If the gift does not take effect by immediate possession it is not properly a gift, but a contract.[8]

A gift may be to a charity not in existence. See CHARITY, 2.

To complete a gift of money in trust, it is not necessary that the beneficiary should be informed of the fact of the gift.[9]

Where the local law does not forbid, the United States government may take property by gift.[1]

A naked promise to give, without some act sufficient to pass title, is not a gift, — a *locus pœnitentiæ* exists.[2]

See ADVANCEMENT; DONATIO; DONUM; INFLUENCE; ONEROUS; POSSESSION; PRESENTS, 2; SERVICE, 3, Civil Service.

Gift enterprise. In common parlance, a scheme for the division or distribution of certain articles of property, to be determined by chance, among those who have taken shares in the scheme.[3] See GAME, 2.

2. At common law, also, the creation of an estate-tail.[4]

GIRARD WILL CASE. See CHARITY, 2; ORPHAN.

GIST.[5] The ground upon which a thing rests; the essence of an obligation or proposition.

The "gist of an action" is the cause for which an action will lie, — the ground or foundation of a suit, without which it would not be maintainable, — the essential ground or object of a suit, and without which there is not a cause of action.[6]

That without which there is no cause of action; comprehends, therefore, whatever is indispensable in law to a right of recovery. Hence, if anything of this kind be omitted, the defect is incurable.[7]

GIVE. 1. To transfer gratuitously, without an equivalent.[8] See GIFT.

2. To furnish or supply: as, to give liquor to a minor.[9]

3. To find, furnish, supply: as, to give bail or security.

4. To forbear to sue; to extend time: as, to give time to a debtor. See FORBEARANCE.

5. To admit an apparent right in another: as, to give color. See COLOR, 2.

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[1] [Baldwin *v.* Van Deusen, 37 N. Y. 492 (1868).

[2] [Cox *v.* North Western Stage Co., 1 Idaho, 380 (1871), Whitson, J.

[3] 2 Bl. Com. 441.

[4] Kehr *v.* Smith, 20 Wall. 34 (1873), Davis, J. See also Gray *v.* Barton, 55 N. Y. 72 (1873); Chadsey, Administrator *v.* Lewis, 6 Ill. 155 (1844); Hynson *v.* Terry, 1 Ark. 87 (1833). As to the difference, in a liquor law, between "gift" and "sale," see Parkinson *v.* State, 14 Md. 194, 197 (1859); Holley *v.* State, 14 Tex. Ap. 512 (1883).

[5] [Flanders *v.* Blandy, 45 Ohio St. 113 (1887), cases, Dickman, J.: 26 Am. Law Reg. 587-92 (1887), cases. In general, 19 Cent. Law J. 422-26 (1884), cases.

[6] See Allen *v.* White, 97 Mass. 507 (1867).

[7] Adams *v.* Adams, 21 Wall. 191 (1874).

[8] Martin *v.* Funk, 75 N. Y. 137-43 (1878), cases.

[1] Dickson *v.* United States, 125 Mass. 313-16 (1878), cases; 52 N. Y. 530; 94 U. S. 315, 321.

[2] Pearson *v.* Pearson, 7 Johns. 26 (1810). Delivery, when not essential, 31 Alb. Law J. 426-29, 445-48 (1885), cases.

[3] Lohman *v.* State, 81 Ind. 17 (1881), Niblack, J; Act of Congress 13 July, 1866: 14 St. L. 120.

[4] 2 Bl. Com. 315.

[5] Jist. O. F. *gist*, it lies: the point wherein the matter lies.

[6] First Nat. Bank of Flora *v.* Burkett, 101 Ill. 334 (1882), Walker, J. See also *Re* Murphy, 109 *id.* 33 (1884).

[7] Gould, Plead. 162: Ch. IV, § 12.

[8] See 1 Iowa, 282; 2 N. Y. 153; 33 Conn. 297; 2 Ala. 555, 23 Me. 219; 8 Cow. 38; 14 Wend. 38.

[9] Commonwealth *v.* Davis, 12 Bush, 240 (1876); Halley *v.* State, 14 Tex. Ap. 512 (1883); Parkinson *v.* State, 14 Md. 194 (1856).

6. To expound; to administer, apply: as, to give law.

7. To surrender voluntarily to an officer of the law: as, to give one's self up.

GLANDERS. See HEALTH, Boards of.

GLOUCESTER, STATUTE OF. See COSTS.

GO. The first word of a few idiomatic or technical expressions. See GOING.

Go bail. To become surety on a bail-bond, *q. v.*

Go to. 1. To be given to, to descend to.[1]

2. A circumstance which concerns or affects one's competency or credibility as a witness, or the jurisdiction of the court, is sometimes said to "go to" the competency, to the jurisdiction, to the question, etc.

"When mutual covenants go to the whole consideration on both sides, they are mutual conditions."[2]

"A demurrer may go to the form of the action, to a defect in pleading, or to the jurisdiction of the court."[3]

Go to prison. To be committed or sentenced to a jail, penitentiary, or other place of confinement for persons accused or convicted of a criminal offense. See PRISON.

Go to protest. Said of commercial paper which becomes protested for non-payment or non-acceptance: to become dishonored. See PROTEST, 2.

Go without day. For an acquitted person to be dismissed from court with no day set for reappearing — *sine die;* also, the record entry in such a case.

GOD. In the generally received sense, occurs in a few expressions:

Act of God. See ACT, 1, Of God.

God and my country. A prisoner, upon arraignment, answered (or answers) that he would be tried "By God and my country."

The practice arose when he elected a trial by ordeal or by a jury. The original form was, likely, By God or by my country: the answer was meant to assert innocence by a readiness to be tried by either mode.[4] See further ARRAIGN.

God's penny. Earnest-money; originally, a small coin given to the church or to the poor.

So help you God. See OATH.

See CHRISTIANITY; LAW, Divine; RELIGION.

[1] Irvin's Appeal, 106 Pa. 181 (1884).

[2] Lowber *v.* Bangs, 2 Wall. 736 (1864).

[3] Bissell *v.* Spring Valley Township, 124 U. S. 229 (1888).

[4] See 1 Chitty, Cr. Law, 416; 4 Bl. Com. 323.

GOING. See CROP; GO; RATE, 1.

Going concern. A corporation which, although it may be insolvent, still continues to transact its ordinary business.[1]

Going witness. A witness who is about to go out of the jurisdiction of the court in which his testimony will be desired. See DEPOSITION.

GOLD. See COIN; MINE; MONEY; TENDER, 2.

GOOD. Generally speaking, preserves its popular, untechnical meanings. Compare BAD; BONUS.

1. Orderly, lawful: as, good behavior *q. v.*

2. Fair, honorable: as, good fame, or character, *q. v.*

3. Valid, valuable: as, a good consideration, *q. v.*

4. Legally sufficient: as, a good — count, deed, defense, ground, *qq. v.*

5. With lawful intent: as, good faith, *q. v.*

6. Genuine, not spurious; also, collectible: as, a good note.[2]

7. Responsible; able to pay a money obligation.

In this sense bondsmen, indorsers, partners, and wrong-doers are spoken of as "good."

In this sense, also, is "good" written upon the face of a check. See CHECK, Certified.

8. Welfare, prosperity, happiness: as, the public good; also whatever promotes the general welfare of society: as, good morals, "the greatest good." See MORALS; POLICE, 2; WELFARE.

GOOD FRIDAY. See HOLIDAY.

GOODS. Has a very extensive meaning.

In *penal statutes*, is limited to movables which have intrinsic value, and does not include securities, which merely represent value. In *wills*, when there is nothing to restrain its operation, includes all the personal estate.[3]

In a limited sense, articles of merchandise; not fixtures, nor chattels real; but may include animals.

In a merchant's store, refers to the merchandise and commodities kept for sale.[4]

[1] White, &c. Manuf. Co. *v.* Pettes Importing Co., 39 F. R. 865 (1887).

[2] See Polk *v.* Frash, 61 Ind. 206 (1878); Corbet *v.* Evans, 25 Pa. 310 (1855); 16 Barb. 342; 14 Wend. 231; 1 Cush. 473; 18 Pick. 321; 4 Metc. 48; 26 Vt. 406.

[3] Keyser *v.* School District, 35 N. H. 483 (1857), Perley, C. J.; United States *v.* Moulton, 5 Mas. 545 (1830), Story, J.; Jarman, Wills, 692; 44 N. Y. 310.

[4] Curtis *v.* Phillips, 5 Mich. 113 (1858).

Goods and chattels. Includes only personal property which is visible, tangible, and movable; not, a right of action;[1] nor, a thing real.

The expression is equivalent to goods, wares, and merchandise.[2]

The precise import depends upon the subject-matter and the context.[3] See CHATTEL.

Goods and merchandise. In the business of commerce, commodities bought and sold by merchants and traders.[4]

Goods, wares, and merchandise. In duty-laws, the word "merchandise" may include goods, wares, and chattels of every description capable of being imported.[5]

In the Statute of Frauds, the expression does not include fixtures, but does include growing crops. Promissory notes and shares in an unincorporated company, and even money, have been held to be within it;[6] also, cattle.[7]

The words of the Statute have never been extended beyond securities which are subjects of common sale and barter, and which have a visible and palpable form. They do not, therefore, include an interest in an unpatented invention.[8] See MERCHANDISE.

See BONA, 2; CONFUSION, 1; DISTRESS; DURESS; EXECUTION, 8; PERISHABLE; PROPERTY, Personal.

GOOD-WILL. Favorable reputation.

The probability that the old customers will resort to the old place.[9]

The advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.[1]

The benefit or advantage which accrues to the firm, in addition to the value of their property, derived from their reputation for promptness, fidelity and integrity in their transactions, from their mode of doing business, and other incidental circumstances, in consequence of which they acquire general patronage from constant and habitual customers.[2]

Every positive advantage that has been acquired by a proprietor, in carrying on his business, whether connected with the premises in which the business is conducted, or with the name under which it is managed, or with any other matter carrying with it the benefit of the business.[3]

Good-will is a firm asset; whether it survives to a partner has not been uniformly decided; after a voluntary dissolution, each partner has a right to use the old firm name, unless otherwise agreed; it is the subject of sale like other personalty.[4]

GOSPELS. See BLASPHEMY; CHARITY, 2; CHRISTIANITY; INDIGENT; OATH, Corporal.

GOVERNMENT.[5] 1. The controlling power in society.[6]

The aggregate of authorities which rule a society.[7]

That form of fundamental rules by which the members of a body politic regulate their social action, and the administration of public affairs, according to established constitutions, laws, and usages.[8]

2. The state, the commonwealth, the people; as, in criminal practice.

3. In a commercial sense "governments" signifies securities of government, State or United States.

[1] Kirkland *v.* Brune, 31 Gratt. 131 (1878).

[2] Passaic Manuf. Co. *v.* Hoffman, 3 Daly, 512 (1871).

[3] Gibbs *v.* Usher, 1 Holmes, 351 (1874); Jarman, Wills, 731; Addison, Contr. 31, 201, 912.

[4] Chamberlain *v.* Western Transp. Co., 45 Barb. 223 (1866): 44 N. Y. 310 (1871); The Marine City, 6 F. R. 415 (1881), cases. See also Tisdale *v.* Harris, 20 Pick. 9, 13 (1838).

[5] R. S. § 2766. See The Elizabeth & Jane, 2 Mas. 407 (1822); 2 Sumn. 362; 4 Blatch. 136.

[6] 2 Pars. Cont. 330-32; 2 Kent, 510, note; Benj. Sales, § 111.

[7] Weston *v.* McDowell, 20 Mich. 357 (1870).

[8] Somerby *v.* Buntin, 118 Mass. 285 (1875), Gray, C. J.; 1 Woolw. 217; 3 Daly, 512; 6 Wend. 355; 40 Ind. 593; 55 Iowa, 520; 2 Bl. Com. 387.

[9] Crultwell *v.* Lye, 17 Ves. *346 (1810), Eldon, Ld. C.; Bradford *v.* Peckham, 9 R. I. 252 (1869); Chittenden *v.* Witbeck, 50 Mich. 420 (1883); Myers *v.* Kalamazoo Buggy Co., 54 *id.* 222 (1884); 128 U. S. 522.

[1] Story, Partnership, § 99. See also 33 Cal. 624; 65 Ga. 14; 1 Mo. Ap. 601; 44 N. H. 343; 70 N. Y. 473; 36 Ohio St. 522; 60 Pa. 121; 19 How. Pr. 26.

[2] [Angier *v.* Webber, 14 Allen, 215 (1867), Bigelow, C. J.; Munsey *v.* Butterfield, 133 Mass. 494 (1882).

[3] Glen & Hall Manuf. Co. *v.* Hall, 61 N. Y. 230 (1874), Dwight, C.

[4] See Barber *v.* Connecticut Mut. Life Ins. Co., 15 F. R. 312, 315-22 (1883), cases; 14 Am. Law Reg. 1-11, 329-41, 649-59, 713-25 (1885), cases; 13 Cent. Law J. 162-65 (1881), cases; 19 *id.* 362-68 (1884), cases; 19 Alb. Law J. 502-3 (1879), Eng. cases; 3 Kent, 64; 1 Pars. Cont. 153; 62 Pa. 81; 5 Ves. 539; 15 *id.* 218, 227.

[5] O. F. *govener:* L. *gubernare*, to steer a ship, to rule. Whence "ship of state."

[6] 1 Sharswood, Bl. Com. 48.

[7] Francis Lieber: 1 Bouv. 715.

[8] Winspear *v.* Township of Holman, 37 Iowa, 544 (1873): Young, Science Gov., p. 13.

The government of a state being the most prominent feature, or that most readily perceived, "government" is frequently used for "state." Similarly, government is also used for "administration."[1]

The object of government is to secure to the governed the right to pursue their own happiness; that is, the happiness of the individuals who compose the mass. In this consists civil liberty.[2] See HAPPINESS; LIBERTY, 1, Civil.

Government is formed by depriving all persons of a portion of their natural rights. The rights they enjoy under government are not conferred by it, but are those of which they have not been deprived. It is only by a deprivation of all persons of a portion of their rights that it is possible to form and maintain government. . . Its organization means a surrender by each of a portion and the control of his reserved rights, and the power of the government to control all persons in the exercise of these reserved rights must be conceded. *Salus populi suprema lex.* In the maintenance of the government and the general welfare, individual rights, whether of natural persons or corporate bodies, must yield to the public good, and the General Assembly is invested with the sole power of determining under what restraints all persons, whether natural or artificial, shall pursue their various vocations, unless restricted by constitutional limitation.[3]

Government is a moral relation, necessarily resulting from the nature of man. . . The wants and fears of individuals in society tend to government. Blackstone supposes that sovereignty resides in the hands of the law-makers. Our idea is that government is a mere agency established by the people for the exercise of those powers which reside in them. The powers of government are, in strictness, delegated powers, and, as such, trust powers, capable of revocation. A written constitution is but the letter of attorney.[4] See COMPACT, Social.

Government is an abstract entity. It speaks and acts through agents; these hold offices under law, constitutional or statutory, with prescribed duties and limited authority.[5]

The theory of our government is that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. The correlative duty resting upon the citizen is to exhibit truth, frankness, and integrity.[6]

Constitutional government. Applies to a state whose fundamental rules and maxims not only define how those shall be chosen or designated to whom the exercise of sovereign powers shall be confided, but also impose efficient restraints on the exercise for the purpose of protecting individual rights and privileges, and shielding them against any assumption of arbitrary power.[1] See CONSTITUTION.

Government de facto. A government that unlawfully gets possession and control of the rightful legal government, and maintains itself there, by force and arms, against the will of the rightful government, and claims to exercise the powers thereof. **Government de jure.** The rightful, legal government.[2]

A government *de facto*, in firm possession of any country, is clothed with the same rights, powers, and duties as a government *de jure*. . . In all cases where the United States have been called upon to recognize the government or independence of any other country, they have looked only to the "fact," and not to the right.[3]

A government *de facto* is (1) such as exists after it has expelled the regularly constituted authorities from the seat of power and the public offices, and set its own functionaries in their places, so as to represent in fact the sovereignty of the nation; or (2) such as exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government. As far as other nations are concerned, the former is treated in most respects as possessing rightful authority; its contracts and duties are enforced; its acquisitions are retained; its legislation is in general recognized; and the rights acquired under it are, with few exceptions, respected after the restoration of the authorities which were expelled. The validity of the acts of the latter depends entirely upon its ultimate success. If it fails to establish itself permanently, all such acts perish with it; if it succeeds and becomes recognized, its acts are upheld as those of an independent nation.

The late Confederate government was distinguished from each of those. It was simply the military representative of the insurrection against the authority of the United States. When its military forces were overthrown, it perished, and with it all enactments and other acts. Legislative acts of the several States, so far as they did not tend to impair Federal supremacy, or the rights of citizens under the Constitution, are valid and binding.[4] See MONEY, Lawful; OATH, Of office.

Local government; municipal government. See CORPORATION, Municipal.

[1] Francis Lieber: 1 Bouv. 715.

[2] 1 Sharswood, Bl. Com. 128, 127.

[3] Wiggins Ferry Co. *v.* East St. Louis, 102 Ill. 569 (1882), Walker, J.

[4] 1 Sharswood, Bl. Com. 48–49. See also Virginia Coupon Cases, 114 U. S. 290 (1885).

[5] The Floyd Acceptances, 7 Wall. 676 (1868), Miller, J.

[6] Trist *v.* Child, 21 Wall. 450 (1874), Swayne, J.; Stone *v.* Mississippi, 101 U. S. 820 (1879).

[1] Calhoun, Works, I, II; Cooley, Principles Const. Law, 22.

[2] Chisholm *v.* Coleman, 43 Ala. 213 (1869), Peck, C. J.

[3] Phillips *v.* Payne, 92 U. S. 133 (1875), Swayne, J.

[4] Williams *v.* Bruffy, 96 U. S. 185 (1877), Field, J. See also Thornington *v.* Smith, 8 Wall. 8–9 (1868), Chase, C. J.; Ford *v.* Surget, 97 U. S. 616, 610 (1878), cases, Clifford, J.; Fifield *v.* Ins. Co. of Pennsylvania, 47 Pa. 170–88 (1884).

Federal, General, National, United States Government; States governments. In the United States, powers of government are of four classes: (1) Those which belong exclusively to the States. (2) Those which belong exclusively to the National Government. (3) Those which may be exercised concurrently and independently by both. (4) Those which may be exercised by the States, but only until Congress shall see fit to act upon the subject.[1]

When the government of the United States was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States.[2] The special powers delegated to it are principally such as concern the foreign relations of the country, the rights of war and peace, the regulation of foreign and domestic commerce, and other subjects of general importance.[3] Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.[4] Its authority extends over the whole territory of the Union; it acts upon the States and the people of the States. It is, so far as its sovereignty extends, supreme. No State can exclude it from exercising its powers, obstruct its authorized officers against its will, or withhold cognizance of any subject which the Constitution has committed to it,—otherwise it would cease to exist.[5] Congress may make all laws necessary (*q. v.*) and proper for carrying into execution the powers delegated to it.[6] The powers not delegated, nor prohibited to the States, in the Constitution, are reserved to the States respectively, or to the people.[6] Every addition to its power is a corresponding diminution of the powers of the States.[7] The rights of each sovereignty are to be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions.[8] See CONSTITUTION.

The departments of government are the legislative, which deals mainly with the future; the executive, which deals with the present; and the judicial, which is retrospective, dealing with acts done or threatened, promises made, and injuries suffered.[9]

The theory of government, State and National, is opposed to the deposit of unlimited power anywhere.[1] The Constitution reposes unlimited power in no department of the National government. The lines of separation are to be closely followed to avoid encroachment.[2] A co-ordinate branch will be decided to have transcended its powers only when that is so plain that the duty cannot be avoided.[3] See DEPARTMENT.

The power of governing being a trust committed by the people to the government, no part of the power can be granted away, as, the power to tax. The several agencies can govern according to their discretion, but cannot give away or sell the discretion of their successors.[4]

Republican form of government. See REPUBLIC, Republican, etc.

See further ALLEGIANCE; ANARCHY; APPRAISER; CITIZEN; COURT; DOMAIN; ELECTION, 1; FAITH, Full, etc.; FRANCHISE; GIFT, 1; INDEPENDENCE; INDIAN; JUDICIARY; JURISDICTION; KING; LACHES; LAW, Common; LEGISLATION; LIBERTY, 1; LIMITATIONS, Statute of; MAGNA CHARTA; MAY; MINISTER, 3; OFFICE; PEOPLE; POLICE, 2; POLICY, 1; PRIVILEGE, 1; RELIGION; REVENUE; SEDITION; SERVICE, 3; SOVEREIGNTY; STATE, 3; SUIT; TAX, 2; TORT; TREASON.

GOVERNOR. See GOVERNMENT; VETO.

GOWN. 1. That worn by the justices of the Supreme Court of the United States has always been a long robe of *black* silk.

A portrait of the first chief justice, John Jay, represents him in a borrowed robe, with broad scarlet facings and collar and sleeves of the same color. This gave rise to the tradition that the justices wore red gowns in the early days of the court.

In the higher tribunals of the States, *scarlet* gowns were worn, in some instances, as late as 1815.[5]

2. In England, the *silk* gown is the professional robe worn by those barristers who have been appointed of the number of her Majesty's counsel, and is the distinctive badge of Queen's counsel, as the *stuff* gown is of the juniors who have not obtained that dignity.

Accordingly, when a barrister is raised to the degree of Queen's counsel, he is said to "get a silk gown." The right to confer this dignity resides with the Lord Chancellor, who disposes of this branch of his patronage according to the talents, the practice, the seniority, and the general merits of the junior counsel.[6]

"The rules as to the robes worn by British judges have been transmitted orally. Scarlet is the color for the judges sitting in banc on the first day of the term; also in banc on such days as appear with red letters in

[1] Chicago, &c. R. Co. *v.* Fuller, 17 Wall. 568 (1873), Swayne, J.; 100 U. S. 386, 390.

[2] United States *v.* Cruikshank, 92 U. S. 549 (1875); Tennessee *v.* Davis, 100 *id.* 263 (1879); Tarble's Case, 13 Wall. 456 (1871).

[3] 1 Sharswood, Bl. Com. 49.

[4] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 10 (1877).

[5] Constitution, Art. I, sec. 8, cl. 18.

[6] Constitution, Amd. Art. X.

[7] *Exp.* Virginia, 100 U. S. 346 (1879).

[8] *Exp.* Siebold, 100 U. S. 394 (1879).

[9] See Wayman *v.* Southard, 10 Wheat. 46 (1825); 21 Am. Law Rev. 399–417 (1887), cases; 1 Law Quar. Rev. 80–99 (1885); 4 R. I. 324; 11 Pa. 489; 29 Mich. 451; 58 N. H. 453.

[1] Loan Association *v.* Topeka, 20 Wall. 663 (1874).

[2] Kilbourn *v.* Thompson, 103 U. S. 190 (1880).

[3] Trade-Mark Cases, 100 U. S. 96 (1879).

[4] Stone *v.* Mississippi, 101 U. S. 820 (1879).

[5] See The Century, Dec. 1882.

[6] See 5 Alb. Law J 225 (1872); Jeaffreson, Courts & Lawyers, 180; Brown, Law Dict.

the calendar. On circuit, at the opening of the commission, scarlet robes are worn by both judges, should two be present. After the commission is opened, the judge who sits in the crown court and tries prisoners continues to wear scarlet until all the prisoners are dealt with. He is hence termed by criminals 'the red-gown judge.' The judge who tries *nisi prius* cases removes his scarlet, puts on black, and is called 'the black-gown judge.' The scarlet robes worn in winter in town, and on circuit, whether in summer or winter, are trimmed with ermine, but in town in summer these robes are trimmed with gray silk. When on circuit, the senior or 'red-gown judge' sits in the crown court at the first town in the circuit, while the junior judge takes *nisi prius* cases, but at the next place 'the red gown judge' becomes 'the black-gown judge,' and so they alternate throughout the circuit. On ordinary days the judges sitting in banc wear dark blue or purple robes, which in winter are trimmed with ermine, and in summer with bronze silk."

GRACE. Favor, indulgence, toleration; opposed to right, strict right: as, that a thing done in court is allowed as a matter of grace.

Act of grace. An act of pardon or amnesty, *qq. v.*

Days of grace. Certain days, in addition to the time specified in a bill or note, in which payment may be made, before it can be lawfully protested.

In common speech this period is termed "grace;" as in saying that "grace" is or is not allowed on a particular instrument.

Originally allowed by the custom of merchants as a matter of favor or indulgence. This custom received the sanction of the courts, and so grew into law. The statute of 3 and 4 Anne (1705), which made promissory notes negotiable, also conferred this right to days of grace. That statute has been generally adopted in our States.

In the absence of an express contract to the contrary, the allowance now enters into every bill or note of a mercantile character, and forms a part of it, so that the paper, in fact and in law, is usually due on the last day of grace.

Demand is made on the last day, and interest is charged on all the days. If the last day is Sunday or a legal holiday, the paper is due the preceding day.

Checks are not entitled to the favor; nor are sight drafts, nor judgment notes.[1]

The number of days varies from three to thirty. Three is the limit in the United States; except in Vermont, where, it seems, no grace at all is allowed. In Louisiana, an inland bill or note is due without grace for purposes of set-off. In New York, bills on bank corporations are not entitled to the favor.

In Great Britain and Ireland, Berlin, and Vienna, the number of days is three; in Frankfort-on-the-main, four; in Sweden, six; in Bremen, and Denmark, eight; in Hamburg, twelve; in Spain, fourteen on foreign bills. No grace is recognized in Amsterdam, Antwerp, France, Genoa, Germany (generally, since 1871), Leghorn, Leipsic, or Naples.[1]

The law of the place of payment is regarded. He who claims the benefit of a foreign law or usage must prove the existence of the law.[2] See PLACE, Of payment; MATURITY, 2.

Grace widow. A widow by grace, by decree of a court; a wife living apart from her husband; a grass widow.

GRADE. 1, *v.* To reduce to a certain degree of ascent or descent.

The power to grade a street is co-extensive with the duty.[3] See OVER, 1; PAVE.

2, *n.* Degree, order, rank. See DEGREE.

Grades of crime. These are higher or lower according to the measure of punishment, and the consequences resulting to the convicted party.[4]

Grade and rank. Navy officers are classified — 1, according to duty, office, or title; 2, according to relative importance or honor; 3, according to compensation. All of these classes come within the normal meaning of the words "grade or rank." The law designates some of them as grades or ranks by name, others only by description.[5] See RANK; TITLE, 5.

GRADUATE. In the universities, a student who has honorably passed through the prescribed course of study and received a certificate to that effect.

A cadet-engineer who has successfully completed his academic course, passed the closing examination, and received from the Academic Board a certificate to that effect, has hitherto been called a "graduate." The act of August 5, 1882 (22 St. L. 285), did not make such graduates "naval cadets."[6] See CADET; TITLE, 5; ALCOHOL.

GRAFT. In equity, describes the right in a creditor, who holds a mortgage upon property to which the mortgagor had an imperfect title, to a lien upon the premises, after the debtor has acquired a good title.[7]

GRAIN. See CROP.

Includes or may include: flax-seed,[8] millet and sugar-cane seed,[9] oats,[10] peas.[11]

[1] See Byles, Bills, 209, 210; Bank of Washington *v.* Triplett, 1 Pet. *31-35 (1828), cases, Marshall, C. J.; Cookendorfer *v.* Preston, 4 How 326 (1846); Bell *v.* First Nat. Bank of Chicago, 115 U. S. 379-83 (1885), cases.

[1] See Byles, Bills, 205; Chitty, Bills, 11 ed. (1878); Pierce *v.* Indseth, 106 U. S. 550 (1882).

[2] See Story, Prom. Notes, §§ 216, 247.

[3] Smith *v.* Washington City, 20 How. 148 (1857).

[4] People *v.* Rawson, 61 Barb. 631 (1872).

[5] Rutherford *v.* United States, 18 Ct. Cl. 343 (1883); McClure *v.* United States, *ib.* 347 (1883).

[6] Leopold *v.* United States, 18 Ct. Cl. 546, 557 (1883), Schofield, J.

[7] See La. Civ. Code, art. 3271; 9 Mass. *36.

[8] Hewitt *v.* Watertown Ins. Co., 55 Iowa, 294 (1880).

[9] Holland *v.* State, 34 Ga. 457 (1866).

[10] Smith *v.* Clayton, 29 N. J. L. 361 (1863).

[11] State *v.* Williams, 2 Strob. L. 477 (S. C., 1848). See Park. Ins. 112; 1 Marsh. Ins. 223, n.

"Corn" in the text of Blackstone's commentaries means grain.[1] "Corn-laws" regulated trade in breadstuffs.

In this country, in statutes of modern date, corn means Indian corn, maize;[2] and either shelled or in the ear.[3]

See also AGRICULTURE; EMBLEMENTS; PERISHABLE; PROVISIONS; SEED.

GRAMMAR. False grammar (syntax) alone never invalidates written instruments: *falsa*, or *mala, grammatica non vitiat chartam.*[4]

See BLANK, 2; PUNCTUATION.

GRAND. Great; greatest; chief; advanced in rank; opposed to *common, petit* or *petty*, q. v.

As, in grand jury or inquest, grand larceny; and, also, as in grandchild and grandparent, *qq. v.*

GRANGER CASES. See *Munn* v. *Illinois*, CHARTER, 2, Private; POLICY, 1, Public.[5]

GRANT. 1. At common law, the method of transferring the property of incorporeal hereditaments, or such things whereof no livery can be had.[6]

An incorporeal hereditament was said to lie *in grant;* and a corporeal hereditament, *in livery*. A grant differed little from a feoffment (*q. v.*), except in the subject-matter; the same words were used.[6]

2. A generic term applicable to all transfers of realty.[7]

Any conveyance of realty.[8]

"Hereby granted" imports an immediate transfer of interest.[9]

To constitute a grant, it is not indispensable that technical words be used; any words that manifest the same intention will suffice.[10]

Statute of 8 and 9 Vict. (1845) c. 106, made all corporeal rights, as regards the conveyance of the immediate freehold, to be deemed to lie in grant as well as in livery.

[1] 3 Bl. Com. 10, 152, 156, 218; 4 *id.* 159.

[2] Kerrick *v.* Van Dusen, 32 Minn. 318 (1884); Commonwealth *v.* Pine, 2 Pa. Law J. R. 412 (1844); Sullins *v.* State, 53 Ala. 475 (1875); Wood *v.* State, 18 Fla. 969 (1882); 46 Tex. 402.

[3] State *v.* Nipper, 95 N. C. 655 (1886).

[4] 2 Bl. Com. 379; State *v.* Shaw, 59 N. H. 74 (1877); 112 U. S. 216; 63 Iowa, 65; 70 Pa. 237; 80 Va. 599; 1 Whart. Cr. 199; Broom, Max. 535.

[5] See also 19 F. R. 698.

[6] 2 Bl. Com. 317; Williams, R. P. 147; 5 Mass. 471; 16 N. Y. 75; 1 Black, 358.

[7] 3 Washb. R. P. 181, 358, 378; Durant *v.* Ritchie, 4 Mas. 69 (1825).

[8] McVey *v.* Green Bay R. Co., 42 Wis. 535-36 (1877); Lambert *v.* Smith, 9 Oreg. 198 (1881).

[9] Wright *v.* Roseberry, 121 U. S. 496, 500 (1887).

[10] East Jersey Iron Co. *v.* Wright, 33 N. J. E. 252 (1880); Barksdale *v.* Hairston, 81 Va. 765 (1886), cases.

Grant and demise. In a lease for years, create an implied warranty of title and a covenant for quiet enjoyment.[1] See DEMISE.

Grant, bargain, and sell. In a deed, do not import a general covenant of seisin or against incumbrances, but a covenant that the grantor has done nothing whereby the estate granted may be defeated,— for quiet enjoyment, at least.[2]

They imply a covenant against incumbrances, including taxes.[3] See COVENANT, Implied; SUFFER.

A grant of personalty is termed an assignment or a bill of sale. See ASSIGNMENT, 2; GIFT, 1; SALE, Bill of; TITLE, 1.

3. Any concession by the public, being evidenced by an enactment or record; in particular, a transfer of public land, or the creation of a franchise by charter, or of a monopoly by letters patent, or of an exclusive privilege by certificate of copyright.

Described as a legislative, government, official, public, State, or United States grant.

Grantor. He who makes a grant.

Grantee. 1. He to whom a grant is made.

2. One who has transferred to him, in writing, the exclusive right, under a patent, to make and use, and to grant to others to make and use, the thing patented, within and throughout some specified portion of the United States.[4] See ASSIGNEE; LICENSEE.

The king's grants are matter of public record. Whether of lands, honors, liberties, franchises, or aught besides, they are contained in charters, or letters patent. . . The manner of granting by him does not differ from that by a subject more than the construction of his grants, when made. (1) A grant by the king, at the suit of the grantee, shall be taken most beneficially for the king; whereas the grant of a subject is construed most strongly against the grantor. (2) A subject's grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress, and regress, to cut and carry away those profits, are inclusively granted. But the king's grant shall not enure to any other intent than that which is previously expressed in the grant. (3) When it appears, from the face of the grant, that the king is mistaken or deceived in a matter of fact or of law, or if his own title be different from what he supposes, or if the

[1] Scott *v.* Rutherford, 92 U. S. 109 (1875), cases.

[2] 4 Kent, 460; 2 Ala. 535; 5 *id.* 586; 12 *id.* 159; 7 Ill. 148; 19 *id.* 235; 21 *id.* 220; 50 Pa. 480.

[3] Blossom *v.* Van Court, 34 Mo. 390 (1864). See further 4 Oreg. 235; 1 Conn. 79; 1 T. B. Mon. 30; 32 Me. 339; 8 Barb. 463; 5 Tenn. 124; 25 Cal. 175; 32 Ill. 348; 60 Mo. 138; Rawle, Cov. Tit. 481-97, cases.

[4] Act 4 July, 1836, §§ 13, 14; Potter *v.* Holland, 4 Blatch. 211 (1858).

grant be informal, or if he grants an estate contrary to the rules of law,— the grant is absolutely void.[1]

By a grant everything passes which is necessary to the full enjoyment of the right, title, or estate which is included in the words. A grant of a mere way carries an easement only — the ownership of the soil not being essential to the free use of the right. But a grant of an estate designated only by the particular use for which the land is appropriated will pass the fee; as, a grant of "a house," "a wharf," "a mill," "a well," "a barn," and the like.[2]

With respect to "public grants," the rule is, that rights, privileges, and immunities not expressly granted are reserved. Nothing can be presumed against the State. There would be no safety to public interests in any other rule. The rule applies with special force where the claim would abridge or restrain a power of government, as, the power of taxation.[3]

Where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the government rather than that of the individual. Nothing can be inferred against the State. Such acts are usually drawn by interested parties; and they are presumed to claim all they are entitled to. The rule serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent upon the face of the act, and thus sanctions only open dealing with legislative bodies.[4]

A more liberal rule of construction is allowable in interpreting a grant from one State or political community to another, than is permitted in interpreting a private grant.[5]

Where power or jurisdiction is delegated to any public officer or tribunal, and its exercise is confided to his or their discretion, acts done are binding as to the subject-matter; and individual rights will not be disturbed collaterally for anything so done. The only questions which can arise between an individual claiming a right under the acts and the public, or a person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed. In no case have documents of title, executed by officers of the government, been held sufficient where the fact in issue was whether the government had any title to convey, to establish the fact in dispute, as against parties claiming a pre-existing, adverse, and paramount title themselves.[1]

No one can grant what he does not own.[2] See DARE, Nemo, etc.

See CHARTER, 2; CONDITION; DEED, 2; DELIVERY; DISCLAIMER, 2; DISPARAGEMENT, 2; INCIDENT; LAND, Public; PATENT 1 (1), 2.

4. To confer, bestow, allow, permit, award, issue: as, to grant a rule to show cause, letters testamentary or of administration, a writ of *certiorari*, *habeas corpus*, or *mandamus*.

GRASS. See CROP.

GRASS WIDOW. See GRACE.

GRATIA. See E, 2; GRACE.

GRATIS. See DICTUM, Gratis.

GRATUITOUS CONTRACT or **SERVICE.** See CONSIDERATION, 2; DEPOSIT, 1; SUBSCRIBE, 2.

GRATUITY. See BONUS, 2; BOUNTY; CHARITY, 2; DEPOSIT, 1; TRUST, 1.

GRAVAMEN. L. Burden, weight.

That part of a charge which weighs most heavily against the accused; the essence of an accusation.

The grievance complained of; the substantial cause of an action.[3]

GRAVE. See BURIAL; SEPULCHRE.

GREAT. See CARE; CHARTER, 1; SEAL, 1. Compare GRAND; GROSS; MAGNUS.

Greater. Larger; superior; chief; principal.

The greater includes the less.

The greater power of making wholly new legislation includes the lesser power of altering old legislation.[4]

The withdrawal or extinguishment of the greater carries the less; thus, the withdrawal or extinguishment of a franchise authorizes the withdrawal or extinguishment of every right which is a part of the franchise.[5]

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[1] 2 Bl. Com. 346-48, 121, 380.

[2] Jamaica Pond Aqueduct Corporation *v.* Chandler, 9 Allen, 164 (1864), Bigelow, C. J.; Johnson *v.* Rayner, 6 Gray, 110 (1856), cases; United States *v.* Appleton, 1 Sumn. 500 (1833); Bank of British North America *v.* Miller, 7 Saw. 163 (1881), cases; Green Bay, &c. Canal Co. *v.* Hewitt, 66 Wis. 464-65 (1886); Lowell *v.* Strahan, 145 Mass. 1, 11 (1887), cases; 26 Am. Law Reg. 722-26 (1887), cases; 19 Cent. Law J. 446 (1884)— Solic. Journ.

[3] The Delaware Railroad Tax, 18 Wall. 225 (1873), Field, J. See also Schulenberg *v.* Harriman, 21 *id.* 62 (1874); Heydenfeldt *v.* Daney Gold, &c. Co., 93 U. S. 638 (1876); Wiggins Ferry Co. *v.* East St. Louis, 107 *id.* 371 (1882), cases; Ruggles *v.* Illinois, 108 *id.* 531 (1883), cases Hannibal, &c. R. Co. *v.* Missouri River Packet Co., 125 *id.* 271 (1888), cases; Swann *v.* Jenkins, 82 Ala. 492 (1886); Omaha Horse R. Co. *v.* Cable Co., 30 F. R. 828 (1887), cases. Limitation on legislative grants, 26 Am. Law Reg. 65-71 (1887), cases.

[4] Slidell *v.* Grandjean, 111 U. S. 437 (1884), Field, J.

[5] Indiana *v.* Milk, 11 Biss. 205 (1882), Gresham, J.

[1] Sabariego *v.* Maverick, 124 U. S. 280 (1888), cases, Matthews, J., quoting United States *v.* Arredondo, 6 Pet. *727 (1832), cases.

[2] 23 How. 175; 1 Wall. 254; 11 *id.* 459; 94 U. S. 389; 95 *id.* 10; 34 La. An. 791.

[3] See 1 Greenl. Ev. § 66.

[4] *Exp.* Siebold, 100 U. S. 384 (1879).

[5] Atlantic & Gulf R. Co. *v.* Georgia, 98 U. S. 365 (1878); 54 Ga. 401; Branch *v.* Jesup, 106 U. S. 478 (1882); 21 Wall. 175; 111 U. S. 270.

Upon indictment for a particular crime, the accused may be convicted of a less offense included in the crime charged. But at common law, under an indictment for felony, there cannot be conviction for a misdemeanor.[1] See ACQUITTAL, Former.

See MAJOR, In se; MERGER.

GREEN. See BAG.

GREENBACK. A popular name applied exclusively to United States treasury notes.

When an indictment charges larceny of treasury notes, the proof may be that the notes were "greenbacks."[2]

Originally, a nick-name or slang word, derived from the color of the engraving on the back of the currency. The fact that the word, from its convenience, has come into common use, does not make it of itself a proper designation in an indictment.[3] See TENDER, Legal.

GRETNA-GREEN. A "Gretna-Green marriage" was a marriage solemnized in Scotland by parties who went there to avoid the delay and formalities required in England.

Gretna-Green, being the nearest place across the boundary line, was the more generally resorted to. Statute of 19 and 20 Vict. (1856), c. 96, requires that at least one of the parties shall have his or her usual place of residence in Scotland, or shall have lived there twenty-one days preceding the marriage.[4]

In the United States, the term describes marriages celebrated between residents of a State who go to a place beyond and yet near to the boundary line of an adjoining State, on account of some advantage afforded by the law of that State.

GRIEVOUS. See ASSAULT; INJURY.

GROCERIES. See PROVISIONS.

Whether wines and liquors are groceries is a question of fact.[5]

Shovels, pails, baskets, and the like, are not, although usually kept in a country grocery store.[6] See FAMILY, Use.

GROSS. Great, large; entire, undiminished, whole; general; extreme. See ENGROSS.

Gross average. General average upon ship, cargo, and freight. See AVERAGE.

Gross earnings. The whole amount of earnings received. See EARNINGS; PROFIT, Net.

Gross neglect or negligence. Extreme want of care; the absence of ordinary or reasonable care and skill. See CARE; NEGLIGENCE.

Gross receipts. All receipts had, undiminished by expenses or other deductions. Compare EARNINGS, Gross.

In gross. 1. In the entirety; as, a sale in gross, *q. v.*

2. Independent of; not annexed to another: as, a common, a power, a right in gross. See COMMON, 2; EASEMENT, Appendant; POWER, 2.

GROUND. 1. Land; soil; earth. See LAND.

May include an improved town lot.[1]

Ground-rent. A rent reserved as the consideration of a conveyance of land in fee-simple.

Ground-landlord. The grantor of such an estate.

Rent payable to the grantee, who erects and leases houses upon the land, is called the "builder's rent." See further, RENT, Ground-rent.

2. "Good ground" to believe or to act means simply good cause.[2]

Ground of action. The foundation, basis, or data, upon which a cause of action rests.

GROWING. See CROP.

GRUDGE. See MALICE; PREJUDICE.

GUARANTEE.[3] 1, *v.* (1) To engage to do a thing; to assure, stipulate, or covenant solemnly.

"The United States shall guarantee to every State . . a Republican (*q. v.*) Form of Government."[4]

(2) To engage that another will do as he has promised.

2, *n.* The person with whom such engagement is made.

Guarantor. He from whom the engagement proceeds.

To guarantee may be equivalent to to promise.[5]

Guaranteed. Warranted, preferred: as, guaranteed stock.[6] See STOCK, 3 (2).

Guaranty. (1) Solemn assurance, covenant, or stipulation that something shall be

[1] Hunter *v.* Commonwealth, 79 Pa. 505 (1875), cases.

[2] Hickey *v.* State, 23 Ind. 23 (1864), Davison, J.

[3] Wesley *v.* State, 61 Ala. 287 (1878), Manning J. See Grant *v.* State, 55 *id.* 209 (1876).

[4] See 2 Steph. Com. 259, note; Brook *v.* Brook, 9 H. L. 193 (1861).

[5] Niagara Ins. Co. *v.* De Graff, 12 Mich. 135 (1863).

[6] Fletcher *v.* Powers, 131 Mass. 335 (1881).

[1] Ferree *v.* School District, 76 Pa. 379 (1874).

[2] Supervisors *v.* Pabst, 64 Wis. 244 (1885).

[3] F. *garantir*, to warrant, lit., to guard, keep. See G.

[4] Constitution, Art. IV, sec. 4.

[5] Thayer *v.* Wild, 107 Mass. 452 (1871); McNaughton *v.* Conklings, 9 Wis. *320 (1859).

[6] Taft *v.* Hartford, &c. R. Co., 8 R. I. 333 (1866).

or be done: as, the guaranties in the Constitution and Amendments thereto.

Guaranty clause. Specifically, section four of article four of the Constitution, guaranteeing a republican form of government to each State. See GUARANTEE, 1.

(2) Distinctively, a promise "to answer for the debt, default or miscarriage" of another person.

This by the statute of frauds (*q. v.*) must be in writing and be signed by the guarantor.

The contract by which one person is bound to another, for the fulfillment of the promise or engagement of a third party.[1]

Usually, a collateral undertaking to pay the debt of another in case he does not pay it.[2]

An undertaking by one person that another shall perform his contract or fulfill his obligation, or that, if he does not, the guarantor will do it for him.[3]

May also mean security or lien; as, in an agreement that lumber should be held as guaranty for the payment of a debt.[4]

An engagement to pay in default of solvency in the debtor, provided due diligence be used to obtain payment from him. A contract of "suretyship" is a direct liability to the creditor for the act to be performed by the debtor; whereas a "guaranty" is a liability only for his ability to perform this act. A "surety" assumes to perform the contract for the principal debtor if he should not; a "guarantor" undertakes that his principal can perform, that he is able to perform. The undertaking of a "surety" is immediate and direct, that the act shall be done, and, if not done, then he is to be responsible at once; but from the nature of the undertaking of a "guarantor," nonability (insolvency) must be shown.[5]

A "guarantor" insures the solvency of the debtor; a "surety" insures the debt itself. A surety must demand proceedings, with notice that he will not continue bound unless they are instituted; whereas a guarantor may rely upon the obligation of the creditor to use due diligence to secure satisfaction of his claim.[6]

To enable a creditor to enforce a contract of guaranty, he must exercise "due diligence" to enforce payment from the principal. That is, the creditor must bring suit within a reasonable time after the maturity of the claim, and duly prosecute the same to judgment and execution, unless it appears that such proceedings can produce no beneficial results.[1]

Absolute guaranty; conditional guaranty. A guaranty that a note is collectible is a conditional promise binding upon the guarantor only in case of diligence. To perfect the obligation so as to render him liable thereon, the guarantee must use diligence in the endeavor to collect his note, for it is a condition precedent. The inchoate obligation does not become absolute until the guarantee has performed the condition on his part.[2]

Continuing guaranty. An undertaking to be responsible for moneys to be advanced or goods to be sold to another from time to time.[3]

General guaranty; special guaranty. A special guaranty operates only in favor of the person to whom it is addressed; a general guaranty is open for acceptance by the public generally.

Guaranties are sometimes further classified as such as are limited to a single transaction, and such as embrace continuous or successive dealings.

A guaranty is a contract in and of itself; but it also has relation to some other contract or obligation with reference to which it is collateral; and it always requires a consideration. When executed at or about the time of the execution of the main contract, as part of one transaction, one consideration may support both contracts; so also where the guaranty is executed in pursuance of the assignment of the main contract.[4]

The real party in interest is now entitled to maintain an action for damages arising from a breach of such contract in his own name, although he was not originally privy to it. That is, both equitable and legal assignments now are equally cognizable in a court of law.

A special guaranty contemplates a trust in the addressee, and no cause of action arises thereon, except upon compliance with its conditions by such person. Until a right of action has arisen, the guaranty is not assignable.

A consideration is necessary; if it is not acknowledged, it must be proved.

Guaranties are construed so as to accord with the apparent intention of the parties. Where the lan-

[1] 2 Pars. Contr. 3, 26; Story, Prom. Notes, § 457; 3 Kent, 121.

[2] See Dole *v.* Young, 24 Pick. 252 (1837), Shaw, C. J.; Parker *v.* Culvertson, 1 Wall. Jr. 160 (1846); Hill *v.* Smith, 24 How. 286 (1858).

[3] Gridley *v.* Capen, 72 Ill. 13 (1874), Breese, C. J.

[4] Wilkie *v.* Day, 141 Mass. 72 (1886).

[5] Reigart *v.* White, 52 Pa. 440 (1866), Agnew, J.

[6] Kramph *v.* Hatz, 52 Pa. 529 (1866), Woodward, C. J. See also 21 Cent. Law J. 6-9 (1885), cases.

[1] National Loan, &c. Society *v.* Lichtenwalner, 100 Pa. 103 (1883), cases, Paxson, J.; 26 Am. Law Reg. 129-47, 201-218 (1887), cases; 18 F. R. 126; 27 Conn. 37; 2 N. Y. 549; 60 *id.* 444; 11 Ohio St. 168; 13 R. I. 119; 7 Humph. 539; 20 Vt. 503.

[2] Edwards, Bills, 238; 2 Daniel, Neg. Inst. § 1769; Allen *v.* Rundle, 50 Conn. 20-22 (1882), cases.

[3] Buck *v.* Burk, 18 N. Y. 343 (1858), Selden, J.; Addison, Contr. 668.

[4] Briggs *v.* Latham, 36 Kan. 209 (1887), Valentine, J.

guage is ambiguous, the surrounding circumstances may be looked at. When the meaning is ascertained, the guarantor is entitled to the application of the strict rule governing the contracts of sureties, and cannot be held beyond the plain terms of the contract.[1] See further CONSTRUCTION, Liberal.

As a principle, a guaranty is not negotiable; it may, perhaps, be made so by negotiable language.[2]

The negotiation of a bill or note is not a guaranty.[3]

The rule requiring notice of the acceptance of a guaranty applies only where the instrument is merely an offer or proposal, acceptance of which is necessary to mutual assent. Made at the request of the guarantee, its delivery constitutes the contract. The same result follows where the agreement to accept is contemporaneous with the guaranty, and is its consideration. An unconditional guaranty of advances is a waiver of demand of payment, and notice of the debtor's default to the amount of the advances, etc. Delay in giving notice, when required, is a defense to an action to the extent of the loss or damage proved. Notwithstanding that the contract is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit, and, literally, to promote the convenience of commercial intercourse.[4]

See FRAUDS, Statute of, III (2); LETTER, 3, Of credit; PROMISE, Collateral; SURETY; WARRANTY.

GUARDIAN.[5] 1. A keeper, protector, conservator; a warden.

Guardian of the peace. A person charged with the duty of securing or protecting the public peace; a conservator of the peace. See PEACE, 1.

Guardian of the poor. A person specially elected or appointed to administer the poor-laws. See POOR.

2. One that legally has the care and management of the person or the estate, or both, during his minority, of a child whose father has died.[6] Correlative, *ward*.

The authorized agent, appointed by law, to take care of the ward's estate and manage his affairs.[7]

Domestic guardian. A guardian appointed at the place of the infant's domicil. **Foreign guardian.** A guardian appointed under the law of another State than that of the infant's domicil.

Their rights and powers are local. By comity only is anything conceded in another State to the claims of the guardian of the domicil. It is usual, however, to appoint in a foreign State the guardian of the domiciliary court.[1]

Guardian ad litem. A person appointed by a court to look after the interests of an infant when his property is involved in litigation.[2]

He manages the defense of an infant defendant, where there is no parent, or other guardian. The power of appointing such a guardian is incident to every court.[3]

He is a species of attorney, whose duty is to prosecute for the infant's rights, and to bring those rights directly under the notice of the court. He can do nothing to the injury of the infant. His duty ends when the suit ends, when it is prosecuted to final judgment. Since he may be required to pay the costs of the action, a person cannot be compelled to serve against his consent. Anciently the custom was to appoint an officer of the court. He may have reimbursement for costs and expenses out of the infant's estate.[4] See FRIEND, Next.

General guardian. A guardian who has general charge of the person and property of a fatherless minor. **Special guardian.** A guardian charged with the management of some particular interest; as, a guardian *ad litem*, or a guardian of the estate or of the person only.[5]

Guardian of the estate. A guardian who has been lawfully invested with the power of taking care and managing the estate of an infant. **Guardian of the person.** A guardian lawfully invested with the care of an infant, whose father is dead.[6]

At common law, a general guardian performs the office of *tutor* of the person and *curator* of the estate as distinguished in the Roman law.[7]

Statute or statutory guardian. A guardian appointed by last will; also, a guardian appointed by a court in pursuance of a statute.

[1] Evansville Nat. Bank *v.* Kaufmann, 93 N. Y. 276-81 (1883), cases, Ruger, C. J.; How *v.* Kemball, 2 McLean, 103 (1840), cases; 2 How. 449; 69 Barb. 355.

[2] Story, Prom. Notes, § 481; 36 Kan. 211.

[3] Central Trust Co. *v.* Cook County. Nat. Bank, 101 U. S. 70 (1879), cases.

[4] Davis *v.* Wells, 104 U. S. 159, 163-66 (1881), cases, Matthews, J.

[5] F. *garder:* A. S. *weard-*; Ger. *warten*, to watch, have ward. See G.

[6] Bass *v.* Cook, 4 Port., Ala., 392: Reeves, Dom. Rel. 311.

[7] Waldrip *v.* Tulley, 48 Ark. 300 (1886), Smith, J.

[1] Hoyt *v.* Sprague, 103 U. S. 631-32 (1880), Bradley, J.

[2] See N. Y. Life Ins. Co. *v.* Bangs, 103 U. S. 438 (1880); Colt *v.* Colt, 111 *id.* 578 (1884).

[3] 3 Bl. Com. 427.

[4] Leopold *v.* Meyer, 10 Abb. Pr. o. s. 40 (N. Y. Com. Pleas, 1860), cases; Tucker *v.* Dabbs, 12 Heisk. 20 (1873); Simmons *v.* Baynard, 30 F. R. 533 (1887): 2 Story, Eq. § 1352; Turrentine *v.* Daly, 82 Ala. 208 (1886),—final account; Cates *v.* Pickett, 97 N. C. 26 (1887),—selling land (local); Hinton *v.* Bland, 81 Va. 592-93 (1886),—of lunatic; Story, Eq. Pl. § 70.

[5] See Colt *v.* Colt, 111 U. S. 578 (1884).

[6] Nicholson *v.* Spencer, 11 Ga. 609 (1852).

[7] 1 Bl. Com. 460.

Testamentary guardian. A person named for the office of guardian in the will of the father of the minor.

Instituted by Statute 12 Charles II (1660), c. 24.[1]

Guardian by chancery. A guardian appointed by a court of equity or of probate.

Guardian in chivalry. The lord of the heir of a tenant in capite, and of body and lands, with no duty to account for profits.

Guardian by common law, or *in socage.* Where a minor was entitled to an estate in lands, his next of kin, to whom the estate could not descend, became such guardian until the minor attained fourteen.

Guardian by nature. The father, and, after his decease, the mother. Has charge of person and estate, and is controlled by a court of equity or probate.

Guardian for nurture. Either of the parents till the child is fourteen, but relates to the care of the person solely.

Guardian ad interim or *interim.* Serves while another guardian is out of the jurisdiction.[2]

In general, guardians exist either by nature or by appointment of a court. At common law, a person became such by relation to the minor, without judicial appointment. In the province of York, on failure of the father to name a guardian by will, the ordinary made the appointment. The power to appoint and to pass upon accounts has been generally conferred by statutes upon the probate courts.

At fourteen, the child may choose a guardian.

A guardian is a temporary parent. The lord chancellor is the general guardian of all infants in England; in the States, the court of probate is the general guardian, the nominal guardian being but an agent or officer of the court.[3]

The reciprocal duties of the persons depend upon the nature of the guardianship. A guardian of the person has a right to the obedience of the ward, but not to his services; and owes the ward protection, but not support. The guardian of the estate is to support and educate the ward in a manner suited to the ward's station in life.

Ordinary skill, prudence, and caution are all that are required of a guardian. Many of his duties are regulated by statute. He may lease the ward's realty; and he receives the rents and profits thereof. He may sell personalty without an order of court, but not realty; nor may he so convert personalty into realty. If he uses money, or neglects to invest it for an unreasonable period, he is chargeable with interest: and if he trades with the money, the ward may demand the principal with either interest or the profits. He is liable for waste as to realty, and for negligence as to personalty. He cannot waive the ward's rights.[1]

The relation ceases at twenty-one. As to the person of a female ward, ceases with marriage to a minor; and as to both person and estate, upon marriage to an adult. Continues, as to his estate, after the marriage of a male ward. But neither may marry without the consent of the guardian.

The court will remove a guardian for misconduct; may require a change in his sureties; may compel him to file an account; may appoint an interim guardian; will regulate the maintenance and education (*q. v.*) of the ward; and may even control the actions of a testamentary guardian.[2]

After the ward becomes of age the guardian is bound to exercise proper care of his property until he has duly accounted for it, and delivered up possession.[3]

See Committee, 1; Curator; Discharge, 1; Invest; Tutor; Ward, 3; Witness.

GUBERNATORIAL. See Government.

GUEST. A traveler, wayfarer, or a transient comer to an inn for lodging and entertainment. It is not now deemed essential that the person should have come from a distance.[4]

As inns are instituted for travelers, a neighbor or friend who lodges in an inn is not deemed a guest. A traveler who is accepted becomes instantly a guest. The length of time a man is at an inn makes no difference; so, although he is not strictly transient, he retains his character as a traveler. He may, by special contract to board and sojourn, make himself a "boarder." Numerous late cases hold that a special agreement as to time and price does not absolutely disturb the relationship of innkeeper and guest. These cases indicate a tendency to conform the old rule to the changes made in hotel keeping in modern times.[5]

See further Boarder; Inn; Lodger; Residence.

GUILTY.[6] 1. The state or condition of one who has committed a crime, a civil in-

[1] See 2 Kent, 224-25; Schouler, Dom. R. 400; 4 Johns. Ch. 380; 12 Ill. 431; 37 Cal. 661.

[2] See 1 Bl. Com. 461-63; 2 *id.* 67, 88; 2 Kent, 220; Reeves, Dom. R. 311; 1 Pars. Contr. 133; De Krafft *v.* Barney, 2 Black, 710 (1862); Lamar *v.* Micou, 112 U. S. 452 (1884); 6 Conn. 500; 33 *id.* 327.

[3] 1 Bl. Com. 463; 3 *id.* 141; 2 *id.* 461.

[1] See Lamar *v.* Micou, 112 U. S. 463-70 (1884), cases; Boaz *v.* Milliken, 83 Ky. 638 (1886); Eyster's Appeal, 16 Pa. 372 (1851).

[2] See Reeves, Dom. R. 311; Schouler, Dom. R. § 283; 1 Pars. Contr. 134-37; Lord *v.* Hough, 37 Cal. 660-69 (1869); 1 Johns. Ch. 109.

[3] Hudson *v.* Bishop, 32 F. R. 521 (1887).

[4] Curtis *v.* Murphy, 63 Wis. 6 (1885), cases, Cole, C. J. See also Russell *v.* Ryan, Sup. Ct. Del. (1886), Comegys, Chief Justice.

[5] See Story, Bailm. § 477; 2 Pars. Contr. 150; Hancock (Mrs. Gen.) *v.* Rand, 94 N. Y. 5, 10 (1883), cases; McDaniels *v.* Robinson, 26 Vt. 330-44 (1854), cases; Calye's Case, 1 Sm. L. C. 241-47, cases; Coggs *v.* Bernard, *ib.* 401-6, cases; 16 Ala. 666; 26 *id.* 377; 33 Cal. 557; 35 Conn. 183; 25 Iowa, 553; 53 Me. 163; 100 Mass. 495; 145 *id.* 244; 12 Mich. 52; 53 Mo. 547; 33 N. Y. 577; 61 *id.* 34; 36 Pa. 452; 62 *id.* 92; 41 Vt. 5; 35 Wis. 118.

[6] A. S. *gylt,* a fine for an offense; an offense.

jury, or a contempt of court. 2. As a plea, the judicial confession of a crime charged.

Not guilty. A plea denying the commission of a crime or a tort.

The plea of "not guilty" raises the general issue; it denies the whole indictment or declaration. In civil law, applicable in delicts sounding in trespass or case, for misfeasance or non-feasance, in ejectment, in garnishment, and in interpleader.[1]

When an accused person is arraigned (*q. v.*), the clerk inquires: "How say you, A. B., are you guilty or not guilty?" His answer, which is recorded, constitutes his plea. If "not guilty," the trial proceeds.

The plea waives objection to the complaint for misnomer or for neglect to add a place of residence.[2]

Where guilty knowledge is an ingredient of a crime, evidence of the commission of other kindred offenses about the same time is admissible as tending to prove that ingredient. Many cases of fraud require the application of the same principle,— as fraud involves intent, and intent can be deduced only from a variety of circumstances. Collateral facts, each insufficient in itself, whose joint operation tends to support the charge, or to disprove it, are then receivable.[3]

Where a statute prohibits an act being done, or being done under certain circumstances, without making knowledge or intent an ingredient in the offense, the person doing the act is bound at his peril to see that the circumstances are such as do not make it unlawful.[4]

Jurors are not called to pass upon a defendant's innocence, but solely whether or not the State has proven beyond reasonable doubt an affirmative proposition, to wit, his guilt.[5]

See CONFESSION, 2; CONVICT; CRIME; DOUBT; INTENT; NEGLIGENCE; WILL, 1. Compare CULPA.

GUITEAU'S CASE.[6] See DELUSION; DOUBT, Reasonable; INSANITY, 2 (6).

GUN. See BAGGAGE; SHOOTING-MARK; TOOL; WEAPON.

GUNPOWDER. See EXPLOSION; POLICE, 2.

GUTTER. See DRAIN.

An ordinance requiring lot-owners to keep the "gutters" opposite their premises in good repair, and free from obstructions, was held to refer to the ordinary open gutters along the streets, and not to a blind ditch or culvert covered with planks and soil.[7]

[1] See 3 Bl. Com. 305; 4 *id.* 338; Gould, Pl. 284.

[2] State *v.* Drury, 18 R. I. 540 (1893); 41 N. H. 407; 1 Bish. Cr. Proc. § 791. On withdrawal of plea, see 23 Cent. Law J. 75 (1886), cases.

[3] United States *v.* Clapboards, 4 Cliff. 303-5 (1874), cases, Clifford, J.; Commonwealth *v.* Jackson, 132 Mass. 18-21 (1882), cases; People *v.* Gibbs, 93 N. Y. 473 (1883); 19 Cent. Law J. 408 (1884).

[4] United States *v.* Curtis, 16 F. R. 187 (1883), cases, Brown, J.; Halstead *v.* State, 41 N. J. L. 589-96, 577-84 (1879), cases, Beasley, C. J.

[5] McNair *v.* State, 14 Tex. Ap. 84 (1883).

[6] Reported in 10 F. R. 161. See also 13 Rep. 138, 717.

[7] Gilluly *v.* City of Madison, 63 Wis. 518 (1885).

H.

H. As an initial, may denote *habeas*, Henry (king), Hilary, *hoc*, house.

H. B. House bill.

H. C. *Habeas corpus;* House of Commons.

H. L. House of Lords.

H. R. House of Representatives.

Abbreviations of the Latin *hoc*, this, formerly more in use than at present, are: *h. a.* for *hoc anno*, this year; *h. t.* for *hoc titulo*, this title; *h. v.* for *hoc verbo* or *his verbis*, this word or these words;— the last two being employed as references.

HABENDUM. See HABERE, Habendum.

HABERE. L. To grasp, lay hold of: to have, hold.

Habeas corpus. That you have the body. The emphatic words of several common-law writs issued to bring persons into court for a designated purpose. See particularly, 6, below.

1. *Habeas corpus ad faciendum et recipiendum.* That you have the body for doing and receiving. Removes an action into a superior court: commands the judge of the inferior court to produce the body of the defendant, with a statement of the cause of his detention (whence called, also, *habeas corpus cum causa*), to do and to receive whatever the higher court shall decree.

Applicable where the simpler writ of *habeas corpus ad subjiciendum* is inadequate; and grantable of right, without motion. Operates as a *supersedeas*.

2. *Habeas corpus ad prosequendum.* That you have the person for prosecuting. Removes a prisoner to the jurisdiction wherein it is alleged he committed a crime.

3. *Habeas corpus ad respondendum.* That you have the person for answering. Removes a prisoner that he may be charged with a new action in a higher court.

4. *Habeas corpus ad satisfaciendum.* That you have the person for satisfaction. Removes a prisoner into a superior court that he may there be charged with process of execution.

5. *Habeas corpus ad testificandum.* That you have the person for testifying. Removes a person from a place of detention that he may give testimony before a court.[1]

6. *Habeas corpus ad subjiciendum.* That

[1] See generally *Exp.* Marmaduke, 91 Mo. 228, 251 (1886), cases.

you have the body for submitting to and receiving. Commands the person who has another in detention to produce the body of the prisoner, with the day and cause of his caption and detention, to do, submit to, and receive whatever the judge or court awarding the writ shall consider (*q. v.*) in that behalf.[1]

This last, the great and efficacious prerogative writ, is commonly called The Writ of Habeas Corpus. It is the best and only sufficient defense of personal freedom.[2]

It is the remedy which the law gives for the enforcement of the civil right of personal liberty. . . The judicial proceeding under it is not to inquire into the criminal act complained of, but into the right to liberty notwithstanding the act. The prosecution against the prisoner is a criminal proceeding, but the writ of *habeas corpus*, which he may obtain, is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a right, which he claims, as against those who are holding him in custody under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offense; but if he succeeds, he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. It is of a wholly civil nature.[3]

The writ was likely used at first to effect relief from private restraint. Trace of early use is found in Year Book 48 Edw. III, 22 (1375); was well understood in the time of Henry VI (1422–61); became available against the crown in the reign of Henry VII (1485–1509); in the time of Charles I (1625–49), was adjudged a constitutional remedy.[4]

The availability of the writ, as it obtained at common law, has been facilitated by statutes, particularly by 31 Charles II (1680), c. 2, called the *Habeas Corpus Act*, another Magna Charta, and by 56 Geo. III (1816), c. 100.[5] Acts having the same general nature and object exist in the various States. A case outside of a statute is governed by the common law.[6]

The general principles were settled long before our national independence, and were in mind when the power was given to the Federal courts and judges.[7]

The Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[8]

This provision has been copied into the constitutions of the States.

Congress, by act of March 3, 1863, authorized the President to suspend the privilege of the writ whenever, during the rebellion, in his judgment, the public safety might require it.[1]

Suspension of the writ simply denies to the person arrested the privilege of its use, to obtain his liberty.[2]

Not a writ of error, though in some cases, in which the court issuing it has appellate power over the court by whose authority the petitioner is held in custody, it may be used with the writ of *certiorari* for that purpose. Used alone, its purpose is to enable the court to inquire, first, if the petitioner is restrained of his liberty. If he is not, the court can do nothing but discharge the writ. If there is such restraint, the court can then inquire into the cause of it, and, if the alleged cause be unlawful, it must discharge the prisoner. Wives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, as in a madhouse, as well as those under military control, may become subjects of relief by the writ. But something more than moral restraint is necessary: there must be actual confinement or the present means of enforcing it.[3]

The writ is of right, in the nature of a writ of error, grantable on cause shown. The usual course is for the court on application to issue the writ, and, on its return, to hear and dispose of the case; but where the cause of imprisonment is fully shown by the petition, the court may determine that the prisoner, if produced, would or would not be entitled to a discharge.[4]

The writ affords relief only where the proceedings below are entirely void, for any cause, as for want of jurisdiction,[5] or because of the unconstitutionality of a statute.[6]

The reviewing power of the Supreme Court, in a criminal case, is confined to determining whether the lower court had jurisdiction to try and sentence for the offense.[7]

Ordinarily, the Supreme Court can issue the writ only under its appellate jurisdiction,— except in cases affecting public ministers or consuls, or those in which a State is a party.[8]

The act of March 27, 1868 (15 St. L. 44), took from the Supreme Court jurisdiction to review on appeal the decision of a circuit court upon a writ of *habeas corpus;* and it has no jurisdiction to review such decision on a

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[1] 3 Bl. Com. 130; *Exp.* Bollman, 4 Cranch, 97–99 (1807), Marshall, C. J.; Tidd, Pr. 296–301, 739.

[2] *Exp.* Yerger, 8 Wall. 95 (1868).

[3] *Exp.* Tom Tong, 108 U. S. 559 (1883), Waite, C. J.; *Exp.* Bollman, 4 Cranch, 101 (1807).

[4] See Hurd, Habeas Corpus, 145.

[5] 3 Bl. Com. 133; 8 Wall.95; 3 Hallam, Const. Hist. 19.

[6] 3 Bl. Com. 137.

[7] *Exp.* Parks, 93 U. S. 21 (1876); *Exp.* Yeager, 8 Wall. 95 (1868).

[8] Constitution, Art. I, sec. 9, cl. 2.

[1] 12 St. L. 755. See generally R. S. §§ 751–66, cases.

[2] *Exp.* Milligan, 4 Wall. 2, 3, 115 (1866); *Exp.* Merryman, 9 Am. Law Reg. 524 (1861), Taney, C. J.; *Exp.* Field, 5 Blatch. 67 (1862); 21 Ind. 370, 472; 44 Barb. 98; 16 Wis. 360; 1 Pac. Law Mag. 360.

[3] Wales *v.* Whitney, 114 U. S. 571–72 (1885), Miller, J.

[4] *Exp.* Milligan, *supra.*

[5] *Exp.* Parks, 93 U. S. 21 (1876).

[6] *Exp.* Rollins, 80 Va. 316 (1885), cases.

[7] *Exp.* Curtis, 106 U. S. 375 (1882); *Exp.* Carll, *ib.* 538 (1882), cases, Waite, C. J.

[8] *Exp.* Hung Hang, 108 U. S. 552 (1883), cases; State *v.* Neel, 48 Ark. 299 (1886), cases: 2 Kan. Law J. 295–99 (1885), cases.

writ of error. It may still issue its own writ of *habeas corpus*.[1]

A circuit court may discharge a person restrained of his liberty in violation of the Constitution, although held on an indictment for an offense against a State.[2]

Congress has prescribed the jurisdiction of the Federal courts under the writ; but as it has never particularly prescribed the mode of procedure, they have followed in substance the rules of the common law. The legislatures of the States not only provide what courts or officers may issue the writ, but, to a considerable extent, have regulated the practice under it.[3]

See EXTRADITION; INDIAN.

Habendum. To have; for having. *Habendum et tenendum:* to have and to hold.

The initial, emphatic word in that clause of a deed which follows the granting part. Determines what estate or interest is granted; may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to, the estate granted in the premises, *q. v.*[4]

Habere facias possessionem. That you cause to have possession. **Habere facias seisinam.** That you cause to have seisin.

If the plaintiff recovers in any action whereby the seisin or possession of land is awarded him, the writ of execution is an *habere facias seisinam*, or writ of seisin, of a freehold; or an *habere facias possessionem*, or writ of possession, of a chattel interest. These are writs commanding the sheriff to give actual possession to the plaintiff of the land recovered.[5]

At present, an *habere facias possessionem* puts into possession of the land a plaintiff who has been successful in an action of ejectment; and the writ of *habere facias seisinam* is in vogue in some States in connection with the action of dower.[6]

Habere facias visum. That you cause to have a view. A writ, and the characteristic phrase in the same, which directed the sheriff to have land viewed by a jury.

Habilis. Having: capable, suitable; fit.

By the canon law, if the parties are *habiles ad matrimonium*, it is a good marriage, whatever their ages.[7]

HABIT.[8] A person's habits refer to his customary conduct, to pursue which he has acquired a tendency, from frequent repetition of the same acts.[9]

It would be incorrect to say that a man has a habit of anything from a single act.[9]

Habitual. According to or by force of habit or frequent use; originating in a fixed habit; habituated.

See CHARACTER; DRUNKARD; INTEMPERATE.

HABITANCY. Embraces the fact of residence at a place, together with the intent to regard it and make it a home.

It is difficult to give an exact definition.[1] See INHABITANT.

HABITATION. See DWELLING.

HÆRES. L. Heir. In Roman law, resembled an executor in English law. See HEIR, 2.

Hæreditas. Inheritance. See DAMNUM, Damnosa, etc.

Hæres natus. An heir born; an heir by descent. **Hæres factus.** An heir by appointment; a devisee.[2]

Nemo est hæres viventis. No one can be the heir of a living person.

No person can be the actual complete heir of another till that other is dead. Before that time the person next in the line of succession is called the "heir apparent," or "heir presumptive."[3]

HÆRET IN CORTICE. See LITERA QUI hæret, etc.

HAIR. May not include bristles.[4]

Hair clippers. See CUTLERY.

HALF. See BLOOD; COIN; DEFENSE, 2; MOIETY; ORPHAN; SISTER.

HALLOWEEN. See NIGHTWALKERS; WANTONNESS.

HALLUCINATION. See INSANITY.

HAMMER. "Under the hammer" refers to public sales by a sheriff or auctioneer.

In Rome, auctioneers stood beside a spear fixed upright in the forum; and the goods were said to be sold *sub hasta*, under the spear.

HANAPER.[5] A bag or basket, kept in offices of the court of chancery to receive dues paid for the seals of charters, patents, commissions, and writs; then, the exchequer of chancery.

Writs issuing out of the ordinary court of chancery (relating to the business of the subject) and the returns thereto were, according to the simplicity of ancient times, originally kept *in hanaperio;* and others (relating to affairs of the crown) were preserved in a little sack or bag; and thence has arisen the distinction of "hanaper office" and "petty-bag office," both

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[1] *Exp.* Royall, 112 U. S. 181 (1884); *Exp.* Yerger, 8 Wall. 103 (1868).

[2] *Exp.* Royall, 117 U. S. 241 (1886).

[3] See generally People *ex rel.* Tweed *v.* Liscomb, 60 N. Y. 559 (1875); 18 Cent. Law J. 368-70 (1884), cases.

[4] 2 Bl. Com. 298; 4 Kent, 468; 3 Washb. R. P. 436.

[5] 3 Bl. Com. 412; Tidd, Pr. 1081; 2 Arch. Pr. 58.

[6] See Brightly, T. & H. (Pa.) §§ 1802, 1807.

[7] 1 Bl. Com. 436.

[8] L. *habitus: habere*, to have oneself, be in a condition.

[9] Knickerbocker Life Ins. Co. *v.* Foley, 105 U. S. 354 (1881), Field, J.

[1] Lyman *v.* Fiske, 17 Pick. 234 (1835), Shaw, C. J.

[2] See Borland *v.* Nichols, 18 Pa. 43 (1849).

[3] 2 Bl. Com. 208.

[4] Von Stade *v.* Arthur, 13 Blatch. 251 (1876).

[5] L. L. *hanaperium*, a large vase; a vessel to keep cups in; *hanapus*, a cup, bowl. Whence hamper.

of which belong to the common-law court in chancery.[1] See PETIT, Petty Bag.

HAND. 1. As the member of the body with which a thing is held, an instrument used, force or action originated or exerted, or a deed done, is in frequent use. See ARRAIGN; BURN; DEATH; MAYHEM. Compare MAIN; MANUS.

Handbill. A written or printed public notice of something to be done; as, of a judicial sale of property.

The number, time, and manner of posting such bills is regulated by local statute or rule of court.

Hand-money. The price or earnest given to bind a bargain, after shaking hands, or instead thereof; the consideration of a hand-sale. See EARNEST.

Hand-sale. Anciently, among northern nations, shaking of hands was necessary to bind a bargain; a custom retained in verbal contracts.[2]

Uplifted hand. Refers to an oath taken by raising the right hand toward Heaven.

Whip-hand. The right hand; the side of a road toward the right hand. See ROAD, 1, Law of.

2. Force; violence.

Strong hand. "With strong hand" implies a degree of criminal force, more than "with force and arms." Statutes relating to forcible entry (*q. v.*) use the words in describing the degree of force which makes an entry or detainer criminal, and entitles the prosecutor, under some circumstances, to restitution and damages.[3]

"With force and arms" are merely formal words in the action of trespass, and if issue be taken upon them, the plaintiff is not bound to prove any actual force.[3]

3. Chirography; penmanship; handwriting.

Whatever one has written with his hand; not merely his usual style of chirography.[4]

Comparison of hands, or of handwriting. Proving penmanship by its likeness to other writing, admitted or proven to be genuine.

The rule of the common law is to disallow a comparison of hands as proof of signature. An exception is, that if a paper, admitted to be in the hands of a party or to be subscribed by him, is in evidence for some other purpose, the signature or paper in question may be compared with it by the jury.[1]

A paper, otherwise irrelevant, may not be put in evidence merely to enable the jury to make a comparison.[2]

When a witness is called to prove a signature from his knowledge of the signer's writing, he should be first cross-examined as to his means of knowledge.[3]

Handwriting is proved by the writer, by his admission, by his writing in court, or by a witness who has either seen him write or is familiar with his hand. The witness may be tested by other writings. In England, comparison is permitted only as to test paper already in court. In some States, comparison with other papers is allowed. Test papers made for the purpose are inadmissible. An expert in handwriting may say whether in his opinion a hand is feigned or natural.[4]

All evidence of handwriting, except in the single instance where the witness saw the document written, is in its nature comparison of hands. It is the belief which the witness entertains upon comparing the writing in question with the exemplar in his mind derived from previous knowledge. Any witness, otherwise disinterested, who has had the opportunity of acquiring such an exemplar, is competent to speak of his belief. It is one of the few instances in which the law accepts from witnesses belief in facts, instead of facts themselves. If, from having seen the party write or from correspondence with him, the witness has become familiar with his hand, he may testify his belief as to the genuineness of the writing in question. Technically, comparison of handwriting means a "comparison by the juxtaposition of two writings, to ascertain whether both were written by the same person." . . (1) Evidence as to the genuineness of a paper may be corroborated by a comparison, to be made by the jury, between that paper and other well authenticated writings. (2) A mere expert may not make the comparison. (3) Witnesses having knowledge of the party's handwriting may testify as to the paper; but they are not to make the comparison. (4) Test documents should be established by the most satisfactory evidence. (5) An expert may be examined to prove forged or simulated writings, and to give conclusions of skill; but not to compare a writing, as a note, in suit, with other test papers, and express his opinion, when he had no knowledge of the defendant's handwriting.[5]

The rule is that a witness who is introduced to prove

[1] 3 Bl. Com. 49; Yates *v.* People, 6 Johns. *363 (1810).

[2] [2 Bl. Com. 448.

[3] King *v.* Wilson, 8 T. R. 362 (1799), Lawrence, J.; Harvey *v.* Brydges, 14 M. & W. *443 (1845), Parke, B.; Lawe *v.* King, 1 Saund. 81 (1668).

[4] Commonwealth *v.* Webster, 5 Cush. 301 (1850), Shaw, C. J.

[1] Moore *v.* United States, 91 U. S. 274 (1875); Strother *v.* Lucas, 6 Pet. *767 (1832); 1 Greenl. Ev. § 578.

[2] United States *v.* Jones, 20 Blatch. 236 (1882).

[3] Frew *v.* Clark, 80 Pa. 181 (1875).

[4] 1 Whart. Ev. §§ 705-40, cases; Commonwealth *v.* Webster, 5 Cush. 301 (1850).

[5] Travis *v.* Brown, 43 Pa. 12, 13, 17 (1862), cases, Woodward, J. See also Ballentine *v.* White, 77 *id.* 26 (1874); Aumick *v.* Mitchell, 82 *id.* 218 (1876); Reese *v.* Reese, 90 *id.* 94 (1879); Berryhill *v.* Kirchner, 96 *id.* 492 (1880); Lessee of Clark *v.* Courtney, 5 Pet. *344 (1831); Winn *v.* Patterson, 9 *id.* 674-75 (1835); Williams *v.* Conger, 125 U. S. 413, 297 (1888), cases.

the handwriting of a person must have personal knowledge of it, either by having seen him write, or by having seen writing admitted by him to be his or, with his knowledge, acted upon as his, or so adopted into the ordinary business of life as to create a reasonable presumption of its genuineness. Exceptions are, first, where the paper is not old enough to prove itself, and yet is so old that living witnesses cannot be had: then, other writings proven to be genuine, or to have been acted upon as such by all parties, may be offered, and experts, by comparison, may give their opinion as to the genuineness; or, second, where other writings admitted to be genuine are already in the case, when the jury may make the comparison without expert aid. The civil and ecclesiastical law permitted the testimony of experts as to handwriting by comparison. The rule varies in the different States. In some, comparison is allowed between the writing in question and any other writing shown to be genuine, whether already in the case or not, or relevant or not; while in others, it is only permitted as between the disputed paper and one already in the case and relevant to it.[1] See FORGERY; SUBSCRIBE.

Under hand and seal, or witness my hand, etc. Said of an instrument of writing, and refers, specifically, to the name or signature thereto. See SEAL, 1.

4. Condition or attitude before the law; as, in the expression —

Clean hands. Upright before the law; free from fault; in a position to ask the intervention of a court of equity.

Hand down. To decide, declare, announce.

Hand down an opinion. When a member of a court of errors and appeals has written an opinion in a case and delivered it to the clerk for transmission to the court whose decision has been under review, the opinion is said to be "handed down."

HANGING. The judgment in a capital case is, that the prisoner "be hanged by the neck till dead."[2]

Hanged is preferred to *hung*, as the past participle.

Hangman. One who executes a prisoner condemned to death by suspension by the neck; also, he who holds the office of public executioner. See DEATH, Penalty.

HAPPEN. See CONTINGENCY; OCCUR.

HAPPINESS. The foundation of ethics or natural law is "that every man should pursue his own true and substantial happiness."[1]

But as *utility* contradicts the common sense and feeling of mankind, utility is not the standard of right and wrong.[2]

The object of all government is to promote the happiness and prosperity of the community by which it is established.[3]

Happiness is an inalienable right. In its pursuit all avocations, honors, positions, are alike open to every one.[4]

The right of men to pursue their happiness means the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give them their highest enjoyment.[5]

The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence. This right is a large ingredient in the civil liberty (*q. v.*) of the citizen. No legislature may deny the right to all but a few favored individuals, by investing the latter with a monopoly.[6] See PRIVILEGE, 2.

HARBOR. 1, *v.* To receive and conceal clandestinely; to secrete, so that another who has the right of custody shall be deprived thereof: as, to harbor a wife, child, apprentice, fugitive slave.[7]

2, *n.* A haven or port. See COMMERCE; LADING; PORT; WHARF.

HARD. See HARDSHIP; LABOR, 1.

HARDPAN. See EARTH.

HARDSHIP. Refers to an argument why a thing should or should not be allowed because of the severity of the law as applied to the particular case.

Where a statute is clear and imperative, of no avail.[8]

Settled principles cannot, with safety to the public, be disregarded to remedy the hardship of a special case.[9]

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[1] Fee *v.* Taylor, 83 Ky. 262-63 (1885), Holt, J. See also Rose *v.* First Nat. Bank of Springfield, 91 Mo. 401-3 (1886), cases; Bell *v.* Brewster, 44 Ohio St. 696, 698 (1887), cases; Smyth *v.* Caswell, 67 Tex. 573 (1887); as to evidence of identity, 22 Cent. Law J. 316 (1886), cases.

[2] 4 Bl. Com. 403.

[1] 1 Bl. Com. 41.

[2] 1 Shars. Bl. Com. 41.

[3] Charles River Bridge *v.* Warren Bridge, 11 Pet. 547 (1837), Taney, C. J.

[4] Cummings *v.* Missouri, 4 Wall. 321 (1866), Field, J.

[5] Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 757 (1884), Field, J.

[6] Butchers' Union Co., &c., *supra*, 111 U. S. 762 Bradley, Harlan, Woods, JJ.

[7] See Driskill *v.* Parrish, 3 McLean, 643 (1847); Jones *v.* Van Zandt, 5 How. 227 (1847); Van Metre *v.* Mitchell, 2 Wall. Jr. 317 (1853); 24 Ga. 71; 26 *id.* 593; 5 N. H. 428, 10 *id.* 247; 1 Abb. Pr. 259; 2 N. Car. Law R. 249.

[8] The Cherokee Tobacco, 11 Wall. 620 (1870).

[9] Buchanan *v.* Litchfield, 102 U. S. 293 (1880); 25. 404.

The certainty of the law is of more importance than individual convenience. Inconvenience and hardship are considerations for the legislature.[1]

See POLICY, 1, Public; POSSIBILITY.

HARDWARE. See CUTLERY.

HARVEST. Referring to a season of the year, the time when crops of grain and grass are gathered; does not apply to second crops cut out of harvest time.[2] See CROP; EMBLEMENTS.

HAUL. See CARRY, 1.

HAVE. See MAY, May have.

"To have and to hold," in a deed, defines the extent of ownership in the matter granted.

Rejected, if repugnant to the rest of the deed.[3] See further HABERE, Habendum.

HAWKER. The primary idea of a "hawker and peddler" is that of an itinerant or traveling trader, who carries goods about for sale, and actually sells them, in contradistinction to a trader who sells goods in a fixed place of business. Superadded to this (though perhaps not essential), by a "hawker" is generally understood one who not only carries goods for sale, but who seeks for purchasers, either by *outcry* or by attracting attention to them, as goods for sale, by an actual exhibition or exposure of them, by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish.[4]

A "hawker and peddler" is an itinerant trader, who goes from place to place, or from house to house, carrying for sale and exposing to sale the goods, wares or merchandise which he carries.[5]

He generally deals in small and cheap articles, such as he can conveniently carry in a cart or on his person. He may be required to take out a license.[6]

Hawking. Embraces the business of one who sells, or offers goods for sale, on the streets by outcry, or by attracting the attention of persons by exposing his goods in a public place, or by placards, labels, or signals.[6]

HAZARD.[1] Danger, peril, risk, but not necessarily the greatest degree.[2]

Hazardous. Involving danger; accompanied with risk; perilous: as, a hazardous contract.

"Hazardous," "extra hazardous," "specially hazardous," and "not hazardous," have distinct meanings in the business of fire insurance. What goods are included under any one designation may not be so well known as to dispense with proof.[3] See INSURANCE; RISK.

Games of hazard. See GAME, 2.

HEAD. 1. He who provides for a family, *q. v.*

2. The responsible person; the chief; the principal: as, the head of a department of government, *q. v.*

3. Compare CAPUT; POLL.

Headnote. A statement of the points decided in a case, and preceding the printed report thereof. See SYLLABUS.

HEALTH. Exemption from disease; freedom from sickness or pain; exemption from prevailing or unusual disease or contagion.

A person is "healthy" who is free from disease or bodily ailment, or that state of the system peculiarly susceptible or liable to disease or bodily ailment.[4]

The degree of health ordinarily enjoyed by men in health, and the physical ability which men of sound bodies ordinarily possess, places one in the class of the "healthy and able-bodied," within the meaning of poor-laws, although there may be casual or temporary illness, or bodily unsoundness.[5]

"Sound health," as used in contracts for life insurance, does not mean absolute freedom from bodily infirmity or tendency to disease.[6] See INTEMPERATE.

Public health. The wholesome sanitary condition of the community at large; the exemption of a municipality or region from any prevailing and unusual disease or mortality; general health; health of the people.

Laws to secure the general health of the people at large are called "public-health laws;" and the officers charged with administering them, the "public-health board," or "public-health officers," or, briefly, the "health-board" or "health-officers."

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[1] Silliman *v.* United States, 101 U. S. 471 (1879); Stewart *v.* Platt, *ib.* 738 (1879); 3 How. 61; 21 Wall. 178; 102 Ill. 221.

[2] Wendall *v.* Osborne, 63 Iowa, 102, 103 (1884), Beck, J.

[3] Jamaica Pond Aqueduct Corporation *v.* Chandler, 9 Allen, 168 (1864), Bigelow, C. J.

[4] [Commonwealth *v.* Ober, 12 Cush. 495 (1853), Shaw, Chief Justice.

[5] Commonwealth *v.* Farnum, 114 Mass. 270 (1873), Endicott, J.; Morrill *v.* State, 38 Wis. 437 (1875)

[6] Graffty *v.* Rushville, 107 Ind. 506 (1886), Mitchell, J.

[1] F. *hasard*, accident; unfortunate throw of dice: *sar*, a die.

[2] Butterfoss *v.* State, 40 N. J. E. 330 (1885).

[3] See Pindar *v.* Continental Fire Ins. Co., 38 N. Y. 364 (1868).

[4] Bell *v.* Jeffreys, 13 Ired. L. 357 (1852), Pearson, J.

[5] Starksboro *v.* Hinesburgh, 15 Vt. 209 (1843), Royce, Judge.

[6] Morrison *v.* Wisconsin Odd Fellows' Mut. Life Ins. Co., 59 Wis. 170 (1884), Lyon, J. See Moulor *v.* American Life Ins. Co., 111 U. S. 335 (1884); May, Ins. § 295, cases.

Bill of health. A certificate given by the authorities of the port from which a vessel clears, showing the state of the public health at the port.

Clean bill of health. A certificate that no infectious disease exists; opposed to a *touched* or *suspected* bill, or a bill actually *foul*.

Board of health. A board of officials specially charged with the preservation of the general health of the people at large.

Their jurisdiction is, ordinarily, a municipality, or a State.

National Board of Health. Established by act of Congress of March 3, 1879, ch. 202, § 1 (20 St. L. 484). Consists of seven members appointed by the President, and four members detailed from the departments. Their duties are to obtain information upon all matters affecting the public health, to advise the heads of departments and State executives, to make necessary investigations at any place in the United States, or at foreign ports, and to make rules guarding against the introduction of contagious diseases into the country and their spread from State to State.[1]

The preservation of the public health is one of the chief purposes of local government. Hence, municipal corporations are liberally endowed with power to prevent and abate nuisances. Public policy requires that health-officers be not disturbed in the exercise of their powers, unless clearly transcending their authority.[2]

All sanitary cordons and preventive regulations come under the right of preventing more serious injuries by stifling the sources of evil. In doing this, health-officers must not interfere with the natural rights of individuals.[3]

Power in boards of health to abate nuisances and the causes of them, and to enforce sanitary regulations, are very great. The courts have excused an excessive exercise of power in cases where there was great peril to the public health. But an exercise which is clearly unlawful, and has no great public necessity to excuse it, will be restrained, however praiseworthy the motive. The people "shall be secure in their persons and houses from unreasonable searches and seizures."[4]

By statute of 1 James I (1603), c. 31, a person infected with the plague, or dwelling in an infected house, could be compelled to keep his house. If he went into company, he could be punished by whipping, be bound to good behavior, or be adjudged guilty of felony. By 26 Geo. II (1753), c. 26, quarantine of ships from infected countries was regulated.[1]

In England the public health is secured by various statutes, principally by the Public Health Act, 11 and 12 Vict. (1848), c. 63, the Local Government Acts of 1858, and amendments thereto. These statutes give large powers to the local authorities for removing nuisances, regulating burials, checking the sale of injurious food and drink, and otherwise preventing disease.

The preservation of health is an absolute right of personal security.[2]

Injuries to a man's health occur when, by any unwholesome practices of another, a man sustains any apparent damage in his vigor or constitution: as, by the sale of bad provisions, by the exercise of a noisome trade, or by the neglect or unskillful management of his physician, surgeon, or apothecary. For such, a special action of trespass on the case for damages lies.[3]

An act (supplementary) of New Jersey, approved March 12, 1880, makes animals with contagious diseases common nuisances; another act (also supplementary), approved March 12, 1884, makes horses affected with glanders common nuisances; and both acts authorize destruction of the animals under prescribed conditions. *Held*, that the acts are within the police powers of the State; that they are not within the prohibition of the Fourteenth Amendment, because, although they authorize the abatement of nuisances in advance of a judicial adjudication of the fact of nuisance, yet they do not make the determination as to that fact conclusive, and only permit acts, in abating a particular nuisance, to be justified by proof of its actual existence; thirdly, that the conditions under which the officials may act, by the statute of 1880, are mere limitations upon their power for the benefit of the owners of animals, and their adjudication that such conditions exist will not protect them, unless the existence of the common nuisance is shown.[4]

See ADULTERATE; DISEASE; POLICE, 2; QUARANTINE, 2; SOUND, 2 (2).

HEARING. 1. The trial of a suit in equity. 2. The session of any court, or of an adjunct thereof, for considering the proofs in a cause. 3. An examination of the testimony offered against a person charged with crime.

As applied to equity cases, "hearing" means the same as "trial" at law.[5]

Final hearing. The trial of an equity case upon its merits; as distinguished from

[1] R. S., 1 Sup. p. 480.

[2] Hart *v.* Mayor of Albany, 3 Paige, 218 (1832); 1 Dillon, Munic. Corp. §§ 369, 374.

[3] Spalding *v.* Preston, 21 Vt. 13-14 (1848).

[4] Eddy *v.* Board of Health, 10 Phila. 94 (1873), cases, Peirce, J. See also Butterfoss *v.* State, 40 N. J. E. 325 (1885).

[1] 4 Bl. Com. 161; King *v.* Vantandillo, 4 M. & S. 73 (1815); King *v.* Burnett, *ib.* 272 (1815).

[2] 1 Bl. Com. 129, 131.

[3] 3 Bl. Com. 122.

[4] Newark & South Orange Horse Ry. Co. *v.* Hunt, Sup. Ct. N. J. (Feb. 27, 1888), cases, Magie, J. Same case, 37 Alb. Law J. 356.

[5] Vannevar *v.* Bryant, 21 Wall. 43 (1874); Jones *v.* Foster, 61 Wis. 29 (1884); 19 Wall. 225; 3 Dill. 463; 40 Ind. 179.

the hearing of any preliminary question arising in the cause, termed "interlocutory."[1]

Further hearing. An adjourned or continued hearing.

Re-hearing. A new hearing in a matter once decided; consideration under a re-examination or re-argument.[2]

A petition for the re-hearing of a case may be required to be made at the term when the cause was first decided.

See NOTICE, 1; JURISDICTION, 2; PROCESS, 1, Due; REMAND, 1; TERM, 4; TRIAL; WAIVER. Compare AUDIRE; OYER; PRESENCE.

HEARSAY. What is heard as rumored; testimony not a matter of personal knowledge with the witness.

That kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person.[3]

In the largest sense, interchangeable with non-original evidence. This is generally inadmissible, because of the depreciation of truth from passage through fallible media; because of non-discrimination by juries between primary and secondary evidence; and because it is irresponsible in its first exhibition.[4]

Because it wants the sanction of an oath, and affords no opportunity for cross-examination, is excluded.[5]

Supposes that better testimony may be had; is intrinsically too weak to satisfy the mind; under its color fraud might be practiced.[6]

Admissible in the following cases: 1. As to a *witness* — what was said in a former trial by a person now dead, out of the jurisdiction, subsequently incompetent, insane, or sick.[7]

2. As to *depositions in perpetuam*. But the testimony must be ephemeral; taken conformably to the rules of evidence; be deposited in court; and the cause be not delayed.[8]

3. As to *matters of general interest*, and *ancient possession*. But the witnesses must be disinterested. Includes declarations of deceased persons as to boundaries.[9] Ancient documents, in proper custody, prove ancient possessions.[10]

4. As to *pedigree* and *relationship:* birth, marriage, and death. Common family tradition is receivable; also, statements of deceased relatives made before a dispute arose; also, family records, epitaphs, armorial bearings, and the like.[1] See PEDIGREE.

5. As to *declarations against interest by deceased persons*. This means against pecuniary or proprietary interest; not as to incidental matters, and although better evidence may be had. But must be brought home to an imputed declarant.[2]

6. As to *business entries*. By a deceased or absent partner or clerk, and made in the regular course of business, admitted. So of notes by surveyor, counsel, bank messenger, notaries, and others. But the entry must have been made contemporaneously with the transaction, confined to the matter it was the person's duty to record, and, in its nature, original.[3] See further ENTRY, II, 1.

7. As to *general reputation* when material.[4] See CHARACTER; REPUTATION.

8. To *refresh memory*, as to extrinsic incidents of testimony; as, dates, places, etc.[5] See REFRESH.

9. As to *res gestæ*. Includes declarations coincident with business acts, and torts; not, if the acts are in themselves inadmissible, or there exists opportunity for concoction.[6] See RES, Gestæ.

10. As to declarations concerning a party's own *health* and state of *mind*. These chiefly regard statements as to injuries and motives.[7]

See further DECLARATION, 2; EVIDENCE; HISTORIES.

HEARSE. See WAGON.

HEATHEN. See OATH; RELIGION.

HEAVY. As applied to different articles, is a comparative term.

Whether a bale of cotton is a "heavy article" or "an article of measurement," within the meaning of a railroad charter, is a question of fact, to be determined by a jury, and regulated by proof of custom.[8]

HEIFER. A female calf of the bovine species, from the end of the first year until she has had a calf.[9]

"Heifer" and "steer" describe animals of the bovine species advanced to an age beyond that of a calf. A more definite description is "yearling heifer," and "yearling steer."[10] See Cow.

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[1] Akerly *v.* Vilas, 24 Wis. 171 (1869), Paine, J.; Jones *v.* Foster, 61 *id.* 29 (1884); Galpin *v.* Critchlow, 112 Mass. 343 (1873).

[2] [3 Bl. Com. 453.

[3] 1 Greenl Ev. § 99: [1 Phill. Ev. 169.

[4] 1 Whart. Ev. §§ 170–75, cases.

[5] 1 Greenl. Ev. §§ 163, 98, 124.

[6] Mima Queen *v.* Hepburn, 7 Cranch, 295 (1813), Marshall, C. J.; Hopt *v.* Utah, 110 U. S. 581 (1884); 1 Wheat. 8; 8 Wall. 409.

[7] 1 Whart. Ev. §§ 177–80, cases.

[8] 1 Whart. Ev. §§ 181–84, cases.

[9] See Clement *v.* Packer, 125 U. S. 321 (1888), cases.

[10] 1 Whart. Ev. §§ 185–200, cases; 1 Greenl. Ev. §§ 127–40.

[1] 1 Whart. Ev. §§ 201–25, cases; 1 Greenl. Ev. §§ 103–7, cases.

[2] 1 Whart. Ev. §§ 226–37, cases.

[3] 1 Whart. Ev. §§ 238–51, cases; 1 Greenl. Ev. §§ 115–23, cases.

[4] 1 Whart. Ev. §§ 252–56, cases.

[5] 1 Whart. Ev. § 257, cases.

[6] 1 Whart. Ev. §§ 258–67, cases; 1 Greenl. Ev. §§ 108, 112–14, cases.

[7] 1 Whart. Ev. §§ 268–69, cases; 1 Greenl. Ev. §§ 102, 110, cases.

[8] Elder *v.* Charlotte, &c. R. Co., 13 S. C. 281 (1879); Bonham *v.* Same, *ib.* 276 (1879).

[9] Freeman *v.* Carpenter, 10 Vt. 435 (1838).

[10] Milligan *v.* Jefferson County, 2 Monta. 546 (1877). See also 7 Vt. 465; 40 *id.* 641; 11 Gray, 211; 8 Allen, 563; 16 Kan. 294.

HEIR. See HÆRES. 1. At common law, he upon whom the law casts the estate immediately on the death of the ancestor.[1] Correlative, *ancestor*, q. v.

Uncontrolled by the context, the person appointed by law to succeed to the real estate in case of intestacy.[2]

Simply one who succeeds to the estate of a deceased person.[3]

Whoever succeeds to property of an intestate.[4]

In a will, unexplained and uncontrolled by the context, construed according to its strict technical import,— the person who, by the statute of descent, would succeed to the real estate in case of intestacy. A term of description of a class of persons who, in the prescribed contingency, take the estate.[5]

He upon whom the law casts an estate of inheritance immediately on the death of the owner.[6]

The primary meaning is, the person related to one by blood, who would take the latter's real estate if he died intestate. The proper primary meaning of "next of kin" is, the person related by blood, who takes personal estate of one who dies intestate.

In New York "heirs," applied to the successors of personalty, means next of kin, and does not therefore include a widow or a husband of an intestate. In a few cases in other States "heirs," applied to personalty, has been held to mean those who by the statute of distributions take the personalty in case of intestacy. There is much confusion in the English cases upon the subject.[7]

No rule can be stated under which all the decisions can be classified. In general, where there is a gift to a person or his heirs, the word "heirs" denotes succession or substitution; the gift being primarily to the person named, or, if he is dead, then to his heirs in his place. In such cases, it has often been held that the word should be construed to mean the persons who would legally succeed to the property according to its nature or quality; and that the heirs at law would take the realty, and the next of kin or persons entitled to inherit personalty would take the personal estate. But where the gift is directly to the heirs of a person, as a substantive gift to them of something which their ancestor was in no event to take, this element of succession or substitution is wanting, and the heirs take as the persons designated in the instrument to take in their own right; and in such cases the courts have usually held that the word "heirs" must receive its common-law meaning — the persons entitled to succeed to real estate in a case of intestacy.[1]

"Heir" is a word of law; "son," "child," and the like, are words of nature.

"Heirs" may be used in deeds,[2] as it is often used in wills, for "children" or "issue,"[3] or grandchildren.[4]

May mean "devisee," "legatee," or "distributee."[5]

May be used where there is no subject to be inherited.[6]

A "widow" is an heir in a special, limited sense only.[7]

A "husband" is neither the heir nor next of kin of his wife, in any technical sense.[8]

In a devise, "heir" is a word of limitation.[9] See SHELLEY'S CASE.

Collateral heir. A relative not of the direct line of descent, but of a collateral line.

Heir apparent. He whose right of inheriting is indefeasible, provided he outlives the ancestor.[10]

In this sense, "heir" is in popular use.

Heir at law; heir at common law, or heir general. He upon whom the law casts the realty of an intestate.[11]

Heir of the body or natural heir. An heir begotten of the body; a lineal descendant.[12]

[1] 2 Bl. Com. 201; Bailey v. Bailey, 25 Mich. 188 (1872).

[2] Gauch v. St. Louis M. L. Ins. Co., 88 Ill. 256 (1878), Schoefield, C. J.; Fabens v. Fabens, 141 Mass. 399 (1886).

[3] McKinney v. Stewart, 3 Kan. 392 (1869), Valentine, J.; Cushman v. Horton, 59 N. Y. 151-52 (1874); Fountain County Coal, &c. Co. v. Beckleheimer, 102 Ind. 76 (1884).

[4] [Eckford v. Knox, 67 Tex. 203 (1886), Willie, C. J.

[5] Clark v. Cordis, 4 Allen, 480 (1862), Bigelow, C. J. See also Lombard v. Boyden, 5 *id.* 254 (1862); Loring v. Thorndike, *ib.* 269 (1862); Rand v. Sanger, 115 Mass. 128 (1874); Minot v. Harris, 132 *id.* 530-31 (1882), cases; Rand v. Butler, 48 Conn. 298 (1880); 101 Ind. 194; 65 Iowa, 80; 18 B. Mon. 829; 40 Miss. 758; 15 N. J. L. 404.

[6] Lavery v. Egan, 143 Mass. 392 (1887), Field, J.

[7] [Pillman v. Davis, 95 N. Y. 24-29 (1884), cases, Earl, J.

[1] Fabens v. Fabens, 141 Mass. 399-400 (1886), cases, C. Allen, J.

[2] Heard v. Horton, 1 Denio, 167-70 (1845), cases; See v. Derr, 57 Mich. 373 (1885).

[3] Haly v. Boston, 108 Mass. 579 (1871); Taggart v. Murray, 53 N. Y. 228 (1873); Jones v. Lloyd, 33 Ohio St. 578-80 (1878), cases; Eldridge v. Eldridge, 41 N. J. E. 91 (1886), cases; 42 *id.* 559; Myrick v. Heard, 31 F. R. 244 (1887).

[4] Woodruff v. Pleasants, 81 Va. 40 (1885).

[5] Sweet v. Dutton, 109 Mass. 591 (1872); Cushman v. Horton, 59 N. Y. 151 (1874); Elsey v. Odd Fellows Relief Society, 142 Mass. 226 (1886).

[6] Aspden's Estate, 2 Wall. Jr. 445 (1853).

[7] Unfried v. Heberer, 63 Ind. 72 (1878); Rusing v. Rusing, 25 *id.* 63 (1865); Eisman v. Poindexter, 52 *id.* 401 (1876); Clark v. Scott, 67 Pa. 452-53 (1871), cases.

[8] Ivins's Appeal, 106 Pa. 184 (1884).

[9] Daly v. James, 8 Wheat. 534 (1823); 99 Ind. 190.

[10] 2 Bl. Com. 208; 8 Bush, 115; 51 Barb. 137; 22 Me. 257.

[11] Aspden's Estate, 2 Wall. Jr. 433-38 (1853).

[12] Smith v. Pendell, 19 Conn. 111 (1848); Williams v. Allen, 17 Ga. 84 (1855); Roberts v. Ogbourne, 37 Ala. 178 (1861); Sewall v. Roberts, 115 Mass. 276-77 (1874).

Heir presumptive. He who, if the ancestor should die immediately, would, in the present circumstances of things, be his heir; but whose right of inheritance may be defeated by the contingency of some nearer heir being born.[1]

Heiress. A female heir; but, in law-language, "heir" includes both sexes.

At common law, "heir" is a word of inheritance, necessary to the *grant* of an estate larger than a life interest.[2] This nicety is a relic of feudal strictness.[3] Unless changed by statute, the rule requiring the use of the word is imperative: no synonym will supply its place; nor will any word of perpetuity.[4]

To bind his heirs, an *obligor* must use the word "heir" or its equivalent; not so, to bind an administrator or an executor.[5]

See ADOPT, 3; DESCENT; HEIRLOOM; HEREDITAMENT; INHERIT; PURCHASE, 2; RIGHT, 1.

2. In civil law, he who is called to the "succession" (*q. v.*), whether by the act of the deceased or by operation of law.

The universal successor is the "testamentary heir;" and, in cases of intestacy, the next of kin by blood is the "heir by intestacy" or "heir-at-law." The former corresponds to the executor, the latter to the administrator, of the common law. The "heir" administers both the real and the personal estate.[6] See HEIRS.

Heirloom. Such personalty as, contrary to the nature of chattels, goes by special custom to the heir along with the inheritance, and not to the executor of the last proprietor.[7]

"Loom" is in Saxon *geloma, leoma:* limb, member; so that "heirloom" is a limb or member of the inheritance. Heirlooms are generally such things as cannot be taken away without damaging or dismembering the freehold: as, charters, deeds, and other evidences of title to land, with the chests containing them; chimney-pieces, pumps, old fixed or dormant tables, benches and the like; also, the ancient jewels of the crown. Of the same nature is a monument or tombstone, a pew in a church, and like articles which, by special custom, cannot be devised away from the heir.[7]

Or, again, "loom" meant, at first, an implement for weaving, and, later, any household article—a table, cupboard, bedstead, wainscot, and the like. These came to be called "heir-looms" because, by special custom, they went to the heir of the owner at his decease, with the house in which they were used.[1]

Heirlooms are properly portraits, coats of arms, paintings, and such like, of the former owners of an inheritance.[2]

A bill in equity will lie for the specific delivery of an heirloom to the rightful owner.[3]

Heirlooms do not seem to be recognized by the law of this country.[4]

HELD. See HOLD, 1.

HELP. See AID, 1.

In an action by A to recover money promised him if he would "help" B to effect the sale of land, it was admitted that A had rendered the required services, and the parties in their pleadings construed the agreement to be that A should use his best effort to bring about the sale. *Held*, that parol evidence was not admissible to explain the word.[5]

HENCE. Compare SO.

HEREAFTER. Will of itself make a statute prospective, and save pending suits.[6]

HEREBY. See GRANT, 2.

HEREDITAMENT. Anything that may be inherited, be it corporeal or incorporeal, real, personal, or mixed.[7]

The word is almost as comprehensive as property.[8]

Corporeal hereditament. Such thing as affects the senses, as may be seen and handled. **Incorporeal hereditament.** Is not the object of sensation, can neither be seen nor handled; is a creature of the mind, exists only in contemplation.[9] See CORPOREAL.

Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of "land."[9]

An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal), or concerning, annexed to, or exercisable within the same. Its effects and profits may be objects of the senses: as, an annuity to a man and his heirs, rents, commons, ways, offices, franchises; and, formerly, advowsons, tithes, dignities, and corodies or pensions,[10] *qq. v.*

The right to a seat in a board of exchange is an incorporeal hereditament.[11]

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[1] 2 Bl. Com. 208.

[2] St. Clair County Turnpike Co. *v.* Illinois, 96 U. S. 68 (1877).

[3] 2 Bl. Com. 107.

[4] 1 Washb. R. P. 56.

[5] Shep. Touch. 369; Coke, Litt. 209, *a*.

See also 44 Cal. 253; 40 Ga. 562; 45 Me. 250; 63 *id.* 379; 45 Pa. 201; 5 *id.* 461; 69 *id.* 190; 10 R. I. 509; 9 Ired. L. 370.

[6] 1 Brown, Civ. Law, 344; Story, Confl. Laws, § 506.

[7] [2 Bl. Com. 427–29, 17.

[1] Cowell; Coke, Litt. 18 *b;* Shep. Touch. 432.

[2] Brown's Law Dict.

[3] Pusey *v.* Pusey, 1 White & T., L. C. *1109–11; 1 Story, Eq. § 709.

[4] 1 Washb. R. P., 4 ed., 20. See Moseley's Estate, 5 W. N. C. 102 (1877).

[5] Hooker *v.* Hyde, 61 Wis. 209 (1884).

[6] State *v.* Hicks, 48 Ark. 520 (1886).

[7] 1 Coke, Inst. 6; 5 Conn. 518; 13 N. Y. 159; 26 Barb 338; 5 Wend. 453.

[8] 3 Kent, 401.

[9] [2 Bl. Com. 17–18; 28 Barb. 340.

[10] 2 Bl. Com. 20–21.

[11] Hyde *v.* Woods, 94 U. S. 524 (1876).

In principle there is no difference, as to the acquisition of rights, between corporeal and incorporeal objects. But, with regard to possession alone, as affecting title, a difference is introduced by reason of the statute of limitations. A grant of land, conferring an entire title, is not presumed from mere possession short of the statutory period. The statute makes all the provisions deemed necessary for quieting possessions of a corporeal nature, thereby removing these cases from the operation of the common law. Conclusive presumption of title to an incorporeal hereditament is afforded by twenty years' adverse, exclusive, undisturbed possession.[1]

See DEMESNE, Seized, etc.; DISTURBANCE; EJECTMENT; GRANT, 1.

HEREDITARY. 1. Subject to inheritance, *q. v.*

2. Transmitted to descendants: as, hereditary insanity, *q. v.*

HEREIN. May refer to the section, the chapter, or the entire enactment in which it is used.[2]

HEREINBEFORE. Compare ANTE.

In the clause, in a will, "I give . . . to the persons, societies and corporations to whom I have hereinbefore made bequests . . . " means, as the same *now* are or exist.[3]

HERESY. See RELIGION.

HERETOFORE. In time past.[4] See JURY, Trial by.

HERIOT.[5] A render of the best beast or other good (as the custom may be) to the lord on the death of the tenant of a copyhold estate.[6]

Also called "heriot-custom." "Heriot-service" was, substantially, a rent due upon a special reservation in a grant or lease of lands.[7]

HERITABLE. See INHERITANCE.

HERMENEUTICS. "Legal hermeneutics" are the rules, as a system, for discovering the meaning of written language.[8]

HIDALGO. See PUEBLO.

HIDE. See ABSCOND; CONCEAL.

HIDES. See FUR.

HIGH. Elevated above another; superior; supreme.

In some connections, the use is pleonastic.

1. Having authority to preserve the peace within a district larger than some other's: opposed to *petty:* as, a high constable, *q. v.*

2. Supreme; above others: as, high court.

3. The more heinous: as, high crimes and misdemeanors, *q. v.*

4. Uninclosed; below low water-mark: as, the high sea, *q. v.* See also WATER-MARK.

5. Charged with the largest executive functions: as, high sheriff, *q. v.*

6. Directed against the government: as, high treason; opposed to *petty* treason. See TREASON.

7. Belonging to, or for use by, the public at large: as, in highway. See WAY.

Highest. 1. Superior to any other: as, the highest bid, *q. v.*

2. The most scrupulous: as, the highest good faith, *q. v.*

HILARY. See TERM, 4.

HINDER. To "hinder and delay" creditors is to do something which is an attempt to defraud them; to put some obstacle in the path, or interpose some time, unjustifiably, before the creditor can realize what is owed him out of the debtor's property.[1]

The hindering and delaying which vitiates an assignment is such as is sought through covin or malice on the part of the debtor for his benefit. The fraudulent intent is a question of fact.[2] See CONVEYANCE, Fraudulent; DELAY.

HIRING. A contract for the use of personalty, or for services. A species of bailment for a price or recompense.

1. As to things. A contract whereby the possession and a transient property is transferred for a particular time or use, on condition to restore the goods as soon as the time is expired or the use performed, together with the price, expressly agreed upon or left to be implied by law according to the value of the service.[3]

The *hirer* acquires a temporary property in the thing, accompanied with an implied condition to use it with moderation; while the owner or *lender* retains a reversionary interest in the thing, and acquires a new property in the price or reward. Of such is the loan of money on interest.[4]

2. As to services. The contracts classed under this head are contracts for work, for

[1] Cornett *v.* Rhudy, 80 Va. 712-14 (1885), cases.

[2] See State *ex rel.* Smiley *v.* Glenn, 7 Heisk. 485, 475, 480 (1872).

[3] Wetmore *v.* Parker, 52 N. Y. 464 (1873).

[4] Andrews *v.* Thayer, 40 Conn. 157 (1873); 12 N. Y. 427, 458; 1 N. J. L. 272.

[5] A. S. *heregeatu*, military apparel.

[6] 2 Bl. Com. 97.

[7] 2 Bl. Com. 421-25.

[8] See Lieber, Leg. & Pol. Herm.

[1] Burnham *v.* Brennan, 42 N. Y. Super. 68 (1877), Curtis, C. J.: 74 N. Y. 597 (1878).

[2] Burr *v.* Clement, 9 Col. 8-10 (1885), cases.

[3] [2 Bl. Com. 453. See 2 Kent, 456; Story. Bailm. § 359; 24 Am. Law Reg. 238-43 (1885), cases.

the safe-keeping of personalty, and for the carriage of persons or personalty.

"Storage" and "carriage" are in more common use than any inflections of hire, to designate a contract for the custody of ordinary merchandise, or for the transportation of persons or property.[1]

The idea of "hiring" may be involved in "employment," but its application is not restricted to any particular mode of use.[2]

See BAILMENT; DEPOSIT, 1; LOCATIO.

HISTORIES. See BOOK.

Historical facts, of general and public notoriety, may be proved by reputation; and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts, which do not presuppose better evidence in existence; and where, from the nature of the transaction, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. The work of a living author who is within reach of process is not of this nature. He may be called as a witness, and examined as to the sources and accuracy of his information. If the facts are of recent date, and within the knowledge of many persons living, from whom he derived his materials, his book is not the best evidence.[3]

HITHERTO. Restrains the meaning of a phrase to a period of time then elapsed.[4]

HOC. See under H.

HODGE-PODGE. See HOTCHPOT.

HOE. See WEAPON, Deadly.

HOG. Hogs are "cattle," within the meaning of a guaranty of drafts against shipments of "cattle."[5]

And also within a statute requiring fencing to protect lands from "straying cattle."[6]

Hogs are "swine;" and the word "hog" will also include a "sow."[7]

In a statute punishing larceny, the live animal or its carcass may be meant;[8] and the word will describe a pig four or five months old.[9]

See ANIMAL; CATTLE.

HOLD. 1. To decide, adjudge, decree.

Whence *held*, decided, ruled, adjudged: as, the court "held" the evidence admissible, or the defendant not liable. In head-notes to reports of cases, follows the statement of the facts and introduces the decision of the court thereon.

2. To deduce as a rule or principle; to maintain on the strength of decided cases: as, the authorities "hold" so and so.

3. To assert, declare, maintain; to occupy the position of propounding as a fact or as law: as, the plaintiff "holds" the affirmative of the issue. See BURDEN, Of proof.

4. To cause to be bound or obligated; to confine or restrain: as, "to hold him to his contract," "the obligor is held and firmly bound," "persons held to service;" "hold" and "held to bail," or "for court," or "for trial." Compare BIND.

5. To sit for a specified purpose; to sit to administer justice: as, to "hold court," "hold pleas;" to "hold an election;" to "hold a hearing" or "session."

6. To possess by virtue of a lawful title: as, "hold a note" or "bond;" "hold lands" or "property," "to have and to hold" described premises; "hold office;" "hold" a fund, or lien, a policy of insurance, a share, stakes, stocks, etc. Compare TENURE.

Whence also free*hold*, lease*hold*.

"Holding," relating to ownership in property, embraces two ideas: actual possession of some subject of property, and being invested with the legal title. It may be applied to anything the subject of property, in law or in equity.[1]

Under an act forbidding a foreign corporation to "acquire and hold" land, a conveyance is not necessarily void. The holding may be subject to the right of escheat.[2]

Holder. One who has possession of anything. One who possesses by virtue of a lawful title:

As, a bondholder, fundholder, lienholder, officeholder, property holder, policy-holder, shareholder, stakeholder, stockholder, *qq. v.*

Holder in good faith; holder for value; innocent holder. He is a holder of negotiable paper or bonds for value, who pays real, in contradistinction from apparent, value, without notice of any fraud or illegality affecting the instrument.[3]

[1] [1 Abbott's Law Dict. 565.

[2] Hightower *v.* State, 73 Ga. 484 (1884).

[3] Morris *v.* Lessee of Harmer's Heirs, 7 Pet. *558 (1833), Story, J. See 1 Greenl. Ev. § 497; 1 Whart. Ev. §§ 664, 838.

[4] Mason *v.* Jones, 13 Barb. 479 (1852).

[5] First Nat. Bank of Decatur *v.* Home Savings Bank of St. Louis, 21 Wall. 299 (1874).

[6] Child *v.* Hearn, L. R., 9 Ex. 181 (1874).

[7] Rivers *v.* State, 10 Tex. Ap. 179 (1881).

[8] Whitson *v.* Culbertson, 7 Ind. 195 (1855); Hunt *v.* State, 55 Ala. 140 (1876); Reed *v.* State, 16 Fla. 564 (1878).

[9] Lavender *v.* State, 60 Ala. 60 (1877).

[1] Witsell *v.* Charleston, 7 S. C. 99 (1875). See also Godfrey *v.* Godfrey, 17 Ind. 9 (1861); Hurst *v.* Hurst, 7 W. Va. 297 (1874); Runyan *v.* Coster, 14 Pet. 120 (1840); 39 N. J. E. 547.

[2] Hickory Farm Oil Co. *v.* Buffalo, &c. R. Co., 32 F. R. 22 (1887); Runyan *v.* Lessee of Coster, 14 Pet. 122 (1840).

[3] Montclair Township *v.* Ramsdell, 107 U. S. 161, 169 (1882), Harlan, J.; Story, Prom. Notes, § 195; Byles, Bills, 117, 119, 124.

If any previous holder of bonds in suit was a *bona fide* holder for value, the plaintiff, without showing that he himself paid value, can avail himself of the position of such previous holder.[1]

See further BEARER; CHECK; FAITH, Good; NEGOTIATE, 2.

Holding over; hold over. (1) Retaining possession of premises after a lease has expired, and without fresh leave from the owner.

Such tenant holds "at sufferance," and his estate is destroyed when the owner makes actual entry, or gives notice to quit. Being once in possession, the law supposes a continuance authorized. The tenant may be required to account for profits made.[2] See DETAINER, 2; ENTRY, I, 1; QUIT, 2.

(2) Continuing to exercise the functions of an office after the end of one's term, and before a successor is qualified.

In many cases statutes, and in others common-law rules, to prevent an interregnum in an office, authorize the incumbent to continue to serve until a successor has been regularly qualified. See VACANCY.

HOLIDAY. A secular day on which the law exempts all persons from the performance of contracts for labor or other personal service, from attendance at court, and from attention to legal proceedings.

Legal or public holidays are appointed by statute law, or are authorized by custom having the force of law. These are New Year's day, Washington's birthday, Decoration day, Independence day, Thanksgiving day, Christmas day; in some States good Friday; general election days; and other days appointed by the President or the governor of the State for thanksgiving, fasting, or other observance.

On these days public business is suspended, and the presentment and protest of paper is excused, as on Sunday. Falling on Sunday, the Monday succeeding is generally observed; paper becoming due on such Monday is payable on the Saturday preceding. Paper due on Decoration day or Good Friday is generally payable on the secular day next previous thereto.[3]

The observance of a holiday binds no man's conscience. It is his privilege to labor or not, as he prefers.[4]

The expression "legal holiday" of itself imports a *dies non juridicus*.[5] See SUNDAY.

HOLOGRAPH.[1] An instrument written entirely in the hand of one person, as, by a grantor, or testator. Spelled also **olograph.** Whence holographic, and olographic.[2]

An olographic will being "one that is entirely written, dated, and signed by the hand of the deceased," a will partly written upon a printed form is not such.[3] Opposed, *dictated* will.

Generally speaking, holograph wills require no attestation.[4]

HOMAGE. See ALLEGIANCE; FEUD.

HOME. While children "remain at home," in a will, may refer to the household of which the testator was head.[5] See HOUSEHOLD.

Where a person takes up his abode, without any present intention to remove therefrom permanently.[6] See further ABODE; DOMICIL; HOUSE; RESIDENCE.

Homestall. In ancient law, a mansion house.[7]

"Stall" and "stead" were Anglo-Saxon for place, seat, fixed spot, station.

Homestead. The home-stall, home-place. The dwelling-house, at which the family resides, with the usual and customary appurtenances, including outbuildings of every kind necessary and convenient for family use, and lands used for the purposes thereof.[8] Whence *homesteader.*

In its popular sense, whatever is used, being either necessary or convenient, as a place of residence for the family, as contradistinguished from a place of business.[9]

Sometimes used as a verb; as, he "homesteaded his pre-emption."[10]

Homestead laws. Constitutional or stat

[1] Montclair Township *v.* Ramsdell, *ante.*

[2] See 2 Bl. Com. 150; 3 *id.* 210; Pickard *v.* Kleis, 56 Mich. 601 (1885).

[3] See Penn. Acts 25 May, 1874, 12 April, 1869, 2 April, 1873; N. Y. Stat. 1873, c. 577.

[4] Richardson *v.* Goddard, 23 How. 43, 41 (1859).

[5] Lampe *v.* Manning, 33 Wis. 676 (1875); 14 Bank. Reg. 868.

[1] Gk. *holo-graphos*, wholly written.

[2] See La. Civ. Code, art. 1581; Code Civ. 970.

[3] Cal. Civ. Code, § 1277: *Re* Estate of Rand, 61 Cal. 468 (1882): 14 Rep. 716; 3 Woods, 77.

[4] See 3 Jarman, Wills (R. & T.), 767, note.

[5] Manning *v.* Woff, 2 Dev. & B., Eq. 12 (N. C. 1838).

[6] Warren *v.* Thomaston, 43 Me. 418 (1857); 3 *id.* 229; 15 *id.* 58; 19 *id.* 293; 35 Vt. 232.

[7] Dickinson *v.* Mayer, 11 Heisk. 521 (1872); 4 Bl. Com. 225.

[8] Gregg *v.* Bostwick, 33 Cal. 227 (1867), Sanderson, J.; Estate of Delaney, 37 *id.* 179 (1869); 4 *id.* 28; 16 *id.* 181. See also 63 Ala. 238; 31 Ark. 465; 48 *id.* 236; 54 Ill. 175; 12 Kan. 257; 77 N. C. 384; 7 N. H. 245; 36 *id.* 166; 46 *id.* 53; 51 *id.* 266; 63 *id.* 428; 6 Tex. 102; 23 *id.* 498; 42 *id.* 37; 28 Vt. 672; 46 *id.* 292; 1 Wash. R. P. 352.

[9] Gregg *v.* Bostwick, 33 Cal. 228, 236-37 (1867); *Re* Crowey, 71 *id.* 303 (1886).

[10] Timber Cases, 11 F. R. 81 (1881).

ntory provisions for the exemption of a certain amount or value of realty, occupied by a person as his homestead, from a forced sale for the payment of his debts. In some States restraints are placed upon alienation by the owner, and in some the property descends to the widow and minor children free from liability for his debts. The estate is like an estate for life.[1]

It is settled: 1. That the object of the homestead law is to protect the family of the owner in the possession and enjoyment of the property. 2. That that construction must be given such laws which will best advance and secure their object. 3. To divest a homestead estate, there must be a literal compliance with the mode of alienation prescribed by statutes.[2]

While a very limited estate in the land, perhaps even a leasehold, may support a claim, some estate is essential.[3]

Where the "joint consent" of a husband and wife is essential to the alienation of a homestead, the better rule is to have it evidenced by their signatures to the same instrument, before the same officer, and in the presence of each other.[4]

The act of May 20, 1862, is the first homestead law of the general government. By it a quantity of land not exceeding 160 acres is given to any person who is the head of a family, or who is twenty-one, and a citizen or intends to become such, on condition of settlement, cultivation, and continuous occupancy as a home for the period of five years.[5] See ABANDON; OWNER.

HOMICIDE.[6] The killing of any human creature.[7]

A generic term, embracing every mode by which the life of one man is taken by the act of another.[8]

Criminal homicide consists in the unlawful taking by one human being of the life of another in such a manner that he dies within a year and a day from the time of the giving of the mortal wound.[1]

If committed with malice, express or implied, it is murder; if without malice, manslaughter. The injury must continue to affect the body of the victim till death. If death ensues from another cause, no murder or manslaughter has been committed. . . The person who unlawfully sets the means of death in motion, whether through an irresponsible instrument or agent, or in the body of the victim, is the guilty cause of the death at the time and place at which his unlawful act produces its fatal result.[2]

Homicidal. Involving or directed toward the killing of a fellow man: as, homicidal intent, or monomania.

"Homicide," as a term, does not necessarily import crime: it includes acts which are crimes. The distinctions denoted by "fratricide," "matricide," "parricide," "patricide," "regicide," "sororicide," are not observed in law. But "prolicide," destroying offspring, "fœticide," killing an unborn child, "infanticide," killing an infant soon after its birth, and "suicide," killing one's self, are employed in senses which involve, more or less, commission of crime.

Killing is justifiable, excusable, or felonious.

Justifiable homicide. When a life is taken in the performance of a duty or the exercise of a right.

This is (1) owing to some unavoidable necessity, without any will, intention, or design, and without any inadvertence or negligence in the party killing, and is, therefore, without blame. Or, it is (2) for the advancement of public justice — by permission: as, where an officer kills a person who resists lawful arrest; where one kills a person charged with felony; killing in dispersing a riot, or by a jailer to prevent an escape. In these cases there must be an apparent necessity. Of this character, also, is killing in war; and so were deaths in trials by battle. To this grade likewise belong killings to prevent forcible or atrocious crimes: as, robbery, murder, burglary, arson; but not mere larceny from the person, nor house-breaking in the day-time. A husband or father may kill for attempted rape [2] — *flagrante crimine*.

Where one in defense of his person, habitation, or property kills another, who manifestly intends and endeavors by violence or surprise to commit a forcible or atrocious felony, such killing is justifiable homicide. In that case, also, the justification must depend upon the circumstances as they appear to the prisoner.[3]

Excusable homicide. When a life is lost by an accident in the lawful doing of a proper act, or is taken to prevent death or grievous injury to another person.

[1] See Barney *v.* Leeds, 51 N. H. 261 (1871); Fink *v.* O'Neil, 106 U. S. 275 (1882); 10 Am. Law Reg. 641-56, 705-17 (1862), cases; 20 *id.* 1-17, 137-50 (1871), cases,— as to the Southern States; Thompson, Homest, &c. § 1; 4 Cal. 26, 33; 33 *id.* 226; 11 Ga. 89; 1 Iowa, 439; 18 Tex. 615; 34 Wis. 657; 61 *id.* 374; 102 U. S. 321; 1 Bouvier, Law Dict. 754.

[2] Howell *v.* McCrie, 36 Kan. 644 (1887), cases, Simpson, Commissioner.

[3] Myrick *v.* Bill, 3 Dak. 293 (1884), cases.

[4] Howell *v.* McCrie, 36 Kan. 645 (1887).

[5] R. S. §§ 2289-2317; Seymour *v.* Sanders, 3 Dill. 441 (1874). Waiving the right, Linkenhoker's Heirs *v.* Detrick, 31 Va. 44, 56 (1885), cases.

[6] F. *homicide*, manslaughter: L. *homicidium;* or, a man-killer: L. *homicida: homo*, a man; *cædere*, to kill.

[7] 4 Bl. Comm. 177.

[8] Commonwealth *v.* Webster, 5 Cush. 303 (1850), Shaw, C. J.

[1] Commonwealth *v.* Macloon, 101 Mass. 6-8 (1869), cases, Gray, J.

[2] 4 Bl. Com. 178-82.

[3] Parrish *v.* Commonwealth, 31 Va. 1, 14-16 (1884), cases. See in general, 26 Am. Law Reg. 706-8 (1887), cases; committed from necessity, 1 Law Quar. Rev. 51-61 (1885).

This is (1) by misadventure, where a man doing a lawful act without intention to hurt, unfortunately kills another: as, where the head of a hatchet flies off and kills a by-stander; where a parent, teacher, or officer causes death from moderate punishment of a child, or of a criminal. The act is in itself lawful; the effect is accidental. This species of homicide is to be distinguished from manslaughter. Or, it is (2) in self-defense, upon a sudden affray, and with no avenue of escape from manifest danger to life or great bodily harm.[1]

Felonious homicide. Killing a human creature, of any age or sex, without justification or excuse.[2]

The killing may be of one's self or of another person. When without malice, the crime is manslaughter; when with malice, murder.[3]

See further DEFENSE, 1; INSANITY, 2 (6); MALICE; MANSLAUGHTER; MURDER; PROVOCATION; RETREAT; SUICIDE; THREAT.

HOMO. L. A human being; man, a man, a person.

Literally, a creature of the earth — *humus*. Derivatives: homage, homicide.

De homine replegiando. For replevying a man. See REPLEVIN, 2.

Liber homo. A free man; also, in Roman law, a freedman.

Liber et legalis homo. A free (good) and lawful person: a juror, who was to be neither a bondsman nor infamous.[3]

Novus homo. A new man; a man pardoned of crime.

HOMOLOGATE.[4] To say the like.[5]

Homologation. Approbation; confirmation; ratification, whether by a party or a court.

In use in civil and Scotch law.

HONESTE VIVERE. See LAW.

HONESTY. When a transaction is as compatible with honesty as with dishonesty, the former is always presumed.[6]

A person who keeps in his employ a servant found to be dishonest cannot have recourse to the guarantor of the servant's integrity for a loss occurring during subsequent service.[7] See CONSCIENCE; EQUITY; FAITH; TRUST, 1.

HONOR. *v*, 1. To accept a bill of exchange, or to pay a promissory note, according to its tenor.

Dishonor. To neglect or refuse to accept or pay commercial paper when due. See further DISHONOR.

Act of honor. An instrument drawn by a notary, after a bill has been protested, or on behalf of a friend of the maker, who wishes to protect the maker's credit, by an acceptance. See PROTEST, 2, Supra, etc.

2, *n.* A term of respect given, in the course of address, to persons occupying the higher judicial positions: as, "his honor," "your honor," "their honors;" also, "honorable court."

HONORARIUM. L. A gift for services rendered.

A voluntary donation, in consideration of services which admit of no compensation in money; in particular, a donation to an advocate at law, who was deemed to practice for honor and influence, and not for fees.[1] See FEE, 2.

HOOK. "To hook" may not be equivalent to "to steal."[2]

HORN-BOOK. A name formerly given to an elementary treatise upon any subject.

Horn-book law. Elementary or rudimentary law.

A "horn-book" was originally a sheet containing the alphabet, mounted on wood and protected with transparent horn, or simply pasted on a slice of horn.[3]

HORSE. A generic term, including, ordinarily, the different species of the animal, however diversified by age, sex, or artificial means.[4]

In a given connection may not include a "gelding, mare, or colt."[4]

In an action against a railroad company for damages for killing a "horse," an amendment of the complaint describing the animal as a "mare" does not introduce a new cause of action.[5]

An "ass" or "jackass" may be considered as a horse, within the meaning of an exemption law.[6]

So may a "mule" be, within a statute giving a remedy for injuries to "horses and cattle" by a railroad company.[7]

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[1] 4 Bl. Com. 182–88.

[2] 4 Bl. Com. 188–201.

[3] 3 Bl. Com. 340, 362.

[4] Gk. *homologein*, to assent, agree; *homos*, the same; *log-*, *leg-*, to speak.

[5] Syndics *v.* Gardenier, 9 Mart. o. s. 546 (1821).

[6] Chapman *v.* McIlwrath, 77 Mo. 44 (1882).

[7] Roberts *v.* Donovan, 70 Cal. 110 (1886); Brandt, Sure. § 368.

[1] McDonald *v.* Napier, 14 Ga. 105 (1853); 3 Bl. Com. 28; 19 Pa. 95; Weeks. Atty's, 536.

[2] Hays *v.* Mitchell, 7 Blackf. *117 (1844).

[3] See Ency. Britannica.

[4] Banks *v.* State, 28 Tex. 647 (1866); Taylor *v.* State, 44 Ga. 264 (1871); Owens *v.* State, 38 Tex. 557 (1873); Turley *v.* State, 3 Humph. 324 (1842); State *v.* Dunnavant, 3 Brev. 10 (S. C., 1811).

[5] South & North Ala. R. Co. *v.* Bees, 82 Ala. 349 (1886), cases.

[6] Richardson *v.* Duncan, 2 Heisk. 222 (1870); Ohio, &c. R. Co. *v.* Brubaker, 47 Ill. 463 (1868).

[7] Toledo, &c. R. Co. *v.* Cole, 50 Ill. 186 (1869); Brown *v.* Bailey, 4 Ala. 413 (1842).

A colt may be exempt as a "horse" or as a "work-beast," if the debtor has nothing more nearly answering the description of a horse.[1]

A "span of horses" means two horses which may be connected together or united for the purposes of a team. A colt four months old is not exempt from sale on execution, as forming with its dam a "span of horses," within the meaning of a statute.[2]

But an uncastrated colt two years old is not a "stallion."[3]

A stallion, not kept for farm work, is not a "horse" exempt from execution.[4]

A horse not broken to harness may still be a "work-horse" — an animal of the horse kind fit for service.[5]

The exemption of a horse from execution may include everything essential to its beneficial use, as, a bridle, a saddle, etc.[6]

See ANIMAL; BATTERY; CATTLE; DECEIT; GENTLE; HEALTH, Boards of; HIRING; IMPLEMENTS; LIVERY-STABLE; MANAGEABLE; SOUND, 2 (2); TEAM; WARRANTY, 2.

Horse-racing. See GAME, 2.

Horse-railway. See RAILROAD.

HORTICULTURE. See AGRICULTURE.

HOSPITAL. See CHARITY, 2.

HOSTELER. See HOTEL; INN.

HOSTILE. See EMBARGO; ENEMY; POSSESSION, Adverse.

HOTCHPOT.[7] Blending properties belonging to two or more persons in order to make an equal division.

Also spelled hodge-podge, hotch-potch, hotspot.

As, where advancements (*q. v.*) are treated as returned, and the estate as a whole divided anew.

"Hotch-pot meant, originally, a pudding: for in a pudding is put one thing with other things."[8]

By this metaphor our ancestors meant that lands in partition among co-parceners, given in frank-marriage, and lands descending in fee-simple, should be mixed or blended together, and then divided in equal portions among all the daughters of their ancestor. . . An incident to an estate is co-parcenary. If, to advance a daughter in marriage, an estate-tail in lands was given her, and afterward lands descended from the donor to her and her sisters in fee-simple, she had no share in the latter unless she agreed to divide her advancement in equal proportion with the lands so descended. Hereby two sorts of lands were mixed and then divided equally.[1]

HOTEL. What in France was known as a *hotelerie*,[2] and in England as a common "inn" of the superior class found in cities and large towns.[3] See INN; TAVERN.

HOUMAS GRANTS. Certain grants of land in Louisiana; as to the history of which see the case cited hereto.[4]

HOUR. See BUSINESS; DAY; SERVICE, 1; TIME.

HOUSE. 1. A dwelling-house; a building divided into floors and apartments, with four walls, a roof, doors, and chimneys.

But not necessarily precisely this.[5]

Involves the ideas of an edifice or structure, and the abode or residence of human beings.

Criminal statutes constantly use "house" as equivalent to "building." A term indicating the particular purpose to which a building is applied may be prefixed; as in state-house, court-house, school-house. In "out-house," buildings that are not dwellings, but merely appendages to some dwelling, are included. When a dwelling is meant, "dwelling-house" or "mansion-house" is usually and properly employed.[6]

While "house" is broader than "dwelling-house," it is narrower than "building."[7]

Does not necessarily mean a whole building; is often applied to a separate apartment.[8,7]

May mean "messuage" — land and structure; as in a will, and in statutes exempting property from taxation.[9]

The law of England has so particular and tender a regard to the immunity of a man's house that it styles it his "castle" and will not suffer it to be violated with impunity. Whence the aphorism, "every man's house is his castle." For this reason, no outside door can, in general, be broken open to execute civil process; though, in criminal causes, the public safety supersedes private. Hence, also, in part, arises the

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[1] Winfrey *v.* Zimmerman, 8 Bush, 588 (1871); Mallory *v.* Berry, 16 Kan. 295 (1876). Compare Carruth *v.* Grassie, 11 Gray, 211 (1858); Johnson *v.* Babcock, 8 Allen, 583 (1864).

[2] Ames *v.* Martin, 6 Wis. *362 (1858).

[3] Aylesworth *v.* Chicago, &c. R. Co., 30 Iowa, 460 (1870).

[4] Robert *v.* Adams, 38 Cal. 383 (1869); Allman *v.* Gann, 29 Ala. 242 (1856).

[5] Noland *v.* Wickham, 9 Ala. 171 (1846); Winfrey *v.* Zimmerman, 8 Bush, 588 (1871).

[6] Cobbs *v.* Coleman, 14 Tex. 598 (1855); Dearborn *v.* Phillips, 21 *id.* 451 (1858).

[7] *F. hochepot*, shake-pot; a medley,— Skeat.

[8] Littleton, §§ 267, 55; 3 Coke, Litt, ch. 12.

[1] 2 Bl. Com. 190-91, 517. See Comer *v.* Comer, 119 Ill. 179 (1886).

[2] From *hostel*, Latin *hospes*, a stranger who lodged at the house of another; also, the master of a house who entertains travelers or guests.

[3] Cromwell *v.* Stephens, 2 Daly, 21 (1867), Daly, F. J.; *ib.* 200; 54 Barb. 316; 4 Duer, 116; 33 Cal. 557.

[4] Slidell *v.* Grandjean, 111 U. S. 412 (1884).

[5] Daniel *v.* Coulsting, 49 E. C. L. *125 (1845), Tindal, C. J.; Surman *v.* Darley, 14 Me. & W. 185 (1845); 2 Man. & R. 514; 8 Barn. & C. 461; 1 Car. & K. 533.

[6] State *v.* Powers, 36 Conn. 79 (1869), Parke, J.; 4 Bl. Com. 221, 224; 7 Biss. 271.

[7] State *v.* Garity, 46 N. H. 62 (1865).

[8] Quinn *v.* People, 71 N. Y. 563-74 (1878), cases; Commonwealth *v.* Bulman, 118 Mass. 456 (1875).

[9] Rogers *v.* Smith, 4 Pa. 101 (1846); McMillan *v.* Solomon, 42 Ala. 358 (1868); Council of Richmond *v.* State, 5 Ind. 387 (1854); Trinity Church *v.* Boston, 118 Mass. 165 (1875).

animadversion of the law upon eavesdropping, nuisances, incendiaries; and for this reason a man may assemble people together lawfully, to protect and defend his house.[1]

A man may defend his house even to the taking of life, if apparently necessary to prevent persons from forcibly entering it against his will, and when warned not to enter and to desist from the use of force. But the law does not sanction taking life to prevent a mere trespass upon real estate.[2] See DOMUS, SUA, etc.

A landlord might not formerly break open a house to make a distress; that would be a breach of the peace. But when he was once in the house, he might break open an inner door.[3] See *Mansion-house*.

Ancient house. A house which has stood for twenty years.

In England, such house acquires a prescriptive right to support from the adjoining soil. In the United States, as a rule, each land-owner has a right to the support of his ground in its natural state from the adjoining land, but not for buildings.[4] See SUPPORT, 2.

House-breaking. Breaking and entering the dwelling-house of another with intent to commit a felony therein, irrespective of the time of day. Compare BURGLARY.

Household. A family; also, pertaining or appropriate to a house or family: as, household furniture, goods, stuff. See FURNITURE.

Persons who dwell together as a family.[5]

Household goods. Articles of a permanent nature, not consumed in their enjoyment, that are used, purchased or otherwise acquired by a person for his house.[6]

Not then, such articles as potatoes, bacon, vinegar, and salt, especially when held for sale or barter.[6]

Householder. The head of a household; the person who has charge of, and provides for, a family or household.[7] See EXEMPTION; FAMILY.

In a statute requiring jurors to be householders, means something more than occupant of a room or house; implies the idea of a domestic establishment, of the management of a household.[1]

House of correction. A prison for the confinement, after conviction, of paupers who refused to work, and vagrants.

Established in the reign of Elizabeth.[2]

For idle and disorderly persons, parents of bastards, beggars, servants who run away, trespassers, rogues, vagabonds, spendthrifts, and the like.[3]

House of ill-fame. A brothel or bawdy-house.

A synonym for "bawdy-house." Has no reference to the fame of the place, but denotes the fact; proof of the fact may be aided by proof of the fame.[4]

Such resorts are public nuisances: they draw lewd persons, endanger the peace, and corrupt the manners.[5]

A flat-boat may be kept as such a house.[6]

A house of prostitution is a constant menace to the good order of the community. It is a nuisance and the keeping of it a misdemeanor at common law. Its suppression, with punishment, are proper subjects of police regulation. In one form or another the authority to prohibit and suppress is given to cities and towns.[7]

See further FAME, Ill-fame; BAWDY-HOUSE; LEWD; PATRONIZE.

House of refuge. A public institution for the confinement of incorrigible youth.

Mansion-house. In the law of burglary, a dwelling-house.

If a house, stable, or warehouse be parcel of the mansion-house, and within the same common fence, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches or appurtenances, if within the curtilage or home-stall. A chamber in a college is the mansion-house of the owner. So also is a room or lodging in any private house the mansion, for the time being, of the lodger, if the owner does not dwell in the house, or if he and the lodger enter by different doors. But a tent or booth is not a mansion-house: the law regards thus highly nothing but permanent edifices.[8]

Public-house. (1) "Public" may be applied to a house, either on account of the proprietorship, as, a court-house, which belongs

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[1] 4 Bl. Com. 223. See also 3 Kan. Law J. 294, 314 (1886) — Chic. Leg. Adv.

[2] Davison *v.* People, 90 Ill. 229 (1878).

[3] 3 Bl. Com. 11. See particularly Semayne's Case, 5 Rep. 91 (1605): 1 Sm. L. C. (H. & W.) 228; Curtis *v.* Hubbard, 4 Hill, 437 (1842); Nash *v.* Lucas, L. R., 2 Q. B. 593 (1867).

[4] See 2 Kent, 437.

[5] Arthur *v.* Morgan, 112 U. S. 499 (1884), Blatchford, J., defining household effects subject to duty under R. S. § 2505.

[6] [Smith *v.* Findley, 34 Kan. 316, 323 (1885), Horton, Chief Justice.

[7] Griffin *v.* Sutherland, 14 Barb. 458 (1852); Bowne *v.* Witt, 19 Wend. 475 (1838); Woodward *v.* Murray, 18 Johns. 402 (1820); 52 Ala. 161; 6 Bush, 429; 15 B. Mon. 447; 110 Ill. 533; 57 Miss. 298; 2 Tex. Ap. 448.

[1] Aaron *v.* State, 37 Ala. 113 (1861); 21 *id.* 261; 17 *id.* 482; 6 Baxt. 522.

[2] 3 Steph. Com. 225; 4 Bl. Com. 370, 377.

[3] Tomlin; Laws, Prov. of Penn. (1682).

[4] State *v.* Smith, 29 Minn. 195 (1882); 28 Mich. 213; 29 Wis. 435; 38 Tex. 603; 1 Bish. Cr. L. § 1088; 2 Whart. Cr. L. § 1451.

[5] Cadwell *v.* State, 17 Conn. 471 (1846); State *v.* Main, 31 *id.* 574 (1863); McAlister *v.* Clark, 33 *id.* 92 (1865); State *v.* Garing, 74 Me. 153 (1882); Commonwealth *v.* Lavonsair, 132 Mass. 3 (1882).

[6] State *v.* Mullen, 35 Iowa, 207 (1872).

[7] Rogers *v.* People, 9 Col. 452 (1886), Helm, J.

[8] 4 Bl. Com. 224-26.

to the county, or from the purposes for which it is used, as, a tavern, a store-house, or a house for retailing liquors.[1]

Statutes against gaming in "public-houses" have particularly in view houses that are public on account of the uses to which they are put. Whether any specified house is public is a question of law, although the general question whether a place is public may be a question of fact.[1] Compare PLACE, Public.

(2) An hotel or inn, *qq. v.*

See BAY-WINDOW; CLEARING; CURTILAGE; DISORDERLY; DOMICIL; DWELLING; FAMILY; FINISHED; FLOOR; GRANT, 2; HEALTH; HEIRLOOM; INCIDENT; LAND; MESSUAGE; NUISANCE; SEARCH; SERVANT, 1. Compare DOMUS.

2. A body of persons organized for the performance of business or duties of a public nature; in particular, a legislative assembly, or a branch thereof.

May mean the entire number of members;[2] or merely the members present doing business.[3]

House of Commons, or of Lords. See PARLIAMENT.

House of Representatives. See ASSEMBLY; CONGRESS.

Lower House. The popular branch of a legislature; the house of representatives. *Upper House.* The Senate.

HUCKSTER. Compare HAWKER.

HUE-AND-CRY.[4] In old common law, pursuing, with horn and voice, felons and such as dangerously wounded another.

Statute of 13 Edw. I (1285), c. 1–4, directed that every county should be so well kept, that immediately upon felonies being committed, fresh suit should be made from town to town and from county to county, and that *hue and cry* should be raised upon the felons, and that they that kept the town should follow with hue and cry with all the town and the towns near, until the fugitives were taken. . . By statute of 27 Eliz. (1585), c. 13, no hue and cry was sufficient unless made with both horsemen and footmen. . . The whole district was liable to be amerced, according to the law of Alfred, if a felon escaped. . . Hue and cry could be raised either by the precept of a justice, or by a peace-officer, or by any private man who knew that a felony had been committed. The party raising it communicated all the circumstances he knew as to the crime and the person of the felon.[1]

HUMANE SOCIETIES. See CRUELTY.

HUNDRED. A civil division of a county.

Consisted of ten tithings. So called, because it was equal to a hundred hides of land; or because it furnished one hundred men in time of war.[2]

Hundredor. An inhabitant of a hundred; also, a qualified juryman within a hundred; and, also, the executive officer of a hundred.[2]

HUNG. Is sometimes applied to a jury which fails to agree upon a verdict.

HURDLE. In old English law, a species of sledge, on which traitors were drawn to the place of execution.[3] See TREASON.

HURON. See LAKES.

HUSBAND. A man who has a wife; a man legally bound in wedlock to a wife.

"Husband and wife" describes persons connected by the marriage tie, and the relation signifies those mutual rights and obligations which flow from the marriage contract.[4]

At *common law*, husband and wife are one person in law, and he is that person; that is, the legal existence of the woman is suspended or at least incorporated into that of the husband, under whose protection she performs everything. Hence, he cannot grant her anything, nor contract with her; but she can be his agent, and take a bequest from him. He must provide her with necessaries, or she can contract for them on his credit. He pays her ante-nuptial debts; such of her personalty as is in her possession, or as he reduces to possession, is his; likewise, the profits of her lands. Her estate is liable for his debts. She is sued and sues with him, unless he is civilly dead. They cannot give evidence for or against each other. He may chastise her moderately. Either one may have security of the peace against the other. For any crime, committed in his presence, except treason and murder, she is presumed to act by his coercion. The injuries to his rights are abduction, adultery, and beating.[5]

By the common law, her money and earnings belonged to him absolutely. The idea was that as he was bound to support the wife and the family, he was entitled to whatever she possessed or acquired. Such property then being absolutely his own, was subject to his disposal without regard to the necessities of the family, and might be taken in execution by his creditors.[6]

As, at common law, the personal property of the wife

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[1] Shihagan *v.* State, 9 Tex. 431 (1853); 10 *id.* 275, 545; 12 Ala. 492; 19 *id.* 526; 20 *id.* 51; 27 *id.* 31, 47; 25 *id.* 78; 29 *id.* 40, 46; 30 *id.* 19, 524, 532, 550; 31 *id.* 371; 32 *id.* 596; 35 *id.* 390.

[2] *Re* Executive Communication, 12 Fla. 656 (1868).

[3] Southworth *v.* Palmyra, &c. R. Co., 2 Mich. 288 (1851); Green *v.* Weller, 32 Miss. 669 (1856); Freilsen *v.* Mahan, 21 La. An. 103 (1869).

[4] Hue: F. *huer*, to hoot, shout; or, to foot, *i. e.*, up foot and cry: run and cry after the felon,—Wood, Inst. 370. F. *cry de pais.*

[1] 4 Bl. Com. 293–94; 1 Steph. Hist. Cr. Law Eng. 187.

[2] 1 Bl. Com. 116; 3 *id.* 34, 161, 359; 4 *id.* 245, 294, 352, 411.

[3] 4 Bl. Com. 92, 376.

[4] People *v.* Hovey, 5 Barb. 118 (1849). See Hardy *v.* Smith, 136 Mass. 330 (1884).

[5] 1 Bl. Com. 442; 2 *id.* 433; 3 *id.* 139; 4 *id.* 28; Bank of America *v.* Banks, 101 U. S. 243 (1879).

[6] Jackson *v.* Jackson, 91 U. S. 124 (1875), Field, J.

passed to the husband upon marriage, she was deprived of this means of supporting her children, and all legal duties growing out of the marriage were imposed upon him. . . Even where the wife possesses separate property, it has been held, independently of statutory obligation, that she is not compelled to support the children of the marriage.[1] See EARNINGS, Separate.

She is always under his power. Hence, the disabilities and safeguards the law places around her. He is liable for her frauds, torts, and breaches of trust.[2] He, she, or both, may have a remedy for an injury to her person or reputation,[3]—the right of action in herself alone being given by statute.

Unless the existing claims of creditors are thereby impaired, his settlement of property upon her is valid. And he may now make the transfer directly to her, instead of through a third person.[4]

An ante-nuptial settlement upon her is valid, if the consideration is legal, and she is not a participant in a fraud intended upon creditors.[5] See SETTLE, 4.

A gift between them is invalid as against creditors.[6]

She is now the owner of her separate estate, as if a *feme sole*, in most of the States, the common-law rule having been greatly relaxed.[7]

But if she allows her money to go into his business, and be mixed with his property, and he uses it for purposes of credit, the property all becomes his and he cannot convey it back in fraud of creditors.[8] See SEPARATE, 2.

And her separate estate may be held for improvements which she permits him, being insolvent, to make to it.[9]

Either may act as agent for the other, with or without compensation; and the husband's creditors, where he so uses his skill without an agreement for remuneration, are not thereby defrauded.[10]

He has an action for enticing her away, even as against a parent. Proof of something done tending to prevent or dissuade her from living with him is necessary.[1]

She may sue a person who maliciously induces him to abandon her, for damages for the loss of support and of his society.[2] See CONSORTIUM.

Either person may prove the marriage collaterally. She cannot be compelled to incriminate him. In bigamy, the lawful wife cannot prove the marriage. Neither can testify as to a confidential communication, except by consent. Under enabling statutes, either may testify for or against the other. In suits by or against a stranger, they may contradict each other. In divorce proceedings, their testimony is closely scrutinized.[3]

In the Federal courts she is not a competent witness for or against him in a criminal case, on the score of public policy.[4]

See also ABANDON, 2 (1); ABDUCTION; ACKNOWLEDGMENT, 2; ADULTERY; BIGAMY; COERCION; COHABITATION; COMMUNICATION, Privileged, 1; CONDONATION; COVERT; CRUELTY, 1; CURTESY; DESERTION, 1; DISABILITY; DIVORCE; DOWER; DOWRY; ELOPEMENT; ENTIRETY; FAMILY; FEME; HEIR, 1; JOINTURE; KIN, Next of; MARRIAGE; NECESSARIES, 1; PARAPHERNALIA; PIN-MONEY; QUARANTINE, 1; RELATION, 3; RELICT; UNITY, 2; WHIPPING-POST; WIDOW; WIFE; WITNESS; WOMAN.

HUSBANDRY. See AGRICULTURE.

HUSH-MONEY. See BLACKMAIL.

HUSTINGS.[5] 1. A temporary court held for the election of members of parliament; also a court held in London before the lord mayor, recorder, and sheriffs, with jurisdiction over actions for the recovery of land within the city, except by ejectment.[6]

"Hustings (*hustengum*) is a court of common pleas held before the mayor and aldermen of London, and it is the highest court they have, for error or attaint lies there of a judgment or false verdict in the sheriff's court. . . Other cities and towns have had a court of the same name."[7]

2. A local court in Virginia.

The Hustings Court of the city of Richmond has exclusive original jurisdiction of all presentments, indictments and informations for offenses committed within the city (except prosecutions against convicts in the penitentiary), and concurrent jurisdiction of

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[1] Gleason *v.* City of Boston, 144 Mass. 27 (1887).

[2] Trust Co. *v.* Sedgwick, 97 U. S. 308 (1877); 2 Kent, 149; 4 Saw. 608.

[3] Shaddock *v.* Clifton, 22 Wis. 110 (1867): 94 Am. Dec. 591-94 (1888), cases.

[4] Jones *v.* Clifton, 101 U. S. 225 (1879), cases; Clark *v.* Killian, 103 *id.* 766 (1880).

[5] Prewit *v.* Wilson, 103 U. S. 24 (1880), cases.

[6] Spelman *v.* Aldrich, 126 Mass. 117 (1879), cases.

[7] Radford *v.* Carwile, 13 W. Va. 576, 85 (1878), cases; Vail *v.* Vail, 49 Conn. 52 (1881), cases; McClellan *v.* Filson, 44 Ohio St. 190 (1886); 20 Am. Law Rev. 356 (1886).

[8] Humes *v.* Scruggs, 94 U. S. 27 (1876), cases. Her contracts, under statutes, 19 Am. Law Rev. 359-79 (1885), cases.

[9] 23 Cent. L. J. 293 (1886), cases.

[10] See generally, wife as husband's agent, 31 Alb. Law J. 206-7 (1885), cases; he as her agent, with compensation, 30 *id.* 444-45 (1885), cases; without compensation, King *v.* Voos, Sup. Ct. Oreg. (1887), cases; 26 Am. Law Reg. 246, 250-53 (1887), cases; 26 Cent. Law J. 259-62 (1888), cases. As to his carrying on business in her name, after she pays some bills, 26 Am. Law Reg. 781-84 (1887), cases.

[1] Bennett *v.* Smith, 21 Barb. 441 (1856); Modisett *v.* McPike, 74 Mo. 639 (1881).

[2] Westlake *v.* Westlake, 34 Ohio St. 626-34 (1878), cases. Effect of abandonment on her power to contract, 20 Am. Law Reg. 745-53 (1887), cases.

[3] 1 Whart. Ev. §§ 421-33, cases; 1 Greenl. Ev. §§ 333-47, cases.

[4] United States *v.* Jones, 32 F. R. 569 (1887); *id.* 571, note. See generally 25 Am. Law Reg. 353-65, 417-31 (1886), cases.

[5] A. S. *husting*, a place of council: *hus*, house; *thing*, cause, council.

[6] See 3 Bl. Com. 80; 3 Steph. Com. 293, note.

[7] Termes de la Ley (1721).

cases within a space of one mile around the city on the north of James river. Also exclusive jurisdiction of all appeals allowed by any State law, or ordinance of the city, from the judgments of the police justices courts, and of all causes removable from them; of proceedings for the condemnation, for public use, of lands, and of motions to correct erroneous assessments on realty; also, concurrent jurisdiction of actions for unlawful or forcible entry or detainer.[1]

HYDRAULIC MINING. See AQUA, Currit, etc.

HYGIENE. See ALCOHOL.

HYPOTHECATION.[2] In Roman law, a pledge without possession by the pledgee,—the possession remaining in the pledgor.[3]

A security whereby realty or personalty is appropriated or pledged for the discharge of a debt or engagement, with no transfer of property or of possession, the debt being viewed as tacked to and following the thing.[4]

There is no pure *hypotheca* in our law. Approaches to it are, bottomry bonds, maritime liens of material-men, and seaman's wages.[5]

Hypothecary; hypothecator. One who proposes and makes a contract of hypothecation.

Hypothecation bond. A bottomry or respondentia bond.

Evidences a marine hypothecation of a vessel or its cargo, for necessary repairs or supplies.[6]

The hypothecation of a vessel is authorized by the necessity of obtaining the means to prosecute the voyage, and inability to get the required funds in any other way.[7]

Established rules as to marine hypothecation are: 1. Liens for repairs and supplies, or for funds to pay for the same, are enforceable only upon proof that the same were necessary, or believed to be necessary. 2. Where proof is made of the necessity, and of credit given to the ship, a presumption arises of a necessity for the credit. 3. Necessity is proven when such circumstances of urgency are shown as would induce a prudent owner, if present, to order the repairs or supplies, or to provide funds for the cost on the security of the ship. 4. An order by the master is sufficient proof of such necessity to support an implied hypothecation in favor of a material-man or lender of money who acts in good faith. 5. To support an hypothecation by bottomry, evidence of actual necessity is required. If the fact of necessity is left unproved, evidence is required of due inquiry and of reasonable ground of belief that the necessity was real and exigent.[1]

If communication with the owner is practicable, that must first be had.[2]

Hypothecation bonds must be recorded by collectors of customs.[3] See BOTTOMRY; RESPONDENTIA.

HYPOTHESIS.[4] In criminal practice, a theory proposed in explanation of the facts in a case, and to establish either guilt or innocence.

Hypothetical. Assumed for the purpose of inference or of opinion.

An hypothetical case consists of a statement of assumed facts intended to be propounded to an expert, in order to elicit his opinion. Thus, an expert in insanity may say whether a person, under indictment for murder, would be likely to be predisposed to emotional insanity, upon a statement of facts, admitted or assumed, supposed to exhibit his individual and family history. See *Dexter* v. *Hall*, EXPERT.

I.

I. As an abbreviation, is used for institutes, internal, Irish.

I. C. C. Inter-State commerce commission (reports).

I. e. (Usually *i. e.*) *Id est*, that is (to say).

I O U. "I owe you." A popular designation of a due-bill or memorandum of debt.

Consists of those letters, a sum of money, and the debtor's signature. As it contains no direct promise to pay, it is not a promissory note, but a mere acknowledgment of indebtedness.[6]

IB. See IDEM.

IBI. See RATIO, Ibi, est, etc.

IBID; IBIDEM. See IDEM.

ICE. Uncut, is an accession or increment to the land.[6]

A riparian proprietor upon an *unnavigable* stream, having title to the middle of the stream, owns the ice that forms over his half of the water.[6]

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[1] See Code, 1887, § 3072.

[2] L. *hypotheca:* Gk. *hypo*, under; *tith-*, to place; to obligate, charge.

[3] See 2 Bl. Com. 159.

[4] See Herman, Mortgages, §§ 3, 1; Taylor v. Hudgins, 42 Tex. 247 (1875).

[5] Story, Bailm., 9 ed., § 288; The Young Mechanic, 2 Curtis, 410 (1855).

[6] The Grapeshot, 9 Wall. 140-41 (1869), Chase, C. J.; The Julia Blake, 107 U. S. 418 (1882), cases, Waite, C. J.; 16 Blatch. 472.

[7] Delaware Mut. Safety Ins. Co. v. Gossler, 96 U. S. 648 (1877), cases; The Emily Souder, 17 Wall. 671, 669 (1873), cases.

[1] The Grapeshot, 9 Wall. 141-42 (1869), Chase, C. J.

[2] The Julia Blake, 16 Blatch. 484-85, 490-94 (1879), cases: 107 U. S. 432, *ante*.

[3] R. S. §§ 4192, 4382.

[4] Gk. *hypothesis*, a placing under: supposition.

[5] See 1 Daniel, Neg. Inst. § 36, cases; 1 Parsons, Notes, &c. 25; Story, Prom. Notes, 14; Smith v. Sheldon, 35 Mich. 47 (1876).

[6] Washington Ice. Co. v. Shortall, 101 Ill. 54 (1881). See also Bigelow v. Shaw, Sup. Ct. Mich. (1887), cases; 34 Cond. 462; 33 Ind. 402; 8 Mich. 18; 30 N. Y. 519; 15 How. Pr. 376.

But he has no proprietary interest in ice that forms upon the water of a *navigable* stream adjacent to his own shore, unless he first takes and secures it.[1]

Since the owner of land bordering upon a flowing stream may use a reasonable quantity of the water, he may detain a reasonable portion until it freezes, and cut and sell the ice. But he may not interfere with the beneficial enjoyment of the water by owners below him.[2]

Ice *upon* a pond or stream is of such an ephemeral nature as to be more like personal than real property. It may be sold by parol as personalty.[3] See CARLOAD.

To thaw a neighbor's ice is an unlawful conversion of it.[4]

Ice fields upon navigable rivers must be so guarded that pedestrians will be protected against accident.[5]

As to the duty of removing ice from pavements, see SIDEWALK.

Ice-cream. See MANUFACTURER; SUNDAY.

ID. See IDEM; CERTUM; IS.

IDAHO. See TERRITORY, 2.

IDEM. L. The same.

Referring to a volume, the same series or set; also, the same book or page. Abbreviated *id.* Compare IS.

Ibidem. In the very same place: the same section, page, or book. Abbreviated *ibid.*, *ib.*

Idem sonans. Sounding the same; substantially identical in sound.[6] Plural *idem sonantia.*

Applies to the names of persons substantially the same in sound, though different in spelling. In searches for liens, all spellings of a name which are pronounced alike are to be noted; and in pleadings, substantial identity in sound is generally sufficient.

Difference of meaning in the original language, as in the German, is not material. Appearance and sound, alone, are important. The initial being the same, allowance must be made for slight differences in the spelling — to which the eye will be directed. Then, a slight difference should put one on inquiry. But the rule does not apply to judgments entered in different initials from those which are usual in English: as, in Yoest for Joest.[7]

Examples of not fatal variances: Bupp and Bopp;[1] Charleston and Charlestown;[2] Heckman and Hackman;[3] Hutson and Hudson;[4] Japheth and Japhath;[5] Jeffers and Jeffries;[6] Lewis and Louis;[7] Penryn and Pennyrine;[8] Ricketts, Rickets, and Ricket;[9] Shaffer and Shafer;[10] Woolley and Wolley.[11] Examples of fatal variances: Hanthorn and Hawthorn;[12] Spints and Sprinz;[13] Whortman and Workman.[14]

A name need not be correctly spelled in an indictment. When substantially the same sound is preserved, variant orthography makes no difference.[15]

Whether one name sounds like another may be a question for a jury.[16]

If the two names, spelled differently, do not necessarily sound alike, the question whether they are *idem sonans* is one of fact for the jury.[17] See NAME, 1.

IDENTITY. Sameness.

1. In larceny, trover, detinue, and replevin, the thing in question must be identified; so in torts, for damage done to specific property; and so in all indictments where the taking of property is the gist. Identity of person must be proven in all criminal prosecutions.[18]

In the ordinary case of buying and selling for cash, the identity of the parties is entirely immaterial; and in many cases where that matter is material, a party is estopped by his dealing with the other from saying that he was mistaken as to the person.[19] See ARRAIGN; CONFUSION, Of goods; DESCRIPTION; NAME.

2. Property transferred in fraud of creditors may be subjected to the payment of their claims upon identification of the property; as, in the case of personalty given to a wife.[20]

One who obtains property by fraud acquires no title to it, but he and all transferees with notice are trustees for the original owner, who may recover the property as long as it can be traced and identified in its

[1] Wood *v.* Fowler, 26 Kan. 690 (1882), cases: 14 Rep. 267.

[2] Myer *v.* Whitaker, 15 Abb. N. C. 176 (1878), cases; Stevens *v.* Kelley, 78 Me. 450 (1886), cases: 35 Alb. Law J. 42–3 (1887), cases.

[3] Higgins *v.* Kusterer, 41 Mich. 322 (1879): 32 Am. Rep. 164–68 (1880), cases.

[4] Aschermann *v.* Best Brewing Co., 45 Wis. 266 (1878). As to value, when unlawfully replevied, see Washington Ice Co. *v.* Webster, 125 U. S. 426 (1888), cases.

[5] Woodman *v.* Pitman, 79 Me. 456 (1887).

[6] Commonwealth *v.* Stone, 103 Mass. 421 (1869).

[7] Bergman's Appeal, 88 Pa. 123 (1878); Heil's Appeal, 99 id. 458 (1881).

[1] Myer *v.* Fegaley, 39 Pa. 429 (1861).

[2] Alvord *v.* Moffatt, 10 Ind. 366 (1858).

[3] Bergman's Appeal, 88 Pa. 120 (1878).

[4] Cato *v.* Hutson, 7 Mo. 142 (1841).

[5] Morton *v.* McClure, 22 Ill. 257 (1859).

[6] Jeffries *v.* Bartlett, 75 Ga. 232 (1885).

[7] Marr *v.* Wetzel, 3 Col. 5 (1876).

[8] Elliott *v.* Knott, 14 Md. 121 (1859).

[9] Stanley *v.* Noble, 59 Iowa, 410 (1882).

[10] Rowe *v.* Palmer, 29 Kan. 337 (1883).

[11] Power *v.* Woolley, 21 Ark. 462 (1860).

[12] Marx *v.* Hanthorn, 30 F. R. 586 (1887).

[13] United States *v.* Spints, 18 F. R. 377 (1883).

[14] City of Lafayette *v.* Wortman, 107 Ind. 404 (1886).

[15] Smurr *v.* State, 88 Ind. 506 (1883), cases; 107 id. 410.

[16] Siebert *v.* State, 95 Ind. 479 (1884). See 1 Bish. Cr. Pr. § 688; 1 Whart. Cr. L. 309.

[17] Commonwealth *v.* Warren, 143 Mass. 569 (1887), in which "Celestia" and "Celeste" were found to be the same name; other cases cited.

[18] See 4 Bl. Com. 396; 2 Crim. Law Mag. 287; 34 La. An. 1082.

[19] Clement *v.* British American Assurance Co., 141 Mass. 303 (1886), Morton, C. J.

[20] Phipps *v.* Sedgwick, 95 U. S. 9 (1877).

original or substituted form.[1] See *ad fin.* TRUST, 1; CONCEAL, 1.

2. Of literary composition, consists in the sentiment and the language: the same conception clothed in the same words must necessarily be the same composition.[2]

3. Identity of designs, etc. See DESIGN, 2; PATENT, 2.

IDEO. See CONSIDERATION, 1.

IDIOCY. Not the condition of a deranged mind, but the total absence of all mind.[3]

A congenital disorder, consisting in a defect or sterility of the intellectual powers.[4]

Idiot. One that hath had no understanding from his nativity.[5]

A person who has been defective in intellectual powers from birth, or from a period before the mind received the impression of any idea.[6]

He is presumed never likely to attain any understanding. But a man is not an idiot if he hath any glimmering of reason, so that he can tell his parents, his age, or like common matters. One born deaf, dumb, and blind is looked upon by the law as in the same state with an idiot.[7]

See INSANITY; LUNACY.

IDLENESS. See VAGRANCY.

IF. Implies a condition precedent, unless controlled by other words.[8]

A word of condition, or of conditional limitation.[9]

To sell property "if it be thought best" means, if in the course of the administration of the estate it should be found necessary or advisable to take that course.[10] See BEST.

"If," in a judge's charge, may not save it from assuming the existence of a fact.[11]

See CONDITION; PROVIDED; WHEN.

-IFF. See PLAINTIFF; SHERIFF.

[1] Third Nat. Bank of St. Paul *v.* Stillwater Gas Co., 36 Minn. 78 (1886), cases: 26 Am. Law Reg. 253 (1887); *id.* 256-60, cases; Fletcher *v.* Sharpe, 108 Ind. 279 (1886), cases: 26 Am. Law Reg. 71; *id.* 74-82 (1887), cases; 25 Cent. Law J. 315-21 (1887), cases; 2 Harv. Law Rev. 28-39 (1888), cases.

[2] 2 Bl. Com. 405.

[3] Owings' Case, 1 Bland, Ch. 396 (Md., 1828).

[4] Stewart *v.* Lispenard, 26 Wend. 314 (N. Y., 1841); 1 Redf. Wills, 59, 61, 64.

[5] 1 Bl. Com. 303; 88 Ill. 502.

[6] [Crosswell *v.* People, 13 Mich. 435 (1865), Cooley, J.; Chitty, Med. Jur.

[7] 1 Bl. Com. 303-4. See 4 Johns. Ch. 441; 3 Ired. Ch. 385; Ray, Med. Jur. Ins. 86, 743; 1 Whart. & St. Med. J. § 1; Taylor, Med. J. 789-91.

[8] Crabbe, R. P. § 2152.

[9] Sutton *v.* West, 77 N. C. 431 (1877); Owen *v.* Field, 102 Mass. 105 (1869); 18 N. J. L. 36.

[10] Chandler *v.* Rider, 102 Mass. 271 (1869).

[11] Chambers *v.* People, 105 Ill. 413 (1883).

IGNOMINY. Shame, disgrace, dishonor: as, in a statute excusing a witness from answering to save himself from ignominy.[1] See CRIMINATE.

IGNORAMUS. See IGNORARI.

IGNORANCE. Want of knowledge or information, whether of a matter of fact or of a matter of law. See ILLITERATE.

Ignorance of a particular fact consists in this, that the mind, capable of healthy action, has never acted upon the fact, because the subject has never been brought to the notice of the perceptive faculties.[2]

Voluntary ignorance. Exists when one by reasonable exertion might have acquired knowledge. **Involuntary ignorance** does not proceed from choice; could not be overcome by the use of any known means.

Ignorance of a fact sometimes excuses; ignorance of law, never. In the law of crimes, ignorance of a fact is regarded as a defect of will. It occurs where a man intending to do a lawful act does that which is unlawful: the deed and the will do not concur.[3] See GUILTY.

If ignorance of what one might know were admitted as an excuse, the laws would become of no effect.[4] See PRESCRIBE.

"If ignorance of the law was admitted as a ground of exemption, the courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impossible; for in almost every case ignorance would be alleged, and, for the purpose of determining the point, the court would be compelled to enter upon questions of facts insoluble and indeterminable." So, if a person will not read or does not know what he signs, or is misinformed as to the effect, he alone is responsible.[5]

The maxim that "ignorance of the law excuses no one" is not universally applicable, but only when damages have been inflicted or crimes committed. [6]

When parties have acted under a mutual mistake of law, and the party jeopardized can be relieved without substantial injustice to the other side, a court of equity will afford redress, especially if the one to be benefited by the mistake invokes the aid of equity to put him in a position where the mistake will become advantageous to him.[7]

[1] Brown *v.* Kingsley, 38 Iowa, 221 (1874).

[2] Boylan *v.* Meeker, 28 N. J. L. 279 (1860).

[3] 4 Bl. Com. 27.

[4] 1 Bl. Com. 46.

[5] Upton *v.* Tribilcock, 91 U. S. 50-51 (1875), cases, Hunt, J. See also Hunt *v.* Rhodes, 1 Pet. 1, 13-15 (1828); 17 Cent. Law J. 422-27 (1883), cases; 18 *id.* 7-10 (1884), cases; 2 Flip. 116; 3 Col. 555; 13 Ill. 395; 60 Md. 355; 50 Mich. 551, 594; 23 Miss. 194; 76 Va. 315; 62 Wis. 332; 1 Johns. Ch. 515; 2 *id.* 60; 6 *id.* 170; Bisp. Eq. § 187; 1 Story, Eq. Ch. V; 2 Pomeroy, Eq. §§ 838-71.

[6] Brock *v.* Weiss, 44 N. J. L. 244 (1882), cases.

[7] Freichnecht *v.* Meyer, 39 N. J. E. 551, 558-60 (188[illegible] cases.

When a party in one State makes a contract with direct reference to the law of another State, he will be held to know the law of the latter State.[1] See LAW, Foreign.

See also ESTOPPEL; IGNORARI; INQUIRY, 1; KNOWLEDGE, 1; MISTAKE; REFORM.

IGNORANTIA. See IGNORARI.

IGNORARI. Not to know or know of; to have no knowledge of.

Ignoramus. We do not know it; we ignore it.

If the grand jury think an accusation groundless, they endorse on the back of the bill "*ignoramus:*" we know nothing of it — the truth does not appear.[2]

Modern expressions are: "not a true bill;" "no bill;" "not found." A fresh bill may be referred to a subsequent jury.[3]

Ignorantia. Non-information: ignorance.

Ignorantia facti excusat; ignorantia juris non excusat. Ignorance of fact excuses; ignorance of the law does not excuse.

Ignorantia legis neminem excusat. Ignorance of the law excuses no one. See IGNORANCE.

IGNORE. To refuse to find a bill of indictment. See IGNORARI.

IL-. A prefix from the Latin *in*, not; negatives the sense of the simple word. See IN, 8.

ILL. 1. Contracted from *evil:* as in ill-fame.

2. Contrary to rule or practice: as in ill-pleading; ill for want of certainty. Compare BAD, 2; WELL, 2.

ILLEGAL. See LEGAL; ERROR, 2 (2), Erroneous.

ILLEGITIMATE. See LEGITIMATE.

ILLEVIABLE. See LEVY.

ILL-FAME. See HOUSE, Of ill-fame.

ILLICIT.[4] Disallowed: forbidden by law; unlawful; illegal: as, illicit intercourse, trade, distilling.

Illicit intercourse. Fornication, or adultery.

Illicit trade. In marine insurance, trade made unlawful by the law of the country to which the object or vessel is bound.[5]

[1] Huthsing *v.* Bosquet, 3 McCrary, 575, 576 (1882), cases; Storrs *v.* Barker, 10 Am. Dec. 316, 323-28, cases; Story, Confl. L. §§ 76, 233, 274.

[2] 4 Bl. Com. 305.

[3] United States *v.* Watkins, 3 Cranch, C. C. 506 (1829).

[4] L. *illicitus*, not allowed: *in-licere.*

[5] 1 Pars. Mar. Ins. 614; 2 La. 337, 338; 3 S. & R. 73; 4 Id. 29; 5 Binn. 403.

ILLITERATE. Without knowledge of written language; ignorant.

To induce an illiterate person, by false reading, to subscribe an agreement, may be a fraud upon his rights, and may even amount to an indictable deceit.[1] See INFLUENCE; READING.

ILLNESS. See BENEFITS; DISEASE; HEALTH; LANGUIDUS.

ILL-PLEADING. See ILL, 2.

ILL-TREATMENT. See CRUELTY; MALTREATMENT.

ILLUSION. See INSANITY. Compare DELUSION.

ILLUSORY. See APPOINTMENT, 2.

ILL-WILL. See MALICE; PREJUDICE.

IM-. A prefix from the Latin *in*, not; in, into, upon. See IN, 8.

IMAGINE. See TREASON.

IMBECILITY. Without strength, impotent.

In a petition for divorce by a wife for corporal imbecility in the husband, it is necessary to show a permanent, incurable impotency to consummate the marriage. "Corporal imbecility" does not, *ex vi termini*, import such impotency.[2] See DIVORCE.

On mental imbecility, see [3] INSANITY.

IMMATERIAL. See MATERIAL.

IMMATURE. See MATURE.

IMMEDIATE. Direct; present; near — in time, or kinship.

That which is produced directly by the act to which it is ascribed, without the intervention or agency of any distinct, intermediate cause: as, immediate interest.[4]

In the law of self-defense, "immediate" generally signifies present in time and place. Thus "immediate danger" of losing life or of sustaining great bodily injury, means that the danger is then and there present and the injury apparently about to be inflicted.[5]

"Immediate delivery," among dealers in coal, means a delivery within the present or, in cases, within the succeeding month.[6]

An action is said to be prosecuted for the immediate (direct) benefit of a person;[7] and devises are made to immediate issue.[8]

[1] See 2 Bl. Com. 304; 2 Whart. Ev. § 1243, cases; 2 Bish. Cr. L. § 156.

[2] Ferris *v.* Ferris, 8 Conn. 167 (1830). See generally 1 Bish. Mar. & Div. §§ 321-39, cases.

[3] Delafield *v.* Parish, 5 N. Y. Sur. 115 (1857). See generally 1 Wharton & St. Med. J. § 691; Taylor, Med. J. 789.

[4] Fitch *v.* Bates, 11 Barb. 473 (1851): Bouvier.

[5] Bailey *v.* Commonwealth, 11 Bush, 691 (1876), Cofer, J.; United States *v.* Baldridge, 11 F. R. 558 (1882): R. S. § 5515; s. c. 3 Cr. Law Mag. 850.

[6] Neldon *v.* Smith, 36 N. J. L. 153 (1873).

[7] Butler *v.* Patterson, 13 N. Y. 298 (1855).

[8] Turley *v.* Turley, 11 Ohio St. 179 (1860).

Immediately. Within reasonable time.

Never, or very rarely, employed to designate an exact portion of time.[1] Compare FORTHWITH.

IMMEMORIAL. See CUSTOM; MEMORY.

IMMIGRATION. Moving into a country, usually to acquire citizenship.

The act of Congress of August 3, 1882 (22 St. L. 214), which levies a duty of fifty cents for every foreign passenger coming by vessel to the United States, to be paid to the collector of customs of the port, by the owner or agent of the vessel, is a valid regulation of commerce with foreign nations. The duty is a license fee, a tax on the owner of the vessel, and on the business of bringing in alien passengers. It is not a capitation tax. The contribution is designed to mitigate the evils incident to immigration from abroad, by raising a fund for that purpose.[2]

See COMMERCE; EXPATRIATION; CHINESE.

IMMORAL. See MORALS.

IMMORTALITY. See CORPORATION.

IMMOVABLES. See MOVABLE.

IMMUNITY.[3] Exemption from a duty, obligation, penalty, or service, which the law requires of citizens in general.

Freedom from what otherwise would be a duty or burden.[4]

The Fourteenth Amendment secures immunity from inequality of legal protection, as to life, liberty, or property.[5]

Immunity from taxation, as of the property of a railroad corporation, not being a franchise, but a personal privilege, is not transferable even under a decree of foreclosure.[6]

See further PRIVILEGE, 1; PROHIBITION, 1; TAX, 2.

IMPAIR. To make worse: to diminish in quantity, value, excellence, strength; to lessen in power; to deteriorate.[7] To relax, weaken, injure.

Impair health. See INTEMPERATE.

"No State shall . . . pass any . . Law impairing the Obligation of Contracts."[8]

To relieve the distress which followed the war of the Revolution, paper money was issued, worthless lands, and other property of no use to the creditor, were made a tender in payment of debts, and the time of payment stipulated in contracts was extended by law. These were the peculiar evils of the day. So much mischief was done and so much more apprehended, that general distrust prevailed, and confidence between man and man was destroyed. . . To restore public confidence, the framers of the Constitution prohibited the use of any means by which the same mischief might again be produced: they established the principle that contracts should be inviolable.[1]

The reference is to contracts respecting *property*, under which an individual may claim a right to something beneficial to himself.[2] The contracts protected are such as relate to property rights, not governmental. It may not be easy to tell on which side of the line a particular case is to be put.[3] There was no intention to restrain the States in the regulation of their civil institutions, adopted for internal government.[3]

The prohibition does not include grants for public purposes, which are in effect mere regulations of internal police.[4] See further MONOPOLY; POLICY, 1, Public.

"Obligation" means the law which binds the parties to perform their undertaking.[5] See OBLIGATION, 3.

The prohibition applies to implied as well as to express, and to executory as well as to executed, contracts: as, a grant of lands by a State to an individual;[6] or, a compact between States;[7] or, a grant of corporate powers[8] — unless a right of revocation or alteration is reserved in the grant or by a general law.[9]

But it does not include all contracts by a State with its public officers or municipal corporations.[10] After a public officer has rendered the services required of

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[1] See Thompson *v.* Gibson, 8 M. & W. *286–89 (1841); McLure *v.* Colclough, 17 Ala. 100 (1849); Gaddis *ads.* Howell, 31 N. J. L. 316 (1865); Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 556–68 (1880), cases; 11 F. R. 555; 44 Ind. 460; 51 Md. 512; 14 Neb. 151–52; 20 Barb. 466; 29 Pa. 198; 40 *id.* 289; 75 *id.* 378; 43 Wis. 318, 479; 62 *id.* 244; 5 Biss. 476; 43 Ill. 155; 13 N. J. L. 313; L. R., 4 Q. B. 471; 20 Moak, 466, 468.

[2] The Head-Money Cases, 18 F. R. 135 (1883), Blatchford, J.: s. c. 112 U. S. 580 (1884), Miller, J.

[3] L. *immunis*, free from public service: *in*, not; *munus*, duty.

[4] Lonas *v.* State, 3 Heisk. 306 (1871).

[5] Strauder *v.* West Virginia, 100 U. S. 310 (1879).

[6] Morgan *v.* Louisiana, 93 U. S. 223 (1876), cases.

[7] Webster's Dict.; Edwards *v.* Kearzey, 96 U. S. 600 (1877).

[8] Constitution, Art. I, sec. 10. Gouverneur Morris, of the committee on style, resolute not "to countenance the issue of paper money, and the consequent violation of contracts," of himself added "No State shall pass laws altering or impairing the obligation of contracts." In the shorter form adopted by the convention, "an end was designed to be made to barren land laws, laws for the installment of debts, and laws closing the courts against suitors,"—2 Bancroft, Hist. Const. 214 (1882).

[1] Sturges *v.* Crowninshield, 4 Wheat. 204, 206, 199 (1819), Marshall, C. J.

[2] Dartmouth College *v.* Woodward, 4 Wheat. 628 (1819), Marshall, C. J.; Butler *v.* Pennsylvania, 10 How. 416 (1850); Newton *v.* Commissioners, 100 U. S. 557 (1879); Charles River Bridge *v.* Warren Bridge, 11 Pet. *572 (1837); 2 Bancroft, Hist. Const. 213; Federalist, No. 44.

[3] Stone *v.* Mississippi, 101 U. S. 820, 816 (1879).

[4] East Hartford *v.* Hartford Bridge Co., 10 How. 535 (1850).

[5] Sturges *v.* Crowninshield, 4 Wheat. 197 (1819), *supra*.

[6] Fletcher *v.* Peck, 6 Cranch, 137 (1810).

[7] Green *v.* Biddle, 8 Wheat. 1, 84 (1823).

[8] Dartmouth College *v.* Woodward, 4 Wheat. 628 (1819); Home of the Friendless *v.* Rouse, 8 Wall. 437 (1869).

[9] Holyoke Company *v.* Lyman, 15 Wall. 522 (1872).

[10] Butler *v.* Pennsylvania, 10 How. 416–17 (1850).

him under an enactment which fixes the rate of compensation (*q. v.*), the obligation to pay for the services at that rate is perfected and rests on the remedies which the law then gives for its enforcement.[1]

A charter granted to a private corporation, which in effect is a mere license, may be withdrawn;[2] so may any other engagement which is a mere gratuity;[3] but not, without consent of the *bona fide* bondholder, power given a municipality to levy a tax with which to pay its bonds.[4] And a State may not tax mortgage bonds, secured on property within it, held by non-residents.[5]

Liability for a tort, created by statute, although reduced to judgment, is not such a debt by contract as is contemplated.[6]

Imprisonment for debt, not being regarded as a part of a contract, may be abolished.[7]

The prohibition extends to provisions of a State constitution, as well as to ordinary legislation.[8]

The existing laws of the place where, or in reference to which, the contract is made, affecting its validity, construction, discharge, or enforcement, form part of the contract. The remedy, or means of enforcing the contract, is part of the obligation.[9]

Judicial construction being a part of a statute, a change of decision is the same in effect as a new enactment.[10]

The Constitution intended to prohibit a law interpolating a new term or condition foreign to the original agreement.[11]

In short, any deviation from the terms of the contract, by postponing or accelerating the period of performance which it prescribes, by imposing conditions not expressed in the contract, or by dispensing with the performance of those which are expressed, however minute or apparently immaterial in their effect upon the contract, impairs its obligation.[12]

Diminishing value by legislation is impairment.[13]

But it is not necessarily impaired by a reasonable change in the mode of enforcing it;[14] unless it substantially lessens the rights of the creditor;[15] nor is it impaired, necessarily, by a new statute of limitations.[1] In modes of proceeding and forms to enforce a contract, the legislature has control, and may enlarge, limit, or otherwise alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right.[2,3] See REMEDY; BOUNTY.

The prohibition in the Constitution refers to enactments to which the State gives the force of law; it does not apply to decisions of the courts, or acts of executive or administrative boards or officers, or doings of corporations or individuals. . . "When the State court decides against a right claimed under a contract, and there was no law subsequent to the contract, this (the Supreme) court clearly has no jurisdiction. When the existence and the construction of a contract are undisputed, and the State court upholds a subsequent law, on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction. When the State court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and, if it is of opinion that it did not confer the rights affirmed by the State court, and therefore its obligation was not impaired by the subsequent law, may on that ground affirm the judgment. So, when the State court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld. But when the State court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction."[4]

IMPANEL. See PANEL.

IMPARLANCE.[5] Opportunity for a conference.

1. An indulgence granted a defendant to defer pleading to the action until a subsequent term.

[1] Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 134 (1885).

[2] Stone *v.* Mississippi, 101 U. S. 820, 816 (1879).

[3] West Wisconsin R. Co. *v.* Supervisors, 93 U. S. 595 (1876).

[4] Von Hoffman *v.* City of Quincy, 4 Wall. 535, 544 (1866); Wolff *v.* New Orleans, 103 U. S. 358 (1880).

[5] State Tax on Foreign-Held Bonds, 15 Wall. 325 (1872).

[6] Louisiana *v.* New Orleans, 109 U. S. 285 (1883); Chase *v.* Curtis, 113 *id.* 464 (1885).

[7] Penniman's Case, 103 U. S. 717, 720 (1880), cases.

[8] Dodge *v.* Woolsey, 18 How. 331 (1855); New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 672 (1885), cases; Fisk *v.* Jefferson Police Jury, 116 *id.* 131 (1885).

[9] Walker *v.* Whitehead, 16 Wall. 317 (1872); Edwards *v.* Kearzey, 96 U. S. 600 (1877), cases; 102 *id.* 532.

[10] Douglass *v.* County of Pike, 101 U. S. 687 (1879).

[11] West River Bridge Co. *v.* Dix, 6 How. 533 (1848).

[12] Green *v.* Biddle, 8 Wheat. 84 (1823), Washington, J.

[13] Planters' Bank *v.* Sharp, 6 How. 327 (1848).

[14] Mason *v.* Haile, 12 Wheat. 378 (1827).

[15] Bronson *v.* Kinzie, 1 How. 311 (1843); Woodruff *v.* Trapnall, 10 How. 190 (1850); Hawthorne *v.* Calef, 2 Wall. 23 (1864); Gunn *v.* Barry, 15 *id.* 623 (1872); Walker *v.* Whitehead, 16 *id.* 318 (1872); Antoni *v.* Greenhow, 107 U. S. 774, 778 (1882); 101 *id.* 339.

[1] Koshkonong *v.* Burton, 104 U. S. 675 (1881), cases; Gilfillan *v.* Union Canal Co., 109 *id.* 401 (1883); Mitchell *v.* Clark, 110 *id.* 642 (1883).

[2] Penniman's Case, 103 U. S. 717, 720 (1880), cases.

[3] See also Kring *v.* Missouri, 107 U. S. 233 (1882), cases; Civil Rights Cases, 109 *id.* 12 (1883); Louisville, &c. R. Co. *v.* Palmes, *ib.* 256 (1883); Louisiana *v.* Mayor of New Orleans, *ib.* 285 (1883); Nelson *v.* St. Martin's Parish, 110 *id.* 720 (1884); Parker *v.* Buckner, 67 Tex. 23 (1886); 25 Am. Law Reg. 81-97 (1886), cases; 2 Story, Const. §§ 1368-91.

[4] New Orleans Water-works Co. *v.* Louisiana Sugar Co., 125 U. S. 18, 30, 38 (1888), cases, Gray, J.; Kreiger *v.* Shelby R. Co., *ib.* 39 (1888).

[5] F. *parler*, to speak.

Before the defendant puts in his defense he is entitled to demand one imparlance, or *licentia loquendi*, to see if he can end the matter amicably without further suit, by talking with the plaintiff; a practice supposed to have arisen in obedience to the precept "Agree with thine adversary quickly, whilst thou art in the way," Matt. v. 25. The Roman law of the Twelve Tables likewise directed the parties to make up the matter while going to the prætor.[1]

General imparlance. That just defined, and grantable of course. **Special imparlance.** Saved all exceptions to the writ or count, and was granted by the prothonotary. *More special imparlance.* Saved all exceptions whatsoever, and granted at the discretion of the court.[2]

Imparlances are no longer recognised in this country, where, after appearance by the defendant, the cause stands continued until the end of the time within which the plea is to be filed. See CONTINUANCE.

2. Stay of execution.[3]

IMPARTIAL.[4] 1. Applied to a juror, indifferent as he stands unsworn;[5] has not formed an opinion as to the issue.[6]

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," etc.[7] Compare INDIFFERENT; PREJUDICE, 1.

The courts are not agreed as to the knowledge upon which an opinion must rest to render a juror incompetent, or whether the opinion must be accompanied by malice or ill-will; but all unite in holding that it must be founded on some evidence, and be more than a mere impression. Some say it must be positive; others, that it must be decided and substantial; others, that it must be fixed; others again, that it must be deliberate and settled. All concede, however, that if hypothetical only, the partiality is not so manifest as to necessitate setting the juror aside.[8]

2. As understood in conditions annexed to bonds, see FAITHFULLY.

IMPEACH.[9] 1. To call to account: as, to impeach a tenant for waste.[10]

2. To impugn, call in question, seek to disparage: as, to impeach the authenticity of a document, the irregularity or legality of a judgment or sale, one's title to negotiable paper or to property. See DISPARAGE, 2; FACIES, Prima; JUDGMENT.

3. To seek to prove unworthy of belief; to discredit: as, to impeach the veracity of a witness.

To charge or accuse of want of veracity; and, to establish such charge.[1]

To accuse, blame, censure. Thus, to impeach one's official report or conduct is to show that it was occasioned by some partiality, bias, prejudice, inattention to or unfaithfulness in the discharge of that duty; or, that it was based upon such error that the existence of those influences may justly be inferred from the extraordinary character or grossness of that error.[2]

Unimpeached. Not discredited, undiscredited; not shaken in character or worth, professed or attributed. **Unimpeachable.** Not to be questioned as to credit; irreproachable; blameless.

After a witness has been examined in chief, his credit may be impeached in various modes besides that of exhibiting the improbabilities of his story by a cross-examination: (1) By disproving the facts stated by him, by other witnesses. (2) By general evidence affecting his credit for veracity. (3) By proof that he has made statements out of court contrary to what he has testified at the trial. But this is only in matters relevant to the issue; and, beforehand, he must be asked as to the time, place, and persons involved in the supposed contradiction: upon the general question he may not remember whether he has said so or not; and justice requires that his attention be first called to the subject. Then he may correct or explain the former statement.[3]

By calling, the party represents his witness as worthy of credit or at least as not so infamous as to be wholly unworthy of credit. For him to attack the witness's veracity would be bad faith to the court, and give the power to destroy if the witness spoke unfavorably, and to make good if he spoke favorably. Hence, at common law, while a party may contradict, and to that extent discredit, he cannot ordinarily "impeach" his own witness.[4]

An adverse witness who contradicts his former statement, thereby surprising the party calling him, may be examined as to his former statement, when

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[1] 3 Bl. Com. 299.

[2] 3 Bl. Com. 301.

[3] Act 19 May, 1828, § 2: R. S. § 988.

[4] L. *im-pars*, not of a part or party.

[5] Littleton, 155 *b*.

[6] Reynolds *v.* United States, 98 U. S. 154 (1878): Coke, Litt. 155 *b*.

[7] Constitution, Amd. Art. VI.

[8] Reynolds *v.* United States, 98 U. S. 155 (1878), Waite, C. J., citing 11 Leigh, 659; 10 Gratt. 658; 13 Ill. 635; 2 Dev. & B. L. (N. Car.) 196; 74 Pa. 458; 84 *id.* 151. See also Northern Pacific R. Co. *v.* Herbert, 116 U. S. 646 (1886), cases.

[9] F. *empeecher*, to prevent, hinder, bar: L. *impedicare*, to impede; or *impingere*, to thrust against.

[10] 2 Bl. Com. 283; 6 Fla. 490.

[1] [White *v.* McLean, 47 How. Pr. 199 (1874).

[2] Bryant *v.* Glidden, 36 Me. 47 (1853), Shepley, C. J.

[3] 1 Greenl. Ev. §§ 461–62. See Becker *v.* Koch, 104 N. Y. 401 (1887), cases; Conrad *v.* Griffey, 16 How. 46–47 (1853), cases.

[4] United States *v.* Watkins, 3 Cranch, C. C. 442 (1829); Commonwealth *v.* Donahoe, 133 Mass. 408 (1882); Sheppard *v.* Yocum, 10 Oreg. 410 (1882); Stearns *v.* Merchants' Bank, 53 Pa. 492–99 (1866), cases.

it would appear that deception has been practiced, the examiner being guilty of no laches.[1]

May impeach an opposing witness by a former statement contradicting that made in his examination in chief;[2] but cannot contradict on a collateral matter. May contradict answers as to motive; question veracity; show bias or conviction of infamous crime.[3] May attack the impeaching witness, and sustain the impeached, but not by proof of former consistent statements. Corroboration is discretionary in the court.[4]

To impair his credibility, a witness may be cross-examined as to specific facts tending to disgrace or degrade him, although irrelevant to the main issue. The range of cross-examination depends upon the appearance and conduct of the witness and other circumstances. It is only where the discretion in the court has been abused, to the prejudice of a party, that error will lie.[5] See CHARACTER; CREDIT, 1; EXAMINATION, 9; REPUTATION.

4. To convict of such misconduct as justifies removal from office.

Articles of impeachment. The formal statement of charges of misconduct preferred against an officer.

Like an indictment for crime, must be sufficiently certain in averment to admit of a defense being framed, and to be used in bar of another accusation upon the same subject-matter in case of acquittal.

Court of impeachment. The tribunal before which articles of impeachment are presented and the charges tried.

Charges which will warrant an impeachment may not sustain an indictment. The prosecution is conducted before some branch of the political power, or before a *quasi* political tribunal.

"The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[6]

"The House of Representatives . . . shall have the sole Power of Impeachment."[6]

"The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be convicted without the Concurrence of two-thirds of the Members present." "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[1]

The Senate has sat as a court of impeachment in the cases of Judge Chase, in 1804; Judge Peck, in 1831; Judge Humphreys, in 1862; and of President Johnson, in 1868.[2]

Proceedings under the constitutions of the States, for the trial of State officials, are similar to the foregoing. See JUDGE; PARDON.

IMPEDE. See OBSTRUCT.

IMPERFECT. See DUTY, 1; PERFECT.

IMPERIUM. L. Dominion; authority; jurisdiction.

Divisum imperium. A divided jurisdiction; jurisdiction belonging to more than one tribunal, or exercised alternately between powers.

As, the jurisdiction of common-law and admiralty courts exercised between high and low water-mark; the jurisdiction exercised concurrently by common-law and equity courts.

Imperium in imperio. A power within a power; a sovereignty within a sovereignty; a jurisdiction within a jurisdiction.[3]

IMPERTINENCE. The introduction of any matter in a bill, answer, or other pleading or proceeding in a suit, which is not properly before the court for decision at any particular stage of the suit.[4]

The court will not strike out the matter unless its impertinence clearly appears; for if erroneously stricken out, the error is irremediable; if left to stand, the court may set the matter right in taxing the costs. Matter which is scandalous (*q. v.*) is also impertinent.[4]

The test is, would the matter, if put in issue, be proper to be given in evidence.[5]

Impertinent. See PERTINENT.

IMPLEAD. See PLEA, 2.

IMPLEMENTS. Things necessary in any trade, without which the work cannot be performed; also, the furniture of a house. Implements of household are tables, presses, cupboards, bedsteads, wainscot, and the like.[6]

Rarely, if ever, includes an animal.[6]

As used in a statute of exemptions, does not include a horse and cart.[7]

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[1] 1 Whart. Ev. §§ 549-67, cases.

[2] Ferry *v.* Breed, 117 Mass. 165 (1875); 35 Vt. 68.

[3] 1 Whart. Ev. §§ 568-71, cases. See generally Seller *v.* Jenkins, 97 Ind. 433-39 (1884), cases.

[4] State *v.* Pfefferle, 36 Kan. 92-96 (1886), cases, Johnston, J. See also Pullen *v.* Pullen, 43 N. J. E. 136 (1887), cases; State *v.* Thomas, Sup. Ct. N. C. (Dec. 21, 1887), cases.

[5] Constitution, Art. II, sec. 4.

[6] Constitution, Art. I, sec. 2, cl. 5.

[1] Constitution, Art. I. sec. 3, cl. 6-7. See 2 Bancroft, Const. 193.

[2] See Story, Const. § 791; 2 Am. Law Rev. 547-67 (1868); 6 Am. Law Reg. 257-83 (1867), T. W. Dwight; *id.* 641-80 (1867), W. Lawrence; 4 Bl. Com. 259-61.

[3] 17 Wall. 328; 106 U. S. 562; 37 Pa. 292.

[4] Story, Eq. Pl. §§ 266-70; Wood *v.* Mann, 1 Sumn. 588-89 (1834), Story, J.; 3 Story R. 13; 15 F. R. 561.

[5] Woods *v.* Morrell, 1 Johns. Ch. *106 (1814), Kent, Ch. See also Hood *v.* Inman, 4 *id.* *433 (1820).

[6] Coolidge *v.* Choate, 11 Metc. 82 (1846).

[7] Enscoe *v.* Dunn, 44 Conn. 99 (1876); Wallace *v.* Collins, 5 Ark. 46 (1843).

A music teacher's piano is an "implement of business."[1] Compare TOOLS.

IMPLICATION. An inference of something, not directly declared, but arising from what is admitted or expressed.[2]

Implied. Infolded: involved in language or intention; resting upon inference; imputed in law.[3] Opposed, *expressed, constructive*, qq. v.

Where it is the duty of a defendant to do an act, the law imputes a promise to fulfill that obligation.[4] See ASSUMPSIT.

What is clearly implied in a statute, pleading, contract, will, or other instrument, is as much a part of it as what is expressed.[5] See INCIDENT.

IMPORT. 1, *v.* To bring from a foreign jurisdiction or country merchandise not the product of this country.[6]

n. Most commonly *imports:* the goods or other articles brought into this country from abroad — from another country.[7] Opposed, *export, exports*, q. v.

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . and all such Laws shall be subject to the Revision and Controul of the Congress."[8]

This does not relate to articles imported from one State into another; only to articles imported from foreign countries.[9]

Nothing is imported till it comes within the limits of a port. The term "imports" covers nothing not actually brought into our limits.[10]

Imposing a license tax on importers is an indirect tax on imports.[11]

See COMMERCE; DUTY, 2; ENTRY, II, 2; IMPOST; INSPECTION, 1.

2. As to import of language, see PURPORT.

IMPOSE. See TERM, 2.

IMPOSITION. See DECEIT; EXTORTION; FRAUD; MISTAKE; REFORM.

IMPOSSIBILITY. See POSSIBILITY.

IMPOST. A custom or tax levied on articles brought into a country.[1]

A duty on imported goods and merchandise. In a larger sense, any tax or imposition. Synonymous with duty; comprehends every species of tax or contribution not included under the ordinary terms "taxes and excises."[2]

IMPOTENCE. See IMBECILITY; INSPECTION, Of person.

IMPOUND. See POUND, 2.

IMPRESSION. 1. A cause in which a question arises for the first time is termed a "case of the first impression."[3]

2. Effect produced upon the mind of a juror.[4] See OPINION, 2.

IMPRIMUS. See PRIMUS; FIRST, 2.

IMPRISONMENT. Detention of another against his will, depriving him of the power of locomotion.[5] Compare PRISON.

Confinement of the person in anywise; as, keeping a man against his will in a private house, arresting or forcibly detaining him in the street.[6]

In the penal legislation of Arkansas, the word "imprisonment," used alone, means imprisonment in a county jail or local prison. Confinement in a penitentiary is not meant, unless expressly so stated.[7]

In Louisiana, "imprisonment," unqualified, in penal statutes, is used in contradistinction to "imprisonment at hard labor."[8]

Duress of imprisonment. A compulsion by an illegal restraint of liberty, until one does some act, as, seal a bond.[9] See further DURESS.

False, or unlawful, imprisonment. Any confinement or detention of the person without sufficient authority.[10]

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[1] Amend *v.* Murphy, 69 Ill. 338 (1873). See also 28 Iowa, 359; 124 Mass. 418; 6 Gray, 298; 45 N. H. 552.

[2] *Re* City of Buffalo, 68 N. Y. 173 (1877), Folger, J.

[3] See Homan *v.* Earle, 58 N. Y. 271 (1873); 13 Abb. Pr. 413.

[4] Bailey *v.* N. Y. Central R. Co., 22 Wall. 639 (1874), cases.

[5] United States *v.* Babbit, 1 Black, 61 (1861), cases; 20 Wall. 493; 101 U. S. 82, 209; 110 *id.* 658.

[6] [United States *v.* The Forrester, 1 Newb. 94 (1856).

[7] [Brown *v.* Maryland, 12 Wheat. 437 (1827), Marshall, C. J.

[8] Constitution, Art. I, sec. 10, cl. 2.

[9] Woodruff *v.* Parham, 8 Wall. 181 (1868), cases; Brown *v.* Houston, 113 U. S. 628 (1885).

[10] Marriott *v.* Brune, 9 How. 632 (1850); Arnold *v.* United States, 9 Cranch, 120 (1815); 4 Metc., Mass., 282.

[11] Brown *v.* Maryland, 12 Wheat. 419 (1827); Warring *v.* Mayor of Mobile, 8 Wall. 110 (1868).

[1] Brown *v.* Maryland, 12 Wheat. 437 (1827), Marshall, Chief Justice.

[2] Pacific Ins. Co. *v.* Soule, 7 Wall. 445 (1868), cases, Swayne, J.; 1 Story, Const. § 669. See also 8 Wall. 181; 14 Mo. 335; 9 Rob., La., 324; 1 Story, Const. § 949; Federalist, No. 30.

[3] 103 U. S. 168; 21 Pa. 175; 98 *id.* 104.

[4] See Greenfield *v.* People, 74 N. Y. 283 (1878).

[5] United States *v.* Benner, Baldw. 239 (1830).

[6] 1 Bl. Com. 136; 3 *id.* 127.

[7] Cleaney *v.* State, 36 Ark. 80 (1880).

[8] State *v.* Hyland, 36 La. An. 710 (1884).

[9] [1 Bl. Com. 136, 131.

[10] 3 Bl. Com. 127.

May consist in detaining another by threats of violence, thereby preventing him from going where he wishes by a reasonable apprehension of personal danger.[1]

A violation of the right of personal liberty. May arise by executing a lawful process at an unlawful time, as, on Sunday. Remedies: *habeas corpus*, and an action for damages,[2] *qq. v.*

An action will lie for the misuse or abuse of process, beyond the fact of arrest and detention.[3]

Imprisonment for debt. No person shall be imprisoned for debt in any State . . on Federal process . . where imprisonment for debt is abolished. The State course of proceeding is to be followed.[4]

"No crime known to the law brought so many to the jails and prisons (one hundred years ago) as the crime of debt, and the class most likely to get into debt was the most defenseless and dependent, the great body of servants, of artisans, of laborers."[5]

See ARREST, 2; COMMITMENT; FELONY; LABOR, 1; PROSECUTION, Malicious.

IMPROVE. To cultivate, as, land.

"Improved land" is such as has been reclaimed, is used for purposes of husbandry, and is cultivated as such,—whether the appropriation is for tillage, meadow or pasture.[6]

Improvement. 1. Amelioration in the condition of property by the outlay of labor or money.

Includes repairs or additions to buildings, the erection of fences, the annexation of fixtures, etc.[7] See BETTERMENT; ESTOPPEL.

As used in a will, relative to property, construed according to the subject-matter. A gift of the improvement of land may constitute a freehold estate, for the devisee's life; of plate, pictures, furniture, it would be the possession and use; of money, securities, or stocks, it would be the income.[8]

Bedding oysters is not an "improvement," within the meaning of a statute authorizing riparian owners to make improvements on navigable streams. The mere depositing of the oysters in the water implies no essential union or relation between the main land and the soil under the water contiguous; and therefore does not effect an improvement of the land implied in something created or constructed, attached to the shore.[1]

Internal improvements. Works within the State, by which the public are supposed to be benefited; such as the improvement of highways and channels of travel and commerce.[2] See AID, 1, Municipal.

Under improvement. Used, occupied, employed, turned to profitable account.[3]

2. An addition of some useful thing to a patentable object. See further INVENTION; PATENT, 2; PROCESS, 3.

IMPROVIDENT. In a statute excluding from an administratorship or executorship a person improvident in habits, the reference is to such habits of mind and conduct as render a man unfit for the duties of the trust.[4] Compare INCAPABLE; SUITABLE, 1.

Improvidently. Designates a rule, order, or decree, had or made prematurely or inconsiderately.

IMPULSE. A sudden impelling.

An irresistible impulse to commit an act known to be wrong does not constitute the insanity which is a legal defense. The law does not recognize an impulse as uncontrollable which yet leaves the reasoning powers — including the capacity to appreciate the nature and quality of the particular act — unaffected by mental disease.[5] See INSANITY.

IMPUNITY. Applies to something which may be done without penalty or punishment.[6]

IMPUTE. See KNOWLEDGE, 1; IMPLICATION.

IN. Introduces English, French, and Latin phrases:

1. English. (1) The preposition: within, inside of, surrounded by.[7]

Under a statute requiring notices to be posted "in" public places, a posting "at" such places may not be sufficient.[8]

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[1] [Pike *v.* Hanson, 9 N. H. 493 (1838); Smith *v.* State, 7 Humph. 43 (1846). See also 35 Ind. 15, 286; 43 *id.* 65; Baldw. 600; 12 Ark. 43; 133 Mass. 399; 81 N. C. 528; 9 Johns. 117; 5 Vt. 588; 1 Bish. Cr. L. § 553.

[2] 3 Bl. Com. 127, 138; 4 *id.* 218; Castro *v.* De Uriarte, 12 F. R. 253 (1882).

[3] Wood *v.* Graves, 144 Mass. 367-68 (1887), cases.

[4] R. S. § 990; The Blanche Page, 16 Blatch. 8 (1879).

[5] 1 McMaster, Hist. Peop. U. S. 98 (1883).

[6] [Clark *v.* Phelps, 4 Cow. 203 (1825). See also 40 Cal. 58; 8 Allen, 213; 68 Pa. 396.

[7] See Schenley's Appeal, 70 Pa. 102 (1871); Schmidt *v.* Armstrong, 72 *id.* 356 (1872); French *v.* Mayor of New York, 16 How. Pr. 223 (1858); 32 Iowa, 254; 34 *id.* 559; 1 Cush. 93; 22 Barb. 260; 78 N. Y. 1, 581; 18 N. J. L. 424.

[8] Lamb *v.* Lamb, 11 Pick. *375 (1831), Shaw, C. J.

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[1] Hess *v.* Muir, 65 Md. 586, 598 (1886).

[2] Union Pacific R. Co. *v.* Commissioners, 4 Neb. 456 (1876); Dawson County *v.* McNamar, 10 *id.* 281 (1880); Traver *v.* Merrick County, 14 *id.* 333 (1883); Blair *v.* Cuming County, 111 U. S. 370-73 (1884), cases.

[3] Chase *v.* Jefts, 58 N. H. 281 (1878).

[4] [Emerson *v.* Bowers, 14 N. Y. 454 (1856): s. c. 14 Barb. 660; Coope *v.* Lowerre, 1 Barb. Ch. 47 (1845).

[5] People *v.* Hain, 62 Cal. 122 (1882).

[6] Dillon *v.* Rogers, 36 Tex. 153 (1871).

[7] See Mayor of New York *v.* Second Avenue R. Co., 31 Hun, 245 (1883).

[8] Hilgers *v.* Quinney, 51 Wis. 71 (1881)

In a bond payable "in twenty-five years" means, at the end of that period, not within nor at any time during the period.[1]

"The city of Wichita claims that when the act was passed there was no Gilbert's addition *in* the city, upon which the act could operate. Such addition may have been in the town or city, considering the collective body of people in that vicinity as the town or city, and not merely the corporate limits."[2]

In action. See ACTION, 2; CHOSE.

In banc or bank. See BANK, 2 (1).

In blank. See BLANK.

In case. See CASE, 1.

In chief. See CHIEF.

In court. See OUT, Of court.

In equity. See EQUITY; LAW.

In evidence. See EVIDENCE.

In fact. See FACT.

In full. See INDORSEMENT, 2; RECEIPT, 2.

In gross. See GROSS.

In kind. See KIND.

In law. See FACT; LAW.

In like manner. See LIKEWISE.

In mercy. See MERCY.

In possession. See POSSESSION.

In that case or event. See THEN; UPON, 2.

In the peace. See PEACE, 1.

In the presence. See PRESENCE.

In the same manner. See MANNER.

(2) The adverb: not out, within; invested with title or possession: as, "in" by descent, "in" by purchase.

2. French. Used for *en* — equivalent to the English and Latin *in*.

In autre droit. In another's right. See DROIT.

In pais or pays. In the country: in deed. See PAIS.

In ventre. In the womb. See ABORTION; VENTER.

3. Latin. (1) An inseparable particle, meaning not. Like the English *un*, negatives the sense of the simple word.

Before *l*, changes to *il*, as in illegal; before *b*, *m*, *p*, (labials), changes to *im*, as in imbecile, immaterials; before *r*, changes to *ir*, as in irregular, irrelevant. Compare EN, 2; NON.

(2) A preposition, denoting rest or motion within or into a place or thing. Opposed to *ex*, coming out from within. May be translated in, into, within, among; to, toward, at; on, upon; against. Compare EN, 1.

In adversum. Against a resisting party. Compare *In invitum*.

In æquali jure. In equal right. See JUS.

In articulo mortis. At point of death. See ARTICLE, 3.

In banco. In bank. See BANK, 2 (1).

In bonis. In property. See BONA.

In capita. Among the persons. See CAPUT.

In capite. In chief. See CHIEF.

In cujus rei testimonium. In testimony of which thing; in testimony whereof.

In consimili casu. In like cause. See CASUS, Consimili.

In custodia legis. In possession of the law. See CUSTODY.

In dubiis. In matters of doubt.

In esse. In existence; opposed to *in posse*, q. v. See REMAINDER; SALE.

In extenso. At length; fully. See AT LARGE, 1.

In extremis. (*a*) At the end, the last. See ARTICLE, 3; NUNCUPATIVE.

(*b*) Under stress of apparent necessity.

A movement *in extremis* by a vessel is not chargeable as a fault in the master or pilot, though erroneous and useless.[1]

In facie ecclesiæ. Before the church. See DOWER.

In favorem libertatis. In favor of liberty.

In favorem vitæ. In favor of life.

In fictione. See FICTION.

In fieri. In the to be made: in the making; in process of being made, created, completed: not completed.

During the term of a court, proceedings are said to be *in fieri*.[2]

In fine. At the end — of the page, title, etc. Abridged *in fin.*, *in f.*

In forma pauperis. As a poor person. See PAUPER, 1.

In foro conscientiæ. Before the bar of conscience. **In foro domestico.** Before the home tribunal. **In foro seculari.** Before the civil court. See FORUM.

In fraudem legis. In evasion of the law.

In futuro. At a future time.

[1] Allentown School District *v.* Derr, 115 Pa. 446 (1887).

[2] City of Wichita *v.* Burleigh, 36 Kan. 41 (1886).

[1] The Alabama, 17 F. R. 864 (1883), cases; 11 *id.* 922; 112 U. S. 526.

[2] 18 Wall. 193; 109 U. S. 499; 70 Ala. 402; 87 Ind. 26; 3 Bl. Com. 407.

In genere. In kind; opposed to *in specie*, q. v.

In gremio legis. In the bosom, protection, of law. See LEX.

In hac parte. On this side.

In hæc verba. In these words. See VERBUM.

In hoc. In this; as to this.

In individuo. In the undivided state: entire.

In infinitum. To infinity; indefinitely.

In initio. In the beginning; from the first.

In integrum. In the unbroken state: whole, entire.

In invitum. Against one not assenting: unwillingly; as, a tax levied *in invitum*. See INVITUS.

In judicio. By judicial procedure; in court.

In jure. In right: rightfully.

In limine. At the threshold: at first inception; at first opportunity.

An objection to testimony must be offered *in limine*.[1]

In litem. In the suit. See OATH, In litem.

In loco parentis. In the place of the parent.

Guardians and teachers are said to stand *in loco parentis*. See further PARENS.

In misericordia. In mercy. Abridged *in m'ia*. See MERCY.

In mitiori sensu. In the milder meaning. See SLANDER; SENSUS.

In mortua manu. In dead hand — mortmain, *q. v.*

In nubibus. In the clouds: in abeyance.

In nullo erratum. In nothing is there error. See ERRATUM.

In odium spoliatoris. In hatred of a despoiler. See ALTERATION, 2; SPOLIATION.

In pari causa. In an equal cause: equal right. **In pari delicto.** In equal wrongdoing. See DELICTUM.

In pari materia. On like subject. See MATERIA; REPEAL.

In perpetuam rei memoriam. For preserving evidence of the matter.

In personam. Against the person; opposed to *in rem*, q. v. See PERSONA.

In pios usus. For religious purposes. See USE, 3, Pious.

[1] 109 U. S. 70, 71; 121 *id.* 400.

In posse. In possibility; opposed to *in esse*, q. v.

In præparatorio. In preparation: being fitted out.[1]

In præsenti. At present time. See MARRIAGE.

In propria persona. In his own person. See PERSONA.

In propria causa. In his own suit. See CAUSA.

In quo. In which. See LOCUS.

In re. In the matter of: in regard to. See RES.

In rem. Against a thing — property; opposed to *in personam*, q. v. See RES.

In rerum natura. In the nature of things; in existence.

In se. In itself.

In solido; in solidum. For the whole; as an entire thing; exclusive of another.

In the case of a joint and several obligation, each obligor is liable for the whole amount; so, possession by a partner accrues to all copartners.

In specie. In the very thing; also, according to the precise terms; opposed to *in genere*, in kind. See DEPOSIT, 2; DISTRESS (4); GENUS; LOSS, 2; SPECIES.

In statu quo. In the condition in which — a person or thing was formerly. See STATUS; RESCISSION.

In terrorem. For a warning: as a threat.

In testimonium. In witness whereof.

In thesi. For a proposition: in statement.

In totidem verbis. In the very words: word for word. See VERBUM.

In toto. In the whole: entirely; absolutely.

In transitu. In passage; on the way. See STOPPAGE.

INABILITY. See ABILITY; DISABILITY.

INACCURACY. See AMBIGUITY.

INADEQUATE. See ADEQUATE.

INADMISSIBLE. See ADMISSION, 1.

INALIENABLE. See ALIEN, 2.

INAUGURATION. See OATH, Of office.

In order to vest official authority in a President or governor elect, it is only necessary that he take the oath of office.

INCAPABLE. Referring to a person disqualified from administering upon an estate, is not limited to mere mental or phys-

[1] 107 U. S. 71.

ical incapacity; includes the idea of unfitness, unsuitableness.[1] Compare IMPROVIDENT.

INCAPACITY. See CAPACITY.

INCENDIARY. See ARSON.

INCERTA. See CERTUM.

INCEST.[2] Illicit intercourse between persons within those degrees of consanguinity as to which marriage is forbidden by law.[3]

There may be a certain power exerted, resulting from age, relationship, or other circumstance, which overcomes the objections of the female, without amounting to that violence which would constitute rape.[4]

Incestuous adultery or fornication. The crime of adultery or fornication aggravated by the additional crime of incest.

While cognizable as an offense under the canon law, incest does not seem to have been punishable by indictment at common law. It is now punishable by statutes, which also prescribe the prohibited degrees of kinship.[5]

Where a defendant in an action for libel alleged that the plaintiff had committed incest from which she was pregnant, and did not attempt to prove the latter act, the plaintiff was held entitled to a verdict.[6] See IGNORANCE; POLYGAMY.

INCHASTITY. See CHASTITY; INCEST.

INCHOATE.[7] Commenced, but not completed; not fully in existence or operation; inceptive; incomplete; imperfect. Opposed, *consummate*, q. v.

Designates a right, title, or claim, not yet complete.[8] Thus, a marriage between minors is inchoate and incomplete.[9] Before the husband's death, right to dower is inchoate.[10] The right of an unborn child to take by descent is inchoate.[11] A legacy transfers an inchoate property to the legatee, perfected by assent of the executor.[12]

The right to a copyright may be inchoate.[13] From the moment of his invention, an inventor has an inchoate property in his invention, which he may complete by taking out a patent.

A purchaser at a judicial sale acquires an inchoate right to the property.[1] An informer, by commencing suit, obtains an inchoate property in the penalty, consummated by judgment.[2] The law forbids the inchoate step to an illegal act.[3] See PERFECT.

INCIDENT.[4] Whatever inseparably belongs to, is connected with, or inheres in another thing as *principal;* less properly, a thing connected with another, even separably.[5]

Incidcnt; incidental. Connected with something of more worth or importance; occupying a subordinate relation; accessory; collateral.

The "incidental" labor for which a mechanic's lien may be filed in Colorado must be directly done for, connected with, or actually incorporated into the building or improvement, and not indirectly and remotely associated with the construction.[6]

Customary incidents. Such incidents as originate in usage or custom.[7]

Annex incidents. Show what things are to be treated as incidental to another thing the subject of a contract.[8]

Parol evidence is admissible to annex incidents.

The rule is that the incident follows the principal. "When the law doth give anything to one, it giveth, impliedly, whatever is necessary for enjoying the same."[9]

When the use of a thing is granted, everything is granted by which the grantee may enjoy such use. The grantor is presumed to intend to make the grant effectual.[10]

Thus, whatever is part and parcel of a house, mill, or factory is conveyed *eo nomine*.[11] Land covered by the eaves of a house goes with a grant of the house.[12] The use of a front-door, entry, windows, closets, pumps, etc., is incident to the tenancy of a room in a house, unless otherwise agreed. The key is an incident to a building; so are the title-deeds to the land; so is rent to the reversion;[13] and so is a remainder to the particular estate. The right of alienation is necessarily incident to a fee-simple at common law.[14]

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[1] Drews' Appeals, 58 N. H. 320 (1878), cases.

[2] F. *inceste:* L. *incestus: in*, not; *castus*, pure.

[3] Daniels *v.* People, 6 Mich. 386 (1859); Territory *v.* Corbett, 3 Monta. 55 (1877); Commonwealth *v.* Lane, 113 Mass. 463 (1873); 39 Mich. 124; 44 Pa. 310.

[4] Raiford *v.* State, 68 Ga. 672 (1882).

[5] See 4 Bl. Com. 64; 1 Bishop, Cr. L. § 502, 1 Mar. & D. § 312, St. Cr. § 727; 2 Kent, 83; State *v.* Fritts, 48 Ark. 68-70 (1886), cases.

[6] Edwards *v.* Kansas City Times Co., 32 F. R. 613 (1887).

[7] In'-cō-āte. L. *inchoare*, to begin.

[8] Trenier *v.* Stewart, 101 U. S. 802 (1879).

[9] 1 Bl. Com. 436.

[10] 2 Bl. Com. 130.

[11] Marsellis *v.* Thalhimer, 2 Paige, Ch. 35 (1830).

[12] 2 Bl. Com. 512.

[13] Lawrence *v.* Dana, 4 Cliff. 66 (1869).

[1] Delaplaine *v.* Lawrence, 10 Paige, 602 (1844).

[2] 2 Bl. Com. 437.

[3] Trist *v.* Child, 21 Wall. 451 (1874).

[4] L. *incidere*, to fall upon or into.

[5] See Neal *v.* East Tennessee College, 6 Yerg. 209 (1834).

[6] Rara Avis Mining Co. *v.* Bouscher, 9 Col. 388 (1886).

[7] 1 Whart. Ev. § 969.

[8] 1 Greenl. Ev. § 294.

[9] 2 Bl. Com. 36.

[10] Steam Stone Cutter Co. *v.* Shortsleeves, 16 Blatch. 382 (1879), cases.

[11] 1 Greenl. Ev. §§ 286, 294, cases.

[12] Sherman *v.* Williams, 113 Mass. 484 (1873).

[13] 2 Bl. Com. 111, 176.

[14] 1 Washb. R. P. 54.

A vessel is incident to its keel; the frame to a picture; the halter to a horse sold; wool upon a pelt to the pelt; wages to freight; interest to its principal; the subscription list to a newspaper establishment; the custody of goods by an innkeeper to the contract for entertainment; such subordinate acts by a special agent as are usually done in connection with the principal act.[1]

Some writs are incidents to the other writs. Power to make rules of court is incidental to the general power invested in every court of record.[2] Power to call for proofs, to compel the attendance of witnesses, and to fine or imprison for non-attendance or non-production, is incidental to the power to hear and determine causes.[3] Costs follow a judgment as an incident thereto.

Power to make by-laws is incident to general corporate powers.

See further ACCESSORY; APPENDAGE; APPENDANT; APPURTENANT; CESSION; COMMAND; GRANT, 2, 3; JOINDER; MACHINERY; MESSUAGE; PRINCIPAL, 1; PROHIBITION, 1; RAILROAD.

INCIPITUR. L. It is begun: the beginning.

Formerly, when parties came to an issue, the plaintiff entered it, with all prior pleadings, on an issue-roll; later, only the commencement of the pleadings was entered. This was termed entering the *incipitur*—the beginning.[4]

INCLOSE. "Inclose" and "include" are of the same derivation. One of their common significations is, to confine within.[5] See INCLUDE.

Inclosure. A tract of land surrounded by an actual fence, and such fence.[6] See CLOSE, 3.

A testator directed his executors "to inclose with an iron fence the Friends' meeting-house grounds, the school-house grounds, and the Friends' burial-ground." These three grounds were adjoining. *Held*, that there was no latent ambiguity as to his intention to inclose each of the grounds on all sides.[7]

INCLUDE.[8] To confine within; to comprise, embrace, comprehend. See INCLOSE.

Including. A legacy of "one hundred dollars, including money trusteed" at a bank, was held to intend a gift of one hundred dollars only.[9]

Inclusive. Embraced; comprehended; opposed to *exclusive*. See DAY; CONSISTING.

INCLUSIO. See EXPRESSIO.

INCOME. That which comes in, or is received from any business or investment of capital, without reference to the outgoing expenditures. Applied to the affairs of an individual, conveys the same idea that "revenue" expresses when applied to the affairs of a state or nation. Sometimes, is synonymous with "profits," the gain as between receipts and payments.[1] See PROFIT, 1. Compare EARNINGS.

The "income of an estate" is the profit it will yield after deducting the charges of management, or the rent which may be obtained for the use of it. "Rent and profits," "income," and "net income" of the estate, are equivalent expressions.[2]

The income from a profession, trade, or employment, which may be taxed, is the result of the business for a given period, the net result of many combined influences: the creation of capital, industry, and skill.[3]

In the ordinary commercial sense, "income," especially when connected with the word "rent," may mean net or clear income. But one may say that his "income" from a certain property amounts to a particular sum, and yet be speaking merely of the accruing rent, without regard to insurance, taxes, or repairs. Outside of business circles we can never know whether net or gross income is meant without further inquiry. "Produce" or "product," as a substituted word, may relieve a will from obscurity.[4]

"Income" is the gain which accrues from property, labor, or business. It is applicable to the periodical payments, in the nature of rent, usually made under mineral leases.[5]

May mean "money," and not the expectation of receiving or the right to receive money at a future time. A note is ground for expecting income, and, in the sense of a statute taxing incomes, the amount thereof is to be returned when paid.[6] See BOND.

An absolute gift of all of the income of property, without limitation as to time, is a gift of the property itself.[7]

INCOMMUTABLE. See COMMUTATION.

INCOMPATIBLE. Offices are said to be "incompatible and inconsistent" when,

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[1] 2 Pars. Contr. 57.

[2] 25 Pa. 516; 3 Binn. 417, 277.

[3] 1 Greenl. Ev. § 309.

[4] See 3 Steph. Com. 566, n.; 1 Arch. Pr. 350.

[5] [Campbell v. Gilbert, 57 Ala. 571 (1877), Brickell, Chief Justice.

[6] Taylor v. Welbey, 36 Wis. 44 (1874); Pettit v. May, 5 id. 672 (1674); Porter v. Aldrich, 29 Vt. 331 (1856); Gundy v. State, 63 Ind. 580 (1878); 8 Hun, 269.

[7] Appeal of Hall, 112 Pa. 52 (1886).

[8] L. *includere*, to shut in, keep within.

[9] Brad[illegible] v. Darling, 132 Mass. 218 (1882).

[1] [People v. Supervisors of Niagara, 4 Hill, 23 (1842), Bronson, J.

[2] Andrews v. Boyd, 5 Me. *203 (1828), Weston, J. Compare Scott v. West, 63 Wis. 532, 590 (1885).

[3] Wilcox v. County Commissioners, 103 Mass. 546 (1870), Ames, J.

[4] Thompson's Appeal, 100 Pa. 481-82 (1882), Gordon, J.; Sim's Appeal, 44 id. 347 (1863).

[5] Eley's Appeal, 103 Pa. 306 (1883), Sterrett, J.

[6] United States v. Schillinger, 14 Blatch. 71 (1876); Gray v. Darlington, 15 Wall. 63 (1872).

See also 14 La. An. 815; 9 Mass. 372; 3 Duer, 426; 30 Barb. 637; 4 Abb. N. C. 400; 1 Wil. (Ind.) 219; 16 F. R. 14.

[7] Bristol v. Bristol, 53 Conn. 259 (1885); Sproul's Appeal, 105 Pa. 441 (1884); 2 Roper, Leg. 371.

from the multiplicity of business, they cannot be executed by the same person with care and ability; or, when their being subordinate and interfering with each other induces a presumption that they cannot both be executed with impartiality and honesty.[1]

Incompatibility. See DIVORCE.

INCOMPETENT. See COMPETENT.

INCOMPLETE. See INCHOATE; PERFECT.

INCONCLUSIVE. See CONCLUDE, 2.

INCONSISTENT. See CONDITION; INCOMPATIBLE; REPUGNANT.

INCONTESTABLE. See CONTEST.

INCONVENIENCE. See HARDSHIP.

INCORPORATE. See CORPORATE.

INCORPOREAL. See CORPOREAL.

INCORRIGIBLE. See REFORMATORY.

INCREASE. That which grows out of land or is produced by the cultivation of it.[2] Compare ACCRETION; EARNINGS; INCOME; PROFIT.

Increased costs. See COSTS.

INCREDIBLE. See CREDIT.

INCREMENT. See ACCESSORY; INCIDENT; ICE.

INCRIMINATE. See CRIMINATE.

INCULPATE. See CULPA.

INCUMBENT. 1. Resting as a duty or obligation.

2. One who is legally authorized to discharge the duties of an office.[3] See VACANCY.

INCUMBIT. See PROBARE, Probatio.

INCUMBRANCE.[4] A burden, an obstruction, impediment.

Whatever charges, burdens, obstructs, or impairs the use of an estate in land, or prevents or impairs its transfer.[5]

An estate or interest in or a right to land, to the diminution of its value.[6]

Every right to or interest in land which may subsist in a third person to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance.[7]

An outstanding lease is such an incumbrance.[8]

So is a subsisting lien of a mechanic or materialman.[9]

Incumber. To charge or burden with a lien, or an estate. **Disincumber.** To relieve of such charge or burden.

Incumbrancer. He who places a charge upon his interest in realty, as, by a mortgage, or a judgment confessed.

"Incumbrance" is broader than "lien." An "incumbrancer" is one who has a legal claim upon an estate. An absolute conveyance is an incumbrance, in the fullest sense of the term.[10]

Unincumbered. Not bound by or subject to anything in the nature of a lien or burden: as, an unincumbered title.[11]

Incumbrances are spoken of as prior, subsequent; first, second, etc.

Covenant against incumbrances. A stipulation that there are no charges against land which will diminish its value.

The mere existence of any such charge constitutes a breach of the covenant. If in the present tense, does not run with the land. The covenantee may extinguish the claim, and recover therefor.[12]

But in a policy of fire insurance a warranty concerning "incumbrances of all kinds" includes only such as are created by the act or consent of the parties, not those created by law.[13]

See BURDEN; CHARGE; LIEN; ONUS, Cum onere; UNDER AND SUBJECT.

INCUR. See EXPENDITURE.

Men contract debts affirmatively; they incur liabilities — the liability is cast upon them by act or operation of law. "Incur" implies, then, something not embraced in the words "debts and contracts."[14]

INCURABLE. See CURE, 2.

INDEBITATUS. See ASSUMPSIT.

INDEBTED. See DEBT.

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[1] People v. Green, 46 How. Pr. 170 (1873): 4 Inst. 100; Bac. Abr. See also Commonwealth v. The Sheriff, 4 S. & R. *277 (1818); Commonwealth v. Binns, 17 id. *220 (1828); State v. Buttz, 9 S. C. 179 (1877); Constitution, Art. I, sec. 6, cl. 2.

[2] De Blane v. Lynch, 23 Tex. 27 (1859).

[3] State v. McCollister, 11 Ohio, 50 (1841); County of Scott v. Ring, 29 Minn. 403 (1882).

[4] F. *encumbrer*, to load: *combrer*, to hinder: L. *cumbrus*: L. *cumulus*, a heap. Also spelled encumbrance; encumber, disencumber.

[5] Anonymous, 2 Abb. N. C. 63 (1876).

[6] Newcomb v. Fiedler, 24 Ohio St. 466 (1873).

[7] Rawle, Cov. Tit. 94; Kelsey v. Remer, 43 Conn. 188 (1875); Alling v. Burlock, 46 id. 510 (1878); Fritz v. Pusey, 31 Minn. 369 (1884), cases. See also 51 Me. 73; 4 Mass. 627; 2 Greenl. Ev. § 242.

[8] Fritz v. Pusey, 31 Minn. 369 (1884), cases.

[9] Redmon v. Phœnix Fire Ins. Co., 51 Wis. 300 (1881).

[10] Warden v. Sabins, 36 Kan. 169 (1887), Horton, C. J.

[11] Gillespie v. Broas, 23 Barb. 376 (1856); 5 Abb. Pr. 23.

[12] See 20 Ala. 137, 156; 6 Conn. 249; 4 Ind. 533; 8 id. 171; 10 id. 424; 19 Mo. 480; 20 N. H. 369; 25 id. 229; 10 Ohio, 317; 5 Wis. 17; 27 Vt. 739; Rawle, Cov. Tit. 89; 2 Washb. R. P. 658; 2 Greenl. Ev. § 242; Tud. L. C. 60.

[13] Hosford v. Hartford Fire Ins. Co., 127 U. S. 404 (1888).

[14] [Crandall v. Bryan, 15 How. Pr. 56 (1857): 5 Abb. Pr. 169. See also 14 Barb. 202; 4 Duer, 101.

INDECENT. Whatever shocks the sense of decency in people generally.

At common law, indictable as a misdemeanor. Examples: Exposure of the person in public, exhibiting pictures of nude persons. What are acts of indecency is generally to be decided by a jury.

Indecent assault; indecent exposure; indecent prints or publications. These offenses (largely self-defining) are punishable, in England, under statute 24 & 25 Vict. (1861) c. 100, s. 52; in the United States, by statute in each State; in Pennsylvania, by the Crimes Act of March 31, 1860, § 44.[1]

In Rev. St. § 3893, which forbids mailing indecent matter, "indecent" means immodest, impure, not simply coarse, nor even profane.[2]

But a sealed letter is not within the prohibition.[3]

Public indecency. Has no fixed legal meaning; is too vague to imply, of itself, a definite offense. The courts, by a kind of judicial legislation, have usually limited the operation of the expression to public displays of the naked person, the publication, sale, or exhibition of obscene books and prints, or the exhibition of a monster,—acts which have a direct bearing on the public morals, and affect the body of society.[4]

The place is "public" if the exposure is such that it is likely to be seen by a number of casual observers.[5]

Where the bodily injury from an indecent assault is trifling, the gravamen of an action for damages must be the mental suffering. In such case evidence is always admissible to show that the plaintiff was a woman of unchaste character.[6]

In an action for defamation, words which in their common acceptation charge the crime of public indecency are actionable *per se*.[7]

See LEWD; MORALS; OBSCENE.

INDEFEASIBLE. See DEFEASANCE.

INDEFINITE. See DEFINITE.

INDEMNITY.[8] 1. Compensation for a loss sustained. 2. An engagement to make good loss that may be sustained: a bond of indemnity.[9]

[1] See Cooley, Const. Lim. 748; 2 Whart. Cr. L. §§ 2385, 2544; 2 Chitty, Cr. L. 42; 1 Russ. Cr. 326; 2 S. & R. 91; 126 Mass. 52; 2 C. & K. 933.

[2] United States *v.* Smith, 11 F. R. 663, 665 (1882), Barr, District Judge.

[3] United States *v.* Loftis, 12 F. R. 671 (1882), Deady, J.

[4] McJunkins *v.* State, 10 Ind. 145 (1858), Hanna, J. See Jennings *v.* State, 16 *id.* 335 (1861); Ardery *v.* State, 56 *id.* 328 (1877).

[5] Van Houten *v.* State, 46 N. J. L. 17 (1884), Beasley, Chief Justice.

[6] Mitchell *v.* Work, 13 R. I. 646 (1882), cases.

[7] Seller *v.* Jenkins, 97 Ind. 430 (1884), cases.

[8] L. *indemnitas: in-demnis*, unharmed, free from *damnum*, hurt, loss.

[9] See Weller *v.* Eames, 15 Minn. 467 (1870); 2 McCord, 282.

Indemnify. To compensate for loss, sustained or anticipated.

Indemnitor. He who undertakes to protect another from loss that may be incurred on account of an act or action by the latter in behalf of the former. Opposed, indemnitee.[1]

Property insurance is a contract for indemnity. Officers selling personalty, under executions, require bonds of indemnity against damages recoverable for trespass.[2] Persons who distribute trust moneys require bonds for *pro rata* repayment in the event of unexpected claims arising; and settlements and wills may contain clauses of indemnity for the protection of executants.

There is difference between an agreement to indemnify and an agreement to pay.[3]

See DAMNUM. Damnificatus; INJUNCTION; INSURANCE; SURETY.

3. Statutes designed to relieve the occupant of an office who has failed to do some act necessary fully to qualify him for the discharge of the duties of the office, or to exempt from punishment persons guilty of offenses, have been called "acts of indemnity." See AMNESTY.

INDENTURE.[4] A deed: a writing sealed and delivered.[5]

A deed *inter partes*, or a mutual deed.[6]

Named from being indented or cut on the top or the side by a waving line or a line of indenture so as to fit the counterpart from which it is supposed to have been separated.[6]

Formerly, when there were more parties than one to a sealed instrument, a copy for each was made, and cut or indented (in acute angles *instar dentium:* like the teeth of a saw, but, later, in a waving line) on the top or side, to tally with the other; which deed, so made, was called an "indenture." Both parts were written on the same piece of parchment, with some word or letters between them and through which the parchment was cut so as to leave half on each part. Later, the indenting was not through any word at all; and, in time, the term "indenture" served merely to give name to the species of deed. The part executed by the grantor was the original, the others counterparts. Where all the parties executed every part, each part was an original. Opposed, *deed-poll*.[7]

By 8 and 9 Vict. (1845), c. 106, the necessity for indenting was abolished in the case of ordinary deeds, and by 24 Vict. (1861), c. 9, as a requisite in gifts of land to charities.[7]

[1] 30 Minn. 321; 15 *id.* 461.

[2] 87 Ill. 243.

[3] Wicker *v.* Hoppock, 6 Wall. 99 (1867).

[4] L. L. *indentare*, to notch: L. *dens*, a tooth.

[5] Overseers of Hopewell *v.* Overseers of Amwell, 6 N. J. L. 175 (1822).

[6] Bowen *v.* Beck, 94 N. Y. 89 (1883).

[7] 2 Bl. Com. 296; 2 Washb. R. P. 587; Williams, R. P. 146-47; 1 Reeve. Hist. Eng. Law, 89.

Indent. *n.* Any contract or obligation in writing; but may have a narrower signification.[1]

INDEPENDENCE. The Declaration of Independence, the state paper issued July 4, 1776, by the "Representatives of the United States of America," was, "that these United Colonies, are and of Right ought to be, Free and Independent States; that they are Absolved from Allegiance to the British Crown, and that all political connection between them and the State of Great Britain is and ought to be totally dissolved; . . . and that as Free and Independent States they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."[2]

The inherent rights which lie at the foundation of all action between fellow-men are happily expressed in the preamble, viz.: "We hold these truths to be self-evident" — that is, so plain that their truth is recognised upon their mere statement,—"that all men are endowed"— not by edicts of emperors, or decrees of Parliament, or acts of Congress, but "by their Creator with certain inalienable rights"— that is, rights which cannot be bartered, given, or taken away except in punishment of crime,—"and that among these are life, liberty, and the pursuit of happiness, and to secure these"— not grant them —"governments are instituted among men, deriving their just powers from the consent of the governed."[3] See CONFEDERATION; HAPPINESS.

Independence Day. See HOLIDAY.

INDEPENDENT. See DEPENDENT; COVENANT.

INDEX. A portion of a book exhibiting, in alphabetical order, and in more or less detail, the contents of the whole volume; or, a book in itself containing, in like order, references to the contents of a series of volumes. Latin plural, *indices;* English plural, indexes.

Direct index. Exhibits the names of grantors, lessors, mortgagors, and other parties of the first part to recorded instruments. **Indirect** or **reverse index.** Gives the names of grantees, lessees, mortgagees, and other like parties to whom recorded instruments were executed; also called *ad sectam* **index:** literally, at the suit of, that is, originally, containing instruments made or delivered to plaintiffs.

Indexes, directed by statute to be made, are designed to facilitate the examination of records, not to protect the interests of persons whose conveyances are recorded. In such case the failure of the officer to make the index will not prejudice the title of a grantee or mortgagee.[1] See IDEM, Sonans.

INDIAN. Includes descendants of Indians who have an admixture of white or negro blood, provided they retain their distinctive character as members of the tribe from which they trace descent.[2]

The United States adopted the principle originally established by European nations, that the aboriginal tribes were to be regarded as the owners of the territories they respectively occupied.[3] See DISCOVERY, 1.

Indians who maintain their tribal relations are the subjects of independent governments, and as such not in the jurisdiction of the United States, because the Indian nations have always been regarded as distinct political communities between which and our government certain international relations were to be maintained. These relations are established by treaties to the same extent as with foreign powers. They are treated as sovereign communities, possessing and exercising the right of free deliberation and action, but, in consideration of protection, owing a qualified subjection to the United States.[4]

If the tribal organization of Indian bands is recognized by the political department of the National government as existing; that is to say, if the government makes treaties with and has its agent among them, paying annuities, and dealing otherwise with "head men" in its behalf, the fact that the primitive habits and customs of the tribe have been largely broken into by intercourse with the whites, does not authorize a State government to regard the tribal organization as gone, and the Indians as citizens of the State where they are and subject to its laws.[5]

When members leave their tribe and become merged into the mass of the people they owe complete

[1] United States *v.* Irwin, 5 McLean, 183-84 (1851).

[2] See Rev. Stat., 2 ed., pp. 3-6.

[3] Butchers' Union Co. *v.* Cresent City Co., 111 U. S. 756 (1884), Field, J.

[1] Nichol *v.* Henry, 89 Ind. 54, 58-59 (1883); Bedford *v.* Tupper, 30 Hun, 176 (1883). See also 35 Ala. 28; 50 Ga. 327; 19 Ill. 486; 29 La. An. 116; 31 *id.* 38; 44 Mich. 128; 46 Mo. 472; 87 N. Y. 257; 16 Ohio St. 548; 76 Pa. 398; 82 *id.* 116; 11 W. N. C. 567; 24 Vt. 327, 338; 4 Biss. 437, 445; Cooley, Torts, p. 387, cases.

[2] Wall *v.* Williams, 11 Ala. 836 (1847). See Relation of Indians to Citizenship, 7 Op. Att.-Gen. 746, 750 (1856); Campan *v.* Dewey, 9 Mich. 435 (1861).

[3] United States *v.* Rogers, 4 How. 567 (1846); Johnson *v.* M'Intosh, 8 Wheat. 574, 584 (1823); United States *v.* Kagama, 118 U. S. 381-82 (1886); 3 Kent, 378; 2 Washb. R. P. 521.

[4] *Exp.* Reynolds, 18 Alb. Law J. 8 (U. S. D. C., W. D. Ark., 1878), Parker, J. See also Cherokee Nation *v.* Georgia, 5 Pet. *16 (1831); Worcester *v.* Georgia, 6 *id.* 515, 584 (1832); Dred Scott *v.* Sandford, 19 How. 403 (1856); Cherokee Trust Funds, 117 U. S. 288 (1886); 2 Story, Const. §§ 1097-1100; 3 Kent, 308-18; 50 Mich. 585.

[5] The Kansas Indians, 5 Wall. 737, 756 (1866), Davis, J.

allegiance to the government of the United States and are subject to its courts.[1]

A white man who is incorporated with a tribe by adoption does not thereby become an Indian, so as to cease to be amenable to the laws of the United States or to lose the right to trial in their courts.[2]

Under the Constitution "Indians not taxed" are not counted in apportioning representatives and direct taxes among the States; and Congress has power to regulate commerce with the Indian tribes. The tribes are alien nations, distinct political communities, with whom the United States have habitually dealt either through treaties or acts of Congress. The members owe immediate allegiance to their several tribes, and are not part of the people of the United States. They are in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, cannot be taxed by any State. General acts of Congress do not apply to Indians, unless so expressed as to clearly manifest an intention to include them. The alien and dependent condition of the members of the tribes cannot be put off at their own will, without the assent of the United States. They have never been deemed citizens, except under explicit provisions of treaty or statute to that effect; nor were they made citizens by the Fourteenth Amendment.[3]

While the government has recognized in the Indian tribes heretofore a state of semi-independence and pupilage, it has the right and authority, instead of controlling them by treaties, to govern them by acts of Congress: they being within the geographical limits of the United States, and necessarily subject to the laws which Congress may enact for their protection and that of the people with whom they came in contact. A State has no power over them as long as they maintain their tribal relations: the Indians then owe no allegiance to the State, and receive from it no protection.[4]

In construing a treaty, if words be used which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used in the latter sense. How the words were understood by the unlettered people, rather than their critical meaning, should form the rule of construction.[5]

The relations between the United States and the different tribes being those of a superior toward an inferior who is under its care and control, its acts touching them and its promises to them, in the execution of its own policy and in the furtherance of its own interests, are to be interpreted as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The inequality between the parties is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws. . . A treaty is not to be read as rigidly as a document between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations.[1]

Indian country. That portion of the United States declared such by act of Congress; not, a country owned or inhabited by Indians in whole or in part.

As, in the act declaring it a crime to introduce spirituous liquors in such country.[2]

Applies to all the country to which the Indian title has not been extinguished, whether within a reservation or not, and whenever acquired.[3]

Indian Territory. An act approved February 15, 1888 (25 St. L. 33), provides that any person hereafter convicted in the United States courts having jurisdiction over the Indian Terrritory or parts thereof, of stealing any horse, mare, gelding, filly, foal, ass or mule, when said theft is committed in the Territory, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than fifteen years, or by both, at the discretion of the court.

SEC. 2. That any person convicted of any robbery or burglary in the Territory shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding fifteen years, or both, at the discretion of the court; *Provided*, That the act shall not be construed to apply to any offense committed by one Indian upon the person or property of another Indian, or so as to repeal any former act in relation to robbing the mails or robbing any person of property belonging to the United States; nor shall the act affect or apply to any prosecution now pending, or the prosecution of any offense already committed.

SEC. 3. That all acts inconsistent with this act are hereby repealed: *Provided, however*, That such acts shall remain in force for the punishment of persons who have heretofore been guilty of the crime of larceny in the Territory.

See COMMERCE; EXPATRIATION; EXTRADITION, 1. GRAIN; PARTUS; PUEBLO.

INDICATE. See SHOW.

INDICIA. L. Marks; signs; appearances; color.

In civil law, circumstantial evidence — facts which give rise to inferences. In common law, indications

[1] *Exp.* Reynolds, *ante*.

[2] United States *v.* Rogers, 4 How. 567 (1846); 2 Op. Att.-Gen. 693; 4 *id.* 258; 7 *id.* 174.

[3] Elk *v.* Wilkins, 112 U. S. 90–100, 102 (1884), cases, Gray, J.

[4] United States *v.* Kagama, 118 U. S. 375, 381–82 (1886), cases, Miller, J. Act 3 March, 1871: R. S. § 2079; 119 U. S. 27.

[5] Worcester *v.* Georgia, 6 Pet. *582 (1832), M'Lean, J.

[1] Choctaw Nation *v.* United States, 119 U. S. 28 (1886), Matthews, J. On Indian citizenship, see 20 Am. Law Rev. 183–93 (1886), cases.

[2] United States *v.* Seveloff, 2 Saw. 311 (1873); Pelcher *v.* United States, 3 McCrary, 510, 515 (1882), cases; United States *v.* Martin, 8 Saw. 473 (1883), cases; Forty-Three Cases of Brandy, 14 F. R. 539–42 (1882), cases; United States *v.* Earl, 17 *id.* 75 (1883), cases; United States *v.* Holliday, 3 Wall. 407, 415–19 (1865).

[3] *Exp.* Crow Dog, 109 U. S. 556, 561 (1883). See also United States *v.* Le Bris, 121 *id.* 287 (1887): R. S. § 2139

of character: as, *indicia* of authority, of fraud, of title.[1] See BADGE, 2.

INDICTMENT.[2] A written accusation of one or more persons of a crime or misdemeanor, preferred to and presented upon oath by a grand jury.[3]

Indict. To charge with crime by means of an indictment. **Indicted.** Charged by indictment. *Indictor* and *indictee* are not now in use. **Indictable.** Admitting of prosecution by indictment.

Bill of indictment. The written accusation presented to the grand jury, and found by them to be a "true bill" or "not a true bill."

The indictment intended by the Fifth Amendment is the presentation to the proper court, under oath, by a grand jury, duly impaneled, of a charge describing an offense against the law for which the party may be punished.[4]

No change can be made in the body of such instrument without a re-submission to the grand jury — except where statutes prescribe otherwise. But changes may be made in the "caption."[4]

The object of indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same offense; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had.[5]

The object is, that the defendant may know what to meet; that he may plead a former acquittal or conviction; and that he may take the opinion of the court before which he is indicted, by demurrer or motion in arrest of judgment, or, the opinion of a court of error on the sufficiency of the statements in the indictment.[6]

Facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth with reasonable particularity of time, place, and circumstances. Every ingredient of the offense must be clearly alleged. Where the definition of an offense includes generic terms, the indictment must state the species.[7]

Where the offense is a common-law offense, the technical words of the common law must be used; where the offense is statutory, the substance of the words may be followed.[1]

For a statutory offense, the charge must be so laid as to bring the case within the description of the offense given in the statute, alleging distinctly the essential requisites. Nothing is to be left to implication or intendment. It is sufficient to pursue the words of the act, or, if that would leave an ambiguity, then the substance and legal effect of the words.[2]

The rule that a statutory offense need not be charged in the words of the statute does not apply to technical terms and words of art which have acquired a conventional meaning and cannot be dispensed with, such as "murdered," "feloniously," and the like. But every material ingredient, constituting the description of the offense in the statute, whether an act done, knowledge had, an intent or purpose entertained, or the existence of any collateral fact, must be affirmatively stated in plain, direct, intelligible language.[3]

Where the statute simply designates the offense, and does not in express terms name its constituent elements, the information must sometimes be expanded beyond the statutory terms.[4]

When a statute contains provisos and exceptions in distinct clauses, it is not necessary to state that the defendant does not come within the exceptions, or to negative the provisos. But if the exceptions are contained in the enacting clause, it will be necessary to negative them, that the description of the crime may in all respects correspond with the statute.[5]

Where an offense may be committed by doing any one of several things, the indictment may, in a single count, group them together, and charge the defendant with having committed them all, and a conviction may be had of any one of the things, without proof of the commission of the others.[6]

Several offenses of the same class or kind, growing out of the same transaction, though committed at different times, may be joined in the same indictment in separate counts.[7]

Where the same offense is charged in different

[1] 60 Mo. 420; 1 Pars. Contr. 45.

[2] F. *indicter*, to accuse: L. L. *indicare*, to point out: L. *indicere*, to proclaim.

[3] 4 Bl. Com. 302. See also 4 Col. 202; 12 Conn. 452; 4 Mich. 424; 72 Mo. 106; 13 Wend. 317; 24 *id.* 570; 11 Ohio, 71; 19 Ohio St. 255.

[4] *Exp.* Bain, 120 U. S. 1, 6-9 (1887), cases, Miller, J. And see 26 Am. Law Reg. 446-47 (1887), cases.

[5] United States *v.* Cruikshank, 92 U. S. 558 (1875), Waite, C. J.

[6] United States *v.* Bennett, 16 Blatch. 350-51 (1879), Blatchford, J.; Bradlaugh *v.* The Queen, L. R., 3 Q. B. 616 (1878).

[7] United States *v.* Cruikshank, *supra*; United States *v.* Cook, 17 Wall. 173-77 (1872), cases; United States *v.* Hess, 124 U. S. 483 (1888), cases.

[1] United States *v.* Bachelder, 2 Gall. 18 (1814), Story, J.; Cannon *v.* United States, 116 U. S. 78 (1885), cases.

[2] United States *v.* Staats, 8 How. 44 (1850), Nelson, J.

[3] Edwards *v.* Commonwealth, 19 Pick. 125 (1837), Shaw, C. J. See 4 Bl. Com. 307, 227; 11 F. R. 240; 2 Flip. 319; 87 Ind. 70; 30 Kan. 365, 612; 17 Nev. 286; 50 Pa. 249; 77 Va. 54.

[4] State *v.* Gavigan, 36 Kan. 327 (1887); 30 *id.* 365. See generally State *v.* Campbell, 29 Tex. 46 (1867), cases: 94 Am. Dec. 252-58 (1888), cases.

[5] 1 Chitty, Cr. L. 283 *b*, 284: United States *v.* Britton, 107 U. S. 670 (1882); United States *v.* Cook, 17 Wall. 173-74 (1872), cases.

[6] Bork *v.* People, 91 N. Y. 13 (1883); State *v.* Gray, 29 Minn. 144 (1882), cases.

[7] United States *v.* Wentworth, 11 F. R. 52 (1882); *Exp.* Peters, 12 *id.* 461 (1880); *ib.* 464, cases: R. S. § 1024.

counts, the whole indictment may be submitted to the jury, with instructions, if they find the defendant guilty upon any count, to return a general verdict of guilty; otherwise, where one count is had, and the evidence thereon is submitted with the rest, against objection.[1] See BAD, 2.

For a common-law offense, the conclusion of an indictment is "against the peace and dignity" of the commonwealth or State; for a statutory offense, "against the form of the statute in such case made and provided."[2] See AMENDMENT, 1; FORM, 2, Of statute.

An indictment is to be distinguished from a presentment and an information, *qq. v.*

See also ABBREVIATIONS; CAPTION, 2; CHALLENGE, 2; COMMENCEMENT; CONFESSION, 2; COPY; CRIME; DEMURRER; DIVERS; EVIDENCE; EXCEEDING; IDEM, SONANS; IDENTITY, 1; IGNORE; INDORSE, 1; INFAMY; JEOFAIL; JOINT; JURY; NEGATIVE; OR, 2; NOLLE PROSEQUI; NOLO CONTENDERE; PLACE, 1; QUASH; SENTENCE; THEN AND THERE; VERBUM, In hæc.

INDIFFERENT. 1. Said of an appraiser, where property has been taken in execution: impartial, free from bias.[3]

2. Said of a juror: that the mind is in a state of neutrality as respects the person and the matter to be tried; that there exists no bias, for or against either party, calculated to operate upon him; that he comes to the trial with a mind uncommitted and prepared to weigh the evidence in impartial scales.[4] Compare IMPARTIAL.

INDIGENT. See PAUPER; POOR.

A gift "to aid indigent young men" of a certain town or State "in fitting themselves for the evangelical ministry," is not void for uncertainty. The words "indigent" and "evangelical" are sufficiently definite, within ordinary intelligence. "They describe a man who is without sufficient means of his own, and whom no person is bound and able to supply, to enable him to prepare himself for preaching the Gospel."[5]

INDIGNITY. What acts or course of conduct will amount to such indignities as constitute a cause for divorce seems to be nowhere defined, and they are perhaps incapable of exact specification.

In Pennsylvania, a single act of indignity is not enough: there must be such a course of conduct, or continued treatment, as renders the wife's condition intolerable and her life burdensome. Indignities to the person need not be such as would endanger life or health; they may be such as would render life too humiliating to be borne.[1]

In North Carolina, the indignity must be such as may be expected seriously to annoy a woman of ordinary good sense and temper, and must be continued in, so that it may appear to have been done willfully or at least consciously.[2]

That condition which renders life burdensome must be shown to exist in fact, and not be merely inferred from facts.[3] Compare CRUELTY, 1.

INDIRECT. See DIRECT.

INDISPUTABLE. See PRESUMPTION.

INDIVIDUAL. Pertaining or belonging to a single or distinct person, considered apart from a number of persons jointly associated or involved; personal; private: as, individual — assets, liability. See LIABILITY; PARTNERSHIP; CONTRIBUTION.

Individuals. See POLICE, 2; WELFARE.

INDIVISIBLE. See DIVISION, 1.

INDORSE.[4] 1. To write upon the back of any instrument or paper: as, to indorse a deed with the day or book of its record; to indorse a pleading filed with the time of receipt, payment of costs, etc.; to indorse a warrant of arrest prior to action under it in another county.[5]

In many cases, simply to write upon. In this sense words may be indorsed upon the *face* of a paper, even upon the face of a bill of exchange or promissory note.[6]

While the word has no definite technical meaning, other than that of some writing "upon the back," its particular meaning is always determined by the context, if in writing, and by its connection, if in spoken words.[7]

Indorsement. Has its primitive and popular sense of something written on the outside or back of a paper, on the opposite side from which something else had been previously written, when the context shows that that sense is necessary to give effect to

[1] Commonwealth *v.* Boston, &c. R. Co., 133 Mass. 391-92 (1882); 16 Gray, 11, 17; 120 Mass. 372.

[2] See Insall *v.* State, 14 Tex. Ap. 144 (1883); Holden *v.* State, 1 *id.* 234 (1876), cases.

[3] Fox *v.* Hills, 1 Conn. 307 (1815); Mitchell *v.* Kirtland, 7 *id.* *231 (1828); Fitch *v.* Smith, 9 *id.* *45 (1831).

[4] People *v.* Vermilyea, 7 Cow. 122 (1827).

[5] Storr's Agricultural School *v.* Whitney, 54 Conn. 352 (1887), cases, Pardee, J.: 35 Alb. Law J. 387, cases. Compare Hunt *v.* Fowler, 121 Ill. 269 (1887), cases: 36 Alb. Law J. 113; *ib.* 115. cases.

[1] May *v.* May, 62 Pa. 210 (1869).

[2] Miller *v.* Miller, 78 N. C. 106 (1878).

[3] Cline *v.* Cline, 10 Nev. 474-77 (1881), cases.

[4] F. *endosser*, to put on the back of: *en*, L. *in*, on; *dos*, L. *dorsum*, the back. *Indorse* seems to be preferred to *endorse*.

[5] See 2 Bl. Com. 468; Hartwell *v.* Hemmenway, 7 Pick. 119 (1828); Marian, etc. Gravel Road Co. *v.* Kessinger, 66 Ind. 553 (1879).

[6] Commonwealth *v.* Butterick, 100 Mass. 16 (1868); 2 Bish. Cr. L. § 570 *a*.

[7] Commonwealth *v.* Spilman, 124 Mass. 329 (1878); Davis *v.* Town of Fulton, 52 Wis. 662 (1881).

the pleading or other instrument in which it occurs.[1]

2. For the person to whom or to whose order a bill of exchange or a promissory note is payable, to write his name on the *back* of such bill or note in order to assign over his property therein.[2]

That is the common meaning, but it is not impossible to indorse by placing the name upon the face of the bill or note.[3]

Indorser. He who writes his name upon a negotiable instrument prior to transferring it by delivery. **Indorsee.** He to whom the instrument is delivered; the transferee.

Indorsement. The act by which a bill or note payable to order is transferred; the transfer of the legal title to any such instrument.

As far as it operates as a transfer of the instrument, it is an executed contract; and also, since it imports, unless restricted, future liability in the indorser, it is an executory contract. But every contract, whether executed or executory, evidenced by a written instrument, must be delivered and accepted. Hence, to complete a contract of indorsement, in addition to writing the name of the payee on the back, the further act of delivering the instrument to the person to whom title is to be transferred is necessary. Indorsing, then, imports delivery.[4]

Accommodation indorsement. In effect, a loan of the indorser's credit without consideration.

Blank indorsement. The form in which the indorser does not name the transferee.

Indorsement in full. Contains the name of the transferee.[5]

Irregular indorsement. An indorsement which departs from common practice as to the place where the name should be written.[6]

Qualified indorsement. By this form the indorser limits or modifies his liability as ordinarily understood.

The words used are "without recourse:" without liability in case of non-acceptance or non-payment. They are written after the indorser's signature.[7]

Evidence that an indorsement in blank was "without recourse" is inadmissible.[1] See further RECOURSE.

Restrictive indorsement. Restrains negotiability to a particular person, or for a special purpose.[2]

"Unqualified" and "unrestricted" designate that form of indorsement which is most common — the wholly unmodified form. And this, the ordinary contract, imports: as to a *bill*, that the indorser will pay it at maturity, if, on presentment for acceptance, it is not accepted, and he is duly notified of the dishonor; and as to a *bill* or *note*, that the indorser will pay it if it is not duly paid by the acceptor or maker, and he is duly notified; that it is genuine; that the signatures of the immediate parties, and, in the better opinion, of prior indorsers, are genuine; that it is a valid and subsisting obligation according to the ostensible relations of the parties; that the original parties, and, in the better opinion, prior indorsers, could bind themselves as they have assumed to do; and that the indorser has a lawful title and the right to transfer it.[3]

An indorser's contract is a new one, as compared with the maker's. He is not a surety, as is sometimes said, for a surety is a joint promisor with the principal.[4]

The maker is liable without demand of payment — his undertaking being unconditional; but the indorser undertakes to pay only if the maker does not pay, which makes it necessary for the holder to take proper steps to obtain payment from the maker, from which it follows that his contract is that due diligence shall be used to that end.[5]

An indorser is only conditionally liable. His responsibility is a contingent one, and, ordinarily, performance of the condition to make demand of the maker and give notice of his default in due time is an essential part of the title of one who asserts an indorser's liability. The reason is, that the indorser, if looked to for payment, may have the earliest opportunity to take steps for his own protection. There is much inconsistency in the decisions whether demand and notice is necessary when they by no possibility could have enabled him to protect himself. The best considered cases hold that he is entitled to notice although he has taken indemnity from the maker — since that may prove insufficient. In general, every indorser ought to have notice whenever he has a remedy over against the maker. Where, by agreement with the maker, the indorser has become the principal debtor, no notice is needed — for the indorser then has no remedy over.[6]

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[1] Powell *v.* Commonwealth, 11 Gratt. 830 (1854).

[2] 2 Bl. Com. 468.

[3] Haines *v.* Dubois, 30 N. J. L. 269 (1863), cases; Commonwealth *v.* Butterick, *ante;* Clark *v.* Sigourney, *infra.*

[4] Clark *v.* Sigourney, 17 Conn. 519 (1846).

[5] See Byles, Bills, 150-51, by Sharswood.

[6] See 24 Cent. Law J. 3-6 (1887), cases.

[7] Story, Prom. Notes, §§ 138, 146; Hailey *v.* Falconer, 28 Ala. 539 (1856).

[1] Martin *v.* Cole, 104 U. S. 30, 36-39 (1881), cases. See generally, as to parol explanations of indorsements, 18 Cent. Law J. 382-86 (1884), cases.

[2] See Armour Banking Co. *v.* Riley County Bank, 30 Kan. 165 (1883); 11 R. I. 119. Suffixes as *descriptio personæ*, Falk *v.* Moebs, 127 U. S. 597, 602-7 (1888), cases.

[3] See 1 Daniel, Neg. Inst. 498.

[4] Ross *v.* Jones, 22 Wall. 688 (1874), cases.

[5] Cox *v.* Nat. Bank of New York, 100 U. S. 713 (1879), cases.

[6] Ray *v.* Smith, 17 Wall. 415 (1873), Strong, J.

An indorser may sue all prior parties concurrently or successively, but can have only one satisfaction.[1]

Contracts of indorsement are to be construed according to the law of the place where made, unless it appears that they are to be performed according to the laws of another State.[2]

See further ACCEPT, 2; ACCOMMODATION; ASSIGN, 2; BEARER; BLANK; DESCRIPTIO PERSONAE; EXCHANGE, 3, Bill of; FAITH, Good; GUARANTY; NEGOTIATE, 2; NOTE, 2; PROTEST, 2.

INDUCEMENT. 1. In pleading, matter merely introductory to the essential ground or substance of the complaint or defense, or explanatory of it or of the manner in which it originated or took place.[3]

Being explanatory, it does not, in general, require exact certainty. Matter unnecessarily stated may be stricken out, or need not be proved.[4]

Thus, in trover, the loss and the finding of the goods, and, in nuisances, the possession of the subject injured, are alleged by way of inducement.[5]

Thus, also, in a suit upon a negotiable coupon, explanation of the relation the bond and the coupon have held, is by way of inducement: in the nature of a preamble, stating the circumstances under which the contract to pay interest was made.[6]

Commonly commences with the word "whereas." The importance of stating matter of inducement has been much relaxed by legislation. See AMENDMENT, 1.

2. In the sense of motive, see CONFESSION, 2; CONSIDERATION.

INDULGENCE. See FORBEARANCE; FAVOR; SURETY.

INEBRIATE. See INTEMPERATE.

INELIGIBLE. See ELIGIBLE.

INEQUITABLE. See EQUITY, Equitable.

INEVITABLE. See ACCIDENT; NECESSITY.

INFAMY. The condition of being without repute, honor, or character: disqualification to testify as a witness or to sit as a juror, on account of conviction of a heinous offense. Whence infamous.

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . ."[8]

"Infamous crime" is descriptive of an offense that subjects a person to infamous punishment or prevents his being a witness. The fact that an offense may be or must be punished by imprisonment in the penitentiary does not necessarily make it, in law, infamous.[1]

The Fifth Amendment had in view the rule of the common law, governing the mode of prosecuting those accused of crime, by which an information by the attorney-general, without the intervention of a grand jury, was not allowed for a capital crime, nor for any felony; rather than the rule of evidence, by which those convicted of crimes of a certain character were disqualified to testify as witnesses. In other words, of the two kinds of infamy known to the law of England before the Declaration of Independence, the Constitutional Amendment looked to the one founded on the opinions of the people respecting the mode of punishment, rather than to that founded in the construction of law respecting the future credibility of the delinquent. The leading word "capital" describing the crime by its punishment only, the associated words "or other infamous crime" must, by an elementary rule of construction, be held to include any crime subject to infamous punishment, even if they should be held to include also crimes infamous in their nature, independently of the punishment affixed to them. Having regard to the object and the terms of the Amendment, as well as to the history of its proposal and adoption, and to the early understanding and practice under it, no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may be lawfully imposed by the court. The test is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded be an infamous one; when the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial except on the accusation of a grand jury. What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another. For more than a century, imprisonment at hard labor in the State prison or penitentiary has been considered an infamous punishment, in England and America. Such imprisonment with or without hard labor is at present considered infamous punishment.[2]

The term "infamous" — without fame or good report — was applied at common law to certain crimes, upon conviction of which a person became incompetent to testify as a witness. This was upon the theory that a person would not commit a crime of such heinous character, unless so depraved as to be wholly insensible to the obligation of an oath, and, therefore, unworthy of credit. These crimes are treason, felony, and the *crimen falsi*. As to what or whether all species of the last are infamous, there is

[1] Brooklyn City, &c. R. Co. *v.* Nat. Bank of the Republic, 102 U. S. 35–37 (1880), cases.

[2] Briggs *v.* Latham, 36 Kan. 259–61 (1887), cases.

[3] [Gould, Plead. 42.

[4] City of Kenosha *v.* Lamson, 9 Wall. 482 (1869); 1 Chitty, Pl. 290.

[5] Constitution, Amd. V.

[1] United States *v.* Maxwell, 3 Dill. 276 (1875), cases, Dillon, Cir. J.; People *v.* Sponsler, 1 Dak. 297 (1876); Jones *v.* Robbins, 8 Gray, 348–49 (1857)

[2] Mackin *v.* United States, 117 U. S. 350–52 (1886). Gray, J.; *Exp.* Wilson, 114 *id.* 429, 422–39 (1885), cases, Gray, J.; Parkinson *v.* United States, 121 *id.* 281 (1887). See also Star-Route Cases (United States *v.* Brady), 3 Cr. Law Mag. 69 (1881).

disagreement among the authorities. . . A crime is not infamous, within the Fifth Amendment, unless it not only involves the charge of falsehood, but may also injuriously affect the public administration of justice by the introduction therein of falsehood and fraud.[1]

Under the Constitution and statutes there are no infamous crimes except those therein denounced as capital, or as felonies, or punished with disqualification as witnesses or jurors. If Congress makes a crime non-infamous, it can be pursued through information. . . Stealing from the mails has not been made infamous.[2]

In early times the character of the crime was determined by the punishment inflicted, but in modern times the act itself, its nature, purpose, and effect, are looked at in determining whether it is infamous or not. Passing counterfeit money is not an infamous crime.[3]

Infamous persons are such as may be challenged as jurors *propter delictum;* and, therefore, they shall never be admitted to give evidence to inform that jury with whom they are too scandalous to associate.[4]

See CRIMEN, Falsi; TURPITUDE.

INFANT.[5] A person under the age of legal capacity; a minor.

Infancy. The status of one who has not attained his majority; minority; non-age.

An infant has a mind, but it is immature, insufficient to justify his assuming a binding obligation.[6]

He can do no legal act that will bind him, except enter into an apprenticeship, contract for necessaries and teaching,[7] and, perhaps, enlist in the army or navy.[8] He may deny or avoid any other contract during his majority or after he comes of age. At common law, also, a male under fourteen, and a female under twelve, cannot make a will.[9] But an infant may serve as agent. He sues by his guardian or next friend, and he defends by his guardian, perhaps by a special guardian *ad litem.*[10]

Under the age of discretion he is not punishable criminally.[11]

If he understands the nature of an oath, he may give evidence.[12]

At common law, the father is liable for torts committed by an infant.[1]

His disabilities are really privileges: to secure him from loss by improvident acts.[2]

In England, the lord chancellor is the general guardian of all infants. The origin of the jurisdiction of the court of chancery is in the crown as *parens patriæ.*[3]

See further ABANDON, 2 (2); AFFIRM, 2; AGE; DISABILITY; CAPAX; CHILD; DISCRETION, 1; FRIEND, Next; GUARDIAN; LACHES; NECESSARIES, 1; NEGLIGENCE; OATH; ORPHAN; PARENT; RATIFICATION; VOID; WARD, 3

INFANTICIDE. See HOMICIDE.

INFEOFFMENT. See FEOFFMENT.

INFER. To bring a result or conclusion from something back of it, that is, from some evidence or data from which it may logically be deduced.[4]

To "presume" is to take or assume a matter beforehand, without proof — to take for granted.[4]

Inference. A deduction or conclusion from facts or propositions known to be true.[5] See PRESUMPTION.

INFERIOR. 1. The lower of two grades of authority or jurisdiction; subordinate: as, an inferior court or tribunal, an inferior officer. Opposed, *superior.* See COURT; OFFICER.

2. Of less worth or importance; the less significant: as, when it is said that terms of a lower class cannot be extended by construction to include terms or members of a higher class.

Thus, the term "animals," meaning quadrupeds, will not be held to include "birds."[6] See GENERAL; SUPERIOR.

INFIDEL. One who does not recognize the inspiration or obligation of the Holy Scriptures, or the generally recognized features of the Christian religion.[7] See ATHEIST; OATH.

Infidelity. See CHARITY, p. 170, col. 2.

INFINITE. See DISTRESS.

INFIRM. 1. Legally insufficient; lacking legal efficacy; incomplete; invalid. See FAITH, Good; NEGOTIABLE.

2. As to physical and mental infirmity, see INFLUENCE; INSANITY.

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[1] United States *v.* Block, 4 Saw. 212 (1877), Deady, J.; Sylvester *v.* State, 71 Ala. 25 (1881).

[2] United States *v.* Wynn, 3 McCrary, 276 (1882), Treat, Judge.

[3] United States *v.* Yates, 6 F. R. 866 (1881), Benedict, J.; United States *v.* Petit, 11 *id.* 58 (1882); United States *v.* Field, 16 *id.* 778 (1883); *ib.* 779–82, cases.

[4] 3 Bl. Com. 370. See also 59 Pa. 116; 17 Fla. 185; 1 Greenl. Ev. § 373; 1 Bish. Cr. L. § 972.

[5] L. *in,* not; *fans,* speaking: *fari,* to speak.

[6] Dexter *v.* Hall, 15 Wall. 21 (1872).

[7] 1 Bl. Com. 465.

[8] 4 Binn. 487; 5 *id.* 423; 30 Vt. 357.

[9] 2 Bl. Com. 497; 1 *id.* 463.

[10] 1 Bl. Com 464.

[11] 4 Bl. Com. 22.

[12] See Commonwealth *v.* Lynes, 142 Mass. 570–80 (1886), cases.

[1] 18 Cent Law. J. 3–7 (1884), cases.

[2] 1 Bl. Com. 464.

[3] 3 Bl. Com. 141; L. R., 10 Eq. 530.

[4] Morford *v.* Peck, 46 Conn. 385 (1878), Loomis, J.

[5] Gates *v.* Hughes, 44 Wis. 336 (1878).

[6] Reiche *v.* Smythe, 13 Wall. 164 (1871); United States *v.* Mattock, 2 Saw. 149–51 (1872).

[7] Gibson *v.* American Mut. Life Ins. Co., 37 N. Y. 584 (1868), Hunt, C. J.; Hale *v.* Everett, 53 N. H. 55 (1868); Omichund *v.* Barker, 1 Sm. L. C. 739–54, cases.

INFLUENCE. Most frequently used in connection with "undue," and refers to persuasion, machination, or constraint of will presented or exerted to procure a disposition of property — by gift, conveyance, or will.

The influence which is undue in cases of gifts *inter vivos* differs from that which is required to set aside a will. In testamentary cases, undue influence is always defined as coercion or fraud, but, *inter vivos*, no such definition is applied. Where parties occupy positions in which one is more or less dependent upon the other, courts of equity hold that the weaker party must be protected, and they set aside his gifts if he had not proper advice independently of the other.[1]

Influence, to vitiate an act, must amount to force and coercion destroying free agency; it must not be the influence of affection or attachment; not the mere desire of gratifying the wishes of another. There must be proof that the act was obtained by coercion, by importunity which could not be resisted; that it was done merely for the sake of peace; so that the motive was tantamount to force or fear.[2]

Undue influence is often defined by the courts to be a "fraudulent and controlling influence." In any application, the phrase savors of what is meant by fraud.[3]

When a person, from infirmity and mental weakness, is likely to be easily influenced by others, a transaction entered into by him, without independent advice, will be set aside, if there is any unfairness in it. Thus, where there is great weakness of mind in a grantor, arising from age, sickness, or other cause, though not amounting to absolute disqualification, and the consideration is grossly inadequate, a court of equity, upon proper and seasonable application of the person injured, his representatives or heirs, will set the conveyance aside. In such case, it is sufficient to show: great mental weakness — not amounting to insanity or extreme imbecility; and, inadequacy of consideration.[4]

Influence obtained by modest persuasion and arguments addressed to the understanding or by mere appeal to the affections, cannot be termed "undue;" but influence obtained by flattery, importunity, superiority of will, mind, or character, or by what art soever that human thought, ingenuity, or cunning may employ, which would give dominion over the will of the testator to such an extent as to destroy free agency or constrain him to do, against his will, what he is unable to refuse, is "undue."[5]

The undue influence for which a deed or will will be annulled must be such that the party making it has no free will but stands *in vinculis*. "It must amount to force or coercion, destroying free agency." The ground upon which courts of equity grant relief is that one party by improper means has gained an unconscionable advantage over another. Each case must be decided on its own merits.[1]

Where a testator embraced spiritualism as practiced by his beneficiary, and became possessed by it, and this belief was used by the beneficiary to alienate him from his only child, his will was set aside.[2]

See DURESS; FRAUD; INSANITY, 2 (5); READING; SPIRITUALISM.

INFORMALITY. See FORMALITY.

INFORMATION.[3] Knowledge imparted or obtained. See BELIEF; COMMUNICATION.

In a statute intended to prevent physicians from disclosing "information" acquired from patients, comprehends knowledge acquired in any way while attending a patient, whether by the physician's own insight, or by verbal statement from the patient, from members of his household, or from nurses or strangers, given to aid the physician in the performance of his duty. Knowledge, however communicated, is information.[4]

An answer to a decoy letter written in a fictitious name, giving "information" of an article reputed to prevent conception, was held not to be within the meaning of a statute prohibiting the mailing of obscene matter.[5]

2. A complaint preferred on behalf of the government in a civil cause.

Bill of information. A bill in equity filed by the attorney-general, or other proper officer, in behalf of the state or of those

[1] Haydock *v.* Haydock, 34 N. J. E. 575 (1881): Huguenin *v.* Baseley, 2 L. C. Eq., 4 Am. ed., 1271, 1192–1290, cases.

[2] Goodwin *v.* Goodwin, 59 Cal. 561 (1881): Jarm. Wills, Perk. Notes, 41; Layman *v.* Conrey, 60 Md. 292 (1883).

[3] Wessell *v.* Rathjohn, 89 N. C. 383 (1883).

[4] Allore *v.* Jewell, 94 U. S. 511–12 (1876), Field, J. Approved, Griffith *v.* Godey, 113 *id.* 95 (1885); Crebs *v.* Jones, 79 Va. 332 (1884). See also Harding *v.* Wheaton, 2 Mas. 336 (1821), Story, J.; Harding *v.* Handy, 11 Wheat. 103, 119 (1826), Marshall, C. J.

[5] Schofield *v.* Walker, 58 Mich. 106 (1885), quoting probate court of Kent county.

[1] Conley *v.* Nailor, 118 U. S. 127, 133, 134–35 (1886), cases, Woods, J.

See further, as to gifts or conveyances, Nichols *v.* McCarthy, 53 Conn. 314–21 (1885), cases; Woodbury *v.* Woodbury, 141 Mass. 331–33 (1886), cases; Dunn *v.* Dunn, 42 N. J. E. 431 (1886); Davis *v.* Dean, 66 Wis. 110–11 (1886), cases; Bingham *v.* Fayerweather, 144 Mass. 51 (1887), cases; June *v.* Willis, 30 F. R. 11, 14 (1887), cases; Hall *v.* Knappenberger, Sup. Ct. Mo. (1888): 26 Cent. Law J. 317; *ib.* 319–22 (1888), cases; 3 McCrary, 650; 59 Cal. 560; 12 Mo. Ap. 293, 314; 34 N. J. E. 570; 1 Story, Eq. §§ 237–38; — as to wills, 22 Cent. Law J. 173 (1886), cases; 28 Ala. 107; 69 Ga. 89; 22 Kan. 79; 99 Mass. 112; 58 Mich. 106; 63 N. Y. 504; 88 *id.* 357; 41 Pa. 317; 43 *id.* 46; 76 *id.* 114.

[2] Thompson *v.* Hawks, 14 F. R. 902 (1883), Gresham, D. J.; *ib.* 905, note. See Lyon *v.* Home, L. R., 6 Eq. *655 (1868); Robinson *v.* Adams, 62 Me. 369 (1874); Smith's Will, 52 Wis. 543 (1881); 26 Am. Law Reg. 523–31 (1887), cases.

[3] L. *in-formare*, to put into shape: *forma*, form. See INFORMATUS.

[4] Edington *v.* Mut. Life Ins. Co., 5 Hun, 8 (1875): 2 N. Y. R. S. 406, § 73.

[5] United States *v.* Whittier, 5 Dill. 42 (1876).

whose rights are the objects of its protection.[1]

One method of redressing such injuries as the crown may receive from the subject is by an information filed in the exchequer by the king's attorney-general. This is a suit for recovering money or other chattel, or for obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the crown. It differs from an information filed in the court of king's bench, in that this is instituted to redress a private wrong by which the property of the crown is affected; that is, is calculated to punish some public wrong, or heinous misdemeanor. It is grounded on no writ under seal, but merely on the intimation of the king's officer, who "gives the court to understand and be informed of" the matter in question; upon which the party is put to answer, and trial is had, as in suits between subject and subject. The most usual informations are those of intrusion or trespass committed on the lands of the crown; and debt upon any contract for moneys due to the king, or for forfeiture upon breach of a penal statute. There is also an information *in rem*, when any goods are supposed to become the property of the crown, and no man appears to claim them.[2]

In the United States, the more familiar informations are informations in the nature of a *quo warranto*, proceedings against persons alleged to be usurping a franchise or office; and *qui tam* informations — actions upon penal statutes, part of the penalty being for the use of the plaintiff; and proceedings to recover forfeitures under the revenue laws. See further QUI TAM; WARRANTUM; REVENUE.

3. A complaint lodged with a magistrate clothed with power to commit to prison, that a person named is guilty of a criminal offense.

The purpose is to effect a summary conviction of the accused, or a holding to bail for indictment and trial. In the latter case, a paper, called the "information," containing the details of the complaint, the names of the witnesses, the hearing or hearings had, the judgment, items of costs, etc., is transmitted to the grand jury for use in finding their bill of indictment, and perhaps accompanies the indictment into court before the trial jury.[3]

4. A criminal proceeding at the suit of the king, without a previous indictment or presentment by a grand jury.[4]

An "indictment" is an accusation found by the oath of a grand jury; an "information" is the allegation of a law-officer.[5]

An information was filed in the king's bench at the mere discretion of the proper law-officer of the government, and *ex officio*. It is sometimes called a "criminal" information.[1]

Prosecution by criminal information as at common law having been used for oppression, the statute of 4 and 5 William & Mary (1693), c. 18, was passed, requiring express leave of court to institute the proceeding.[2]

Under the laws of the United States, informations are resorted to in cases of illegal exportation of goods,[3] of smuggling,[4] and for offenses, not infamous, against the elective franchise.[5] See further INFAMY.

Informer. He who prefers a charge against another person by way of an information in a court exercising penal or criminal jurisdiction.

Common informer. A person who sues for forfeitures created by penal statutes.[6]

Whether the information he gives applies to customs, internal revenue, criminal matters, or forfeitures for any reason, an informer is one who gives the information which leads directly to the seizure and condemnation, regardless of the questions of evidence furnished, or interest taken in the prosecution.[7] See ACTION, 2, Popular; QUI TAM; MOIETY; PARDON.

INFORMATUS. L. Instructed; informed.

Non sum informatus. I am not informed. A judgment by default, when a defendant's attorney declares he has no instruction to say anything by way of answer or defense.[8]

INFRA. L. Below, beneath, under, within; during. Opposed, *supra*.

Used alone, refers to a citation or other matter further on, as in the text or at the foot of the particular page. Whence also *ut infra*, as (see) below.

Infra ætatem. Under age.

Infra annos nubiles. Within marriageable years.

Infra annum luctus. Within the year of mourning. See ANNUS, Luctus.

Infra corpus comitatus. Within the body of the county. See COUNTY, Body of.

Infra hospitium. Within the inn,—said of property in charge of an innkeeper.

Infra sex annos. Within six years. See ANNUS.

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[1] [1 Bouvier's Law Dict. 245.

[2] 3 Bl. Com. 261; 4 *id.* 308. See also 3 Pick. 224; 6 Leigh, 588; 15 Johns. *337.

[3] See Goddard *v.* State, 12 Conn. *451 (1838).

[4] [4 Bl. Com. 308.

[5] United States *v.* Borger, 19 Blatch. 253 (1881); 4 Tex. 246.

[1] See 2 Story, Const. § 1786; 3 *id.* § 659; 1 Bish. Cr. Proc. § 141; Edwards *v.* Brown, 67 Mo. 379 (1878); State *v.* Concord, 20 N. H. 296 (1850).

[2] See 4 Bl. Com. 311.

[3] 1 Gall. 3.

[4] 1 Mass. 482, 500; 1 Wheat. 9; 9 *id.* 381.

[5] Act 31 May, 1870: R. S. § 1022.

[6] 3 Bl. Com. 161; 2 *id.* 437.

[7] The City of Mexico, 32 F. R. 106 (1887), cases, Locke, Judge.

[8] [3 Bl. Com. 397.

INFRINGEMENT.[1] Breaking, infraction, violation; a trespass, transgression, invasion.

Infringer. One who invades or violates another's right.

Infringement, with its inflections, is used of a violation of a law, regulation, contract, or common right; more often of the usurpation of an exclusive right. It has acquired a use almost technical in reference to the law of copyrights, patents, and trade-marks: an infringement of any one of which consisting in violating the exclusive right another person has secured to make, sell, or use the thing in question.

In determining the question of the infringement of a patent right, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result.[2]

Where a defendant, who had been enjoined from using an invention, asked that he might give bond so that he could continue to use the invention and fill contracts therefor, it was held that a bond would not be adequate protection to the complainant's rights. The defendant also asked that the life of the injunction be limited to a day when, it was alleged, the patent would expire; but the court held that the time being in litigation the question could be disposed of on a motion to dissolve when that time arrived. It was further decided that the court had no authority to restrain the complainant from publishing the fact that the injunction had been issued.[3]

A right of action for the infringement of a patent survives to the personal representative of the patentee, and he may transfer the right to another person.

There is no Federal statute of limitations in force respecting infringements committed since June 22, 1874. State statutes of limitations have no application.[4]

See COPYRIGHT; DESIGN, 2; PATENT, 2; PROFIT, 2; TRADE-MARK. Compare INTERFERENCE.

INGRESS. The right of entry upon land in a prescribed way.

"Egress" is the right of going off the premises to other points in any lawful way. "Regress" is the right of returning in any of these ways.

A grant of a right of "ingress, egress, and regress" is of a right of way from the *locus a quo* to the *locus ad quem*, and from the latter forth to any other spot to which the grantee may lawfully go, or back to the *locus a quo*.[1]

INHABITANT.[2] Implies a more fixed and permanent abode than "resident;" frequently imports many privileges and duties to which a mere resident could not lay claim or be subject.[3]

One domiciled: one who has his domicil or fixed residence in a place, in opposition to a mere "sojourner."[4]

A person may be an inhabitant without being a citizen; and a citizen may not be an inhabitant, though he retains his citizenship.[5]

A legal voter; as, in a statute requiring that a subscription in aid of a railroad must be approved by the inhabitants of a town.[6]

In a figurative sense, a corporation may be said to inhabit the place where its members reside; and since, in a legal sense, it may be an occupier of land, any such corporation in England has been called an inhabitant. But an ordinary business corporation, keeping an office merely as a place for transacting business, cannot be said to inhabit the town where such office happens to be.[7]

Inhabitancy. A fixed and permanent abode or dwelling-place for the time being, as contradistinguished from a mere temporary locality of existence. Not the same as "domicil," when applied to successions to personalty.[8] See HABITANCY.

See BELONG; CITIZEN; DOMICIL; RESIDENCE.

INHERIT. To take property by descent as an heir.

As used by a testator, may refer to lands devised or conveyed by an ancestor.[9]

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[1] L. *in-fringere*, to break into, in upon.

[2] Union Paper-Bag Machine Co. *v.* Murphy, 97 U. S. 125 (1877), Clifford, J. Approved, Cantrell *v.* Wallick, 117 *id.* 695 (1886), Woods, J.

[3] Westinghouse Air Brake Co. *v.* Carpenter, 32 F. R. 545 (1887), Shiras, J.

[4] May *v.* County of Logan, 30 F. R. 250 (1887), cases, Jackson, J.

[1] Somerset *v.* Great Western Ry. Co., 46 L. T. 884 (1882).

[2] L. *in-habitare*, to dwell in: *habitare*, to have (oneself) often: *habere*, to have.

[3] Supervisors of Tazewell County *v.* Davenport, 40 Ill. 206 (1866); 19 Wend. 13.

[4] Barnet's Case, 1 Dall. *153 (1785); Borland *v.* Boston, 132 Mass. 98–99 (1882).

[5] Picquet *v.* Swan, 5 Mas. 46 (1828), Story, J.

[6] Walnut *v.* Wade, 103 U. S. 694 (1880).

[7] Hartford Fire Ins. Co. *v.* Hartford, 3 Conn. 25 (1819). See also 1 Dall. 480; 2 Pet. Adm. 450; 3 Ala. 547; 4 *id.* 630; 2 Conn. 20; 32 *id.* 47; 28 Ga. 121; 3 Ill. 403; 6 Ind. 83; 37 Me. 369; 2 Gray, 484; 132 Mass. 98–99; 45 N. H. 87; 23 N. J. L. 527; 36 *id.* 368; 8 Wend. 141; 10 *id.* 186; 4 Barb. 521; 48 *id.* 51; 1 Bradf. 83; Cooley, Const. Lim. 755.

[8] *Re* Wrigley, 8 Wend. 140 (1831); 132 Mass. 98; 9 F. R. 229.

[9] De Hay *v.* Irving, 5 Denio, 646, 654 (1846); 112 U. S. 380.

May refer to a distributive share of the proceeds arising from the sale of land.[1]

Disinherit. To direct by will that an heir shall receive no part of the testator's estate. See INOFFICIOUS.

Heritable. Capable of taking, or of passing, by descent.

Inheritance. An estate which descends, or may descend, to the heir upon the death of the ancestor;[2] also, the fact of receiving an estate as heir.

Estates of freehold are estates of inheritance, absolute or limited; and estates not of inheritance, or for life only.[3]

In its popular acceptation, "inheritance" includes all the methods by which a child or relative takes property from another at his death, except by devise, and includes as well succession as descent. As applied to personalty, signifies succession.[4]

An estate acquired by inheritance is one that has descended to the heir, and been cast upon him by the single operation of law.[5]

Shifting inheritance. An inheritance liable to be defeated by the birth of a nearer heir.

Does not prevail in the United States, where change of title from the living person is made by deed, rather than by the statute of descent, as in England where the canons of descent are designed to accumulate property in the hands of a few. By the rule of shifting inheritances, "If an estate is given to an only child, who dies, it may descend to an aunt, who may be stripped of it by an after-born uncle, on whom a subsequent sister of the deceased may enter, and who again will be deprived of the estate by the birth of a brother."[6]

See DESCENT; FREEHOLD; HEIR, 1; SUCCESSION, 1; WASTE, 1.

INHIBITION.[7] Forbidding; interdiction; prohibition.

A writ to forbid a judge from proceeding in a cause, or an individual from doing some act. Nearly the same as "prohibition" (*q. v.*) at common law, and "injunction" in equity.[8]

INITIALS. See IDEM, SONANS; NAME, 1.

INJUNCTION.[9] A remedial writ, formerly issued almost exclusively by a court of chancery, to restrain the commission of a threatened act, or the continuance of an act.

A judicial process operating *in personam*, and requiring the person to whom it is directed to do or to refrain from doing some particular thing.[1]

Enjoin. To prohibit by an injunction.[2]

Preliminary injunction. An injunction granted at the outset of a suit brought to restrain the doing of a threatened act, until the rights of the disputants have been determined. Called also an *interlocutory* or *provisional* injunction, or an injunction *pendente lite;* and, also, a *mandatory* or *preventive* injunction, according as the order is to do or refrain from doing the particular act. Opposed, **final injunction:** issued upon final adjudication of the rights in question. Being designed to effect permanent relief, is frequently termed the *perpetual* injunction.

The object of a preliminary or interlocutory injunction is, in general, simply preventive — to maintain things in the condition they are in at the time, until the rights and equities of the parties can be considered and determined after a full examination. Such injunction is never awarded, except when the right or equity of the plaintiff is clear, at least supposing the facts of which he gives *prima facie* evidence to be ultimately established. All injunctions are generally processes of mere restraint; yet final injunctions may certainly go beyond this and command acts to be done or undone. They are then called "mandatory;" and often are necessary to do complete justice. But the authorities are clear that an interlocutory or preliminary injunction cannot be mandatory. . . Injunction as a measure of mere temporary restraint is a mighty power to be wielded by one man. . . An interlocutory injunction may be granted on an *ex parte* application; when it is upon notice it is upon *ex parte* affidavits.[3]

As a preliminary injunction is in its operation somewhat like judgment and execution before trial, it is only to be resorted to from a pressing necessity to avoid injurious consequences which cannot be repaired under any standard of compensation.[4]

As it is, in fact, the result of an interlocutory decree in advance of a regular hearing and plenary proofs, it should never be granted except where irreparable injury is threatened; and the court should be

[1] Ridgeway *v.* Underwood, 67 Ill. 426 (1873).

[2] [2 Bl. Com. 201.

[3] 2 Bl. Com. 104, 120.

[4] Horner *v.* Webster, 33 N. J. L. 413 (1867).

[5] Estate of Donahue, 36 Cal. 332 (1868).

[6] 2 Christ. Bl. Com. 208 n; Bates *v.* Brown, 5 Wall. 713-19 (1866), cases.

[7] L. *in-hibere*, not to have: to keep in, hold in, check.

[8] See Termes de la Ley; Wharton's Law Dict.; 6 Q. B. D. 420.

[9] L. *injunctio: injungere*, to bid, command.

[1] High, Injunctions, § 1.

[2] See 31 Alb. Law J. 181, 220, 240, 279 (1885).

[3] Audenried *v.* Philadelphia & Reading R. Co., 68 Pa. 375-78 (1871), cases, Sharswood, J. See generally 18 Cent. Law J. 323-26, 343-46 (1884), cases.

[4] Mammoth Vein Coal Co.'s Appeal, 54 Pa. 188 (1867), Thompson, J. See also Ballantine *v.* Harrison, 37 N. J. E. 561 (1883); Stanford *v.* Lyon, *ib.* 113 (1883).

satisfied that in attempting to prevent such injury as to one party it will not bring like injury upon the adverse party.[1]

An injunction is generally a preventive, not an affirmative, remedy. But it is sometimes used in the latter character to carry into effect a court's own decree; as, to put into possession the purchaser under a decree of foreclosure of a mortgage.[2] Where granted without a trial at law, it is upon the principle of preserving the property until a trial at law can be had. A strong *prima facie* case of right must be shown, and there must have been no improper delay. In granting or refusing the writ, the court exercises a careful discrimination.[3]

A court of equity may substitute a bond of indemnity for an injunction, if the ends of justice will thereby be promoted; especially if a public interest may suffer by the continuance of an injunction.[4]

An injunction is available to stay proceedings at law; to restrain the transfer of stocks, notes, bills, and other evidences of debt; to restrain the transfer of the possession or title to property; to restrain one from setting up an inequitable defense at law; to restrain the infringement of a patent, a copyright, a trade-mark; to prevent the removal of property or the evidence of title to property or of indebtedness out of the jurisdiction; to restrain the commencement of proceedings in a foreign court; to restrain an illegal act by municipal officers; to prevent the creation or the continuance of a nuisance; to restrain acts of waste.

A court of equity has no power to enjoin the prosecution of an offense in a court of common law.[5]

But there must be no plain, adequate, and complete remedy at law. The writ will not be granted at all while the rights between the parties are undetermined, except, as seen, where irreparable injury will be done. The petition or bill must sufficiently appraise the respondent as to what duty is required of him.[6]

An injunction must be respected while in force, although improperly granted; but it cannot affect the rights of a person who is not a party or privy to the proceeding.[7]

In England, a *common* injunction has been issued as of course when the defendant failed to enter his appearance or to answer the bill within the prescribed time; and a *special* injunction, by leave of court, upon proof of the charges and notice to the adverse parties. At present, it seems, that any court of that country may issue injunctions of all kinds.[8]

See ADEQUATE, 2; EQUITY; INJURY, Irreparable.

[1] Wagner *v.* Drake, 31 F. R. 853 (1887); High, Inj. §§ 7-10, cases.

[2] Walkley *v.* City of Muscatine, 6 Wall. 483 (1867).

[3] Parker *v.* Winnipiseogee, &c. Co., 2 Black, 552 (1862), cases.

[4] Northern Pacific R. Co. *v.* St. Paul, &c. Co., 4 F. R. 888 (1880).

[5] Sucss *v.* Noble, 31 F. R. 855 (1887); *Re* Sawyer, 124 U. S. 210 (1888), cases.

[6] See R. S. §§ 718-20; 1 Hughes, 607; 3 F. R. 507; 4 Dill. 600; 2 Woods, 621.

[7] Roberts *v.* Davidson, 83 Ky. 282 (1885).

[8] 1 Story, Eq. § 892.

INJURIA. L. Wrong; injury. A tortious act, whether willful and malicious, or accidental.[1] Compare DELICTUM.

Ab assuetis non fit injuria. From matters of long standing no injury arises.

Acquiescence with a state of things as it has long existed, operates as a waiver or abandonment of one's right therein. See ESTOPPEL.

Damnum absque injuria. Loss without such injury as the law recognizes. See further DAMNUM.

De injuria. Of (his own) wrong. See REPLICATION.

Volenti non fit injuria. To him who wills a thing there can be no injury. See further VOLO, Volenti.

INJURY. A privation of legal right; a wrong; a tort. See INJURIA.

A wrong done to a person; a violation of his right.[2]

"Injury" is the wrongful act or tort which causes harm or injury to another. "Damages" are allowed as an indemnity to the person who suffers loss or harm from injury. "Injury" denotes the illegal act; "damages," the sum recoverable as amends for the wrong.[3]

Civil injury. A private wrong; an infringement or privation of the private or civil rights belonging to an individual considered as an individual.

It affects an absolute or relative right, and is committed with force and violence, as in battery and false imprisonment; or without force, as in slander and breach of contract. *Public injuries* are public wrongs or crimes,[4] *q. v.*

Results from non-feasance, misfeasance, or malfeasance; and affects the person, personalty, or realty. See TAKE, 8.

Irreparable injury. Injury of such nature that the party wronged cannot be adequately compensated in damages, or when the damages which may result cannot be measured by any certain pecuniary standard.[5]

All that is meant is, that the injury would be a grievous one, or at least a material one, and not adequately reparable in damages. The term does not mean that there must be no physical possibility of repairing the injury.[6]

[1] Wright *v.* Chicago, &c. R. Co., 7 Bradw. 446 (1880).

[2] Parker *v.* Griswold, 17 Conn. *302 (1845).

[3] North Vernon *v.* Voegler, 103 Ind. 319 (1885), Elliott, J.; 25 Am. Law Reg. 101, 112-15 (1886), cases.

[4] 3 Bl. Com. 2, 118.

[5] [Wilson *v.* Mineral Point, 33 Wis. 164 (1875): High, Injunc. § 460.

[6] Sanderlin *v.* Baxter, 76 Va. 306 (1882): Kerr, Injunc. 199; Moore *v.* Steelman, 80 Va. 340 (1885), cases; Wahle *v.* Reinbach, 76 Ill. 326 (1875).

The word "irreparable" is unhappily chosen to express the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages estimable only by conjecture and not by any accurate standard.[1]

In the sense in which used in conferring jurisdiction upon courts of equity, does not necessarily mean that the injury complained of is incapable of being measured by a pecuniary standard.[2]

Literally, anything is irreparable injury which cannot be restored *in specie*. In law nothing is irreparable which can be fully compensated in damages. To entitle a party to an injunction, he must show that the injury complained of is irreparable because the law affords no adequate remedy.[3]

Injuriously affect. See TAKE, 8.

See further ADMISSION, 2; CASE, 3; CAUSE, 1; CONTINUOUS, 2; CONTINUANDO; DECLARATION, 1; INSPECTION, 2, Of person. Compare DAMAGE; REDRESS; RELIEF; TORT; WRONG.

INJUSTICE. See JUSTICE, 1.

INK. See WRITING.

INLAND. See COMMERCE; EXCHANGE, Bill of; NAVIGATION.

In the act of July 2, 1864, § 7, that no property seized upon "any of the inland waters of the United States," by the naval forces, shall be regarded as maritime prize, "inland" applies to all waters upon which a naval force could go, other than bays and harbors on the sea-coast.[4]

INN. A house where the traveler is furnished with everything which he hath occasion for whilst upon his way.[5]

A public house of entertainment for all who choose to visit it.[6]

A house kept open publicly for the lodging and entertainment of travelers in general, for a reasonable compensation.[7]

The leading ideas of all the definitions are, that an inn is a house for the entertainment of travelers and wayfarers, at all times and seasons, who properly apply and behave with decency, and this as guests for a brief period, not as lodgers or boarders, by contract, for the season.[1]

Synonymous with "tavern" and "hotel;" not with "boarding-house," "restaurant," or "lodging-house."[2]

Innkeeper. A person who makes it his business to entertain travelers and passengers, and provide lodging and necessaries for them, their horses and attendants.[3]

He is a guest at an inn or hotel who is away from home and receives accommodations at the house as a traveler. See further GUEST.

An innkeeper's liability for a loss to his guest is the same in character and extent as the liability of a common carrier. In the absence of proof that the loss was occasioned by the hand or through the negligence of the hotel keeper, or by a clerk or servant employed by him, the guest cannot recover the amount of the loss from the keeper.[4]

His responsibility approximates to insurance when an article (a valise) is entrusted by a guest to his keeping.[5]

An innkeeper impliedly engages to entertain all persons who apply; and an action on the case will lie against him for damages, if, without good reason, he refuses to admit a traveler. To frustrate, in that way, the end of the institution, was held to be disorderly behavior. Indeed, for an unreasonable refusal to receive travelers, the proprietor could even be indicted and his inn suppressed.[6]

The common-law liability of an innkeeper has been generally changed by statute. He is not now liable for money, jewelry, or other valuables, lost or stolen, if he provides a safe for their keeping and duly notifies guests thereof. Nor should he be held liable for goods stolen from a room furnished for the display of samples of merchandise.[7]

He is not liable as an innkeeper for the loss of

[1] Commonwealth *v.* Pittsburgh, &c. R. Co., 24 Pa. 160 (1854), cases.

[2] Wilmarth *v.* Woodcock, 58 Mich. 485 (1885), Champlin, J.

[3] Brace Brothers *v.* Evans *et al.*, C. P. No. 1, Allegheny Co., Pa. (April 21, 1888), Slagle, J.: 35 Pitts. Leg. J. 406, cases. A boycotting case. "The business lost, and which will be destroyed by defendants' acts, cannot be restored. If permitted, plaintiffs may build up a new business, but the old one cannot be replaced. It is gone irreparably." See also Breuschke *v.* The Furniture Makers' Union, Sup. Ct. Cook Co., Ill. (188–); Western Union Tel. Co. *v.* Rogers, 42 N. J. E. 314 (1886); Emack *v.* Kane, 3 Ry. Corp. Law J. 317 (1888).

[4] Porter *v.* United States, 106 U. S. 612 (1882).

[5] Thompson *v.* Lacy, 3 B. & A. 285 (1820), Bayley, J.

[6] Wintermute *v.* Clarke, 5 Sandf. 247 (1851), Oakley, C. J.; Walling *v.* Potter, 35 Conn. 185 (1868); 36 Barb. 462.

[7] 2 Kent, 595.

[1] Bonner *v.* Welborn, 7 Ga. 307 (1849).

[2] People *v.* Jones, 54 Barb. 316–17 (1863), cases; Pinkerton *v.* Woodward, 33 Cal. 596 (1867), cases.

[3] Bacon, Abr., Inn. B.; Carter *v.* Hobbs, 12 Mich. 56 (1863); Howth *v.* Franklin, 20 Tex. 801 (1858).

[4] Elcox *v.* Hill, 98 U. S. 224 (1878), cases; 66 Ga. 206; 1 Bl. Com. 430; 2 Kent, 592; Story, Bailm. § 470.

[5] Murray *v.* Marshall, 9 Col. 482 (1886), cases.

[6] 3 Bl. Com. 166; 4 *id.* 167.

[7] Fisher *v.* Kelsey, 121 U. S. 383, 385–86 (1887), cases. The plaintiff, a traveling salesman, engaged a room in the Planters' House, city of St. Louis, for the exhibition of articles of jewelry. During his occupancy of the room, articles valued at $12,600 were stolen, without neglect in him or in the proprietor of the hotel. *Held*, that the relation of innkeeper and guest did not exist as to the use made of the sample room; also, that knowledge in the proprietor that the articles were brought into his hotel to be exhibited for sale, did not relieve the owner from serving written notice upon the proprietor, as required by statute in Missouri, that he had such merchandise in his possession.

money deposited with him for safe-keeping by a person not a guest.[1]

The owner of a steamship is not an innkeeper.[2]

See BOARD, 1; HOTEL; LIEN, Common-law; LODGER; RESIDE; RESTAURANT; RIGHT, 2, Civil Rights Acts; TAVERN.

Inns of court. Originally, town-houses in which the nobility and gentry resided when in attendance at court; later, schools for the study of law.

The name was given to law societies which occupied certain "Inns," as Lincoln's Inn, Gray's Inn. The buildings were originally private residences, or *hospitia* — town-houses. They retained, in their new use, their former names; in them lectures were read, and degrees conferred in the common law.[3] See BENCHER.

INNER. See BARRISTER.

INNOCENCE. Being free from the guilt of crime, fraud, or negligence.

Innocent. Not chargeable with fault, fraud, or wrong: as, an innocent purchaser or holder.

1. Where one of two innocent parties must suffer through the fraud or wrong of a third party, the loss falls upon him who gave the credit; as, where one signs his name to blank paper which is afterward fraudulently made a promissory note.[4]

If one of two innocent parties must suffer for a deceit, it is more consonant to reason that he who "puts the trust and confidence in the deceiver (agent, cashier, etc.) should be the loser, rather than the stranger."[5]

The loss should fall on him who by reasonable diligence could have protected himself.[6]

He who gave the power to do the wrong must bear the burden of the consequences.[7]

In the negotiation of commercial paper, a holder is not innocent where there is any circumstance to excite the suspicion of a man of ordinary caution as to a defect or irregularity in the paper, or a want of power in any party thereto.[8] See FAITH, Good; KNOWLEDGE, 1.

2. In the law of criminal procedure, innocence is presumed until the contrary is proven. That is, a reasonable doubt of guilt is a ground of acquittal, where, if the probative force of the presumption were excluded, there might be a conviction. This presumption or probative evidence is not applicable in civil cases or in revenue seizures — where the issue depends upon the evidence, but the defendant is not put to his defense until a *prima facie* case is made out by the plaintiff.[1]

Innocence is always presumed, except as against the publisher of a libel.[2]

See DOUBT, Reasonable; INTENT; LIBEL, 5.

INNUENDO. L. With the meaning; thereby meaning. A clause in a pleading explanatory of a preceding word or averment.

The same in effect as "that is to say." While used almost exclusively in actions for defamation, it may be inserted in declarations in other actions, to explain the meaning of a written instrument.[3]

In a declaration for slander or libel, explains the words uttered; annexes to them their proper meaning. It cannot enlarge or extend the sense of expressions beyond their usual, natural import, unless something is put upon the record by way of introductory matter with which they can be connected. Then, words which are equivocal or ambiguous, or fall short in their natural sense of importing any defamatory charge, may have fixed to them a meaning certain and defamatory, extending beyond their ordinary import.[4]

If the words impute an infamous crime punishable by law, an *innuendo*, undertaking to state the same in other words, is superfluous; if they do not, an *innuendo* cannot aid the averment, as it is a clear rule of law that an *innuendo* cannot introduce a meaning broader than that the words naturally bear, unless connected with proper introductory averments.[5]

See COLLOQUIUM; LIBEL, 5; SLANDER.

INOFFICIOUS. An inofficious will is one in which natural affection and the claims of near relationship have been disregarded.[6]

The civil law defines an inofficious or undutiful will to be such as substantially departs from the disposition of the estate which would be made in case of intestacy.

In America, authority to make a will implies the power to discriminate between, or to disinherit, next of kin; and the fact of such discrimination raises no presumption of undue influence.[7]

See TESTAMENTUM, Inofficiosum.

INOPERATIVE. See OPERATIVE, 2.

INOPS CONSILII. L. Without legal counsel.

Devises by will are more favored in construction than formal deeds, which are presumed to be made

[1] Arcade Hotel Co. *v.* Wiatt, 44 Ohio St. 45–46 (1886). As to lien, see 21 Am. Law Rev. 679–95 (1887), cases.

[2] Clark *v.* Burns, 118 Mass. 277 (1875), cases. See, in general, 25 Am. Law Reg. 904–6 (1886), cases; 1 Sm. Ld. Cas. 401–6, cases.

[3] See 1 Bl. Com. 23–25; 3 *id.* 39.

[4] Bank of Pittsburgh *v.* Neal, 22 How. 111 (1859), cases.

[5] Carpenter *v.* Longan 16 Wall. 273 (1872).

[6] Nat. Savings Bank *v.* Creswell, 100 U. S. 613 (1879).

[7] People's Bank *v.* Manufacturers' Nat. Bank, 101 U. S. 183 (1879).

[8] Merchants' Bank *v.* State Bank, 10 Wall. 604, 646 (1870); 34 La. An. 180; 34 N. Y. 30.

[1] Lilienthal's Tobacco *v.* United States, 97 U. S. 267 (1877); 15 Gray, 415; 2 Whart. Ev. § 1245.

[2] 1 Greenl. Ev. § 36; 1 Cr. Law Mag. 1; 4 *id.* 643, 845.

[3] See Whitsett *v.* Womack, 8 Ala. 482 (1845).

[4] Beardsley *v.* Tappan, 1 Blatch. 591 (1850), cases, Nelson, J.; Young *v.* Cook, 144 Mass. 41–42 (1887), cases.

[5] Pollard *v.* Lyon, 91 U. S. 233 (1875), cases, Clifford, J. See also 8 Biss. 268; 29 Kan. 518; 50 Mich. 640; 5 Johns *438; 53 Pa. 418; 59 *id.* 488; 114 *id.* 558.

[6] Banks *v.* Goodfellow, 39 L. J. R., Q. B. 248, 244 (1870), Cockburn, C. J.

[7] Stein *v.* Wilzinski, 4 Redf. 450 (1880).

with great caution, forethought, and advice. In this principle originated executory devises.[1]

INQUEST. An inquiry by a jury, duly impaneled by the proper officer, into any cause, civil or criminal; also, such jury itself. Compare INQUIRY, 2, 3.

Coroner's inquest. An inquiry by a coroner, assisted by a jury, into the manner of death of one who has been killed, or died suddenly or in prison. See CORONER.

Grand inquest. The grand jury, *q. v.*

Inquest of lands; sheriff's inquisition. In Pennsylvania, after a sheriff has levied upon a debtor's realty, he summons a jury of at least six men who ascertain whether the rents and profits of the estate, beyond all reprises, will be sufficient, within seven years, to satisfy the judgment and costs of suit. The right to the proceeding is frequently waived.[2]

Inquest of office. A method of redressing an injury which the crown (state) receives from a subject.

An inquiry made by a sheriff, coroner, escheator, or commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels; as, reversions accruing to the crown, escheats, forfeitures, whether one is a lunatic and what property he has, the fact of a wreck, of treasure-trove, etc. Also known as "office found,"[3] *q. v.*

INQUIRY. A seeking: search, investigation. Compare INQUEST.

1. When there are facts sufficient to put a man of ordinary caution upon inquiry, the means of knowing and knowledge itself are, in legal effect, the same thing. See further KNOWLEDGE, 1; NOTICE, 1.

2. In the oath of grand jurors "diligently inquire" means diligently inquire into the circumstances of the charges, the credibility of the witnesses, and, from the whole, judge whether the accused ought to be put upon trial.[4]

3. A writ by which the sheriff is directed to summon a jury to ascertain the damages due from a defendant against whom there has been an interlocutory judgment, entered either by default or by confession, the amount not being ascertainable by mere calculation.[5]

[1] 2 Bl. Com. 381, 172, 115, 106.

[2] See 1 Bright. T. & H. Pr. §§ 1222-36.

[3] 3 Bl. Com. 258; 2 Kent, 16, 23.

[4] Respublica *v.* Shaffer, 1 Dall. *237 (1788).

[5] See 3 Bl. Com. 398; Hanley *v.* Sutherland, 74 Me. 213 (1882), cases; McHenry *v.* Union Passenger Ry. Co., 14 W. N. C. 404 (Pa., 1884).

INQUISITION. See INQUEST; INQUIRY.

INSANITY.[1] Disorder of mind from disease or defect in the brain; disease of the mind.

1. In pathology. A condition in which the intellectual faculties, or the moral sentiments, or the animal propensities,— any one or all of them,— have their free action destroyed by disease, whether congenital or acquired. . . "A disease of the brain, affecting one or more of the mental faculties — intellectual or emotional.[2]

A manifestation of disease of the brain, characterized by a general or partial derangement of one or more faculties of the mind, and in which, while consciousness is not abolished, mental freedom is perverted, weakened, or destroyed.[3]

By "disease" is here meant structural change due to injury, malformation, malnutrition, non-development, or other cause.[3]

Insanity is due: I. To defective development of faculties; called *idiocy* or *imbecility*, resulting from congenital defect, or from an obstacle to development, supervening in infancy. II. To lesion of faculties subsequent to development; called *mania*, intellectual or affective, and either general or partial, or *dementia*, consecutive to mania, or to injury to the brain, or else senile.[4]

Most of the definitions, so called, are merely sententious descriptions of the disease. It is impossible to frame a perfectly consistent definition. No words can comprise the different forms and characters the malady may assume. The more common forms are *mania*, *monomania*, and *dementia;* each of which implies a derangement of the faculties of the mind from their normal or natural condition. *Idiocy* (q. v.) is more properly the absence of mind than derangement of its faculties; it is congenital, and consists not in the loss or derangement of the powers, but in the destitution of powers never possessed. *Mania* is derangement accompanied with more or less excitement, amounting, in cases, to a fury. The individual is subject to hallucinations and illusions; is impressed with the reality

[1] L. *insanitas*, unsoundness of mind: *in*, not; *sanus*, healthy, whole, sound.

[2] Tuke (Bucknill & T.), Insanity, ed. 1858, p. 88.

[3] Hammond, Treatise on Insanity, 265 (1881). See also Ray, Med. Jurisp. of Ins. § 54; Elwell, Malpr. &c. 338.

[4] Ray, Med. Jurisp. of Ins. (1871), § 56. See further 25 Cent. Law J. 195-218 (1887), cases.

of events which have never occurred, and of things which do not exist; and acts more or less in conformity with these particulars. The mania may be general, and affect all or most of the operations of the mind; or partial, and be confined to particular subjects — which last constitutes *monomania*. An absence of reason on one matter, indeed on many matters, may exist, and at the same time the patient exhibit a high degree of intelligence and wisdom on other matters. The cases show a want of entire soundness of mind or partial insanity. This form does not necessarily unfit the patient for transacting business on all subjects. *Dementia* is derangement accompanied with general enfeeblement of the faculties. It is characterized by forgetfulness, inability to follow any train of thought, and indifference to passing events. There is not usually equal weakness exhibited on all subjects, nor in all the faculties. Matters which, previously to the existence of the malady, the patient frequently thought of, are generally retained with greater clearness than less familiar subjects. One faculty, as, the memory, will be greatly impaired, while other faculties retain some portion of their original vigor. The disease is of all degrees, from slight weakness to absolute loss of reason. These three forms of insanity,— mania, monomania, dementia,— present themselves in an infinite variety of ways, seldom exhibiting themselves in any two cases exactly in the same manner.[1]

Emotional insanity. The condition of one, in possession of his ordinary reasoning faculties, whose passions convert him into a maniac, and, while in this condition, he commits an act in question.

Impulsive insanity. Exists when one is irresistibly impelled to the commission of an act.[2]

To be distinguished from the case where, being in possession of his reasoning faculties, the person is impelled by passion merely.[3] See IMPULSE.

Moral insanity. Describes a mind which, while undisturbed by hallucination or illusion, and qualified to judge between right and wrong, is yet powerless to control conduct according to knowledge; as, in *kleptomania*.

Consists in a morbid perversion of the feelings, affections or active powers, without any illusion or erroneous conviction impressed upon the understanding.[1]

2. In medical jurisprudence. The law, being neither a medical nor a metaphysical science, has no theory on the subject of diseases of the brain. It seeks practical rules which may be administered, without inhumanity, for the security of society, by protecting it from crime. It holds every man responsible who is a free agent. "Insanity" is really not a legal term.

Questions involving sanity arise in determining what degree of unsoundness will make void a marriage, disqualify for the duties of an office or trust, render incompetent or discredit as a witness, advise commitment to an asylum, or negative consent in the commission of certain crimes. On these and kindred subjects, no uniform test has been established: each case is to be decided from a consideration of its own circumstances.[2]

In the Revised Statutes and in any act or resolution of Congress passed subsequently to February 1, 1871, the words "insane person" and "lunatic" include every idiot, *non compos*, lunatic, and insane person.[3]

In particular, questions as to legal capacity arise in connection with the receiving of testimony, with the right to exercise the elective franchise; in proceedings to place a person or his property in charge of a committee or trustee; in discussions as to the validity of contracts, and deeds; upon contests as to the validity of wills; and with regard to punishment for crime.

(1) As to giving testimony. A person affected with insanity is admissible as a witness, if it appears to the court, upon examining him and competent witnesses, that he has sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters he has seen or heard in reference to the questions at issue.[4]

(2) As to exercising the elective franchise. A person who is capable of doing ordinary work, and transacting business, who knows what money is and its value, makes his own contracts and does his own trading, or a person vacillating and easily persuaded, or a person who has been laboring under some kind of illusion or hallucination, but not so as to incapacitate him for the general management of business, which illusion or hallucination is not shown to extend to political matters, cannot be denied the privilege of the elective franchise on the ground of a want of mental capacity.[5]

(3) As to proceedings *de lunatico*. The inquiry is as

[1] Hall *v.* Unger, 2 Abb. U. S. 510-15 (1867), Field, J., Cir. Ct., 9th Cir., Dist. Cal.

[2] Mut. Life Ins. Co. *v.* Terry, 15 Wall. 590 (1872).

[1] Forman's Will, 54 Barb. 291 (1869); Prichard, Ins. 16, 19, 30. See Taylor *v.* Commonwealth, 109 Pa. 270 (1885). Moral mania, 3 Law Quar. Rev. 339 (1887).

[2] People *v.* Finley, 38 Mich. 483 (1878); United States *v.* McGue, 8 Curtis, 13 (1851).

[3] R. S. § 1.

[4] District of Columbia *v.* Armes, 107 U. S. 521 (1882), Field, J.; Regina *v.* Hill, 5 Cox, Cr. C. 266 (1850).

[5] Clark *v.* Robinson, 88 Ill. 499, 502 (1878), Sheldon, J

to the individual's fitness to manage his own affairs, and to conduct himself with safety to himself and others. See further LUNACY.

(4) As to contracts and deeds. The inquiry is, what degree of mental capacity is essential to the proper execution of the act; and was that capacity possessed at the time of the execution. Different degrees are requisite for contracts of a complicated character, and for a single transaction of a simple nature.

The law presumes every adult sane, his will standing as the reason for his conduct. Whoever denies his sanity must establish the position. Testimony as to previous or subsequent insanity will not answer, unless the insanity be shown to be habitual, that is, continuous and chronic. Habitual insanity, once shown, is presumed to continue.[1]

The burden of proof is upon him who alleges incapacity, unless it is shown that he was insane prior to the date of the contract; then the burden shifts, and the person claiming under the contract must show that it was executed during a lucid interval. Partial insanity, in the absence of fraud or imposition, will not avoid a contract, unless it exists with reference to the subject of it at the time of its execution; but in cases of fraud it may be considered in determining whether a party has been imposed upon.[2]

In a policy of insurance, "sane or insane" refers to intended self-destruction, whether the insured was of sound mind or in a state of insanity. To avoid the policy, the insured must have been conscious of the physical nature of his act, and intended by it to cause his death, although at the time he was incapable of judging between right and wrong, and of understanding the moral consequences of what he was doing.[3] See further SUICIDE.

(5) As to testamentary capacity. A testator must have a sound and disposing mind and memory: he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which the matter is composed — the disposition of his property in its simple forms. Bodily health may be in a state of extreme infirmity, and he yet have sufficient understanding to direct how his property shall be disposed of. His capacity may be perfect to dispose of his property by will, and yet be inadequate to the transaction of other business, as, the making of a contract. . . He expresses the previously formed deliberations of his own mind. Soundness is to be judged from his conversation and actions at the time the will is made.[4]

The mere fact that a testator is subject to insane delusions is no sufficient reason why he should be held to have lost his right to make a will, if the jury are satisfied that the delusions have not affected the general faculties of his mind and cannot have influenced him in any particular disposition of his property.[1]

Want of the requisite soundness is incapable of definition suited to all cases. Each case is largely to be tested by its own facts.[2]

The best considered cases put the question upon the basis of knowing and comprehending the nature of the transaction.[3]

Old age, failure of memory, eccentricity, ignorance, credulity, vacillation of purpose, irritability, passion, prejudice, meanness, and even degrees of idiocy, may all exist along with adequate capacity.[4]

When the due execution of a paper, rational in its provisions and consistent in its details, language, and structure, has been proven, the propounder has made out a *prima facie* case. The burden of showing that the testator was not of disposing mind then shifts to to the contestant.[5] See further INFLUENCE.

(6) As to responsibility for crime. The decisions show "a steady amelioration, in the light of advancing medical knowledge." They have regard to the possession of the faculty of understanding right from wrong. But some, in addition, regard the power of choosing between acts.

All well considered cases, since 1843, in both England and America, are founded upon the doctrine laid down by the fourteen judges in *M'Naghten's Case*,[6] that "the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the commitment of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did not know it, that he did not know he was doing what was wrong."

That rule, however, is not universal. In some States the question is left to the jury, in a general way, whether insanity caused the act; in others, knowledge of right and wrong is the test; and in others, to that test is coupled an inquiry as to the power to control action.

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[1] Hall *v.* Unger, 2 Abb. U. S. 513-15 (1867); 8 Conn. 39; 7 Ga. 484; 32 Ind 126; 56 Me. 246; 58 *id.* 453; 33 Md. 23; 4 Neb. 115; 23 N. J. E. 509; 9 Gratt. 704.

[2] McNett *v.* Cooper, 13 F. R. 586, 590 (1882), cases; Dexter *v.* Hall, 15 Wall. 9, 20 (1872), cases; Griffith *v.* Godey, 113 U. S. 95 (1885).

[3] Bigelow *v.* Berkshire Life Ins. Co., 93 U. S. 287 (1876), cases, Davis, J.

[4] Harrison *v.* Rowan, 3 Wash. 585-86 (1820), Washington, J. Approved, 1 Redf. Wills, 30; 29 Pa. 302,—in many cases.

[1] Banks *v.* Goodfellow, 39 L. J. R., Q. B. 237, 248 (1870), Cockburn, C. J.

[2] Thompson *v.* Kyner, 65 Pa. 378 (1870).

[3] 1 Redfield, Wills, *124; 18 Cent. L. J. 282-86 (1884), cases; 26 Alb. L. J. 384-86 (1882), cases.

[4] See generally 2 N. J. E. 11; 3 *id.* 581; 5 John. Ch. 158; 87 Ind. 18; 50 Mich. 456; 9 Oreg. 129; 33 Pa. 409; 65 *id.* 377; 8 W. N. C. 203.

[5] Fee *v.* Taylor, 83 Ky. 261 (1885), Holt, J.; 18 Cent. Law J. 282-87 (1884), cases.

[6] M'Naghten's Case, 10 Cl. & F. 210, 200 (House of Lords), per Tindal, Ld. C. J.; United States *v.* Holmes, 1 Cliff. 120 (1858), Clifford, J.; 2 Steph. Hist. Cr. L. Eng. 158.

The right and wrong test seems to prevail in Alabama, California, Connecticut, Delaware, Georgia, Louisiana, Maine, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Tennessee, Texas, Virginia, Wisconsin, and in the Federal courts.[1] To that test seems to be added the power to control acts, in Indiana, Iowa, Kentucky, Massachusetts, Minnesota, Ohio, and Pennsylvania.[2] While in Illinois, Kansas, Michigan, and New Hampshire, responsibility would seem to be left in broad terms to the jury.[3]

The required proof of insanity is either preponderance of testimony, or satisfaction beyond a reasonable doubt. The burden to establish a *prima facie* case rests upon the accused; after which the prosecution may rebut.

The defendant is not entitled to the benefit of a reasonable doubt whether he was or was not insane.[4] See DOUBT, Reasonable.

That the accused is more ignorant and stupid than common men, of bad education, and of bad passions and bad habits, does not excuse. Those qualities are but the common causes of crime.[5]

To constitute the crime of murder, the assassin must have a reasonably sane mind. "Sound memory and discretion," in the old common-law definition of murder, means that. The condition of mind of an irresponsibly insane man cannot be separated from his act. If he is laboring under disease of his mental faculties to such extent that he does not know what he is doing, or does not know that it is wrong, he is wanting in that sound memory and discretion which make a part of the definition of murder. As insanity is the exception, the law presumes sanity. It is for the defendant to prove insanity in the first instance, to show that the presumption is a mistake as far as it relates to him. Mind can only be known by its outward manifestations,—the language and conduct of the man. By these his thoughts and emotions are read, and according as they conform to the practice of people of sound mind, who form the large majority of mankind, or contrast harshly with it, we form our judgment as to his soundness of mind. . . Was the accused's ordinary, permanent, chronic condition of mind such, in consequence of disease, that he was unable to understand the nature of his actions, or to distinguish between right and wrong in his conduct? Was he subject to insane delusions that destroyed his power of so understanding? And did this continue down to and embrace the act for which he is tried? If so, he was simply an irresponsible lunatic. The answer of the judges in *M'Naghten's Case* has not been deemed entirely satisfactory, and the courts have settled down upon the question of knowledge of right and wrong as to the particular act, or rather the capacity to know it, as the test of responsibility. . . Distinction must be made between mental and moral obliquity; between a mental incapacity to understand the distinctions between right and wrong, and a moral indifference and insensibility to those distinctions. Indifference to what is right is not ignorance of it, and depravity is not insanity.[1]

The opinion of a non-professional witness as to the mental condition of a person, in connection with a statement of the facts and circumstances, within his personal knowledge, upon which that opinion is formed, is competent evidence. In a substantial sense, and for every purpose essential to a safe conclusion, the mental condition of an individual, as sane or insane, is a fact, and the expressed opinion of one who has had adequate opportunities to observe his conduct and appearance is but the statement of a fact. Insanity is a condition, which impresses itself as an aggregate on the observer.[2]

See DELIRIUM; DELUSION; INTELLIGENCE; LUCID INTERVAL; WILL, 1.

INSCRIPTIONS. See EVIDENCE, Secondary.

INSENSIBLE. See SENSE.

INSIMUL. See COMPUTARE, Insimul.

INSINUATION. Suggestion; information communicated: as, at the insinuation of the plaintiff, the court made a particular order.

INSOLVENCY. Sometimes, the insufficiency of the entire property and assets of an individual to pay his debts — the general and popular meaning. In a more restricted sense, inability to pay debts as they become due in the ordinary course of business.

The term is used in the latter sense when traders and merchants are said to be insolvent, also in bankrupt laws. With reference to persons not engaged in trade and commerce, the term may have a less restricted meaning.[3] Opposed, *solvency*, q. v.

In the sense of the Bankrupt Act, means that a party, whose business affairs are in question, is unable

[1] 25 Ala. 21; 71 *id.* 393; 24 Cal. 230; 62 *id.* 54, 120; 10 Conn. 136; 46 *id.* 330; 1 Houst. Cr. 249; 42 Ga. 9; 45 *id.* 57; 25 La. An. 302; 34 *id.* 186; 57 Me. 574; 3 S. & M. 518; 64 Mo. 591; 4 Neb. 407; 21 N. J. L. 196; 52 N. Y. 467; 75 *id.* 159; Phil. L. R. 376; 3 Heisk. 348; 40 Tex. 60; 20 Gratt. 860; 40 Wis. 304; 57 *id.* 56; 1 Cliff 118.

[2] 31 Ind. 492; 88 *id.* 27; 25 Iowa, 67; 41 *id.* 232; 1 Duv. 234; 7 Met. 500; 13 Minn. 341; 23 Ohio, 146; 4 Pa. 264; 76 *id.* 414; 78 *id.* 128; 88 *id.* 291; 100 *id.* 573.

[3] 31 Ill. 385; 11 Kan. 32; 17 Mich. 9; 19 *id.* 401; 43 N. H. 224; 50 *id.* 369. See generally 16 Cent. L. J. 282–86 (1883), cases; 17 *id.* 408–10 (1883), cases; 36 Alb. Law J. 326–31 (1887), cases.

[4] State *v.* Johnson, 91 Mo. 443 (1886); United States *v.* Ridgeway, 31 F. R. 144 (1887). As to "reasonable doubt," see also 18 Cent. Law J. 402–5 (1884), cases.

[5] United States *v.* Cornell, 2 Mas. 109 (1820), Story, J.; Goodwin *v.* State, 96 Ind. 550 (1883). See also 16 Cent. Law J. 282–86 (1883), cases; 4 Crim. Law Mag. 512–14 (1883), cases; Med. Leg. J., Sept. 1883; Wash. Law R., May, 1883.

[1] United States *v.* Guiteau, 10 F. R. 163, 166, 167–68, 182–83 (Jan. 25, 1882), Cox, J.; note and cases to same, pp. 189–203, by Dr. Wharton.

[2] Connecticut Mut. Life Ins. Co. *v.* Lathrop, 111 U. S. 618–20 (1884), Harlan, J.; 1 Whart. & S. Med. J. § 257.

[3] Toof *v.* Martin, 13 Wall. 47 (1871), Field, J. See Clarion Bank *v.* Jones, 21 *id.* 338 (1874); Cunningham *v.* Norton, 125 U. S. 90 (1888).

to pay his debts as they become due in the ordinary course of his daily business.[1]

Insolvency is owing debts in excess of the value of one's tangible property. Without debts there can be no insolvency. Poverty and insolvency are not synonymous terms within the meaning of a statute conferring the right to administer upon an estate.[2]

Insolvent. 1, *adj.* Not possessing the means with which to pay debts in full; concerning one so involved. In the last sense "insolvency" is frequently used. Thus we have insolvent debtor, trader, criminal, circumstances; and insolvent or insolvency laws.

2, *n.* A person who is not pecuniarily able to pay his debts as they fall due; also, a person whose property, if distributed *pro rata* among his creditors, would not be sufficient to pay their claims in full.

Insolvency or insolvent laws. Laws passed by the individual States for the distribution, among creditors, of the property of persons who are unable to pay their debts in the ordinary course of business.

In strictness, "bankrupt" laws apply only to traders or merchants, and "insolvent" laws to all other persons. Insolvent laws are bankrupt laws passed by the States. Bankrupt laws discharge absolutely; insolvent laws leave future acquisitions liable. State laws are suspended while a national law is in operation.[3]

See BANKRUPTCY; CAUSE, 1 (2), Probable; CIRCUMSTANCES, 2; CONTEMPLATION; PREFERENCE.

INSPECTION. A looking at: examination; view. Whence inspector, inspectorship.

1. An official examination of articles of food or of merchandise, to determine whether they are suitable for market or commerce.[4]

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws."[5]

The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government: all of which can be most advantageously exercised by the States themselves.[1]

The scope of inspection laws is not confined to articles of domestic produce or manufacture, or to articles intended for exportation, but applies to articles imported, and to those intended for domestic use as well.[2]

Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds; all these matters being supervised by a public officer having authority to pass or not pass as lawful merchandise, as it did or did not answer the prescribed requirements. It is not necessary that all these elements should coexist to make a valid inspection law. Quality alone may be the subject of inspection, or the inspection may be made to extend to all of the above matters. These laws are none the less inspection laws because they may have a remote and considerable influence upon commerce. Congress may interpose if a statute, under the guise of an inspection law, goes beyond the limit prescribed by the Constitution.[3]

A State may not require the payment of an assessment or fee for each passenger upon an ocean vessel who is inspected to ascertain if he has leprosy, and impose a fine upon the owners of the vessel for nonpayment.[4] See POLICE, 2.

Inspection laws have exclusive reference to personal property; they never apply to free human beings. A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title. . . An inspection is something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test. When testimony is to be taken and examined, it is not inspection in any sense whatever.[5]

2. In the reception of evidence, a substitution of the eye for the ear.

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[1] Buchanan *v.* Smith, 16 Wall. 308 (1872), Clifford, J.; Wager *v.* Hall, *ib.* 599 (1872); Dutcher *v.* Wright, 94 U. S. 557 (1876); May *v.* Le Claire, 18 F. R. 166 (1882); *Re* Bininger, 7 Blatch. 264, 278 (1870), cases.

[2] Bowersox's Appeal, 100 Pa. 438 (1882); Daniels *v.* Palmer, 35 Minn. 347-50 (1886), cases.

See also 1 Dill. 195; 2 Low. 401; 1 Woods, 434; 2 *id.* 401; 9 Cal. 45; 33 *id.* 625; 20 Conn. 69; 2 Ind. 57; 88 *id.* 578; 19 La. An. 183, 197; 4 Cush. 134; 3 Gray, 600; 8 Allen, 114; 123 Mass. 13; 9 N. Y. 594; 15 *id.* 9, 199; 43 *id.* 75; 25 Hun, 169; 4 Hill, 652; 57 N. H. 458; 2 N. J. E. 173; 9 *id.* 457; 12 Ohio, 336; 13 Gratt. 683; 116 E. C. L. 1090; 2 Bl. Com. 285, 481; 2 Kent, 389.

[3] Sturges *v.* Crowninshield, 4 Wheat. 195 (1819), Marshall, C. J.; 2 Mas. 160; 12 Wheat. 280.

[4] See 2 Woods, 290; 20 Blatch. 303.

[5] Constitution, Art. I, sec. 10, cl. 2.

[1] Gibbons *v.* Ogden, 9 Wheat. 203 (1824), Marshall, C. J.; 8 Cow. 46; 64 Pa. 105.

[2] Neilson *v.* Garza, 2 Woods, 290 (1876), Bradley, J.; Brown *v.* Maryland, 12 Wheat. 433 (1827), Marshall, C. J.

[3] Turner *v.* Maryland, 107 U. S. 55, 54, 51-54, note (1882), cases, Blatchford, J.

[4] People *v.* Pacific Mail Steamship Co., 8 Saw. 640 (1883), Sawyer, Cir. J.

[5] People *v.* Compagnie Générale Transatlantique, 107 U. S. 61-63 (1882), Miller, J.: 20 Blatch. 296; 10 F. R. 357; Story, Const. § 1017; Cooley, Const. Lim. 730.

Inspection of documents, or of records. Refers to the right of a party to a suit to inspect and take copies of writings or records, in the possession of his opponent or of a public officer, which are material to the maintenance of his case.

In civil practice, independently of the old doctrine of profert and oyer, a rule may be granted to compel the production and permit the copying of such papers as are essential to the maintenance of a contested right. But surrender of the documents will not be ordered. The doctrine applies to public, corporation, and private documents, in which the petitioner has an interest, and which are not of an incriminating nature. Previous demand must have been made, and the documents must be under respondent's exclusive control.[1] See DISCOVERY, 6, Bill of; PRODUCE, 2; RECORD, Nul tiel.

Inspection of the person. In an action for damages for personal injuries, the plaintiff may be required by the court, upon application, to submit his person to an examination for the purpose of ascertaining the character and extent of his injuries.

The courts have held in divorce cases, that an examination may be ordered of a defendant alleged to be impotent.[2]

Trial by inspection. When, for the greater expedition of a cause, in some point or issue the object of the senses, the judge, upon the testimony of his own sense, decides the point in dispute.[3]

When the fact, from its nature, must be evident to the court either from ocular demonstration or other irrefragable proof, there the law departs from its usual custom, the verdict of twelve men, and relies upon the judgment of the court alone; as, in allegations of non-age, that plaintiff is dead when one calling himself plaintiff appears, that a man is an idiot; and in references to the almanac. But in all these cases, the judges, if they conceive a doubt, may order it to be tried by jury.[3]

Inspection is to be regarded rather as a means of dispensing with evidence than as evidence itself. That which the court or jury sees need not be proved. It is valuable as an ingredient of circumstantial evidence. A common illustration is where juries are taken to view the scene where the events of litigation occurred. . . All materials and objects in any way part of the *res gestæ* may be produced at the trial of the case. But inspection alone is not relied upon when more exact proof can be produced.[1]

3. Supervision; trusteeship.

Deed of inspectorship. An assignment by a debtor of his property, by which he is allowed to manage the property for a specified time, under the inspection of certain individuals, appointed by the body of the creditors, whose duty is to see that the property is disposed of in the manner most conducive to the interests of the creditors.[2] See COMPOSITION; LIQUIDATOR.

INSTALLMENT.[3] One of the several portions of a debt, payable at different periods.

Where, for the purpose of collection, an assessment for benefits accruing from a public improvement is divided into installments, each one may be regarded as an assessment, and a statute of limitations run against it as a distinct claim.[4]

Buying or selling personalty upon the installment plan is upon the scheme of different portions of the price at stipulated intervals. When the seller, at his option, may remove the property for breach of contract, replevin will not lie, until after demand and refusal to surrender.[5] See SALE, Conditional; LIEN, Secret.

INSTANCE. Application to set aside a proceeding for irregularity must be made as early as possible — "in the first instance."[6]

Instance court. That branch of the English court of admiralty which has cognizance of all matters pertaining to intercourse upon the high seas except prizes.[7]

INSTANTER. L. Without delay: within twenty-four hours.[8] See IMMEDIATELY.

INSTAR. L. Like; resembling; equivalent to.

Instar omnium. Representative of all.

Money is said to be *instar omnium* as to values;[9] one act, as to the purpose of all acts;[10] and one case, as to the reasoning in all cases of its class.[11]

[1] 1 Whart. Ev. §§ 742-56, cases; 1 Greenl. Ev. §§ 471-78, 559-62, cases; Brewer *v.* Watson, 71 Ala. 304-6 (1882), cases; Commonwealth, *ex rel.* Sellers *v.* Phœnix Iron Co., 105 Pa. 115-19 (1884), cases; 23 Am. Law Reg. 395-400 (1884), cases; 22 Cent. Law J. 341 (1886), cases.

[2] See generally Schroeder *v.* Chicago, &c. R. Co., 47 Iowa, 376-83 (1877); Atchison, &c. R. Co. *v.* Thul, 29 Kan. 466, 474 (1883); 19 Cent. Law J. 144-48 (1884), cases; 2 Bish. M. & D. § 590, cases.

[3] 3 Bl. Com. 332-33.

[1] 1 Whart. Ev. §§ 345-47, cases; 25 Law J. 3-7 (1887), cases.

[2] [4 South. Law Rev. 639 (1878), cases.

[3] Spelled, also, instalment.

[4] Pelton *v.* Bemis, 44 Ohio St. 57 (1886); Ryall *v.* Prince, 82 Ala. 266 (1886).

[5] Cushman *v.* Jewell, 7 Hun, 525 (1876); Smith *v.* Newland, 9 *id.* 553 (1877); 89 Ill. 238; 20 Kan. 137; 27 Mich. 209, 463; 33 *id.* 94; 41 N. Y. 155; 70 *id.* 466; 13 Rep. 511.

[6] 3 Chitty, Bl. Com. 287.

[7] See 3 Kent, 355, 378; 18 Johns. 292.

[8] Moffat *v.* Dickson, 3 Col. 315 (1877).

[9] 1 Bl. Com. 266; 2 *id.* 466; 3 *id.* 231.

[10] 4 Bl. Com. 155.

[11] 4 W. N. C. (Pa.) 500.

INSTITUTE. 1. To commence: as, to institute an action, proceeding, suit.

2. To appoint: an instituted executor is one chosen by the testator.

3. To establish upon a permanent basis. Whence institutional.

Institutes. Text-books exhibiting the established principles of jurisprudence; comprehensive treatises upon elementary law; commentaries upon law.

Institution. A permanent establishment, as contradistinguished from an enterprise of a temporary character.[1] See PERMANENT.

Sometimes describes the establishment or place where the business or operations of a society or association are carried on; at other times, designates the organized body.[2]

INSTRUCT. 1. To give orders to an agent in relation to the duties of his employment.

Section 251, Rev. St., empowering the secretary of the treasury to issue regulations for the government of collectors of revenue, makes a distinction between "instructions" and "regulations," which is inherent in the nature of the two things. An instruction is a direction to govern the conduct of the particular officer to whom it is addressed; a regulation affects a class or classes of officers.[3]

2. To direct a jury as to their duties under the law in a cause about to be submitted to them for a verdict.

Binding or peremptory instruction. Directs the kind of verdict the jury should return.

The jury may be instructed to find for the defendant, where, if the verdict were against him, the court would set it aside.[4]

The practice saves time and costs; gives the certainty of applied science to the results of judicial investigation; draws clearly the line which separates the provinces of the judge and the jury, and fixes where it belongs the responsibility which should be assumed by the court.[5]

Misinstruct. To charge a jury erroneously with respect to the law in the case pending before them.

See ADVISE; CHARGE, 2 (2, c); JURY, Trial by.

[1] Indianapolis v. Sturdevant, 24 Ind. 395 (1865).

[2] Gerke v. Purcell, 25 Ohio St. 244 (1874); Appeal Tax Court v. St. Peter's Academy, 50 Md. 345 (1878).

[3] Landram v. United States, 16 Ct. Cl. 86 (1880).

[4] Griggs v. Houston, 104 U. S. 553 (1881); Montclair v. Dana, 107 *id.* 162 (1882); 93 *id.* 143; 106 *id.* 30; 122 *id.* 411; 3 McCrary, 268; 17 F. R. 133.

[5] Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 647 (1870), Swayne, J.

INSTRUMENT. 1. An implement or tool, *qq. v.*

2. Whatever may be presented as evidence to the senses of an adjudicating tribunal,—a document, witness, or even a living thing produced for inspection.[1]

A means of proof; the means by which the truth is in fact established, and whether written or unwritten.[2]

3. Anything reduced to writing: a "written instrument" or "instrument of writing;" more particularly, a document of a formal or solemn character.

Common descriptive epithets: commercial, negotiable, sealed and unsealed instruments.

"Instruments in writing," associated in a statute with "bonds," "laws," "deeds," and "records," has a restrictive connotation. Independently of such surroundings, the expression, by itself, does not comprehend all written papers, but only written papers of a class. An instrument is "something reduced to writing as a means of evidence." Returns of births, marriages, and deaths, to a department of government, are not "instruments."[3]

A generic term for bills, bonds, conveyances, leases, mortgages, promissory notes, wills, and like formal or solemn writings. Scarcely includes accounts, letters in ordinary correspondence, memoranda, and similar writings, with respect to which the creation of evidence to bind the party, or the establishment of an obligation or title, is not the primary motive.[4]

Instruments will be so construed as to carry into effect the intention of the parties, but there must always be sufficient words to enable the courts to ascertain what this intention was. The rule that courts will so construe an instrument as to make it effective, does not mean that they will inject into it new and distinct provisions. Thus, that an instrument may have effect as a conveyance, it must contain words importing a grant.[5]

See ALTERATION, 2; CAPTION, 2; CANCEL; DATE; DESCRIPTION; FORGERY; LOST, 2; PAPER; PRESENTS (1); PROFERT; REDUNDANCY; REFORM; REPUGNANT; SEAL, 1; SIGN; SPECIALTY; SPOLIATION; SUBSCRIBE; WRITING.

INSUFFICIENT. See SUFFICIENT.

INSULT. See ASSAULT; PROVOCATION.

INSURANCE. Making sure, secure, safe: indemnity against loss; a contract to pay money in the event of pecuniary loss from a specified cause.

Assurance. Formerly used in the sense of insurance; is sometimes limited to risks upon lives. Whence "assurer" and "assured."

[1] [1 Whart. Ev. § 615.

[2] 1 Greenl. Ev. §§ 3, 306-8.

[3] State v. Kelsey, 44 N. J. L. 34 (1882), Beasley, C. J.

[4] [Abbott's Law Dict.; Hankinson v. Page, 31 F. R. 186 (1887).

[5] Hummelman v. Mounts, 87 Ind. 180 (1882).

There are instances in which "the assured" refers to the person for whose benefit the contract is effected, and "the insured" to the person whose life is insured. The application of either term to the party for whose benefit the insurance is effected, or to the party whose life is insured, has generally depended upon its collocation and context in the policy.[1]

Insurer. The party who engages to make the indemnity. **Insured,** *n.* He who is to receive the indemnity: also, the person the continuance of whose life has been made the subject of a contract.

The subjects of insurance are property, life, and health. In *fire* and *marine* insurance, the subject is property; in *life* and *accident* insurance, the lives, and health or freedom from physical injuries, of human beings. Contracts are also made upon the *fidelity* of agents and trustees, and upon the *honesty* of customers as debtors; upon *titles* to realty; upon valuables against *theft;* upon *plate-glass* windows against breakage; upon *steam-boilers* against explosion; upon the lives and good condition of domestic *animals.* There are also other species. The commonest kinds are *accident, fire, life,* and *marine* insurance. In general, insurance is applicable to protect men against uncertain events which may in any wise be of disadvantage to them.[2]

Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss.[3]

A contract of insurance is an agreement, by which one party, for a consideration (usually paid in money, either in one sum or at different times during the continuance of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest.[4]

A contract between A and B, that, upon A's paying a premium equivalent to the hazard run, B will indemnify him against a particular event.[5]

Policies of insurance against *fire* and *marine* risks are contracts of indemnity,—the insurer engaging to make good, within limited amounts, the losses sustained by the assured in their buildings, ships, and effects. The contract called *life* assurance is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life. This last species in no way resembles a contract of indemnity.[1]

Guaranty insurance is instituted as a substitute for private suretyship, to aid persons in obtaining places of trust and responsibility, and to protect employers from the unfaithfulness of their employes.[2]

The word "insurance," in common speech and with propriety, is used quite as often in the sense of *contract* of insurance, or *act* of insuring, as in that expressing the abstract idea of *indemnity* or security against loss.[3]

A contract of *life* assurance is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. The payment of each premium is not, as in fire policies, the consideration for insurance during the next following year. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual installments. Each installment is, in fact, part consideration of the entire insurance for life. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount insured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance. . . All the calculations of the insurance company are based on the hypothesis of prompt payments. Forfeiture for non-payment is a necessary means of protecting itself from embarrassment. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the co-existence of many risks arises the law of average, which underlies the whole business. An essential feature of the scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality, and of prompt payments and compound interest thereon.[4]

[1] Connecticut Mut. Life Ins. Co. *v.* Luchs, 108 U. S. 504 (1883), Field, J.

[2] See May, Ins. § 73.

[3] May, Ins. § 1.

[4] Commonwealth *v.* Wetherbee, 105 Mass. 160 (1870), Gray, J. Approved, 71 Ala. 443; 30 Kan. 587; 72 Mo. 159.

[5] 2 Bl. Com. 458; Cummings *v.* Cheshire County Fire Ins. Co., 55 N. H. 458 (1875), Foster, C. J.

[1] Dalby *v.* The Indian & London Life Assur. Co., 80 E. C. L. *387 (1854), Parke, B. See also Mutual Life Ins. Co. *v.* Girard Life Ins. Co., 100 Pa. 180 (1882).

[2] May, Ins. §§ 73, 540.

[3] Funke *v.* Minnesota Farmers' Mut. Fire Ins. Association, 29 Minn. 354 (1882), cases; 44 N. J. L. 87.

[4] New York Life Ins. Co. *v.* Statham, 93 U. S. 30-31 (1876), Bradley, J.; Klein *v.* New York Life Ins. Co., 104 *id.* 88 (1881); Thompson *v.* Knickerbocker Life Ins.

A policy of *marine* insurance is a contract of indemnity against all losses accruing to the subject-matter of the policy from certain perils during the adventure. This subject-matter need not be strictly a property in the ship, goods, or freight.[1]

The contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom. It was unknown to the common law. Its first appearance in any code or system of laws was in the law maritime as promulgated by the various maritime states and cities of Europe. It grew out of the doctrine of contribution and general average, which is found in the maritime laws of the ancient Rhodians. By this law, if ship, freight, or cargo was sacrificed to save the others, all had to contribute their proportionate share of the loss. This division of loss suggested a previsional division of risk; first, among those engaged in the same enterprise; and, next, among associations of ship-owners and shipping merchants. Hence, too, the earliest form of the contract was that of mutual insurance. The next step was that of insurance upon premium. Capitalists, familiar with the risks of navigation, were found willing to guarantee against them for a small consideration or premium paid. This, the final form, was in use as early as the beginning of the fourteenth century.[2]

Insurable interest. (1) In life insurance. Any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. Examples are, the interest of a man in his own life, in the life of his wife or child; the interest of a woman in her husband; a creditor's interest in the life of his debtor; interest in one's own life for a relative or friend; the interest of two or more in their joint lives for the survivor. The essential thing is, that the policy is obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest.[3]

It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefits from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful, as operating more efficaciously, to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured.[1]

Otherwise, the contract is a mere wager, by which the party taking the policy is directly interested in the death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned as being against public policy. For which reasons, a person who has procured a policy upon his own life cannot *assign* it to a party who has no insurable interest in his life.[1]

(2) In fire and marine insurance. These being contracts of indemnity, the insured must have some interest in the property at the time of injury.[2]

But he need not have either a legal or equitable title. If he has a right in or against the property, which some court will enforce, a right so dependent for value upon the continued existence of the property alone as that a loss of the property will cause him pecuniary damage, he has an insurable interest.[3]

A right of property is not indispensable. Injury from its loss or benefit from its preservation may be

Co., *ib.* 252 (1881); Connecticut Mut. Life Ins. Co. *v.* Home Ins. Co., 17 Blatch. 146–47 (1879); 100 Pa. 180.

[1] Lloyd *v.* Fleming, L. R., 7 Q. B. 302 (1872), Blackburn, J.; 3 Kent, 253.

[2] New England Mut. Marine Ins. Co. *v.* Dunham, 11 Wall. 31–33 (1870), Bradley, J.

[3] Connecticut Mut. Life Ins. Co. *v.* Schaefer, 94 U. S. 460, 457 (1876), Bradley, J.

[1] Warnock *v.* Davis, 104 U. S. 779, 782 (1881), Field, J. Approved, Connecticut Mut. Life Ins. Co. *v.* Luchs, 108 *id.* 505 (1883). See also 32 Alb. Law J. 385–88, 403–6 (1885), cases; 25 Cent. Law J. 27 (1887), cases; 22 How. 388; 13 Wall. 619; 15 *id.* 643; 8 Saw. 620; 16 F. R. 652; 41 Ind. 116; 101 Mass. 564; 13 N. Y. 31; 20 *id.* 32. On assigning life policies, see McCrum *v.* Missouri Life Ins. Co., 36 Kan. 148 (1887), cases; 18 Cent. L. J. 346–49 (1884), cases; 24 Am. Law Reg. 753–69 (1885), cases. Rights in policy for the benefit of a wife after the death of her husband, 27 *id.* 377–81 (1888), cases.

[2] Connecticut Mut. Life Ins. Co. *v.* Schaefer, *supra*.

[3] [Rohrback *v.* Germania Fire Ins. Co., 62 N. Y. 54 (1875), Folger, J. See also Buck *v.* Chesapeake Ins Co., 1 Pet. 151 (1828); 12 Iowa, 287; 42 *id.* 18

sufficient. Hence, an agent, factor, bailee, carrier, trustee, consignee, mortgagee, or other lien-holder, may insure to the extent of his interest; and by the clause "on account of whom it may concern," for all others to the extent of their interests, where there is previous authority or subsequent ratification.[1]

The owner of an equity of redemption (an equitable interest) has an insurable interest equal to the value of the buildings, whether personally liable for the mortgage debt or not. And so has the holder of a mechanic's lien.[2]

From the nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid the assured the amount of the indemnity agreed upon, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods or from damages paid by third persons for the loss.[3]

The insurance which a person has on property is not an interest in the property itself, but is a collateral interest, personal to the insured.[4]

Insurance agent. An insurance company is responsible for the acts of its agent within the general scope of the business intrusted to his care, and no limitation on his power, unknown to strangers, will bind them.[5]

Insurance broker. If the insured employs an insurance broker to place insurance for him, he is his agent, and not that of the company. But if, acting on behalf of an agent of the company, the broker solicits the insurance, he is the agent of the company.[6]

Insurance company. An association, usually incorported, which makes a business of entering into contracts of insurance.

Mutual insurance company. This is composed of the persons insured, in their lives or property. They contribute *pro rata* upon the amount they have insured (and, possibly, a sum *per capita*, annually or otherwise) to a fund, out of which losses and expenses are paid.

The theory is that the premiums paid, or to be paid, constitute a fund for the liquidation of losses. They may be paid by note or cash.[1]

Mutuality exists when the members contribute cash or assessable notes, or both, to a common fund, out of which each is entitled to indemnity in case of loss.[2]

Stock insurance company. In this the members contribute a capital which is liable for losses and expenses, and the insured pay premiums.

There are companies which combine both schemes.

Insurance loss. The occurrence of a casualty insured against — the loss of a life or lives, the impairment of health, or the destruction of property, with consequent damage.

Insurance policy. A contract for insurance reduced to writing. Called, briefly, "a policy;" practically, a bond of indemnity.

Implies a contract in writing, the usual mode among prudent persons.[3]

But, unless prohibited by positive regulations, may be by parol.[4]

The contract may be either made or changed by parol.[5]

Blanket or *floating policy.* Is issued to a factor or warehouseman, and intended to cover margins uninsured by other policies, or to cover the limited interest of the factor or warehouseman.[6]

Endowment policy. In one respect, a contract payable in the event of a continuance of life; in another respect, in the event of death before the period specified.[7]

Interest policy. States or intends that the insured has a real and substantial interest in the thing insured. Opposed, *wager policy.*[8]

Open or *running policy.* Enables a merchant to insure goods shipped at a distant port when it is impossible for him to be advised of the particular ship upon which they

[1] Hooper *v.* Robinson, 98 U. S. 538 (1878), cases, Swayne, J.; Home Ins. Co. *v.* Baltimore Warehouse Co., 93 *id.* 543 (1876), cases.

[2] Insurance Co. *v.* Stinson, 108 U. S. 29 (1880).

[3] Phœnix Ins. Co. *v.* Erie Transportation Co., 117 U. S. 321 (1886), cases, Gray, J.

[4] The City of Norwich, 118 U. S. 494 (1886), cases. Contracts as effected by changes of title, 19 Am. Law Rev. 895-915 (1885), cases. After-acquired titles, 21 Cent. Law J. 500-8 (1885), cases. On assigning fire and marine policies, see 1 Harv. Law Rev. 388-98 (1888), cases.

[5] Union Mut. Ins. Co. *v.* Wilkinson, 13 Wall. 222, 235 (1871), cases. See also 25 Conn. 53, 465, 542; 26 *id.* 42; 37 N. H. 35; 19 N. Y. 305; 23 Pa. 50, 72; 26 *id.* 50; 2 Phill. Ins. § 1848; May, Ins. §§ 118-55.

[6] Mohr Distilling Co. *v.* Ohio Fire Ins. Co., 13 F. R. 74 (1882); May, Ins. § 123. See also Haden *v.* Farmers', &c. Fire Association, 80 Va. 683 (1885); Kyte *v.* Commercial Union Assurance Co., 144 Mass. 46 (1887).

[1] State *v.* Manufacturers' Mut. Fire Ins. Co., 91 Mo. 318 (1886), cases.

[2] Spruance *v.* Farmers', &c. Ins. Co., 9 Col. 77 (1885), cases.

[3] Manny *v.* Dunlap, 1 Woolw. 374 (1869); 11 Paige, 556.

[4] Humphry *v.* Hartfield Fire Ins. Co., 15 Blatch. 511 (1879), cases; Relief Fire Ins. Co. *v.* Shaw, 94 U. S. 574 (1876), cases.

[5] Cohen *v.* Continental Fire Ins. Co., 67 Tex. 398 (1887), cases.

[6] Howe Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 541 (1876).

[7] Brummer *v.* Cohn, 86 N. Y. 17 (1881).

[8] See Sawyer *v.* Dodge County Ins. Co., 37 Wis. 530 (1875); May, Ins. § 33.

are laden, and when, therefore, he cannot name the ship in the policy.

The usual words are the cargo "on board ship or ships," with a condition that the particular ship, as soon as known, shall be declared to the underwriter, whose agreement is that the policy shall attach if the vessel is seaworthy. From the uncertainty attending the unknown condition of the vessel, a high rate of premium is demanded.[1]

Paid-up policy. A policy upon which all the annual premiums are paid, or considered as paid, at one time.

A policy of life insurance containing a provision that a default in payment of premiums shall not work a forfeiture, but that the sum insured shall then be reduced and commuted to the annual premiums paid, confers the right on the assured to convert the policy at any time, by notice to the insurer, into a paid-up policy for the amount of premiums paid.[2]

Time policy. In this the duration of the risk is fixed by definite periods. In a *voyage policy* the duration is determined by geographical limits.[3]

Valued policy. When the parties, having agreed upon the value of the interest insured, to save the necessity of further proof, insert the valuation in the policy in the nature of liquidated damages.[4] See VALUE, Equitable.

Wager policy. In this the insured party has no interest in the matter insured, only an interest in its loss or destruction.

Void, as against public policy or positive law. But precisely what interest is necessary to take a policy out of this category has been the subject of much discussion. In life insurance it is at least essential that the policy be obtained in good faith, and not for speculation upon the hazard of a life in which the insured has no interest. In marine and fire insurance, where the insurance is strictly an indemnity, the difference is not so great.[5] See further *Insurable Interest;* WAGER, 2.

Insurance risk or peril. The event or casualty insured against. See PERIL; RISK.

Double insurance. A second insurance upon the same interest, against the same perils, in favor of the same person.[6]

In such case the policies are considered as one; the insurers are liable *pro rata*, and are entitled to contribution to equalize payments made on account of losses.[1]

Over insurance. Insurance upon property in an amount exceeding the value. See VALUATION, Over.

Premium of insurance. The consideration in a contract of insurance.

Usually paid in money, in one sum, or at different times during the continuance of the risk. The amount may be secured by a *premium note.* See PREMIUM.

Re-insurance. Insurance upon an underwriter's contracts of insurance.[2]

Contracts of re-insurance, by which one insurer causes the sum which he has insured to be re-assured to him by a distinct contract with another insurer, with the object of indemnifying himself against his own responsibility, though prohibited for a time in England by statute, are valid by the common law, and have always been lawful in this country; and in a suit upon such a contract, the subject at risk and the loss thereof must be proved in the same manner as if the original assured were the plaintiff.[3]

When a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to a binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. It is the language of the company which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself.[4]

As to fire and marine insurance, see ABANDON, 1; ACCIDENT; AVERAGE; CAPTURE; CONCEAL, 5; CONTAINED; CONTRIBUTION; DEPARTURE, 2; DEVIATION; FREIGHT; HAZARDOUS; LOSS, 3; OCCUPIED; PREMISES, 3; REFORM; REPRESENTATION, 1; SEIZURE, 2; UNDERWRITER; VALUATION.

As to life insurance, see DECLARE, 4; DISEASE; EPIDEMIC; FORFEITURE; INTEMPERATE; REPRESENTATION, 1; SUICIDE; TRUE.

INSURRECTION. A rising against civil or political authority; the open and active opposition of a number of persons to the

[1] Orient Mut. Ins. Co. *v.* Wright, 23 How. 405-6 (1859), cases, Nelson, J.; 38 Ohio St. 134; 3 Kent, 258, 272; May, Ins. § 31.

[2] Lovell *v.* St. Louis Mut. Life Ins. Co., 111 U. S. 264, 272 (1884), Bradley, J.

[3] May, Ins. § 34.

[4] See 3 Kent, 272; May, Ins. § 30; Wood, Ins. § 41; 38 Ohio St. 134; 100 Mass. 475.

[5] Connecticut Mut. Life Ins. Co. *v.* Schaefer, 94 U. S. 460 (1876), Bradley, J.; 2 Bl. Com. 460; 3 Kent, 275; May, Ins. § 33.

[6] See Turner *v.* Meridan Fire Ins. Co., 16 F. R. 454, 460-65 (1883), cases; May, Ins. § 440.

[1] Sloat *v.* Royal Ins. Co., 49 Pa. 14, 18 (1865); 2 Wood, Fire Ins. §§ 372-407.

[2] See Commercial Ins. Co. *v.* Detroit Fire & Mar. Ins. Co., 38 Ohio St. 15-16 (1882); May, Ins. § 11; Phillips, Ins. § 374.

[3] Phœnix Ins. Co. *v.* Erie Transp. Co., 117 U. S. 328 (1886), cases, Gray, J.; Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 *id.* 485, 510 (1882); 2 Kent, 278-79.

[4] First Nat. Bank of Kansas City *v.* Hartford Ins. Co., 95 U. S. 678 (1877), Harlan, J.; Grace *v.* American Central Ins. Co., 109 *id.* 282 (1883); Moulor *v.* American Ins. Co., 111 *id.* 341-42 (1884); Dwight *v.* Germania Life Ins. Co., 103 N. Y. 347-48 (1886), cases; Travelers' Ins. Co. *v.* McConkey, 127 U. S. 666 (1888), cases.

execution of law in a city or a state; a rebellion; a revolt.[1] See MOB; WAR.

INTELLIGENCE. Discernment; understanding; knowledge.

The possession of intelligence is not a test of sanity; for with it there may be an absence of power to determine the nature of the act, and its effect upon the subject.[2]

INTEMPERATE. If the rule or habit is to drink to intoxication when occasion offers, and sobriety or abstinence is the exception, then the charge of "intemperate habits" is established. It is not necessary that the custom be an every-day rule.[3]

"Sober and temperate" does not imply total abstinence from intoxicating liquor. The moderate, temperate use of intoxicating liquors is consistent with sobriety.[4]

While in a very clear case a court may assume that certain facts disclose a case of habitual intemperance, or that they warrant the opposite conclusion, in the main these are questions to be submitted to the jury.[5]

A life policy provided that it should be void if the insured "became so far intemperate as to impair health, or induce delirium tremens." The trial court charged that the "impairment of health" was not the indisposition arising from a drunken debauch, but that arising from such frequency of use as indicated an injurious addiction to the practice. *Held*, that it was for the jury to decide whether death was caused by an excessive use of stimulants.[6]

See DRUNKENNESS; HABIT; INTOXICATE.

INTENDMENT. The correct understanding or intention of the law; the true meaning or correct policy of a law.

INTENT; INTENTION. Design; determination; purpose.

"Intent" implies purpose only — refers to the quality of the mind with which an act is done. "Attempt" (*q. v.*) implies an effort to carry intent into execution.[7]

Common intent. The ordinary meaning of words.

Criminal intent. Evil, malicious will expressed in a criminal act.

While crime proceeds from a criminal mind, ignorance of the law is not a defense.

General intent. A purpose to do something in general: as 1, to benefit a class of persons or objects by a charitable devise; 2, to violate law. Opposed, 1, **particular intent:** an intent, expressed in a will, which cannot be given effect,— see CY PRES; and, 2, **specific intent:** applied to an act done with a particular design.

When an act, in general terms, is indictable, a criminal intent need not be shown, unless, from the language or effect of the law, a purpose to require the existence of such intent can be discovered. To introduce into the law the requisite of a guilty mind it must appear that such was the intent of the law-maker.[1]

Neglect to discharge a duty, or indifference to consequences, is, in cases, equivalent to a specific criminal intent.[2]

"Act" and "intention," in the phrase "die by his own act or intention," mean the same as "act" alone, for act implies intention.[3]

A criminal intent and a criminal act make a crime. But here a "specific intent" and a "criminal intent" are not to be confounded: they have nothing in common except as mental operations. The former determines the object toward which the act shall be directed; the latter that the act so directed shall be done. The former, as part of the criminal act, must be alleged and proved as any other portion of the act; the latter is neither alleged nor proved, but inferred from the commission of the act. Thus, a criminal act presumes criminal intent, though the accused was intoxicated; but where the existence of a specific intent is necessary to the act, a degree of drunkenness incompatible with the formation of that intent negatives the act and disproves the crime.[4] See further CRIME; INDICTMENT; MALICE; PREMEDITATE.

Intention is judged of with reference to voluntary action.[5]

When guilty knowledge is an ingredient of an offense, evidence may be given of the commission of other acts of a like character where they are necessarily connected in time or place or as furnishing a clue to the motive.[6] See further GUILTY.

Intention may be proved inductively by collateral facts; as, in trespass, slander, libel, fraud, adultery, questions of good faith, of prudence, etc.[7]

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[1] County of Allegheny *v.* Gibson, 90 Pa. 417 (1879): Worcester's Dict.

[2] Ortwein *v.* Commonwealth, 76 Pa. 421 (1874); Bennett *v.* State, 57 Wis. 86 (1883).

[3] Tatum *v.* State, 63 Ala. 152 (1879), Stone, J.

[4] Brockway *v.* Mutual Benefit Life Ins. Co., 9 F. R. 253 (1881). See Knickerbocker Life Ins. Co. *v.* Foley, 105 U. S. 354 (1881); 122 *id.* 512; Union Mut. Life Ins. Co. *v.* Reif, 36 Ohio St. 599 (1881); 62 Cal. 178; 34 Iowa, 222; 70 N. Y. 605; 9 R. I. 346; 1 F. & F. 735.

[5] Northwestern Mut. Life Ins. Co. *v.* Muskegon Bank, 122 U. S. 506 (1887), Miller, J.

[6] Ætna Life Ins. Co. *v.* Davey, 123 U. S. 743-44 (1887); N. W. Life Ins. Co. *v.* Muskegon Bank, 122 *id.* 505 (1887), distinguished.

[7] Prince *v.* State, 35 Ala. 369 (1860), cases.

[1] Halsted *v.* State, 41 N. J. L. 552, 589-91 (1879), cases, Beasley, C. J. See also United States *v.* Baysaud, 16 F. R. 883 (1883).

[2] United States *v.* Thomson, 12 F. R. 245 (1882).

[3] Chapman *v.* Republic Ins. Co., 6 Biss. 240 (1874).

[4] See 3 Greenl. Ev. §§ 13-19; 1 Bish. Cr. L. §§ 428-93; Broom, Com. 876, 887-88; 2 Steph. Hist. Cr. Law Eng. 110-13; Commonwealth *v.* Hersey, 2 Allen, 179-81 (1861), cases.

[5] *Re* Bininger, 7 Blatch. 267 (1870).

[6] People *v.* Gibbs, 93 N. Y. 473 (1883); 58 *id.* 555.

[7] 1 Whart. Ev. §§ 31-37, cases.

At common law, an intention to commit a felony does not amount to the felony, though it did, by statute, where the intention was to commit treason.[1]

An intention to commit a fraud has been given the force and effect of fraud.[2]

"Intent to injure and defraud" charges embezzlement, forgery, and like offenses.[3]

As men seldom do unlawful acts with innocent intentions, the law presumes a wicked intent from any such act; but the *prima facie* case thus made out may be rebutted by showing the contrary. Thus, in murder, malice is presumed from the fact of killing.[4]

Every person of sound mind is presumed to intend the necessary, natural, or legal consequences of his deliberate act.[5] This presumption may be conclusive, as when the consequences must necessarily follow the act; or be disputable, rebuttable by evidence of want of intention, where the consequences do not necessarily follow the act. Thus, where one voluntarily points a loaded pistol at a vital part, the law declares that the natural, inevitable consequence of that act is to kill, provided the pistol be fired; and the individual cannot be heard to say that he had no intent to kill. So, when a debtor procures his property to be taken on legal process, the effect being to defeat or delay the operation of a bankrupt act, he is held to have intended that effect.[6] The intention is the turning point in an issue to decide whether a judgment against an insolvent was obtained with a view to give a preference.[7]

Persons of sound mind and discretion are understood to intend, in the ordinary transactions of life, that which is the necessary and unavoidable consequences of their acts, as they are supposed to know what the consequences of their acts will be in such transactions. This rule applies in civil and criminal cases. Exceptions may arise; as, where the consequences likely to flow from the act are not matters of common knowledge, or where the act or the consequence is attended by circumstances tending to rebut the ordinary probative force of the act or to exculpate the intent of the agent — as, that the holder of a warrant to confess judgment could enter judgment to get a preference.[8] See further CONSEQUENCES.

Intention is gathered from all the things done, said, written; in ordinary documents, any words expressing it may be used. In wills it is "the pole-star of interpretation," when no rule of law is violated. In construing writings generally, the courts strive after the intention, putting themselves in the place of the party or parties.[9]

See ABANDON; CONTRACT; DOMICIL; GRANT; IGNORANCE; STATUTE; WILL.

[1] 4 Bl. Com. 221.

[2] 2 Pars. Contr. 772.

[3] United States *v.* Taintor, 11 Blatch. 378 (1873).

[4] 1 Greenl. Ev. § 34.

[5] Reynolds *v.* United States, 98 U. S. 167 (1878).

[6] *Re* Bininger, 7 Blatch. 268, 277 (1870), cases.

[7] Little *v.* Alexander, 21 Wall. 500 (1874).

[8] Clarion Bank *v.* Jones, 21 Wall. 337 (1874), Clifford, Justice.

[9] 1 Greenl. Ev. §§ 287-89. As to presumptions, see 20 Alb. Law J. 66-70 (1884), cases; evidence of, 22 Cent. Law J. 271 (1886), cases.

INTER. L. In the midst; among; between.

Used in Latin phrases, and in compound words; in the latter, the simple words are sometimes separated by a hyphen.

Inter alia. Among other things.

Inter alios. Among other persons — as to strangers. See RES, Inter, etc.

Inter.com. See INTERIM, Committitur.

Inter conjuges. Between husband and wife.

Inter pares. Between equals — in capacity or opportunity.

Inter partes. Between persons — the immediate parties to an instrument. See PARS, Inter, etc.

Inter rusticos. Among the unlearned.

Inter se, or sese. Between themselves.

Inter vivos. Between living persons. See GIFT.

INTERCOMMON. See COMMON, Right of.

INTERCOURSE. Between nations and the States, see COMMERCE. Between persons, see ACCESS; COHABIT.

INTERESSE. L. To be of interest to: interest. See INTEREST, 1.

Interesse termini. Interest in a term.

"A bare lease does not vest any estate in the lessee, but only gives a right of entry, which right is his interest in the term, or *interesse termini*."[1]

The right to the possession of a term at a future time.[2] See TERMINUS, 2.

Pro interesse suo. To the extent of his interest.

A party may intervene in litigation instituted by others, *pro interesse suo*.[3]

INTEREST. I. Lat. It interests, concerns, is of importance to.

Interest reipublicæ ut sit finis litium. It concerns the commonwealth that there be an end to lawsuits. The general welfare requires that litigation be not interminable.

No maxim is more firmly established or of more value in the administration of justice. It prevents repeated litigation between the same parties in regard to the same subject.[4]

It prevents multiplicity of suits.[5]

In it originates the rule against circuity of action;

[1] 2 Bl. Com. 144, 314.

[2] 4 Kent, 106; 72 Mo. 542.

[3] 106 U. S. 505.

[4] United States *v.* Throckmorton, 98 U. S. 65 (1878); Miles *v.* Caldwell, 2 Wall. 39 (1864); 3 Bl. Com. 308.

[5] Stark *v.* Starr, 94 U. S. 485 (1876); 71 Pa. 177; 2 Pars. Contr. 690.

and it states the principle upon which rest statutes of set-off and of limitations.

For this reason, the prevention of litigation is a valid consideration.[1]

For this reason, also, but one action lies for all the articles converted by one act.[2]

It is the policy of the law to settle in one suit the interests of all parties in the subject-matter, leaving as little room as possible for multiplicity of actions.[3]

2. Eng. (1) Concern, advantage, good; share, portion, part, participation.[4]

Concern, advantage, benefit. Such relation to the matter in issue as creates a liability to pecuniary gain or loss from the event of the suit.[5] Opposed, *disinterest.*

In this sense a witness is said to be incompetent, and a judge or juror disqualified, from interest.

At common law, a party could testify for himself only when he alone knew the matter to be proved. This was to prevent absolute failure of justice, where his right to relief was shown by other evidence.[6]

An interest disqualifying a witness, at common law, must be legal, real, substantial, present, certain, vested, and *ex parte*. Interest in the question is not meant, nor inclination arising from relationship, friendship, or other motive.

The meaning is that parties legally interested in the result are incompetent. This interest is to be real, not merely apprehended, and in the event of the cause. The true test regards gain or loss by the judgment. The degree is not regarded. A remote, contingent, uncertain interest does not disqualify. One may testify against his interest; and an offer to release an interest qualifies. Equal interest on both sides does not disqualify. Objection for interest must be made before examination. Precisely what interest disqualifies is largely a question for the court.[7]

But the common-law rule has been generally abrogated. The effect of interest upon credibility is now left to the jury to determine.[8] See further PARTY, 2; WITNESS.

(2) Right of property in a thing.

May denote the property itself, objectively considered.[9]

A claim to advantage or benefit; any right, in the nature of property, less than title; title to a share.[1]

Spoken of as present or vested, contingent or future, chattel or landed, beneficial, reversionary, undivided, legal, equitable, etc.

The quantum depends upon the title in the possessor. As respects realty, this may be freehold or less; as respects chattels, it is *joint*,—shared with other persons; or *several* or *sole*, —possessed by one person exclusively, or by more than one, their interests then not being in common.

The chief use of the word is to designate some right which cannot or need not be defined with precision. In some connections it includes title; in others, advantages less than title. Sometimes it is added to words of more definite meaning by way of precaution that no conceivable claim shall be omitted; sometimes it signifies an undefined share.[1] Compare CLAIM; DEMAND.

Community of interest. See COMMUNITY, 1.

Coupled with an interest. Said of an agency in which the agent has a business interest, along with his principal.

A power coupled with an interest is where the grantee has an interest in the estate as well as in the exercise of the power.

It is determined to exist or not according as the agent is found to have such estate or not before the execution of the power. If his interest is only a right to share the proceeds which result from the execution of the power, he has no such power.[2]

Such a power survives the person giving it, and may be executed after his death. This refers to an interest in the thing itself, a power which accompanies, or is connected with, an interest.[3]

Equitable interest. Such interest as is cognizable in a court of equity. Legal interest. An interest cognizable in a court of common law.

Immediate interest. See IMMEDIATE.

Interest or no interest. Refers to a policy of insurance which is to be valid whether the insured has or does not have an insurable interest,[4] *q. v.*

Opposing interest. At the meeting of the creditors of a bankrupt to elect an assignee, if no choice was made, the judge, or, if there was "no opposing interest," the register, appointed a person. This meant, not merely an interest contending by vote for the election of a particular person, but an interest in

[1] 1 Pars. Contr. 438; Smith, Contr. 179.

[2] Phillips *v.* Berick, 16 Johns. 140 (1819). See also 105 Ill. 108.

[3] Eckford *v.* Knox, 67 Tex. 205 (1886); 2 Kan. Law J. 280 (1885); 6 Tex. 446; 30 F. R. 911; 41 N. J. E. 443; 7 Mass. 432; 99 *id.* 203; 4 Allen, 473; 16 Gray, 27; 5 *id.* 197; 1 *id.* 302; 24 Pick. 61; 22 *id.* 53; 21 *id.* 253; 20 *id.* 290; 15 *id.* 286.

[4] Fitch *v.* Bates, 11 Barb. 473 (1851).

[5] Bouvier, Law Dict.; Inhabitants of Northampton *v.* Smith, 11 Metc. 394-96 (1846), cases, Shaw, C. J.

[6] United States *v.* Clark, 96 U. S. 41 (1877); 3 Bl. Com. 370; 1 Greenl. Ev. § 348.

[7] 1 Greenl. Ev. §§ 386-430, cases.

[8] 1 Whart. Ev. § 419; 30 Hun, 557; 63 Pa. 156; 64 *id.* 39; 65 *id.* 126; 32 Tex. 141.

[9] Pierce *v.* Pierce, 14 R. I. 517 (1884).

[1] [Abbott's Law Dict.

[2] Flanagan *v.* Brown, 70 Cal. 259 (1886); Brown *v.* Pforr, 38 *id.* 550 (1869); Hartley's Appeal, 53 Pa. 212 (1866); Frink *v.* Roe, 70 Cal. 310 (1886).

[3] Hunt *v.* Rousmanier, 8 Wheat. 203 (1823), Marshall, C. J.; Walker *v.* Walker, 125 U. S. 343 (1888); 59 Tex. 392.

[4] See 2 Bl. Com. 480.

opposition to the power of appointment by the register.[1]

(3) Increase by way of compensation for the use of money; price or reward for the loan of money; a premium for the hire of money; a reasonable equivalent for the temporary inconvenience the lender of money may feel by the want of it.[2]

Compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for it detention.[3]

A compensation for the loan or use of money.[4]

The measure of damages for money withheld upon contract.[5]

Though interest, *eo nomine*, may be a creation of statute law, it is allowed as mulct or punishment for some fraud, delinquency, or injustice of the debtor, or from some injury done by him to the creditor.[6]

Simple interest. Interest computed solely upon the principal of the loan. **Compound interest.** Is reckoned upon the principal for the first period, and thereafter upon both principal and accrued interest; interest upon interest.

"Compound interest" signifies the adding of the growing interest of any sum to the sum itself, and then the taking of interest upon this accumulation.[7]

At interest. In ordinary parlance "money at interest" refers more to money loaned than to interest-bearing notes and accounts received for property sold.[8]

Ex-interest. Said of a sale of stocks or bonds without interest already or soon payable. See Ex, 8.

With interest. When a note is made payable at a future day, "with interest" at a prescribed rate *per annum*, such interest does not become due or payable before the principal, unless there is a special provision to that effect.[1]

The rate, or sum, depends upon the usual or general inconvenience of parting with the loan, and the hazard of losing it entirely. Where the hazard is peculiarly great, as in contracts of bottomry and respondentia, policies of insurance, and annuities upon lives, the rates are high. Charging an exorbitant rate, in an ordinary case, is usury,[2] *q. v.*

As compensation for the use or detention of money, has its origin in the usages of trade, by contract, or by statute. Hence, the rules in regard to it are as diversified as the trade, habits of the people, and their peculiar laws may be.[3]

Spoken of as lawful or legal, and unlawful or illegal, excessive or usurious, as marine or maritime, etc.

Follows the principal as an incident.

Not chargeable upon claims against the assets of an insolvent from the date of the assignment, or against the estate of a decedent from the day of death; nor upon an advancement; nor upon costs.

Where not stipulated as part of a contract, given as damages for detaining money, property, or services, and from the day of default.[4]

In torts, allowance as damages rests in the discretion of the jury. Has been allowed upon money obtained by fraud or detained by an officer.[5]

The practice of the treasury department of the United States has always been not to pay interest upon claims against the government, without express statutory authorization; and Congress has repeatedly refused to pass any general law for the allowance of interest.[6]

Compound interest is not recoverable, unless there has been a settlement, or a judgment whereby the aggregate amount of principal and interest due is turned into a new principal; or where there is a specific agreement to do so.[7]

If interest upon interest were allowed in all cases, debts would increase beyond all ordinary calculation and endurance; common business could not stand the overwhelming accumulation.[8]

See Bonus; Coupon, Bond; Damages; Deposit, 2; Discount, 2; War.

INTERFERENCE. Is used in the Revised Statutes prescribing proceedings when an application is made for a patent which

[1] R. S. § 5084; *Re* Jackson, 7 Biss. 287 (1876).

[2] [2 Bl. Com. 454.

[3] Brown *v.* Hiatts, 15 Wall. 185 (1872), Field, J.; Insurance Co. *v.* Piaggio, 16 *id.* 336 (1872), cases; Aurora City *v.* West, 7 *id.* 105 (1868), cases; Redfield *v.* Ystalyfera Iron Co., 110 U. S. 176 (1884); 12 F. R. 864; 2 McCrary, 394; 8 Saw. 169.

[4] Turner *v.* Turner, 80 Va. 381 (1885).

[5] Loudon *v.* Taxing District, 104 U. S. 774 (1881). See also 2 Cal. 568; 28 Conn. 20; 42 *id.* 528; 3 Dak. 460; 66 Ga. 501; 3 N. Y. 355; 87 *id.* 437; 13 Barb. 76; 30 Pa. 341; 34 *id.* 211.

[6] Rensselaer Glass Factory *v.* Reid, 5 Cow. 609-18 (1825), cases; Heidenheimer *v.* Ellis, 67 Tex. 428 (1887), cases.

[7] Camp *v.* Bates, 11 Conn. 501 (1836); Koshkonong *v.* Burton, 104 U. S. 677 (1881), cases; 105 Ill. 553; 34 Pa. 212.

[8] Wasson *v.* First Nat. Bank of Indianapolis, 107 Ind. 212 (1886).

[1] Tanner *v.* Dundee Land Investment Co., 12 F. R. 648 (1882).

[2] 2 Bl. Com. 454.

[3] Stokely *v.* Thompson, 34 Pa. 211 (1859).

[4] United States *v.* Hills, 4 Cliff. 521-22 (1878), cases.

[5] Lincoln *v.* Claflin, 7 Wall. 139 (1868); Fraser *v.* Bigelow Carpet Co., 141 Mass. 127-28 (1886), cases.

[6] Angarica *v.* Bayard, 127 U. S. 260 (1888), cases.

[7] Stokely *v.* Thompson, Camp *v.* Bates, *supra*.

[8] Connecticut *v.* Jackson, 1 Johns. Ch. *14 (1814), Kent, Ch. See generally Selleck *v.* French, 1 Conn. 32 (1814); 1 Am. L. C. 500-35, cases; 25 Cent. Law J. 293 (1887), cases.

may interfere with a pending application or with an unexpired patent.[1] See PATENT, 2.

INTERIM. L. *Inter ipsum (tempus)*, within that time: in the meantime, meanwhile; provisionally.

Ad interim. For the time intervening.

Interim committitur. In the meantime, let him be committed; meanwhile he will be kept in prison.

Abridged to "inter. com.," has been used for the docket entry in cases where, until some further action can be taken or proceeding be had, a prisoner is remanded to jail; as, in a case of conviction for murder, when sentence of death is pronounced, to be carried into execution at a distant day.

Interim officer. One appointed when another, the principal, is absent, is incapable of acting, or has not yet been chosen or fully qualified.

Sometimes termed the *ad interim* officer. Such is a provisional assignee, trustee, curator, guardian.

Interim order. An order taking effect provisionally, or until further direction; in particular, an order made pending an appeal.

Interim receipt. A deposit or protection receipt for money paid on a proposed contract of insurance; also, *ad interim* receipt.

Holds the applicant secure until his proposal is accepted or rejected. If the risk is not approved, the money is returned, less the premium for the time being.[2]

INTERLINEATION. See ALTERATION, 2; BLANK, 2.

INTERLOCUTORY.[3] Intervening — happening, accruing, or imposed between the commencement and the termination of proceedings — during the progress of an action at law or of a suit in equity: as, interlocutory — costs, decree, judgment, order, report, *qq. v.* Compare FINAL.

INTERMARRIAGE. See MARRIAGE.

INTERMIXTURE. See ACCESSION.

INTERN.[4] To imprison by restricting to a limited territory: as, to intern a political prisoner within a city or upon an island.

INTERNAL. See IMPROVEMENT; REVENUE.

INTERNATIONAL. See EXTRADITION; LAW; NATION.

INTERNUNCIO. See MINISTER, 3.

INTERPLEAD. To become parties litigant; to determine a dispute by judicial action.

Interpleader; bill of interpleader. Where a person, who owes a debt to one of the parties in a suit, but, till the determination of it, he knows not to which one, desires that they may interplead, that he may be protected in making the payment.[1]

The stakeholder prays that the court judge between the claimants, to whom the thing belongs, and that he be indemnified. He alleges that the persons have preferred a claim against him, and for the same thing, that he has no beneficial interest in the matter, and that he cannot determine, without hazard, to which of them the thing or right belongs.[2]

The plaintiff must have no interest in the thing, no adequate remedy at law, and be ignorant of the rights of the claimants.[3]

If the thing claimed is a sum of money, the holder may pay it into court.

The bill will not lie if the complainant sets up an interest in the subject-matter of the suit, and the relief sought relates to that interest. The relief sought, in a bill in the nature of a bill of interpleader, must be equitable.[4]

In cases of adverse independent legal titles, the party holding the property must defend himself as well as he can at law.[5]

INTERPRETATIO. L. Expounding, explanation: construction, interpretation, *q. v.*

Ex antecedentibus et consequentibus, fit optima interpretatio. From what things go before and come after, the best explanation is had. A doubtful word or passage may be best understood by reference to the whole instrument — deed, will, contract, statute. Intention may be read in the light of surrounding circumstances.[6] Compare NOSCITUR, A sociis.

INTERPRETATION. Is used interchangeably with "construction." Opposed, *misinterpretation.*

The act of finding out the true sense of any form of words, that is, the sense their

[1] See R. S. § 4904; Gold Separating Co. *v.* Disintegrating Co., 6 Blatch. 310 (1869).

[2] See May, Ins. §§ 57-59.

[3] L. *inter-loqui*, to speak in between.

[4] L. *internus: intra*, within.

[1] [3 Bl. Com. 448.

[2] Atkinson *v.* Marks, 1 Cow. 703 (1823).

[3] Howe Machine Co. *v.* Gifford, 66 Barb. 599 (1872). See also 2 Paige, Ch. 200; 2 Story, Eq. Ch. XX.

[4] Killian *v.* Ebbinghaus, 110 U. S. 571 (1884), cases.

[5] 2 Story, Eq. § 820; Third Nat. Bank *v.* Lumber Co., 132 Mass. 410 (1882), cases. See generally McMunn *v.* Carothers, 4 Clarke, Pa., 134-36 (1848); 3 Pomeroy, Eq. §§ 1319-29.

[6] 2 Bl. Com. 379; 1 Greenl. Ev. §§ 201, 437; 71 Pa. 301; 76 Va. 714.

author intended; and of enabling others to derive from them the same idea.[1]

Properly precedes construction, but does not go beyond the written text.[2] See further CONSTRUCTION; INTERPRETATIO.

INTERPRETER. One who translates the testimony of witnesses speaking a foreign tongue, for the benefit of the court and jury.

His re-statement is not hearsay; it may be impeached for inaccuracy.[3]

INTERROGATORY. One of a series or set of written questions prepared by counsel for the examination of a party to a suit in equity.

A formal question, in writing, for the judicial examination of a party or a witness.[4]

Direct or original interrogatory. An interrogatory exhibited by the party who calls a witness in the first instance. **Counter or cross interrogatory:** is exhibited by the adverse party.

Fishing interrogatory. Inquries after a matter as to which proponent has no right to a discovery.

Suggestive interrogatory. Indicates the answer desired.

Interrogatories accompany bills in the nature of discovery, proceedings for contempt, attachment in execution against garnishees, commissions to take testimony out of court. They are subject to the same rules as examinations in court.[5]

See CHANCERY, Bill in; DEPOSITION; DISCOVERY, 6; EXAMINATION, 9; QUESTION, 1.

INTERSECT. Ordinarily, to cross.[6]

A railroad which runs along a turnpike so as to require a change in the traveled path, does not intersect the turnpike.[6]

Roads intersect at their middle lines.[7]

INTER-STATE. See COMMERCE; EXTRADITION, 2; STATE, 3 (2).

INTERVAL. See LUCID INTERVAL.

INTERVENE.[8] To file a claim or a defense in a suit instituted by or against others.

Intervener; intervenor. One who applies to be heard as an original party in another's suit, he being interested in the result of the suit.

Intervention. The act or proceeding by which one, on his own motion, becomes a party to a suit pending between others: as, in a case in equity or in admiralty. Opposed, non-intervention.

INTESTATE. 1, *adj.* Without a will; the status of a person who dies without having disposed of his property by means of a will, and the condition in which the property itself stands before the law: as, intestate — estate, property, laws. Opposed, *testate.*

2, *n.* A person who has died without leaving a valid will: as, an intestate, an intestate's estate or property.[1] Opposed, *testator.*

Intestacy. Dying without a will; the state or condition of one who dies without having made a valid testamentary disposition of his property. Opposed, *testacy.*

Intestable. Without capacity to make a valid will; also, incapable of transfer by will. Opposed, *testable.* See further TESTACY; DISTRIBUTION, 2; DESCENT.

INTIMATE. Compare ACQUAINTED.

That a man has been "intimate" with another's wife, does not of necessity import criminality.[2]

INTIMIDATION. See BOYCOTTING; DURESS; ELECTION, 1; FEAR; STRIKE, 2.

INTOXICATE. To become inebriated or drunk.[3]

Intoxicated. Drunk, from use of spirituous liquor.[4]

Whenever any other idea is intended other words are used; as, in saying that a person is intoxicated or drunk with opium, ether, or laughing gas.[4]

Intoxicating liquor. "Intoxicating liquors or mixtures thereof" are liquors which will intoxicate and which are commonly used as beverages for such purpose; also, any mixture of such liquors as, retaining their intoxicating qualities, it may fairly be presumed may be used as a beverage and become a substitute for the ordinary intoxicating drinks.[5]

In the absence of evidence to the contrary, beer will always be presumed to be an intoxicating liquor.[6]

But "intoxicating" and "spirituous" not being

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[1] Lieber, Herm. 23; 14 How. Pr. 272; 36 N. J. L. 209; 1 Bl. Com. 59.

[2] 2 Pars. Contr., 7 ed., 491 (*a*).

[3] 1 Whart. Ev. § 493.

[4] See 3 Bl. Com. 438; 4 *id.* 287; 5 N. J. L. 772.

[5] See Bischoffsheim *v.* Baltzer, 20 Blatch. 231 (1882).

[6] State *v.* New Haven, &c. R. Co., 45 Conn. 344 (1877).

[7] Springfield Road, 73 Pa. 129 (1873); 74 *id.* 259.

[8] L. *inter-venire*, to come in between.

[1] See 2 Bl. Com. 294.

[2] Adams *v.* Stone, 131 Mass. 433 (1881).

[3] Mullinix *v.* People, 76 Ill. 213 (1875).

[4] State *v.* Kelley, 47 Vt. 296 (1875).

[5] Intoxicating-Liquor Cases, 25 Kan. 767 (1881), Brewer, J.; State *v.* McGinnis, 30 Minn. 53 (1882).

[6] State *v.* Teissedre, 30 Kan. 484 (1883); Griffitt *v.* State, 58 Wis. 41 (1883), cases; 6 Kan. 371; 16 Mo. 389; 14 Ohio, 586; 12 Gray, 29; 63 N. Y. 277; 11 R. I. 593.

synonymous, an indictment for unlawful sales of "spirituous *and* intoxicating" liquors is not supported by proof of sales of liquors which are intoxicating but not spirituous.[1]

See further CONDITION; DRUNKENNESS; LIQUOR; POLICY, Public.

INTRA. See INFRA; ULTRA.

INTRINSIC. See VALUE.

INTROMISSION. Dealings in stock, goods, or cash of a principal, coming into the hands of his agent, to be accounted for by the agent.[2]

INTRUDER. A person who enters upon land when he has no right.[3] Compare SQUATTER. See LAND, Public.

Intrusion. Injury by ouster, or amotion of possession from the freehold: the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion.[4]

INUNDATION. See ACT, 1, Of God; WATERCOURSE.

INURE.[5] To serve to the use, benefit, or advantage of some one; to take or have effect; to operate.

As, that discharge of the principal inures to the benefit of the surety; that confirmation of a title inures to the grantee; that a grant by the state inures to the intent expressed.[6]

Inurement. Use, user, usage.

Passage of title by inurement and estoppel is the work of the common law and legislation.[7]

INVALID, *adj.* See VALID.

INVALID, *n.* See WITNESS.

INVASION. See WAR.

INVEIGLE. See KIDNAPING; PERSUADE.

INVENTION.[8] Finding out, by some effort of the understanding; not merely putting two things together, although never done before.[9]

The process of thought and experiment by which some new machine, composition, design, improvement or other article or thing is brought into existence; also, the thing itself thus produced.

The applicant for a patent must be the first as well as the original inventor; and a subsequent inventor, although an original inventor, is not entitled to a patent, if the invention is perfected and put into actual use by the first and original inventor. Until an invention is perfected and adapted to use, it is not patentable. An invention resting in mere theory, or in intellectual notion, or in uncertain experiments, and not actually reduced to practice and embodied in some distinct machinery, apparatus, manufacture, or composition of matter, is not patentable.[1]

The patent law requires a thing to be new as well as useful. To be new, it must be the product of original thought or inventive skill, and not a mere formal and mechanical change of what was old and well-known. But the effect produced by change is often an appropriate, though not a controlling, consideration in determining the character of the change itself.[2]

Merely turning down and cementing the edges of celluloid collars in the form of a hem is not invention.[3]

It is becoming more and more difficult to distinguish between skill and invention. As the standard of skill in mechanics is raised, the standard of invention is also raised.[4]

Useful invention. Such invention as may be applied to some beneficial use in society, in contradistinction to an invention which is injurious to the morals, the health, or the good order of society.[5]

All improvement is not invention; to entitle it to protection it must be the product of some exercise of the inventive faculties, and involve something more than what is obvious to persons skilled in the art.[6]

The improvement must be distinct from the conception which originated the original article or product. A mere carrying forward or new or more extended application of the original thought, a change only in form, proportion, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent.[7]

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[1] Commonwealth *v.* Livermore, 4 Gray, 20 (1855).

[2] Stewart *v.* M'Kean, 29 E. L. & Eq. 391 (1855), Alderson, B.

[3] [O'Donnell *v.* McIntyre, 16 Abb. N. Cas. 88 (1885).

[4] 3 Bl. Com. 169; 9 Ill. 170.

[5] L. *in ure*, in operation, work, use. Preferred to enure.

[6] See 2 Bl. Com. 347.

[7] Dickerson *v.* Colgrove, 100 U. S. 583, 584 (1879).

[8] F. *inventer*, to devise: L. *in venire*, to come upon, find out.

[9] Earle *v.* Sawyer, 4 Mas. 5 (1825), Story, J.

[1] Reed *v.* Cutter, 1 Story, 596, 599 (1841), Story, J.

[2] The Stanley Works *v.* Sargent & Co., 8 Blatch. 346 (1871), Shipman, J. See also Smith *v.* Goodyear Co., 93 U. S. 495 (1876); Washburn & Moen Manuf. Co. *v.* Haish, 10 Biss. 72-75 (1880); Western Electric Light Co. *v.* Chicago Electric Light Manuf. Co., 11 *id.* 427 (1882); Gardner *v.* Herz, 118 U. S. 180 (1886), cases, Blatchford, J.; Pomace Holder Co *v.* Ferguson, 119 *id.* 338 (1886), cases.

[3] Celluloid Manuf. Co. *v.* Zylonite Novelty Co., 8 F. R. 617 (1887).

[4] Wilcox *v.* Bookwalter, 31 F. R. 229 (1887).

[5] Bedford *v.* Hunt, 1 Mas. 308 (1817), Story, J.; 3 Wis. 442; 13 N. H. 318.

[6] Pearce *v.* Mulford, 102 U. S. 118 (1880), Strong, J.

[7] Smith *v.* Nichols, 21 Wall. 119 (1874), Swayne, J. See also Stephenson *v.* Brooklyn R. Co., 114 U. S. 154 (1885), cases.

Inventor. He who originally contrives or devises a new article or thing.

Inventors are a meritorious class generally, and favored in law.[1] Acts intended to determine the value, utility, or success of an invention are liberally construed.[2] But inventors must comply with statutory conditions. They cannot, without cause, hold an application pending more than two years.[3]

Exact description is requisite: that the government may know what it has granted, and what will become public property when the patent expires; that licensees may know how to use the invention; and that subsequent inventors may know what portion of the field has been occupied.[4]

While an agreement to assign in gross a man's future labors does not address itself favorably to the courts, an inventor may dispose of his invention and bind himself to assign to the purchaser any improvements he may thereafter make; and a pecuniary interest in the sale of the patent does not seem to be necessary to the validity of such a bargain.[5]

See further ORIGINALITY; PATENT, 2; TELEPHONE CASE; USE, 2, Useful.

INVENTORY.[6] A list or schedule of articles of property.

A list or schedule, or enumeration of the articles of property, setting out the names of the different articles, either singly or in classes.[7]

Accounts of the items of property levied upon are called inventories; and insolvents file inventories of assets. A more common use is in the administration of the estates of decedents. The representative, at the outset, files an inventory of the assets. This is made by two or more fair-minded persons as sworn appraisers. The representative is then charged with the amount of the inventory. Articles not converted into money, and disbursements, may afterward be allowed as credits. The inventory exhibits to creditors, legatees, and distributees, the nature and amount of the estate.

The inventory made by a landlord who distrains for rent should be full enough to inform the tenant of the articles distrained, for which he may have a writ of replevin.[8]

INVENTUS. See FIND, 3.

INVEST. 1. To clothe with power or authority. See VEST.

2. In common parlance, to put out money on interest.

To place money so that it will yield a profit; as commonly understood, to give money for other property.[1]

Includes, but is not restricted to, "loan."[2]

Does not universally import preservation or a permanent keeping for the purpose of collecting income. "It is not uncommon to hear it said that the best investment of money is in paying debts."[3]

Invested. A sum represented by anything but money is invested.[4]

Money loaned is invested in a debt against the borrower, regardless of the evidence.[5]

Investment. Laying out money in such manner that it may produce a revenue, whether the particular method be a loan or the purchase of stocks, securities, or other property. In common parlance, putting out money on interest, either by way of loan or by the purchase of income-producing property.[6]

An investment of money in the business of another is more than a loan: it is a contribution to the capital.[7]

Neglect by a trustee to invest moneys in his hands is a breach of trust, and ground for removal.[8]

The rule is everywhere recognized that a trustee, when investing property in his hands, is bound to act honestly and faithfully, and to exercise a sound discretion, such as men of ordinary prudence and intelligence use in their own affairs. In some jurisdictions, no attempt has been made to establish a more definite rule; in others, the discretion has been confined, by the legislature or the courts, within strict limits.[9]

INVESTIGATION. Inquiry by observation, experiment, or discussion.[10]

The Penal Code of New York, § 79, makes it compulsory upon persons concerned in bribery to testify "upon any trial . . . or investigation" thereof, their testimony not to be used against them in any subsequent proceeding. This does not refer to an "investigation" in the course of a criminal prosecution, but to any inquiry in the conduct of which persons may be called by authority to testify, and hence includes an inquiry directed by the legislature, and conducted by any of its committees.[11]

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[1] Wilson *v.* Rousseau, 4 How. 674 (1846).

[2] Jennings *v.* Pierce, 15 Blatch. 45–46 (1878), cases; Lyman *v.* Maypole, 19 F. R. 735, 737–44 (1884), cases.

[3] Plaining-Machine Co. *v.* Keith, 101 U. S. 485 (1879).

[4] Tucker *v.* Tucker Manuf. Co., 4 Cliff. 400 (1876), Clifford, J.; Parker *v.* Stiles, 5 McLean, 55 (1849).

[5] Aspinwall Manuf. Co. *v.* Gill, 32 F. R. 700 (1887), Bradley, J.

[6] L. *in-venire*, to find.

[7] [Silver Bow Mining Co. *v.* Lowry, 5 Monta. 621 (1885).

[8] Richards *v.* McGrath, 100 Pa. 400 (1882); 59 Wis. 408.

[1] Neel *v.* Beach, 92 Pa. 226 (1879).

[2] Shoemaker *v.* Smith, 37 Ind. 127 (1871).

[3] New England Life Ins. Co. *v.* Phillips, 141 Mass. 540, 543 (1886).

[4] Parker Mills *v.* Commissioners, 23 N. Y. 244 (1861).

[5] Jennings *v.* Davis, 31 Conn. 140 (1862). See also 2 Cow. 678; 1 Edw. 513; 10 Gill. & J. 299.

[6] Una *v.* Dodd, 39 N. J. E. 186 (1884), Van Fleet, V. C. See also People *v.* Utica Ins. Co., 15 Johns. *392 (1818).

[7] Lyon *v.* Zimmer, 30 F. R. 410 (1887).

[8] Cavender *v.* Cavender, 114 U. S. 473 (1885), cases.

[9] Lamar *v.* Micou, 112 U. S. 465–70 (1884), cases, Gray, J.; New England Trust Co. *v.* Eaton, 140 Mass. 535 (1886), cases; 25 Am. Law Reg. 217–34 (1886), cases.

[10] Wright *v.* Chicago, 48 Ill. 290 (1868).

[11] People *v.* Sharp, 107 N. Y. 427 (1887).

INVESTITURE. A grant of land in feudal ages was perfected by the ceremony of corporal investiture: open and notorious delivery of possession in the presence of other vassals.

Made by putting a *vestis*, a robe, upon the tenant. Perpetuated memory of the transaction at a time when writing was little known.[1] See DELIVERY, 1.

INVIOLABLE. See IMPAIR.

INVIOLATE. See JURY, Trial by.

INVITATION. See NEGLIGENCE.

INVITUS. L. Against the will; unwilling.

Ab invito. From an unwilling person.

In invito. Against a resisting party.

Frequently applied to proceedings against a party who opposes the demand made upon him, and also to the judgment or decree made in such case. Taxes are said to be levied *in invitum*.

Invito domino. The owner being unwilling.

Said of the "taking" in larceny.

INVOICE.[2] A document transmitted from the shipper to his factor or consignee, containing the particulars and prices of the goods shipped.[3]

A written account of the particulars of merchandise shipped to a purchaser, factor or consignee, with the value or prices and charges annexed.[4]

Invoice cost or price. Sometimes, the prime price or cost of goods, whether there is an invoice in fact or not.[5]

An invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quality, and cost or price of things invoiced, and is as appropriate to a bailment as to a sale. It does not of itself necessarily indicate to whom the things are sent, or even that they have been sent at all. Hence, standing alone, it is never regarded as evidence of title.[6] See BOOK-ENTRIES.

INVOLUNTARY. See VOLUNTARY.

IPSE. L. He himself. *Ipsud*, it itself; the very same.

Ipsissimis verbis. In the identical words. See VERBUM.

Ipso facto. By the mere fact.

Ipso jure. By the law itself.

IRON CLAD OATH. See OATH, Of office.

IRREGULAR. See ERRONEOUS; REGULAR.

IRRELEVANT. See RELEVANT.

IRREPARABLE. See INJURY.

IRRESISTIBLE. See ACCIDENT; FORCE.

IRRESPONSIBLE. See RESPONSIBLE.

IRREVOCABLE. See REVOKE.

IRRIGATION. See AQUA, Currit, etc.; RIPARIAN.

IS. L. That one; he.

Inflections: *id*, *ei*, *ejus*, *eo*, qq. v.

ISSINT.[1] Introduced a statement that special matter amounted to a denial — "the general issue with an *issint*."[2]

ISSUABLE. See ISSUE, 3.

ISSUE.[3] 1, *v.* To send out: as, to issue a writ or process.

A process is "issued" when made out and placed in the hands of a person authorized to serve it, with a *bona fide* intent to have it served.[4]

n. A causing to go forth: as, the issue of an order or writ, the issue of letters patent or letters testamentary. Compare EXIRE, Exit.

Re-issue; re-issued. Refer, in particular, to a continuation of an original patent. Whence re-issuable.

Whenever a patent is inoperative or defective, by reason of a defective or insufficient specification or claim of more than the applicant has a right to as new, if the error has arisen by inadvertence, accident, or mistake, and without deceptive intention, the commissioner of patents, on the surrender of such patent, shall cause a new patent to issue in accordance with the corrected specification. The surrender takes effect from the issue of the amended patent, and runs for the unexpired term of the original patent. But new matter may not be introduced.[5]

The surrender of valid patents, and the granting of re-issued patents thereon, with expanded or equivocal claims, where the original was clearly neither "inoperative nor invalid," and whose specification is neither "defective or insufficient," is a great abuse of the privilege granted, and productive of great injury to the public.[6]

A re-issue must be for the same invention, and, in

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[1] 3 Bl. Com. 53, 311.

[2] A corruption of *envois*, Eng. plural of F. *envoi*, a sending.

[3] Le Roy *v.* United Ins. Co., 7 Johns. *354 (1811).

[4] Pipes *v.* Norton, 47 Miss. 76 (1872), Tarbell, J.; 16 Op. Att.-Gen. 160.

[5] Sturm *v.* Williams, 6 Jones & S. 342 (1874); 7 Johns. *354.

[6] Dows *v.* Nat. Exch. Bank of Milwaukee, 91 U. S. 630 (1875), Strong, J. See 2 Wash. 124, 155; 4 Abb. Ap. Dec. 78.

[1] Norm. F., thus. so.

[2] Gould, Pl. 313; 4 Rawle, 83.

[3] F. *issir*: L. *ex-ire*, to go out.

[4] Mills *v.* Corbett, 8 How. Pr. 502 (1853); Bragg *v.* Thompson, 17 S. C. 378 (1882).

[5] R. S. §§ 4916, 4895.

[6] Burr *v.* Duryee, 1 Wall. 577 (1863), Grier, J.; James *v.* Campbell, 104 U. S. 371 (1881).

judgment of law, is only a continuation of the original patent.[1]

If, on comparing a re-issue with its original, the former appears on its face to be for a different invention from that described or indicated in the latter, it must be declared invalid.[2]

A re-issue can only be granted for the same invention which was originally patented. If it were otherwise, a door would be opened to the admission of the greatest frauds. Claims and pretensions shown to be unfounded at the time, might, after the lapse of a few years, a change of officers in the patent office, the death of witnesses, and the dispersion of documents, be set up anew, and a reversal of the first decision be obtained without an appeal, and without any knowledge of the previous investigations on the subject. New light breaking in upon the patentee as the progress of improvement goes on, and as other inventors enter the field, and his monopoly becomes less and less necessary to the public, might easily generate in his own mind an idea that his invention was really broader than had been set forth in the specification of his patent. It is easy to see how such new light would naturally be reflected in a re-issue of the patent, and how unjust it might be to third parties who had kept pace with the march of improvement.[3]

By a curious misapplication of the law it has come to be principally resorted to for the purpose of enlarging and expanding patent claims. And the evils which have grown from the practice have assumed large proportions. Patents have been so expanded and idealised, years after their first issue, that thousands of mechanics and manufacturers, who had just reason to suppose that the field of action was open, have been obliged to discontinue their employments, or to pay an enormous tax for continuing them.[4]

The patentee has no rights except such as grow out of the re-issued patent. No damages can be recovered for any acts of infringement committed prior to the re-issue. The reason is, the original patent, which is surrendered, becomes extinguished by a re-issue.[5]

Whether there was an "inadvertent" mistake in the specification, is, in general, a matter of fact for the commissioner of patents to decide; but whether the application for re-issue is made within a reasonable time is a matter of law, which the courts may determine by comparing the re-issued patent with the original, and, if necessary, with the records in the patent office when presented by the record.[6]

A patentee who imposes words of limitation upon his claim, especially so when required by the patent office in taking out his re-issue, is bound by such limitations in subsequent suits on the re-issued patents.[7] See PATENT, 2.

2, *v.* To put into circulation; to emit, *q. v.*: as, to issue bank notes, bonds, script.

n. All of a class or series of like securities or instruments for the payment of money put forth at one time.[8]

3, *n.* The disputed point or question.[9]

A single, certain, and material point, arising out of the allegations or pleadings of the parties, and generally made by an affirmative and a negative.[10]

When the parties come to a point which is affirmed on one side, and denied on the other, they are said to be "at issue." All debate is then contracted into a single point, which must be determined in favor of one of the parties.[11]

Issuable. Permitting an issue to be framed: as, issuable matter, or plea; to plead issuably.

Issue, *exitus*, is the end of all pleadings. It is upon a matter of law or of fact. An issue upon a matter of law is called a demurrer, *q. v.* An issue of fact is where the fact only, and not the law, is disputed.[12]

When either side denies the facts pleaded by his antagonist, he usually "tenders an issue." If the denial comes from the defendant, the form is "And of this he puts himself upon the country;" if from the plaintiff, the form is "And this he prays may be inquired of by the country" — a jury. Thereupon the other party subjoins "And the said A does the like." Which done, the issue is said to be "joined," both parties agreeing to rest the fate of the cause upon the truth of the fact in question.[13]

Thus also in equity, the plaintiff may aver, in reply, that his bill is true, certain, and sufficient, and defendant's answer the reverse, which he is ready to prove as the court shall award; upon which the defendant rejoins, averring the like on his side.[14]

Collateral issue. An issue upon an incidental matter.[15]

Feigned issue. As no jury is summoned to attend a court of equity, a matter of fact, strongly controverted, is directed to be tried at the bar of a court of law, upon a "feigned" issue. This is an action wherein the plaint-

[1] Read *v.* Bowman, 2 Wall. 604 (1864), Clifford, J.

[2] Ball *v.* Langles, 102 U. S. 130 (1880), cases, Strong, J.

[3] Swain Turbine & Manuf. Co. *v.* Ladd, 102 U. S. 413 (1880), Bradley, J.; Parker & Whipple Co. *v.* Yale Lock Co., 123 *id.* 37, 97 (1887).

[4] Miller *v.* Bridgeport Brass Co., 104 U. S. 353 (1881), Bradley, J.

[5] Peck *v.* Collins, 103 U. S. 664 (1880), Bradley, J. See also *ib.* 791; Heald *v.* Rice, 104 *id.* 749 (1881); Wing *v.* Anthony, 106 *id.* 147 (1882); Moffitt *v.* Rogers, *ib.* 423, 428 (1882), cases; 18 Blatch. 534; 17 F. R. 235.

[6] Mahn *v.* Harwood, 112 U. S. 359-60 (1884), cases, Bradley, J.; Hoskin *v.* Fisher, 125 *id.* 223 (1888), cases.

[7] Crawford *v.* Heysinger, 123 U. S. 606 (1887), cases, Blatchford, J.

[8] See 8 Mich. 104; 2 McCrary, 449; 17 Barb. 341.

[9] Seller *v.* Jenkins, 97 Ind. 438 (1884).

[10] Simonton *v.* Winter, 5 Pet. *149 (1831); Gould, Pl. 279.

[11] 3 Bl. Com. 313. See 2 Ark. 104; 30 Conn. 488; 55 Ga. 61; 9 Gill, 258; 2 N. J. E. 157; 51 Wis. 77.

[12] 3 Bl. Com. 314-15; 2 N. J. E. 157; 51 Wis. 76.

[13] 3 Bl. Com. 313, 315; 57 N. H. 164.

[14] 3 Bl. Com. 448.

[15] See 4 Bl. Com. 306.

iff, by a fiction, declares that he laid a wager with the defendant, and then re-avers the truth of the fact, and therefore demands the amount of the wager. The defendant admits the wager, but denies the truth of the fact, whereupon the issue is joined, which is directed to be tried out of chancery. This issue is also used in the courts of law by consent, to determine some disputed right without the formality of pleading, and to save time and expense.[1]

A frequent use is in the trial of issues *devisavit vel non*, q. v.

A feigned issue is a mode of procedure adopted from the civil law by courts of law as well as courts of equity as a means of having some question of fact arising incidentally, and to be made the foundation of an order or decree, determined by the verdict of a jury. It is called a "feigned" issue for the reason that its object is not the establishment of a legal right on which a judgment shall regularly follow, but the ascertainment by a formal issue of some issue of fact arising in another cause, and material to the decision of the latter. For convenience of trial the issue must be given the form of a common-law action, with appropriate pleadings, and an issue thereon; but, nevertheless, the nature and purpose of the issue give it character as a feigned issue or otherwise, and not the form in which the issue is expressed.[2]

Formal issue. Framed according to rule; opposed to *informal* issue.

General issue. Traverses and denies the whole declaration, without offering any special matter whereby to evade it. Leaves everything open — the fact, the law, and the equity of the case.

Special issue. Denies some one substantial point as decisive of the whole cause.[3]

Common general issues: *nil* or *nihil debet; non assumpsit; non cepit; non detinet; non est factum;* not guilty; *nul tiel record; nulla bona; plene administravit; rein en arreare*, qq. v.[4]

Material issue. Framed upon a matter decisive of the question in dispute. **Immaterial issue.** Framed upon a point not decisive of the right.[5]

In equity practice, a material issue is an issue upon a fact which has some bearing upon the equity sought to be established.[6]

Matter in issue. That matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings.[1]

4, *n.* **Issues:** rents and profits of realty: as, in the expression, "rents, issues, and profits."[2]

5, *n.* **Heirs of the body;** all ones lineal descendants indefinitely: as, in the expressions, issue of body, failure of issue, die without issue.[3]

In wills and deeds of settlement, while "issue" is construed to include grandchildren, "child" or "children" is not, unless a contrary intent is clear.[4]

"Issue" necessarily includes children; but "children" does not include more remote issue.[5]

In a will, "issue" means, *prima facie*, the same as "heirs of the body," and in general is to be construed as a word of limitation. But this construction will give way if there be on the face of the instrument sufficient to show that the word was intended to have less extended meaning, and to be applied only to children or to descendents of a particular class or at a particular time.[6]

In a devise, "issue" is a word of purchase or of limitation, as best answers the intention; in a deed, it is always a word of purchase.[7]

Issue of body. Is more flexible than "heirs of the body;" courts more readily interpret the former as synonymous with "children" and a mere description of persons.[8]

See CHILD; DESCEND; DIE, Without issue; FAILURE; HEIR; SHELLEY'S CASE; TAIL; WILL, 2.

ITA. See LEX, Ita, etc.

ITEM.[9] 1. In like manner; after the same manner; likewise; also; again.

2. A particular in an account or bill. See ACCOUNT, 1; BALANCE.

Formerly used in wills to mark a new paragraph or division after the first paragraph — which was the *in-primis.*[10] See ALSO; FIRST.

ITINERANT. See CIRCUIT.

[1] [3 Bl. Com. 452.

[2] American Dock, &c. Co. *v.* Trustees of Public Schools, 37 N. J. E. 269 (1883), Depue, J.

[3] See 3 Bl. Com. 305; 4 *id.* 340; 55 Vt. 97; Gould, Pl. 282–315.

[4] See 3 Bl. Com. 305; Gould, Pl. 284.

[5] [Wooden *v.* Waffle, 6 How. Pr. 151 (1851).

[1] King *v.* Chase, 15 N. H. 16 (1844), Parker, C. J.; 55 *id.* 592; 58 *id.* 117, 471; 4 F. R. 390; 18 Blatch. 457.

[2] 3 Bl. Com. 280; Perot's Appeal, 102 Pa. 256 (1883).

[3] Holland *v.* Adams, 3 Gray, 193 (1855), Shaw, C. J.; 140 Mass. 267; 60 N. H. 451.

[4] Ingraham *v.* Meade, 3 Wall. Jr. 42 (1855); Adams *v.* Law, 17 How. 421 (1854).

[5] Bigelow *v.* Morong, 103 Mass. 289 (1869).

[6] Taylor *v.* Taylor, 63 Pa. 483 (1870), Sharswood, J.; Kleppner *v.* Laverty, 70 *id.* 72 (1871); Robins *v.* Quinliven, 79 *id.* 335 (1875); Wister *v.* Scott, 105 *id.* 200, 214–16 (1884), cases; Reinoehl *v.* Shirk, *id.* (1885), cases; Palmer *v.* Horn, 84 N. Y. 519 (1881), cases; Magnum *v.* Pleister, 16 S. C. 324 (1881); Atkinson *v.* M'Cormick, 76 Va. 799 (1882).

[7] 2 Washb. R. P., 4 ed., 604; 4 T. R. 299; 13 N. J. 177; 63 Pa. 483; 28 *id.* 102; 40 *id.* 65; 100 *id.* 540.

[8] Daniel *v.* Whartenby, 17 Wall. 643 (1873).

[9] L. *ita*, so; or, *is, id*, that same.

[10] See Hopewell *v.* Ackland, 1 Salk. *329 (1710).

J.

J. The initial letter of judge and justice, words frequently abbreviated:

J. A. Judge-advocate.

J. A. G. Judge-advocate general.

J. J. Junior judge.

JJ. Justices or judges.

J. P. Justice of the peace.[1]

Other abbreviations: *A. J.*, associate judge or justice; *C. J.*, chief justice; *F. J.*, first judge; *L. J.*, law judge; *P. J.*, president or presiding judge. See JUDGE.

JAC. Jacobus: James, king James.

JACKASS. See title HORSE.

JACTITATION.[2] An assertion repeated to another's inquiry.

Jactitation of marriage. When a person gave out that he was married to another, whereby common reputation of their matrimony might ensue. Upon proof of the wrong, the boaster, made respondent to a libel in the ecclesiastical court, was enjoined to perpetual silence.[3]

Under canon law, false claims of right to a church sitting, and of title to certain tithes, were also species of jactitation.

The law of Louisiana has allowed an action of jactitation for slander of title.

JACTUS. See JETTISON.

JAIL.[4] A house or building used for the purposes of a public prison, or where persons under arrest are kept.[5]

Originally, a place where persons were confined to await further judicial proceeding; as, a debtor, till he paid his debt, a witness, or an accused person, till the trial came on. A "prison" was for confinement as punishment.[6]

Every county has two gaols: one for debtors,—any house where the sheriff pleases; the other for matters of the crown,— the *county* or *common* gaol.[7]

Jailer. The keeper of a jail.

Formerly, a servant of the sheriff. He keeps safely persons committed to him by lawful authority.[8]

Jail delivery. A commission to members of the courts of oyer and terminer and general jail delivery, empowering them to try and to deliver every person held in provisional confinement, when the judges arrived at the circuit town.

This commission was at first *special*, issued for individual cases, but in time became *general*, or for all persons so confined. Under this practice the jails were cleared, and all offenders tried, punished or delivered, twice each year.[1]

Jail liberties, or limits. A limited region of liberty for a person imprisoned for debt.

Equivalent expressions are: "prison bounds," and "rules of the prison."[2] Compare INTERN.

See IMPRISONMENT; PRISON.

JANITOR. A person employed to take charge of rooms or buildings, to see that they are kept clean and in order, to lock and unlock them, and, generally, to care for them.[3]

JEOFAIL.[4] Mistakes in pleading are helped by the statute of amendments and jeofails: so called because when a pleader perceives a slip in the form of his pleadings and acknowledges the error (*jeo faile*, I have failed), he may amend it.[5]

These statutes did not extend to proceedings in criminal cases. They cut off niceties in pleading which had disgraced the courts, and permitted writs of error only for material mistakes.[6] See AMENDMENT, 1.

JEOPARDY.[7] Hazard; danger; peril.[8]

1. The act of March 3, 1825, § 22, prescribes additional punishment for any person who, in robbing the mail, puts the life of the carrier in jeopardy by the use of a dangerous weapon. *Held*, that if the carrier's life is in danger, or if he has a well-grounded fear for his life, from a threat to use a weapon, his life is put in jeopardy, provided a robbery is committed.[9]

2. "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[10]

The constitutions of the several States contain a like provision.

"Jeopardy of life or limb" originally referred to trial by battel,[11] *q. v.*

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[1] Shattuck *v.* People, 5 Ill. 481 (1843).

[2] L. *jactitare* to utter.

[3] [3 Bl. Com. 93; 1 Chitty, Pr. 459.

[4] Formerly, gaol: F. *gaole*, a prison: L. L. *gabiola*, *gabia*, a cage: L. *cavea*, a cave.

[5] State *v.* Bryan, 89 N. Car. 533 (1883), Merrimon, J.

[6] [Bouvier's Law Dict.

[7] [Jacob's Law Dict.

[8] [1 Bl. Com. 346.

[1] See 4 Bl. Com. 269; Law Mag. & R., May, 1883; Great Law of Pa. (1683): Linn, 120.

[2] See United States *v.* Knight, 14 Pet. 312, 314 (1840).

[3] Fagan *v.* Mayor of New York, 84 N. Y. 352 (1881).

[4] Jĕf'-fāl. F. *j'ai failli*, I have erred, failed.

[5] [3 Bl. Com. 407.

[6] 4 Bl. Com. 375, 439; 3 *id.* 407. See Wildor *v.* Gilman, 55 Vt. 504 (1883).

[7] F. *j'ai perdu*, I have lost; *jeu perdu*, a lost game, or *jeu parti*, a divided game: of equal chance; hence, risk, peril,— Skeat.

[8] See United States *v.* Gibert, 2 Sumn. 38-62 (1834), cases, Story, J.; 4 Wash. 402; 44 Wis. 287.

[9] R. S. § 5472; United States *v.* Wilson, Baldw. 98 (1830).

[10] Constitution, Amd. V. Ratified, Dec. 15, 1791.

[11] McFadden *v.* Commonwealth, 23 Pa. 16 (1855), Black, C. J.

"Jeopardy" has, in the Constitution, its technical common-law sense; it applies only to strictly criminal prosecutions. There is no case where a conviction has been held a bar to a civil action for damages.[1]

A person is in legal jeopardy when put upon trial before a court of competent jurisdiction, under an indictment or information sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance — that is, empanelled and sworn.[2]

A prisoner is in jeopardy when a jury has been empanelled and sworn to try him upon a capital charge.[3]

The discharge of the jury without the prisoner's consent, after it has been sworn, is allowable only in a case of absolute necessity; if made without such necessity, it will operate as an acquittal.[3]

The provision, properly interpreted, refers only to treason and felonies; but it is made to include misdemeanors. It does not extend to proceedings for the recovery of penalties, nor to application for sureties of the peace.[4]

A prisoner who is indicted for murder, convicted of murder in the second degree, and granted a new trial, cannot, on the second trial, be convicted of a higher crime than murder in the second degree.[5]

Where a new trial is granted to one found guilty of manslaughter under an indictment for murder, he may again be tried for murder.[6]

See further CONVICTION, Former; PUNISHED, Twice; VEXATION.

JETTISON, or JETSAM.[7] Any throwing overboard; a throwing overboard for the preservation of ship and cargo; also, to cast overboard.[8] Sometimes designated as *jactus* or the *jactus*.

Jetsam is where goods cast into the sea, sink and remain under water.[9] Opposed, *flotsam*, *ligan*. See further AVERAGE, General; WRECK.

[1] See United States *v.* Gibert, *ante*.

[2] Cooley, Const. Lim. 327–28, cases.

[3] Hilands *v.* Commonwealth, 111 Pa. 4 (1886), cases, Mercur, C. J. See also People *v.* Horn, 70 Cal. 18 (1886); 24 Cent. Law J. 563 (1887), cases; 18 *id.* 43–45, 63–65 (1884), cases; 17 Am. Law Rev. 735–53 (1883), cases; 4 Cr. Law Mag. 31–36, 487–506 (1883), cases; 71 Ala. 369; 38 Cal. 467; 41 *id.* 211; 48 *id.* 324, 331; 59 *id.* 359; 1 Idaho, 763; 5 Ind. 290; 18 *id.* 215; 14 *id.* 39; 26 *id.* 366; 59 Iowa, 473; 78 Ky. 96; 1 Gray, 490; 105 Mass. 189; 38 Me. 574, 586; 23 Pa. 12; 12 Vt. 93; L. R., 1 Q. B., 289; 2 Benn. & H., Ld. Cr. Cas. 337.

[4] 1 Bish. Cr. L. § 990.

[5] State *v.* Belden, 33 Wis. 120, 124 (1873), cases; 1 Bish. Cr. L. § 849; Cooley, Const. Lim. 328. *Contra*, State *v.* Behimer, 20 Ohio St. 572 (1870); State *v.* McCord, 8 Kan. 241 (1871), cases; United States *v.* Harding, 1 Wall. Jr. 127 (1846).

[6] Commonwealth *v.* Arnold, 83 Ky. 11 (1886), cases.

[7] O. F. *jett-er*, to throw; *-son*, together. L. *jactus*, thrown.

[8] Butler *v.* Wildman, 3 B. & Al. 236 (1820).

[9] 1 Bl. Com. 292; 1 Story, Eq. § 490; 3 Kent, 135; Gibsone *v.* The Jessup, &c. Paper Co., 14 Rep. 644 (1882); 19 How. 162, 10 *id.* 305; 14 F. R. 59; 19 *id.* 162.

JEWEL. An ornament of the person, such as an ear-ring, a pearl, a diamond, prepared to be worn.[1]

A watch is not carried as a jewel or ornament, but as an article of ordinary wear, and of hourly use. It is as necessary to a guest at an inn in his room as out of it, in the night as in the day-time.[2]

Jewelry. In a statute which prohibits peddling jewelry without a license, a term of the largest import, including all articles under the genus.[3]

As generally used, includes articles of personal adornment, and imports that the articles are of value in the community where they are used. . . If by a pleasing combination of materials, by an attractive arrangement of parts, an article is produced bearing a general resemblance to real jewelry ornaments, and suitable for similar uses, it may fairly be called "imitation jewelry."[4] See BAGGAGE.

JEWS. See SUNDAY.

JOBBER. A merchant who purchases goods from importers and sells to retailers.[5]

JOHN DOE. See DOE.

JOINDER. Joining; coupling; uniting. See JOINT.

Joinder in demurrer. Accepting the issue tendered by defendant. See DEMURRER.

Joinder of actions or causes of action. Stating more than one cause in the same declaration. See COUNT, 4.

Joinder of issue. Acceptance of an issue of fact tendered by one's opponent. See ISSUE, 3.

Joinder of offenses. Incorporating two or more distinct charges of crime in one indictment.

Joinder of parties. Uniting two or more persons in one action as co-plaintiffs or as co-defendants.[6] See PARTY, 2.

Mis-joinder. Joining in an action as co-plaintiffs or co-defendants persons who ought not to be joined.

Non-joinder. Failure to join persons as co-parties.[7]

JOINT. Joined; united; done by or against, or shared between, two or more persons in union.[8] Compare CO, 2.

[1] Cavendish *v.* Cavendish, 1 Brown, Ch. *463 (1785).

[2] Ramaley *v.* Leland, 43 N. Y. 541 (1871): 4 Hand, 539.

[3] Commonwealth *v.* Stephens, 14 Pick. 373 (1833), Shaw, C. J.

[4] Robbins *v.* Robertson, 33 F. R. 710 (1888).

[5] Steward *v.* Winters, 4 Sandf. Ch. *590 (1847): Webster's Dict.; L. R., 7 P. C. 104.

[6] See 1 Chitty, Pl., 16 Am. ed., 53; Prunty *v.* Mitchell, 76 Va. 170 (1882).

[7] See Heinlen *v.* Heilbron, 71 Cal. 560 (1887).

[8] [Abbott's Law Dict.

Joint and several. Said of an obligation in which all the obligees are to be held either collectively or as individuals. Compare SOLE.

As, a joint, or a joint and several — action or suit, bond, contract or covenant, interest, obligation; a joint — administration, executor or trustee, adventure, creditor, debtor, indictment, judgment or decree, life, party, tenant, trespass, stock company, *qq. v.*

Parties are not said to be joint merely because they are connected in an interest which is common to them both: they must be so connected as to be in some measure identified. They have not several and respective shares which being united make a whole; but these together constitute one whole, which, whether it be an interest or an obligation, belongs to all. Hence arises an implied authority to act for each other.[1]

A joint and several *contract* contains distinct engagements — that of each contractor individually, and that of all jointly; and different remedies may be pursued upon each. In co-partnerships there is no such several liability.[2]

Every contract for a joint loan is in equity deemed, as to the borrowers, a joint and several contract — the larger security.[3]

Even without satisfaction, a judgment against one of two or more joint contractors is a bar to an action against the others, within the maxim *transit in rem judicatam;* the cause of action being changed into a matter of record, which has the effect of merging the inferior into the higher remedy.[4]

"A covenant is to be construed as joint or several according to the interests of the parties appearing upon the face of the obligation, if the words are capable of such construction; but it will not be construed as several by reason of several interests, if it be expressly joint."[5]

Where the obligation is joint and several, the obligee may elect to sue the obligors jointly or singly. Hence, if he obtains a joint judgment, he cannot then sue the obligors separately — the contract being merged into a judgment; nor can he maintain a joint action after a recovery in a separate action against one party.[6]

If one of two joint obligees (sureties) dies before the principal, his representative cannot be charged — the obligee having elected to take a joint judgment at law or a joint and several obligation. Equity can give relief only when the joint obligation does not express the meaning of the parties.[7] See REFORM.

[1] 1 Pars. Contr. 21.

[2] Mason *v.* Eldred, 6 Wall. 235-41 (1867), cases.

[3] 1 Story, Eq. § 162.

[4] United States *v.* Ames, 99 U. S. 44 (1878), cases.

[5] Farni *v.* Tesson, 1 Black, 315 (1861): Parke, B.; Calvert *v.* Bradley, 16 How. 596 (1853); Seymour *v.* Western R. Co., 106 U. S. 321 (1882), cases.

[6] Sessions *v.* Johnson, 95 U. S. 347-48 (1877), cases.

[7] United States *v.* Price, 9 How. 91-95 (1850), cases; Pickersgill *v.* Lahens, 15 Wall. 142-44 (1872), cases; 1 Story, Eq. §§ 162-64.

Persons engaged in committing the same *trespass* are joint and several trespassers. Like joint and several contractors, all, or one, may be sued in one action. Where more than one is sued, they may sever in their pleas, and the jury may find several verdicts. But the acceptance of any one verdict is a satisfaction of all the others, except as to costs, and is a bar to another action.[1] See CONTRIBUTION.

Before the Supreme Court, where the judgment or decree is joint, all the parties against whom it is rendered must join in a writ of error or an appeal, in order, first, that the successful party may enforce the judgment or decree against the parties who do not desire a review; second, that the same question on the same record may be decided at the hearing.[2]

The parties non-assenting to the review may be severed. The party whose interest is affected by the alleged error may carry up the case alone, by summons and severance.[3]

Joint-debtor Acts. In most of the States legislative acts have been passed, called Joint-debtor Acts, which, as a substitute for outlawry, provide that if process be issued against several joint-debtors or partners, and served on one or more of them, and the others cannot be found, the plaintiff may proceed against those served, and, if successful, have judgment against all.

Such judgments are generally held to bind the common property of the joint-debtors, as well as the separate property of those served with process; and, while they are binding personally on the former, they are regarded as either not personally binding at all or only *prima facie* binding on the latter.[4]

JOINTURE. 1. Originally, an estate limited to both husband and wife; but in common acceptation extends also to a sole estate limited to the wife only, and made in satisfaction of her whole dower. In the latter sense, as defined by Lord Coke, "a competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least."[5]

One mode of barring the claim of a widow to dower is by settling upon her an allowance previous to marriage, to be accepted by her in lieu thereof. This is called a jointure.[6]

[1] Lovejoy *v.* Murray, 3 Wall. 10 (1865); The Atlas, 93 U. S. 315 (1876); Sessions *v.* Johnson, 95 *id.* 348 (1877).

[2] Masterson *v.* Herndon, 10 Wall. 416 (1870).

[3] Simpson *v.* Greeley, 20 Wall. 157 (1873), cases; Hanrick *v.* Patrick, 119 U. S. 163 (1886); 121 *id.* 632.

[4] Hall *v.* Lanning, 91 U. S. 168 (1875), Bradley, J. See generally 36 Alb. Law J. 245-49, 265-69 (1887), cases.

[5] 2 Bl. Com. 137: 1 Coke, Inst. 36.

[6] 1 Washb. R. P. Ch. VIII. See also Grogan *v.* Garrison, 27 Ohio St. 60 (1875); Vance *v.* Vance, 21 Me. 364 (1842); 3 Miss. 602; 19 Mo. 469; 3 Metc., Ky., 151; 12 Bush. 513.

Although once common in England, of little moment since the Dower Act of 3 and 4 Wm. IV (1833), c. 105, placed the subject of the wife's dower under the control of the husband in all cases where special provision is not made in her favor; which is usually done by marriage settlements. See SETTLE, 4.

Jointures, where recognized, are legal or equitable in nature, and may be made before or after marriage. They have been regulated largely by the statute of 27 Hen. VIII (1536), c. 10,— the Statute of Uses.[1] See USE, 3, Statute, etc.

2. An estate in joint-tenancy.

JOURNAL. A record of the proceedings of a legislative body.

"Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, on the Desire of one fifth of those Present, be entered on the Journal."[2]

The constitutions of the States contain similar provisions.

The journal is a public record of which the courts may take judicial notice. If it appears that an act did not receive the requisite vote, or that it was unconstitutionally adopted, the court may adjudge it void.[3]

No court has assumed to go beyond the proceedings of the legislature, as recorded in its journals, on the question whether a law has been adopted. Many cases follow *The King* v. *Arundel*, Hobart, *109 (1617), adopting the attested enrollment as conclusive on the question of passage. But in many States, Ohio among them, the journals, which are required to be kept by the constitution, are regarded. In the time of Hobart the journals were not records, but "remembrances for forms of proceedings to the record"— the enrolled bill.[4] See ENTRY, II, 6; YEAS AND NAYS.

JOURNEY. Originally, a day's travel; now applied to travel by land from place to place, without restriction as to time, and without the ordinary habits, business, or duties of the person, to a distance from his home, and beyond the circle of his friends or acquaintances; as, in a statute against carrying concealed weapons, except while traveling on a journey.[5]

Travel in the neighborhood of one's home, though in another county, is not contemplated in the Tennessee act of 1870.[6]

Journeyman. A servant by the day — whether the work is done by the day or by the piece.[1]

JR. See JUNIOR, 1; NAME, 1.

JUDEX. 1. In Roman law, when a suit was commenced, the parties appeared before the praetor, who made a preliminary examination to find the precise point in controversy. From the statements of the parties he constructed a *formula*, or brief technical statement of the issue. He then appointed a *judex* to try the case according to the issue, to condemn or acquit the accused, and to make return of his judgment.[2]

2. In civil law, a magistrate who conducted the proceedings in a cause from its first inception, and finally decided it.

3. In English law an officer who administers justice in a court of law; a judge.

Boni judicis est ampliare jurisdictionem. It is the part of a good judge to enlarge his jurisdiction — in order to prevent a failure of justice.

Lord Abinger said "that the maxim of the law is to amplify its remedies, and without usurping jurisdiction, to apply its rules to the advancement of substantial justice."[3] Lord Mansfield suggested that the reading should be "*ampliare justitiam*."[4] The idea is about this, that the law provides a remedy for every wrong.[5]

Coram judice. Before a judge. **Coram non judice.** Before one not a judge. That is, before a court clothed, or not clothed, with jurisdiction in the matter.[6] See JURISDICTION.

Nemo debet esse judex in propria sua causa. No one should be judge in his own cause. No one can be at once judge and party.

In a state of mere nature each individual is his own judge; which is one of the evils society is intended to remedy. The power is now lodged in the civil magistrate.[7]

JUDGE.[8] A public officer whose function is to declare the law, to administer justice in

[1] 2 Bl. Com. 180.

[2] Constitution, Art. I. sec. 5, cl. 3.

[3] Koehler v. Hill, 60 Iowa, 549-53 (1883), cases; Wise v. Bigger, 79 Va. 280-81 (1884); Cooley, Const. Lim. 135, cases; 2 Story, Const. § 801; 94 U. S. 263; 40 Ark. 209; 95 Ill. 181; 45 *id.* 119; 11 Ind. 424; 26 Pa. 450; 5 W. Va. 85.

[4] State, *ex rel.* Herron v. Smith, 44 Ohio St. 362-405 (1886), cases *pro* and *con*. See also Attorney-General v. Rice, Sup. Ct. Mich. (1887): 26 Am. Law Reg. 304-11, cases; 37 Alb. Law J. 426-33, 449-55 (1888), cases.

[5] Gholson v. State, 53 Ala. 521 (1875), Brickell, C. J.

[6] Smith v. State, 3 Heisk. 511 (1872).

[1] Hart v. Aldridge, 1 Cowp. 55 (1774), Mansfield, C. J.

[2] See Hadley, Rom. Law, 60.

[3] Russell v. Smith, 9 M. & W. *818 (1842).

[4] Rex v. Phillips, 1 Bur. *304 (1757).

[5] Reynolds v. Hoxsie, 6 R. I. 468 (1860); 1 Story, Eq. §§ 49-50; Bacon, Aph. 96; 12 C. B. 413; 17 Mass. 310; Broom, Max. 81, 84.

[6] See Virginia v. Rives, 100 U. S. 316 (1879).

[7] 4 Bl. Com. 8. See 64 Pa. 184-85; 98 N. Y. 396; 39 Tex. 447; 6 Q. B. 753; 18 id. 491.

[8] F. *juger:* L. *jus dicare*, to pronounce the right. See JUDEX.

a court of law, to conduct the trial of causes between litigants according to legal forms and methods.[1]

As sometimes used, includes any officer appointed or commissioned to decide a litigated question or questions: as, a justice of the peace, a referee, master, arbitrator. It is in this sense that jurors are said to be "judges of the fact."[2]

Frequently interchanged with "justice." See JUSTICE, 3.

Originally, the king determined causes; but in time he delegated the power to judges of his courts, which power is merely an emanation of the royal prerogative. A judge is the law's vicegerent; he is the law speaking.[3]

Associate judge or justice. A fellow member of a court, learned (or unlearned) in the law, and of equal (or unequal) authority in the decision of causes. **Chief or president judge or justice.** The member of a court who presides at its sessions and in its deliberations, directing the business before it, assigning causes to his associates for written opinions of the court, signing orders, and the like. See LEARNED.

The supreme court is composed of a chief justice and eight associate justices; any six of whom constitute a quorum.[4]

Various courts of appeal are composed of a chief justice and associate judges or justices. "Associate" does not here import inferiority in any sense. But it is otherwise where the associates are laymen: then, while the laymen are judges, and consult with the president judge, their authority is inferior, and they do not have an equal vote.

Law judge. A judge learned in the law; as opposed to a judge, perhaps an "associate" justice, who has not had legal training. See J.

Senior judge. In the Ohio act of April 7, 1882, the judge who has served the longest under his present commission.

In Nevada, the senior justice in commission is chief justice, and when the commissions of any two bear the same date, they determine by lot who shall be chief justice. In Kentucky, the judge having the shortest time to serve is styled the chief justice. Similar provisions are found in California, Georgia, Michigan, Mississippi, Missouri, Nebraska, Oregon, and West Virginia, while in nineteen States there is no provision for the selection of a chief justice, no such officer seeming to be known, and in the remaining States the matter is either determined by the governor, or by the legislature, or the choice is made by the court itself. In the newer States of the west and south, the policy of short determinate terms is favored, while in many of the older Atlantic States the policy of priority by reason of service is recognized. The policy of Ohio accords with the former class.[1]

The duties of a judge, in forming his judgment, are: to gather the materials (facts, law, authorities) on which to form his opinion; to estimate authorities at their proper value as guides; to solve the difficulties presented; and, aided by his own knowledge and reason, and the arguments of counsel, with an unprejudiced mind to make a decision; and, in so doing, to regard the nature of the case, as new, as within some rule, or as governed by precedent.[2]

Maxims: a judge is to expound, not to make, the law; must hear both sides; cannot punish an injury done to himself; cannot be a witness or a judge in his own cause; is not to act upon his personal judgment or from a dictate of private will, but to pronounce according to law and justice; ought ever to regard equity; should have two salts: the salt of wisdom and the salt of conscience. See DISCRETION, 5.

The power and jurisdiction of a judge constitute the office of a judge. The constitutional grant of this power is incapable of any limitation but that attached to the grant; and the object is to secure independence in the judiciary. But the aggregate of the duties of a judge may be diminished by the division of his district or by the election of an assistant.[3]

Upon a judge as such no functions can be imposed except those of a judicial nature. Judicial authority, conferred upon a court, is to be exercised by the judges organized as a court.[4]

All judicial officers are exempt from liability for their judicial acts done within their jurisdiction; and judges of subordinate and general authority are exempt even where the judicial act is in excess of their jurisdiction, unless, perhaps, when done maliciously or corruptly. Judges of limited and inferior authority are protected when they act within their jurisdiction.[5]

It is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, should be free to act upon his own convictions, without apprehension of personal consequences to himself. This rule exists for the benefit of the public, and was established to secure the independence of the judge. Should

[1] See Opinion of Commission, 57 N. Y. 405 (1874); 8 Heisk. 650.

[2] See 4 Dall. *229; 3 Yates, 314; 3 Cush. 564.

[3] [1 Bl. Com 267; 3 *id.* 24.

[4] R. S. § 673.

[1] State *ex rel.* Belford *v.* Hueston, 44 Ohio St. 5, 10–11 (1886), Spear, J.

[2] [Ram, Leg. Judg. 4.]

[3] Commonwealth *v.* Gamble, 62 Pa. 343 (1869). See Commonwealth *v.* Harding, 87 *id.* 343 (1878); Bredin's Appeal, 109 *id.* 337 (1885).

[4] United States *v.* Ferreira, 13 How. 40 (1851); 2 Dall. 409; 19 Wall. 107, 655; 6 Kan. 500; 114 Mass. 247. On exercising executive powers, see 2 Kan. Law J. 306–16, 354 (1885), cases.

[5] Randall *v.* Brigham, 7 Wall. 535–39 (1868), cases, Field, J. See also Lange *v.* Benedict, 73 N. Y. 25–37 (1878), cases; Rains *v.* Simpson, 50 Tex. 495, 498–500 (1878), cases; Johnston *v.* Moorman, 80 Va. 140–48 (1885), cases.

he act with partiality, maliciously, corruptly, arbitrarily, or oppressively, he may be removed from office by impeachment, and vote of the legislature.[1]

No man can be a good judge who does not feel free to follow the dictates of his own mind. In a country where the people rule, and where popular clamor is apt to sway the multitude, nothing is more important than that the judges should be kept independent. The settled law of the Supreme Court is that where any judicial officer, a justice of the peace included, acts within his jurisdiction, he is not amenable to a civil action for damages. His motives cannot be inquired into.[2]

An act may be so entirely in excess of jurisdiction as to make it the arbitrary or unlawful act of a private person.[3]

See BRIBERY; CERTIFICATE; CHARGE, 2 (2, c); COURT; DECISION; GOWN; JUDGMENT; JUDICIAL; JURISDICTION, 2; JURY; JUS, Dicere; LEGISLATION, Judicial; NOTES, 1; OPINION, 3; PREJUDICE; PRESIDE.

JUDGE-ADVOCATE. The advising and prosecuting officer in military law or before a court-martial.

He may be the judge-advocate general, or a deputy judge-advocate. In conducting a trial, he represents the United States, the accused, and the court. The officer highest in rank present is president of the court.

The officer who may order a court-martial is competent to appoint the judge-advocate; the appointment for a regimental or a garrison court-martial is made in the same manner as for a general court-martial.

Without the order of the court, he may summon necessary witnesses; and he may compel the attendance of any person not in the military service. When it is possible, he should send subpœnas through regular military channels. He also conducts the examination of witnesses, observing the established rules of evidence.

By order of the court he may be assisted by a clerk, preference being given to a soldier.

At the close of the trial, without delay, he should transmit the proceedings to the officer having authority to confirm the sentence.[4]

Communications relating to questions of military justice or proceedings of military courts, upon which the opinion of the judge-advocate general is desired, are to be forwarded through proper channels to the adjutant-general, when such questions cannot be decided by an intermediate authority. But questions of an abstract, general character will not be considered.[5] See MARTIAL, Court, etc.

JUDGMENT. The saying of the law; the sentence of the law, pronounced by the court, upon the matter contained in the record.[1]

The determination of the law as the result of proceedings instituted in a court of justice.[2]

The final determination of the rights of the parties in the action.[3]

An adjudication of the rights of the parties in respect to the claim involved.[4]

The conclusion that naturally and regularly follows from the premises of law and fact. This conclusion depends not upon the arbitrary caprice of the judge, but upon settled, invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries; the suit or action is the vehicle or means of administering it.[6]

A step by which a plaintiff, if successful, obtains what he is seeking. It declares, does not create, a right. May be set aside or reversed, and gives no right superior to that which the plaintiff had before he obtained it.[6]

In its comprehensive sense, embraces not only judgments strictly so called, but also definitive decrees and orders in the nature of judgments.[7]

In criminal law, denotes the action of the court before which a trial is had, declaring the consequences to the convict of the fact ascertained by his conviction.[8] See CONVICTION; SENTENCE.

What is ordered and adjudged by the court, not merely what is entered, constitutes the judgment.[9]

The more common judgments rendered are: for plaintiff — by confession, or by default; for defendant — by non suit, *non prosequitur*, *retraxit*, *nolle prosequi*, discontinuance, or *stet processus;* for either plaintiff or defendant — upon a demurrer, an issue of *nul tiel* record, or a verdict,[10] *qq. v.*

Accumulative judgment. A sentence to imprisonment for a term to commence after a previous term has expired. See SENTENCE, Cumulative.

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[1] Bradley *v.* Fisher, 13 Wall. 347-54 (1871), cases, Field, J.

[2] Cooke *v.* Bangs, 31 F. R. 641-42 (1887), Brewer, J.

[3] Lange *v.* Benedict, 99 U. S. 71 (1878).

[4] Regulations of the Army of the United States, pp. 88, 89, 92 (1881).

[5] *Ibid.* p. 87.

[1] 3 Bl. Com. 395; Davidson *v.* Smith, 1 Biss. 351 (1860).

[2] Mahoning County Bank's Appeal, 32 Pa. 160 (1858); 51 *id.* 375.

[3] Pearson *v.* Lovejoy, 53 Barb. 408 (1866); N. Y. Code, § 245; 76 N. Y. 557; Kan. Civ. Code, § 395.

[4] McNulty *v.* Hurd, 72 N. Y. 521 (1878), Church, C. J.

[5] 3 Bl. Com. 396; *Re* Sedgeley Avenue, 88 Pa. 519 (1879); Zeigler *v.* Vance, 3 Iowa, 530 (1856).

[6] Steamship Co. *v.* Joliffe, 2 Wall. 466 (1864).

[7] *Re* Road in Shaler Township, 108 Pa. 253 (1885), Sterrett, J.

[8] Commonwealth *v.* Lockwood, 109 Mass. 325 (1872); Commonwealth *v.* Gloucester, 110 *id.* 496 (1872). See also 3 Ark. 299; 7 *id.* 398; 3 Col. 531; 2 Fla. 123; 5 *id.* 450; 50 Ga. 285; 1 Idaho, 459; 74 Ind. 550; 70 Iowa, 89; 3 La. An. 35, 634; 3 Metc., Mass., 520; 32 Md. 150; 12 Minn. 437; 3 Neb. 254; 31 N. J. L. 473; 68 N. C. 355; 19 S. C. 507; 31 Vt. 150; 10 Wis. 241.

[9] Houston *v.* Clark, 36 Kan. 414 (1887): Freeman, Judgm. § 38, cases.

[10] See 3 Bl. Com. 395-96.

Domestic judgment. A judgment rendered by a court at the domicil of the parties. **Foreign judgment.** That rendered under some other and independent or foreign jurisdiction.

An action of debt lies upon a foreign judgment.[1] At common law such a judgment was *prima facie* evidence of the debt adjudged to be due. It may be shown that the court had no jurisdiction or that the judgment was obtained by fraud. A domestic judgment, at common law, could not be collaterally impeached, if rendered in a court of competent jurisdiction; but only by a writ of error, a petition for a new trial, or a bill in chancery.[2]

Judgments recovered in one State, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties.[3]

Though the judgment be set out in full in the complaint, the action, whether debt or *assumpsit*, will not be held to be brought on such judgment as a record, if the complaint alleges that by reason of the judgment the defendant became indebted.[4] See FAITH, Full, etc.; LAW, Foreign.

Final judgment. Such judgment as at once puts an end to the action by declaring that the plaintiff has or has not entitled himself to the remedy for which he sues. **Interlocutory judgment.** Is upon some intermediate plea, proceeding, or default, and does not finally determine or complete the suit.

The "interlocutory judgment" most frequently spoken of is that incomplete judgment whereby the right of the plaintiff is established, but the quantum of damages is not ascertained.[5]

A "final judgment" at once puts an end to the action, by determining that the plaintiff is, or is not, entitled to recover, and the amount in debt or damages to be recovered.[6]

No judgment is final which does not terminate the litigation between the parties.[7]

A motion for a new trial prevents a judgment from becoming effectual as a final judgment, until the date of the order refusing the new trial.[1]

All that is required is that the judgment should determine the issues involved in the action. It may be that some future order may become necessary to carry the judgment into effect.[2]

A judgment being the final determination of the rights of the parties in an action, it must be final — that is, it must settle the matter which it purports to conclude. The reasons announced form no part of it.[3]

A judgment is "interlocutory" when given in the course of a cause before final judgment.[4] See further DECREE, Final.

A judgment for damages, estimated in money, is sometimes called by text writers a specialty or "contract by record," because it establishes a legal obligation to pay the amount recovered; and, by a fiction of law, a promise to pay is implied where such legal obligation exists. But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it, as, a judgment for a tort.[5]

In some decided cases, and in text books, judges and jurists have spoken of judgments as "contracts." They have been so classified with reference to the remedies upon them. But, strictly, as said by Lord Mansfield, in 1764, "a judgment is no contract, nor can be considered in that light: for *judicium redditur in invitum*," — consent and consideration are both wanting.[6]

The judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar; or, as evidence, conclusive between the same parties, upon the same matter, directly in question in another court. The judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But the judgment of neither a court of concurrent nor of exclusive jurisdiction is evidence of any matter which came collaterally in question, though within the jurisdiction; nor of any matter indirectly cognizable; nor of any matter to be inferred by argument from the judgment.[7]

A judgment is valid upon its face, if it appears that the court had jurisdiction of the subject-matter and

[1] 3 Bl. Com. 160, 438.

[2] Michaels *v.* Post, 21 Wall. 426 (1874), cases; Thompson *v.* Whitman, 18 *id.* 461-69 (1873), cases; Glass *v.* Blackwell, 48 Ark. 55-56 (1886), cases; 17 Am. Law Rev. 411-22 (1883), cases; 18 Cent. Law J. 203-6 (1884), cases; Columbia Jurist, 1886: 3 Kan. Law J. 178, 192 (1886), cases; R. S. § 906; 21 W. Va. 115.

[3] Hanley *v.* Donoghue, 116 U. S. 4 (1885), cases.

[4] Mellin *v.* Horlick, 31 F. R. 867-88 (1887), cases.

[5] 3 Bl. Com. 398, 396-97.

[6] Mahoning County Bank's Appeal, 32 Pa. 160 (1858).

[7] St. Clair County *v.* Lovingston, 18 Wall. 628 (1873); *id.* 586; Weston *v.* City Council, 2 Pet. *464 (1829); United States *v.* Abatoir Place, 109 U. S. 162 (1882), cases; 118 *id.* 48.

[1] Brown *v.* Evans, 18 F. R. 56-61 (1883), cases.

[2] Perkins *v.* Sierra Nevada Co., 10 Nev. 411 (1876), cases. See also 3 Ala. 226; 9 Ark. 352; 1 Cal. 28; 6 Conn. 61; 21 *id.* 284; 5 Fla. 450; 40 Ga. 320; 9 Iowa, 46; 24 Pick. 300; 3 Wend. 35; 9 Oreg. 441; 37 Tex. 390.

[3] Butt *v.* Herndon, 36 Kan. 372 (1887), cases, Horton, Chief Justice.

[4] Nacoochee Hydraulic Mining Co. *v.* Davis, 40 Ga. 320 (1869); Mora *v.* Sun Mutual Ins. Co., 13 Abb. Pr. 307 (1861).

[5] Louisiana *v.* Mayor of New Orleans, 109 U. S. 289 (1883).

[6] O'Brien *v.* Young, 95 N. Y. 430-31 (1884), cases, Earl, J.; Bidleson *v.* Whytel, 3 Burrow, 1548 (1764).

[7] Duchess of Kingston's Case, 20 How. St. Tr. 355 (1776), De Grey, Ld. C. J.: s. c. 2 Sm. L. C. *784; 2 Gall. 229; 17 Pick. 7-14; 2 Kent, 119.

of the parties, and that a judgment had in fact been rendered.[1]

All defenses admissible against a judgment where it was recovered are admissible in an action upon it in another State. Want of jurisdiction is a good defense. Whether fraud in procuring it is, seems to depend upon the practice in the forum where the action is brought.[2] See JURISDICTION.

A distinction between erroneous and void judgments is universally recognized.[3] See ERROR, 2 (2), Erroneous.

At common law, a judgment was not a *lien* upon realty; a lien arose from the power to issue a writ of elegit, by statute of 13 Ed. I (1286), c. 18. The right to extend the land fixed the lien upon it. The reason was, lands answered for feudal duties, and a new tenant could not be forced upon the lord.[4]

Judgments rendered in the courts of the United States are liens upon the defendant's realty in all cases where similar judgments of the State courts are made liens by the law of the State.[5] See ADDENDA.

The lien of a judgment is co-extensive with the territorial limits of the court in which the judgment is rendered.[6]

Judgment-docket. A public record intended to afford purchasers and subsequent incumbrancers reliable information in regard to the existence or lien of judgments.

If the entry of a judgment is wrong in name, amount, or time, a third person who does not know of the error, will be protected against loss from having acted upon the reliability of the record statements.[7] See IDEM, Sonans.

See AMENDMENT, 1; CONFESSION, 1; CONVICTION; CREDITOR; DEBT; DECREE; DEFAULT; DEMURRER; EXECUTION, 3; JOINT AND SEVERAL; MERGER, 2; OPEN, 1 (4); PREJUDICE, Without; PRÆSUMPTIO, Omnia; RECOVERY; RENDER, 4; REVERSAL; REVIEW, 2; SATISFACTION; SIGN; TERM, 4; TERRE-TENANT; VALID.

JUDICATURE. The state or profession of those employed in the administration of justice; judiciary; jurisdiction; a tribunal.

"Parliament was originally a court of judicature."

Judicature Acts. Statutes of 36 and 37 Vict. (1873), c. 66, and of 38 and 39 Vict. c. 77, with their supplements.

These statutes made important changes in the organization of the courts, and in principles of procedure. The first went into effect Nov. 1, 1875.[8] See COURTS, of England.

[1] Maxwell *v.* Stewart, 22 Wall. 79 (1874); Moore *v.* Town of Edgefield, 32 F. R. 501 (1887), cases.

[2] Freeman, Judgments, § 576, cases.

[3] Hall *v.* Law, 102 U. S. 464 (1880), cases.

[4] Morsell *v.* First Nat. Bank, 91 U. S. 360 (1875), cases; Shrew *v.* Jones, 2 McLean, 78 (1840).

[5] Ward *v.* Chamberlain, 2 Black, 438 (1862), cases.

[6] Lombard *v.* Bayard, 1 Wall. Jr. 196 (1848).

[7] Appeal of Nat. Bank of Northumberland, 100 Pa. 497 (1882); Moore *v.* McKinley, 60 Iowa, 373 (1882).

[8] Preface to 15 Eng. Rep., by Moak; 2 Law Q. Rev. 1-11 (1886).

JUDICIAL. Whatever emanates from a judge as such, or proceeds from a court of justice.[1]

Pertaining to the administration of justice by a judge or court; also, authorized by law.

Extra-judicial. Outside of lawful procedure; emanating from a person who is a judge but not from him *as* a judge; not sanctioned by law.

As, judicial or a judicial — act or action, admission or confession, authority, capacity, circuit, cognizance, comity, construction, day, decision or determination, department, *dictum*, discretion, district, document, ermine, notice, oath, office or officer, opinion, power, proceeding, proof, question, record, report, sale, separation, trial, writ, *qq. v.*

Extra-judicial is applied, almost exclusively, to an act or action, an admission or a confession, a decision or an opinion, and to an oath.

Judicial act. An act done in the exercise of judicial power: an act performed by a court, touching the rights of parties, or property, brought before it by voluntary appearance or by the prior action of ministerial officers.[2] See MINISTERIAL.

A "judicial act" determines what the law is, and what the rights of parties are, with reference to transactions already had. A "legislative act" prescribes what the law shall be in future cases.[3]

Judicial action. What shall be adjudged between litigants, and with which is the right of the case, is judicial action, by hearing and determining it.[4]

Where any power is conferred upon a court, to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action of the court is to be regarded as judicial, irrespective of the original nature of the power.[5]

Judicial action is the application to persons or things of legal sequences from facts agreed or judicially ascertained. There must therefore be parties, an issue, and a judgment.[6]

[1] *Re* Cooper, 22 N. Y. 82, 84 (1860), Selden, J.

[2] Flournoy *v.* Jeffersonville, 17 Ind. 173-74 (1861).

[3] Sinking Fund Cases, 99 U. S. 761 (1878), Field, J.; Mabry *v.* Baxter, 11 Heisk. 690 (1872).

[4] Rhode Island *v.* Massachusetts, 12 Pet. 718 (1838), Baldwin, J.

[5] Tindal *v.* Drake, 60 Ala. 177 (1877), Stone, J. See also *Re* Saline County Subscription, 45 Mo. 53 (1869); Mills *v.* Brooklyn, 32 N. Y. 495 (1865); *Re* Zborowski, 66 *id.* 97 (1877).

Judicial power. The power of interpreting law — of declaring what the law is or has been.[1]

"The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;" — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizen of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.[2]

This provision embraces alike civil and criminal cases. A case "arises" under the Constitution, a law, or a treaty, when its correct decision depends upon the construction of either. Cases arising under the laws are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted. A case may arise out of the implication of the law.[3]

How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, and the manner of procedure in its exercise, are not prescribed. These subjects are remitted without check or limitation to the wisdom of Congress.[4]

Except in the cases in which the Supreme Court is given by the Constitution original jurisdiction, the judicial power is to be exercised as Congress may direct.[5]

A proceeding to ascertain the compensation for land taken for a public use is a "suit at law," within the meaning of the Constitution and acts conferring jurisdiction on the Federal courts.[6]

See CASE, 2; COURTS, United States; POWER, 3.

JUDICIARY. 1. Pertaining to the department of government which expounds the laws.

2. The body of officers who administer the law; the judges taken collectively; the bench. Frequently spoken of as the *Federal* and the *State* judiciary.

Elective judiciary. When the judges of the courts of a State are chosen by popular vote they are said to constitute an "elective judiciary." Opposed, *appointed judiciary*. See JUDGE.

Judiciary Act. The act of Congress of September 24, 1789, under which the Federal courts were originally organized.[1]

The bill was prepared by Oliver Ellsworth.

The wisdom and forethought with which the act was drawn have been the admiration of succeeding generations. It remains to the present day, with a few unimportant changes, the foundation of our system of judicature, and the law which confers, governs, controls, and limits the powers of all the Federal courts, except the Supreme Court, and which largely regulates the exercise of its powers.[2]

JUDICIUM. See JUDGMENT.

JUMP BAIL. A colloquial expression describing the act of the principal in a bail-bond in violating the condition of the obligation by failing to do the thing stipulated, as, not appearing in court on a particular day to abide the event of a suit or the order of court, but, instead, withdrawing or fleeing from the jurisdiction.

JUNIOR. 1. Although usually attached to a person's name, is not regarded as a part thereof.

"Junior" and "senior" are words of description, constitute no part of a name, and may be added or omitted in different counts in an indictment without affecting its sufficiency.[3] See NAME, 1.

2. Younger; opposed to senior: as, junior counsel.

3. Younger in time; later or more recent; opposed to prior: as, a junior judgment, execution, writ, creditor, patent, survey.

JURA. See JUS.

JURAL. Pertaining to natural or positive right.[4]

JURAT. From the Latin *juratum*, sworn; the emphatic word in the Latin form of the certificate to an affidavit or deposition that it was sworn to.

The common form is "Sworn to (or affirmed) and subscribed before me this —— day of ——, 1889." See AFFIDAVIT.

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[1] [Wolfe v. M'Caull, 76 Va. 880 (1881).

[2] Constitution, Art. III. sec. 1, 2.

[3] Cohens v. Virginia, 6 Wheat. 379 (1821), Marshall, C. J.; Osbourn v. United States Bank, 9 *id.* 820 (1824); Tennessee v. Davis, 100 U. S. 264 (1879); The City of Panama, 101 *id.* 460 (1879); Manhattan R. Co. v. Mayor of New York, 18 F. R. 195 (1883); 2 Story, Const. § 1647.

[4] Mayor of Nashville v. Cooper, 6 Wall. 251 (1867), Swayne, J.

[5] New Orleans, &c. R. Co. v. Mississippi, 102 U. S. 141 (1880), Harlan, J. See Ames v. Kansas, 111 *id.* 463-72 (1884), cases; 65 Barb. 448; 55 N. Y. 150.

[6] Searl v. School District, 124 U. S. 199 (1888), cases; Colorado Midland R. Co. v. Jones, 29 F. R. 193 (1886).

[1] See 1 St. L. 73.

[2] United States v. Holliday, 3 Wall. 414 (1865), Miller, J.; Jones v. Foreman, 66 Ga. 377 (1881).

[3] Geraghty v. State, 110 Ind. 104 (1886): 59 *id.* 499; 19 Paige, 177; 7 Johns. 549; 17 Pick. 200; 131 Mass. 184.

[4] [Webster's Dict.

JURE; JURIS. See Jus.

JURIDICAL. Pertaining to the distribution of justice; used or recognized in courts of justice.[1] Opposed, *non-juridical;* as, that Sunday is a non-juridical day.

JURISCONSULT. The *juris consulti*, or jurisconsults, were experts in the law, resorted to by all persons concerned in the administration of justice, both officials and advocates, and even private persons who wanted advice as to their legal rights.[2]

Often, especially in earlier times, they were elderly men who, after passing through the series of political distinctions, found an agreeable occupation for their advanced years in giving to their fellow-citizens the benefit of their knowledge and experience.[3]

2. A person who is familiar with international or public law.

JURISDICTION.[4] 1. Governmental authority.

In extradition treaties, more than mere physical, territorial, *quasi* territorial, or treaty jurisdiction; has the enlarged meaning which is equivalent to "authority, cognizance, or power of the courts."[5] See State, 3 (2); Territory, 1.

2. Power to hear and determine a cause.[6]

Power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them.[6]

Relates to the exercise of judicial powers.[7]

Refers to the power of the court over the parties, the subject-matter, the *res* or property in contest, and the authority of the court to render the judgment or decree which it assumes to make.[8]

By jurisdiction over the "subject-matter" is meant the nature of the cause of action or relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers or in the authority specially conferred. Jurisdiction of the "person" is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause. Jurisdiction of the "res" is obtained by seizure under process of the court, whereby it is held to abide such order as the court may make concerning it.[1] See Notice, 1, Judicial.

Hence, want of jurisdiction may be shown as to the subject-matter, the person, or, in proceedings *in rem*, as to the thing.[2]

Any movement by a court is the exercise of jurisdiction. . . If the law confers the power to render a judgment or decree, then the court has jurisdiction.[3]

Jurisdiction is *coram judice* whenever a case is presented which brings the power into action.[4]

Opposed, **non-jurisdiction:** the want of jurisdiction.

Jurisdictional. Concerning, also exhibiting, the power to hear and determine a cause; opposed to *non-jurisdictional:* as, a jurisdictional amount, fact, limit, question; non-jurisdictional facts.[5]

Original jurisdiction. Jurisdiction conferred upon, or inherent in, a court in the first instance. **Appellate jurisdiction.** Power to review the final judgment, order or decree, of some inferior court.[6]

The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. It implies that the subject-matter has been already instituted and acted upon by some other court whose judgment or proceedings are to be revised.[7]

Exclusive jurisdiction. Jurisdiction confined to a particular tribunal or grade of courts. **Concurrent or co-ordinate jurisdiction.** Exists co-extensively and contemporaneously in courts of equal or of different grade or systems.

Exclusive jurisdiction is necessarily original, though original jurisdiction is not necessarily exclusive.[8]

The rule that among courts of concurrent jurisdiction the one which first obtains jurisdiction has the exclusive right to decide every question arising in the case, is limited to suits between the same parties or privies, seeking the same relief, and to such questions

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[1] [Webster's Dic.

[2] Hadley, Rom. Law, 61, 59; Cushing, Rom. Law, §§ 5-6; Maine, Anc. Law, 35-38.

[3] L. *jus*, right; *dicere*, to proclaim.

[4] *Exp.* Vogt, 18 Int. Rev. Rec. 18.

[5] United States *v.* Arredondo, 6 Pet. *709 (1832), Baldwin, J.; Cornell *v.* Williams, 20 Wall. 249 (1873).

[6] Rhode Island *v.* Massachusetts, 12 Pet. *718 (1838), Baldwin, J.

[7] Reid *v.* Morton, 119 Ill. 130 (1886).

[8] Cooper *v.* Reynolds, 10 Wall. 316 (1870), Miller, J.; 19 Cent. Law J. 102-4 (1884), cases; 25 *id.* 435 (1887), cases.

[1] Cooper *v.* Reynolds, *ante.*

[2] Thompson *v.* Whitman, 18 Wall. 461-68 (1873), cases.

[3] Rhode Island *v.* Massachusetts, *ante.*

[4] United States *v.* Arredondo, 6 Pet. *709 (1832). See also 2 How. 338; 7 Saw. 385; 17 F. R. 724; 25 Ala. 91; 71 *id.* 477; 11 Ark. 544; 26 *id.* 436; 10 Cal. 292; 43 *id.* 368; 44 *id.* 88; 16 Fla. 332; 54 Iowa, 79, 157; 17 La. An. 70; 27 *id.* 71; 57 Me. 154; 3 Metc., Mass., 462; 74 Mo. 423; 34 N. J. L. 422; 39 *id.* 262; 53 N. Y. 450; 72 *id.* 231; 36 Barb. 244; 13 Pa. 630; 32 *id.* 357; 42 Tex. 339; 43 *id.* 440; 44 Wis. 454.

[5] 106 U. S. 581, 582, 635.

[6] See *Exp.* Batesville, &c. R. Co., 39 Ark. 87 (1882).

[7] 2 Story, Const. § 1761; Piqua Bank *v.* Knoup, 6 Ohio St. 390 (1856); Auditor of State *v.* Atchison, &c. R. Co., 6 Kan. 505 (1870).

[8] Commonwealth *v.* O'Connell, 8 Gray, 465 (1857).

as arise ordinarily and properly in the progress of the first suit brought.[1]

The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise toward each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same place, they are independent and have no common superior. They exercise jurisdiction in different planes.[2]

Where a court, whether State or Federal, has legal custody of persons or property, the courts of the other jurisdiction will not arrest such persons or property. The possession of the officer is the possession of the court, and such action would invade the jurisdiction of the court.[3]

Where, in attachment proceedings in a State court, the sheriff is unable to make actual seizure because the property is in the possession of a United States marshal under an attachment from a Federal court, the creditor, though residing in the same State with the defendant, may, upon service of notice of his claim upon the marshal, intervene in the Federal court, and, upon showing a properly adjudicated claim, secure a right to share in the proceeds of the sale of the property.[4]

Limited or special jurisdiction. Jurisdiction which is confined to particular causes, as, those involving demands for money up to a certain sum. **General jurisdiction.** Extends to all cases comprised within a class or classes of causes, in particular to causes of a civil nature.[5]

Inferior jurisdiction is opposed to *superior* jurisdiction, *civil* to *criminal* jurisdiction, *equitable* and *statutory* to *common-law* jurisdiction.[6]

In chancery, *ordinary* jurisdiction is that wherein the common law is observed; *extraordinary*, that of equity and good conscience. See CHANCERY.

Where there is a lack of jurisdiction, a judgment is void; where there is a wrongful or defective exercise of the power, the judgment is voidable,[1] *q. v.*

Jurisdiction once acquired is effectual for all purposes, and exclusive.[2] But the court must proceed according to the established modes governing the class to which the case belongs, and must not transcend the law in the extent or character of its judgment.[3]

Jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is to be made to support the proceeding. Infinite confusion would ensue were the rule otherwise.[4]

The record of a court of special jurisdiction must show its jurisdiction: nothing is presumed in its favor; otherwise, as to a court of general jurisdiction.[5] See further APPARERE, De non, etc.

Jurisdiction is given by the law; consent can neither give nor take it away,[6] — except, perhaps, as to jurisdiction over the person.[7]

Where there is collusion to give jurisdiction, the court will dismiss the suit for want of jurisdiction.[8]

When a law conferring jurisdiction is repealed without a reservation as to pending cases, such cases fall with the law.[9]

See COURT; JUDGMENT; JUDICIAL, Power; JUDEX, 2, Boni, etc.; PROHIBITION, 1.

JURISPRUDENCE.[10] The science of law; the practical science of giving a wise interpretation to the laws and of making a just application of them to cases.[11] Whence jurisprudential.

Comparative jurisprudence. The study of different systems of laws, or the laws of different nations.

Equity jurisprudence. That portion of remedial justice which is administered in courts or equity.[12]

[1] Buck *v.* Colbath, 3 Wall. 345 (1865); Heidritter *v.* Elizabeth Oil Cloth Co., 112 U. S. 294 (1884), cases; Smith *v.* Bauer, 9 Col. 380 (1886).

[2] Covell *v.* Heyman, 111 U. S. 182 (1884), Matthews, J.; Ableman *v.* Booth, 21 How. 516 (1858).

[3] Senior *v.* Pierce, 31 F. R. 627 (1887), cases; Melvin *v.* Robinson, *ib.* 634 (1887), cases; Judd *v.* Bankers', &c. Tel. Co., *ib.* 183 (1887), cases.

[4] Gumbel *v.* Pitkin, 124 U. S. 131 (1888), cases, Matthews, J.

[5] See Grace *v.* American Central Ins. Co., 109 U. S. 283 (1883).

[6] As to conditional statutory jurisdiction, see 26 Am. Law Reg. 481–506 (1887), cases.

[1] Gray *v.* Bowles, 74 Mo. 423 (1881).

[2] French *v.* Hay, 22 Wall. 253 (1874), cases; Ober *v.* Gallagher, 93 U. S. 206 (1876), cases.

[3] Windsor *v.* McVeigh, 93 U. S. 282 (1876), cases; United States *v.* Walker, 109 *id.* 267 (1883).

[4] Cornett *v.* Williams, 20 Wall. 250 (1873), Swayne, J.

[5] See Galpin *v.* Page, 18 Wall. 365–66 (1873), cases; Mousseau's Will, 30 Minn. 205 (1883), cases; Dick *v.* Wilson, 10 Oreg. 490 (1883), cases; Wade *v.* Handcock, 76 Va. 625 (1882), cases.

[6] Home Ins. Co. *v.* Morse, 20 Wall. 451 (1874), cases; Santom *v.* Ballard, 133 Mass. 465 (1882).

[7] Grimmett *v.* Askew, 48 Ark. 156 (1886); 49 N. Y. 208.

[8] Williams *v.* Nottawa, 104 U. S. 209 (1882); Coffin *v.* Haggin, 13 Rep. 547 (1882): Act 3 March, 1875, § 5.

[9] Baltimore, &c. R. Co. *v.* Grant, 98 U. S. 401 (1878), cases; Sherman *v.* Grinnell, 123 *id.* 690 (1887).

[10] L. *jus*, right; *providens*, foreseeing.

[11] [Bouvier's Law Dict.

[12] [1 Story, Eq. § 25; Jackson *v.* Nimmo, 3 Lea, 669 (1879).

Medical jurisprudence. See MEDICINE, Medical, etc.

JURIST. One versed in the science of law.

Juristic; juristical. Pertaining to the science of law; concerning a jurist, or jurisprudence.

A "jurist," if anything more than a fine word for a lawyer, means a lawyer who is mainly eminent through his familiarity with the theoretic side of the law. Savigny and Austin, for instance, were jurists in this sense. But a judge who has a wide practical acquaintance with cases, and knows how to administer the law found in them, is more than a "jurist:" he is an excellent lawyer and judge.[1]

JUROR. See JURY.

JURY.[2] A body of persons sworn, or affirmed, to decide a matter of fact in controversy in a court of justice.

A body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society.[3] See PEER.

The persons are, individually, **jurors** or **jurymen.**[4]

The term usually imports a tribunal of *twelve* men presided over by a court hearing the allegations, evidence, and arguments of the parties; a common or petit jury,[5] *q. v.*

But it may import more or less than twelve, as when the reference is to a grand jury, a coroner's or a sheriff's jury.[6]

The common-law jury of twelve persons has seldom been allowed in courts of special, inferior, or limited jurisdiction, such as police courts, courts of justices of the peace, probate courts, courts of equity, or in reviewing courts.[7]

Grand jury. Twenty-four [twenty-three] freeholders returned by the sheriff to each session of the court of oyer and terminer and general jail delivery, to inquire, present, and do all other things commanded them.[8]

Having been first instructed in their duties by the judge, they withdraw to hear accusations by bills of indictment, whether there is sufficient cause to call upon the party to answer before the petit jury. They inquire for the body of the county; and find a bill to be "true" or "not true" by vote of at least twelve members.[1]

The institution serves to protect persons from being put to the trouble and expense of a trial upon groundless accusation; constitutes a security against vindicative prosecutions by the government, political partisans, or private enemies.[2]

The institution of the grand jury is of very ancient origin. For a long period its powers were not clearly defined; it seems at first to have both accused and tried public offenders. At the time of the settlement of this country, it was an accusing tribunal only, without whose action no person charged with a felony, except in certain special causes, could be put upon trial. In the struggles which arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name. Thus it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizens which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted and is continued from considerations similar to those which give it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from the government, or is prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in cases mentioned, to answer for any of the higher crimes, unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.[3]

While there is now no danger to the citizen from the oppressions of a monarch, or from any form of executive power, it remains true that the grand jury is as valuable as ever in securing individual citizens from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury.[4]

Objection to the qualification of grand jurors, or to the mode of summoning or impanelling them, must be

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[1] The Nation, No. 935, p. 456 (May 31, 1883).

[2] F. *jurée*, a body of sworn men: L. *jurare*, to bind by oath.

[3] Strauder *v.* West Virginia, 100 U. S. 308 (1879), Strong, J.

[4] Fife *v.* Commonwealth, 29 Pa. 439 (1857).

[5] See State *v.* Kemp, 34 Minn. 63–64 (1885); 57 Ill. 172; 16 Ind. 496; 70 Iowa, 51–52; 14 Minn. 439; 12 N. Y. 190; 2 Barb. 33; 17 Nev. 370; 4 Ohio St. 177; 2 Wis. 28; 57 id. 75; 2 Dall. 335.

[6] Fitchburg R. Co. *v.* Boston, &c. R. Co., 3 Cush. 85 (1849); Knight *v.* Campbell, 62 Barb. 33 (1872).

[7] State *v.* City of Topeka, 36 Kan. 86 (1886).

[8] 4 Bl. Com. 302.

[1] 4 Bl. Com. 302.

[2] 2 Story, Const. § 1785.

[3] Charge to Grand Jury, 2 Saw. 668–69 (1872), Field, J.; Hurtado *v.* California, 110 U. S. 555 (1884); *Exp.* Bain, 121 *id.* 10 (1887).

[4] *Exp.* Bain, 121 U. S. 12 (1887), Harlan, J., quoting Jones *v.* Robbins, 8 Gray, 329 (1857).

made by a motion to quash, or by a plea in abatement, before pleading in bar.[1]

A grand jury is a component part of the court, and is under its general supervision and control. Individual jurors may be punished for contempt consisting in willful misconduct or neglect of duty; but they are independent in their actions in determining questions of fact, and no investigation can ever be made as to how a juror voted, or what opinion he expressed on a matter before him.

Investigations before a grand jury must be made in accordance with the well-established rules of evidence, and it must hear the best legal proofs of which the case admits.

Whether a witness is an expert must be first determined by the court.

Evidence of confessions should not be admitted, except under the direction of the court, or, perhaps, unless the prosecuting officer makes the preliminary inquiries necessary to render such testimony admissible.

Since they are sworn "to inquire and a true presentment make," they may order the production of other evidence than that adduced by the prosecution, which they believe exists and is within reach.

A witness's testimony before a grand jury is not a confidential communication.

It is a high contempt of court for a person voluntarily to communicate with a grand jury with reference to a matter which may come before them.

The court is the only proper source from which a grand jury may obtain advice as to a question of law.

Courts sometimes permit the district attorney, or his assistant, to go before a grand jury, when requested by the foreman or when necessary for a proper administration of justice. These officers may then assist in examining witnesses; may advise in matters of procedure, according to well-settled practice; may read statutes upon which bills of indictment are founded; but they may not advise as to the sufficiency of evidence.[2]

While grand jurors are sworn to secrecy, the later doctrine is that, to prevent justice from being defeated, a member may testify what evidence was given before the body.[3]

Local statutes regulate the qualifications, summoning, organization, and duties of grand juries.[4]

Common, petit, or traverse jury. *Common jury.* Originally, a jury summoned to try matters of an ordinary nature.

Not for each separate cause, as at first, but consisting of one panel for every cause, of forty-eight to seventy-two jurors, twelve of whose names are drawn for the jury itself.[5]

Petit jury. The lesser jury, which passes finally upon the truth of the fact in dispute; a common jury of twelve men.

Traverse jury. The jury which passes upon the truth of the facts traversed or denied; a common or petit jury.

Mixed jury. A right to which every colored man is entitled is, that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of color.

This is a different thing from a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws.[1] See CITIZEN, Amendment, XIV.

Special or struck jury. Originally, drawn in causes of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality.[2]

The sheriff produced his freeholder's book, and an officer took indifferently forty-eight names. From these names each side *struck off* twelve, and the remaining twenty-four were returned upon the panel, from which a jury of twelve men were selected.[3]

Of rare occurrence. The method of selection is regulated by local law, and varies as to details in different jurisdictions. In some States the jury is granted as of course upon application; but generally it must appear that a fair trial cannot be otherwise had, or that the intricacy or importance of the case requires men specially qualified for the service.[4]

Trial by jury. A trial by a common-law jury, a body of twelve men.[4]

A trial by one's peers; secured, originally, by Magna Charta. The bulwark of the subject's liberties.[5]

In the time of Henry II, trial by twelve men generally superseded trial by an indefinite number of suitors of court, which was in common use in Saxon times.[6]

The very spirit of trial by jury is, that the experience, practical knowledge of affairs, and common sense of jurors may be appealed to, to mediate the inconsistencies of the evidence, and reconcile the extravagances of the opposing theories of the parties.[7]

"In courts at common law, where the value in controversy shall exceed twenty dollars, the right of trial

[1] United States v. Gale, 109 U. S. 65, 71 (1883), cases.

[2] United States v. Kilpatrick, 16 F. R. 765 (1883), Dick, J.

[3] State v. Grady, 12 Mo. Ap. 363 (1882), cases; 4 Crim. Law Mag. 171-87 (1883), cases; 21 Cent. Law J. 104-6 (1885), cases and statutes.

[4] See generally Thompson & M., Juries, Ch. XXVII-XXXIV; Proffatt, Jury Trials, §§ 41-61.

[5] [3 Bl. Com. 357.

[1] Virginia v. Rives, 100 U. S. 323 (1879).

[2] 3 Bl. Com. 357.

[3] See Thompson & M., Juries, §§ 12, 14, cases; Proffatt, Jury Trials, §§ 71-75, cases; Abb. N. Y. Dig., tit. Trial, §§ 196-206; 1 T. & H. Pr. (Pa.) § 636.

[4] People v. Justices, 74 N. Y. 407 (1878).

[5] 3 Bl. Com. 349; 4 *id.* 414. See also State v. Kemp, 34 Minn. 63-64 (1885).

[6] 12 Alb. Law J. 143. See generally 11 Am. Law. Rev. 24-50 (1876); 1 Kan. Law J. 100-3 (1885); *ib.* 357; 4 *id.* 161 (1886); 1 Steph. Hist. Cr. Law Eng. 252-72.

[7] Standard Oil Co. v. Van Etten, 107 U. S. 334 (1882), Matthews, J. See also Sioux City, &c. R. Co. v. Stout, 17 Wall. 664 (1873), Hunt, J.

by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." [1]

This relates to trials in the Federal courts; the States are left to regulate trials in their courts in their own way. The Constitution only secures trials in State courts according to the settled course of judicial proceedings. [2]

The right does not extend to cases of *equity* jurisdiction; as, in claims for damages for alleged infringement of letters-patent. [3]

An application for trial by a jury in a patent case by a defendant against whom an injunction is asked may be granted in the discretion of the court; but if the question can be determined more properly by a chancellor, the application should be refused. [4]

The constitutions of the several States provide that "trial by jury shall be as heretofore, and the right thereof remain inviolate."

The legislature may withhold trial by jury from new offenses created by statute and unknown to the common law, as in the case of the Sunday Law, and of numerous enactments in the nature of police regulations for preserving the peace; from new jurisdictions created by statute and clothed with no common-law powers, as, in Pennsylvania, in the case of the Justices' Hundred Dollar Law, and of the authorities that enforce the liability of counties for property destroyed by mobs; from proceedings which, though in common-law courts, are out of the course of the common law, as in motions for summary relief against judgments; and, in equity suits. Proceedings in orphans' courts, and many in quarter sessions, are other examples. Trial may be denied to municipal corporations. In these instances it is no invasion of the rights of the citizen to provide some other mode of trying contested facts, because "heretofore," that is, at the common law which antedated our constitutions, trial by jury did not exist in such cases. [5]

The meaning is that a jury trial is to be preserved in all cases in which it existed prior to the adoption of the constitution. The right is preserved, not extended; it remains "inviolate" — that is, not disturbed or limited, [6] as ample and complete as when the constitution was adopted. [1]

The provision is intended to secure a benefit or right to a party to a suit which he may avail himself of or waive at its election; and the legislature may make reasonable laws regulating the mode in which the right shall be enjoyed. [2]

The right "to a speedy public trial by an impartial jury of the county wherein the offense shall have been committed," is waived by the accused, when, upon his application, the place of trial is changed to another county. [3]

An accused person cannot waive the right unless waiver is expressly authorized. [4] See WAIVER.

See CONVICTION, Summary; DEFENSE, 2, Affidavit of.

Questions of law are to be determined by the court; questions of fact by the jury. In this regard the authority of each is absolute. [5]

The jury should take the law as laid down by the court, and give it full effect; but its application to the facts, and the facts themselves, it is for them to determine. [6] The court may not enter their distinctive province. These are the check and balance which give to trial by jury its value. [6]

Where the facts are undisputed, their effect is for the judgment of the court; where different minds may honestly draw different conclusions from the facts, as where care or negligence is to be inferred, the question is for the jury. [7]

What is said by the court as to the weight of evidence is advisory, in nowise intended to fetter the exercise of the juror's independent judgment. With this limitation, it is the right and duty of the court to aid them by recalling the testimony to their recollection, by collecting its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating the true points of inquiry, by resolving the evidence, however complicated, into its simpler elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends upon the discretion of the judge. Without this aid, chance, mistake, or caprice may determine the result. [6]

In *civil* cases, the jury are to find for the party in whose favor the evidence preponderates. In *criminal*

[1] Constitution, Amd. VII. Ratified, Dec. 15, 1791.

[2] Walker *v.* Sauvinet, 92 U. S. 92 (1875), cases, Waite, C. J.; Pearson *v.* Yewdall, 95 *id.* 296 (1877); Callan *v.* Wilson, 127 *id.* 547 (1888).

[3] Herdsman *v.* Lewis, 20 Blatch. 206 (1882); Rubber Co. *v.* Goodyear, 9 Wall. 788 (1869); Cawood Patent, 94 U. S. 695 (1876); Marsh *v.* Seymour, 97 *id.* 348 (1877); 2 Flip. 712; 13 Rep. 129; 68 Pa. 130; 73 *id.* 169.

[4] Keyes *v.* Pueblo Smelting, &c. Co., 31 F. R. 560 (1887).

[5] Rhines *v.* Clark, 51 Pa. 101 (1865), Woodward, C. J.; Haines *v.* Levin, *ib.* 414 (1865); Appeal of Borough of Dunmore, 52 *id.* 374 (1866); La Croix *v.* County Commissioners, 50 Conn. 327 (1882), cases.

[6] *Re* Rolfs, 30 Kan. 762 (1883). Brewer, J. Refers to Byers *v.* Commonwealth, 42 Pa. 94–96 (1862), Strong, J., as presenting a "clear and forcible discussion of the subject." See also Van Swartow *v.* Commonwealth, 94 Pa. 134 (1854), Black, C. J.; Callan *v.* Wilson, 127 U. S. 552–55 (1888), cases.

[1] State *v.* City of Topeka, 36 Kan. 76 (1886), Valentine, J.

[2] Foster *v.* Morse, 132 Mass. 355 (1882), cases.

[3] Bennett *v.* State, 57 Wis. 69 (1883); *ib.* 74–75, cases.

[4] Wartner *v.* State, 102 Ind. 52–53 (1884), cases. On abolishing trial by jury, see 20 Am. Law Reg. 661 (1881). The system of jury trial, 21 Am. Law Rev. 859–68 (1887), Hon. Samuel F. Miller.

[5] Nudd *v.* Burrows, 91 U. S. 439 (1875). As to questions of fact for the court, see 27 Cent. Law J. 4–8 (1888), cases.

[6] Hickman *v.* Jones, 9 Wall. 201–2 (1869), cases. Swayne, J.

[7] Sioux City, &c. R. Co. *v.* Stout, 17 Wall. 663 (1873). Hunt, J.; Mutual Life Ins. Co. *v.* Sayder, 98 U. S. 398 (1878).

trials, the accused is entitled to the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scales in his favor.[1] See further DOUBT, Reasonable.

The jury are no more the judges of *the law* in a criminal case, upon the plea of not guilty, than they are in a civil case, tried upon the general issue. In each case, their verdict, when general, is necessarily compounded of law and fact. In each, they determine the law and the fact. In each, they have the physical power to disregard the law, as laid down by the court. But they have not the moral right to decide the law according to their own notions or pleasure. On the contrary, the most sacred constitutional right of every person accused of a crime is that the jury should respond as to the facts and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as laid down. This is the only protection of the citizen. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be uncertain, from the different views juries might take of it; but, in case of error, there would be no remedy for the injured party; for the court would not have any right to review the law as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the other hand, if the court should err, in laying down the law, remedy may be had by a motion for a new trial or by a writ of error. Every person accused as a criminal has a right to be tried by the fixed law of the land.[2]

The jurors have the power to give a general verdict upon the general issue, which includes the question of law, as well as of fact; but when, by pleading, special verdict or demurrer to evidence, the law is separated from the fact, they have no right to decide the law, but must follow it as laid down by the court.[3]

The right of a trial by a jury in a criminal case is not more distinctly secured than it is in a civil case. The right exists only in respect to a disputed fact. Where the facts constituting guilt are undisputed, it is the duty of the court to direct a verdict of guilty.[4]

The jury judge of the law in criminal cases. Having the power, they have a right to give a verdict contrary to the instructions of the court upon the law. The court may present the considerations which should induce them to follow its instructions, but should not give a binding instruction which it would be powerless to enforce by granting a new trial if the instruction should be disregarded. This power is one of the most valuable securities guaranteed by the Bill of Rights. Judges may be partial and oppressive, from political or personal prejudice.[1]

By reason of the experience of the judge the jury will doubtless highly regard his opinion, and incline to adopt it rather than a contrary view presented by counsel; but his instructions are only advisory, the jury are not bound to follow them; and hence the defendant may present views and interpretations of the law differing from those stated by the court. The argument must of course be confined to the issue, and be presented in a respectful manner; and the court may restrict the time within reasonable bounds.[2]

It is not improper to instruct the jury that if they can say upon their oaths that they know the law better than the court itself, they have a right to do so; but that before saying this it is their duty to reflect whether from their study and experience they are better qualified to judge of the law than the court.[3]

The reasons for constituting the jury the "judges of the law and the fact" in criminal cases, seem to have been: 1. Having the power to pass upon the law by a general verdict, their right to do so necessarily followed. 2. Up to the time of the prosecutions in England for seditious utterances, the right, while admitted to exist, was seldom exercised, but the condition of affairs in the time of Judge Jeffreys caused a vigorous assertion of the right.[4]

In capital cases, the jurors are kept together until discharged; but pending a trial for a misdemeanor, they may be permitted by the court, without the knowledge of the defendant, to separate, without vitiating their verdict.[5]

Facts found by a jury may be revised by a motion for a new trial, or by a writ of error.

Jury box. The space set apart for a jury while engaged in a trial.

A revolving barrel is a "box," within the requirement of a statute that names of jurors, before being drawn, shall be placed in a box and shaken together.[6]

Jury commissioner. An officer who provides panels of jurors for the successive terms of a court.

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[1] Lilienthal's Tobacco *v.* United States, 97 U. S. 266 (1877), Clifford, J.

[2] United States *v.* Battiste, 2 Sumn. 243 (1835), Story, Judge.

[3] Stettinius *v.* United States, 5 Cranch, C. C. 573, 584–89 (1839), cases, Cranch, C. J. See also United States *v.* Wilson, Baldw. 108 (1830); State *v.* Croteau, 23 Vt. 14, 19–31 (1849), cases; Robinson *v.* State, 66 Ga. 518 (1881); Malone *v.* State, *ib.* 542–43 (1881).

[4] United States *v.* Anthony, 11 Blatch. 209–10 (1873), Hunt, J. *Contra*, United States *v.* Taylor, 3 McCrary, 300–5 (1882), cases, McCrary, J.

[1] Kane *v.* Commonwealth, 89 Pa. 525–27 (1879), Sharswood, C. J.

[2] State *v.* Verry, 36 Kan. 420 (1887), cases, Johnston, J.

[3] Spies *et al. v.* People, 122 Ill. 25 (1887), cases.

[4] See 2 Steph. Hist. Cr. Law Eng. 313, *et seq.*

"The jurors were necessarily the judges in all cases of life, limb, crime, and disherison of the heir *in capite*. The king could not decide, for he would then have been both prosecutor and judge, neither could his justices, for they represent him." Bracton, 119; 2 Litt. § 368; 3 Coke, Litt. 288*a*.

See generally 3 Cr. Law Mag. 484 (1883), Wade, C. J.; 4 *id.* 15–27 (1882); 17 Am. Law Rev. 398–410 (1883); 26 Alb. Law J. 404 (1882).

[5] United States *v.* Bennett, 16 Blatch. 374 (1879), cases; Commonwealth *v.* Walsh, 132 Mass. 10 (1882), cases. On improper interference with juries, see 26 Am. Law Reg. 666–73 (1887), cases.

[6] Commonwealth *v.* Bacon, 135 Mass. 525 (1883).

Jury list. A paper containing the names, occupations, and place of residence of a panel of jurors.

Jury process. The writ by which a jury is summoned.

Jury wheel. A revolving receptacle in which are placed, at designated intervals, the names of persons qualified for service as jurors, and from which panels are drawn.

See further ARRAY; CALL, 3; CHALLENGE, 4; CHARGE, 2 (2, c); CONTEMPT, 1; COUNTRY, 2; ELISOR; EMBRACERY; FOREMAN; IMPARTIAL; INDIFFERENT; INDICTMENT; LABOR, 2; MEDIATAS LINGUAE; OPINION, 2; PAPE; PANEL; PRIVILEGE, 2; PROCESS, 1, Due; PUNISHED, Twice; QUALIFY, 2; RIGHT, 2, Civil Right's Acts; STAND ASIDE; TALES; TRIOR; VAGRANT; VENIRE; VERDICT; VICINAGE; VIEW; WAIVER; WITHDRAWING.

JUS. L. Right; law, in the abstract; justice; jurisprudence. Plural, *jura*. Other forms are *jure, juris*. See below.

Lex is law in the concrete sense. See EQUITY.

Alieni juris. See *Sui juris*.

Apex juris. A subtlety of the law; a legal nicety. A doctrine carried to an extreme of refinement.

Apices juris non sunt jura. Subtleties of the law are not (do not define) rights — law or equity.[1]

Jus accrescendi. Right of survivorship. See SURVIVE, 2.

Jus ad rem. Right to a thing. **Jus in re.** Right in a thing. Denote, the first, a right without possession — an inchoate right, an incomplete title; the second, a right with possession — a perfected title.

A lien with possession is a *jus in re;* a lien resting in a contract, a *jus ad rem*.

In civil law, a *jus ad rem* obtains mediately and from relation to a particular person; a *jus in re*, immediately and absolutely, and is the same as against all persons.[2] See RES.

Jus dare. To make the law. **Jus dicere.** To say what the law is; to apply the law.

Jus dicere, non dare. To declare, not to make, the law. The duty of a judge is to apply the law as made, not to legislate.

The courts administer the law as they find it; they are not to make or modify it. Hence, considerations as to expediency are to be addressed to the law-making body.[3] See HARDSHIP.

Jus dispondendi. The right to part with a thing, — to give property away as the owner pleases. See WILL, 2.

Jus et norma. See USUS, Norma, etc.

Jus fiduciarum. See USE, 2.

Jus gentium. The law of all nations; the law which natural reason establishes among all races of men; also, international law.[1]

Jus mariti. The right of the husband — in the wife's movable property. See *Jure uxoris*.

Jus personarum. Rights of persons. **Jus rerum.** Right of things. See *Jura*.

Jus possessionis. Right of possession.

Jus postlimini. The right of reprisal, — postliminy, *q. v.*

Jus precarium. See USE, 3, p. 1072.

Jus privatum. Private right: law regulating the affairs of individuals. *Juris privati.* Of private right. **Jus publicum.** Public right: law regulating affairs of the state. *Juris publici.* Of public right.[2]

When private property is "affected with a public interest, it ceases to be *juris privati*" (Hale, Ld. C. J.). Property becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. In such cases the owner in effect grants to the public an interest in the use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.[3]

Jus proprietatis. Right of property: proprietorship.

Jus representationis. The right of representation, or of being represented, by another.

Jus scriptum. Written law; statute law. Compare LEX, Scripta.

Jus tertii. Right in a third person.

Thus, a tenant may plead a new attornment; a bailee may show that his bailor has parted with his right.[4]

Jura personarum. Rights of persons. **Jura rerum.** Rights in things. The rights which concern or are annexed to the persons of men; and such rights as a man may acquire over external objects.[5]

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[1] See Broom, Max. 188; 2 Story, 143; 5 Conn. 334.

[2] See 2 Bouv. 30; 2 Bl. Com. 312; 20 Wall. 163.

[3] 1 Cranch, 177; 21 Wall. 178; 100 U. S. 288, 406, 738; 108 *id.* 515; 50 Conn. 189; 1 Bl. Com. 79.

[1] See 1 Bl. Com. 43.

[2] 2 Bl. Com. 9; 37 Wis. 442, 445.

[3] Munn *v.* Illinois, 94 U. S. 126, 130 (1876), cases. Waite, C. J.

[4] 93 U. S. 580; 2 Pars. Contr. 204.

[5] 1 Bl. Com. 122; 2 *id.* 1.

Jura summa imperii. Supreme rights of dominion.

Jure alluvionis. By right of alluvion. See ALLUVIO.

Jure divino. By Divine right or law.

Jure humano. By human law.

Jure naturæ. By the law of nature.

Jure uxoris. The right of the wife. See *Jus mariti.*

Juris et de jure. Of right and by right — by law.

Applied to an irrebutable presumption; as, that a man at Rome cannot be at London the same day. Opposed, a presumption *juris.*[1] See PRESUMPTION.

Juris privati. See *Jus privatum.*

Strictum jus. Severe right or law; law in its rigor as opposed to equity. *Stricti juris.* Of strict right. *Strictissimi juris.* Of the strictest right. Subject to the strictest construction, the most rigorous application, of law.

Applied to a license or a grant highly advantageous to the receiver; to maritime liens (*q. v.*) which are not extended by construction, analogy, or inference;[2] to a claim against a surety (*q. v.*), whose obligations are never increased by presumptions and equities.[3]

Sui juris. Of one's own right; of capacity to act for one's self. Opposed, **non sui juris:** not of one's own right; and, **alieni juris:** of the right of another — under another's control.

What one *sui juris* may himself do, he may delegate to another to do for him.[4]

Sui juris cannot be accurately used to denote the possession of any degree of physical or mental power.[5]

Roman citizens were either *sui juris* (men of their own right), acting for themselves independently of family control, or *alieni juris* (subject to another's right), subject to the control of one who stood as the head of the family. Both enjoyed alike the rights of freemen.[6]

JUST. 1. Probable; reasonable: as, just cause to make an arrest, to suspect one of crime. See CAUSE, Probable.

2. Fair, adequate, equivalent: as, just compensation, *q. v.*

In the assessment of property for general taxation, a "just" or equal valuation is more important than an absolutely "true" one; therefore it is no answer to a complaint of unequal valuation, that the property is assessed at its "true cash value."[1]

JUSTICE.[2] 1. Rendering to every man his due.

The dictate of right according to the common consent of mankind generally or of the portion associated in one government or governed by the same principles and morals.[3]

"In a judicial sense, exact conformity to some obligatory law." The doing of justice is, then, the performance toward another of whatever is due him in virtue of a perfect and rigorous right, the execution of which he may demand by forcible means.[4]

In its nature justice is preventive, and remedial.

Every man for an injury done him may have right and justice, freely without sale, fully without denial, and speedily with delay.[5]

A refusal or neglect of justice is remedied by a *procedendo*, a *mandamus*, or a prohibition.[6]

Offenses against justice are: embezzling or vacating records; personating others in court; obstructing the execution of process; escape; breach of prison; rescue; receiving stolen goods; common barratry; maintenance; champerty; compounding prosecutions; conspiracy; perjury; bribery; embracery; false verdict; negligence of public officers; oppression by magistrates; extortion by officers,[7] *qq. v.*

See CONSCIENCE; EQUITY; FUGITIVE; TRIAL, Speedy.

2. A justice of the peace: an inferior judicial officer. See PEACE, Justice of.

3. Is interchanged with judge.

"Circuit justice" and "justice of the circuit" designate the justice of the Supreme Court allotted to a circuit; and "judge," applied generally to any circuit, will also include such justice.[8]

The members of most supreme courts are styled "justices" — chief justice, associate justice, etc. See JUDGE.

JUSTICIAR. See CHANCELLOR.

JUSTIFIABLE. See BATTERY; HOMICIDE.

JUSTIFICATION. Making an act a matter of right.

1. Allegation of a reason why defendant might lawfully do the act complained of.

In libel, common as a plea on the ground of privilege, or of truth and public advantage. The effect

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[1] 1 Whart. Ev. §§ 1232–37; 1 Greenl. Ev. § 15 (1).

[2] Vandewater *v.* Mills, 19 How. 89 (1856).

[3] Leggett *v.* Humphreys, 21 How. 75 (1858); Smith *v.* United States, 2 Wall. 235 (1864).

[4] Story, Agency, § 11.

[5] 38 N. Y. 455; 47 *id.* 317; 63 *id.* 104; 15 Alb. L. J. 327.

[6] Hadley, Rom. Law, 107, 119.

[1] Dundee Mortgage Trust Investment Co. *v.* Charlton, 32 F. R. 194 (1887).

[2] L. *justitia: justus*, rightful.

[3] [Duncan *v.* Magette, 25 Tex. 253 (1860), Roberts, J.

[4] Borden *v.* State, 11 Ark. 528 (1851), Scott, J., quoting Burlamaqui.

[5] [1 Bl. Com. 141: Magna Charta, c. 29.

[6] 3 Bl. Com. 109.

[7] 4 Bl. Com. 127.

[8] R. S. § 605.

then is that the plaintiff never had any right of action, because the act charged was lawful.[1] See SLANDER.

2. Proof that bail is sufficient.

Made by oath of the person proposed, that he possesses the qualifications required by law.

K.

K. As an abbreviation, commonly denotes king. Compare Q.

K. B. King's bench, *q. v.*

K. C. King's council, or counsel, *qq. v.*

KEEP. Varies in meaning with the connections in which it is found — the context or circumstances.

Keep a gaming table. Implies a use not merely temporary.[2]

Keep a nuisance. See MAINTAIN.

Keep a woman. In popular acceptation, imports an illicit relation.[3]

Keep an inn. Keep a house for the entertainment of travelers and others, for pay.[4]

Keep down interest. Pay interest periodically as it becomes due.[5]

Keep house. May be said of a trader who secretes himself in his house to avoid his creditors.[6]

Keep in repair. See REPAIR.

Keep liquor. Keeping spirituous liquor for sale is having possession and control of it with intent and readiness to make a sale or sales.

This may be a long-continued practice or it may be instantaneous.[7]

Keep open. Implies a readiness to carry on the usual business in a store, saloon, etc.[8]

To allow general access, for purposes of traffic, although the outer entrance is closed.[9]

Keep the peace. To avoid disturbing the peace; to prevent others from breaking the peace.

Keeper. 1. A person placed in charge of attached personalty.[10]

2. One who assists in superintending a gaming-house.[1] See DISORDERLY HOUSE.

3. One who harbors a dog upon his premises is responsible, as keeper of the animal, for injuries done by him.[2]

4. Owner, proprietor. See INN; LIVERY-STABLE; SALOON.

Keeper of the king's conscience. The lord chancellor — formerly an ecclesiastic.

Keeper of the seal. See SEAL, 1.

KENO. See GAME, 2.

KENT, JAMES.

Was born in Putnam county, New York, July 31, 1763, and died December 12, 1847.

His grandfather was a clergyman, his father a lawyer; and both were graduates of Yale college.

He entered Yale in 1777, and was graduated with distinction in 1781. In July, 1779, the students being dispersed by the invasion of New Haven by the British troops, he withdrew to a small town, where he chanced to read a copy of Blackstone's Commentaries, the perusal influencing him in deciding to study law.

He was admitted to the bar in 1785, and began the practice at Poughkeepsie, where he had pursued his studies.

In 1790, and in 1792, he was elected to the legislature from Duchess county. He was an active Federalist, and had the friendship of Jay and Hamilton.

In 1793, he removed to New York city, and in the following year began to deliver lectures in the law department of Columbia college. The attendance upon the course for 1795 did not encourage him to deliver another course. The first three lectures were afterward published, but the sale of copies did not repay the expense of publication.

In 1796, he was appointed one of the two masters in chancery in New York city, and was also re-elected to the legislature; and the next year he was made recorder of the city.

In 1798, he was appointed a judge of the supreme court, in which capacity he continued sixteen years, during ten of which he was chief justice. At that time there were neither reports nor precedents of the court; the judges pronounced their opinions orally and at very irregular intervals; the law itself was embryonic and unsettled. Kent decided cases without delay, and, in cases of importance, delivered written opinions. The most of these opinions have been preserved in the three volumes of Johnson's Cases (1779–1803), the fourteen volumes of Johnson's Reports (1806–1817), and the seven volumes of Johnson's Chancery Reports (1814–1823). The large number of *per curiam* opinions in eighth Johnson, all of one term, are by him, although not so indicated. "English authorities did not stand high in those feverish times, and this led me," he wrote, "to bear down opposition, or to shame it, by

[1] Steph. Pl. 234; 3 Bl. Com. 306.
[2] United States *v.* Smith, 4 Cranch, C. C. 660–63 (1835).
[3] Downing *v.* Wilson, 36 Ala. 719 (1860).
[4] [State *v.* Stone, 6 Vt. 298 (1834).
[5] Regina *v.* Hutchinson, 32 E. C. L. *211 (1854).
[6] Cumming *v.* Baily, 6 Bing. *370 (1830).
[7] State *v.* Haney, 58 N. H. 379 (1878).
[8] Lynch *v.* People, 16 Mich. 477 (1868).
[9] Commonwealth *v.* Harrison, 11 Gray, 308 (1858).
[10] See Cutter *v.* Howe, 122 Mass. 543 (1877).

[1] Stevens *v.* People, 67 Ill. 590 (1873).
[2] Barrett *v.* Malden, &c. R. Co., 3 Allen, 101 (1861); Commonwealth *v.* Palmer, 134 Mass. 537 (1883); Cummings *v.* Riley, 52 N. H. 369 (1872); Grant *v.* Ricker, 74 Me. 488 (1883).

exhausting research and overwhelming authority. Our jurisprudence was probably on the whole improved by it. . . The judges were Republicans, kindly disposed to everything French; and this enabled me, without exciting alarm or jealousy, to make free use of such [French] authorities, and thereby enrich our commercial law."

From 1814 to 1823, he presided over the court of chancery in the State of New York. The seven volumes of Johnson's Chancery Reports contain his decisions for that period, and present an extended and learned exposition of equity jurisprudence. "For the nine years I was in that office," he further wrote, "there was not a single decision or *dictum* of either of my predecessors — Livingston, and Lansing, 1777 to 1814 — cited or even suggested to me. I took the court as if it were an institution never before known in the United States. I had nothing to guide me, and was left at liberty to assume all such English chancery practice and jurisdiction as I thought applicable under our constitution. . . I was only checked by the senate as a court of errors."

He left no aspect of a case unexamined and undecided. His *dicta* have furnished the basis of countless adjudications.

In 1823, being in his sixty-first year, and, under the constitution, no longer qualified for judicial office, he resumed residence in New York city, and was re-elected to the chair in Columbia law school which had been vacant since he left it in 1795. Here he delivered the lectures which constituted the substance of his "Commentaries on American Law," as first published. "Having got heartily tired of lecturing, I abandoned it, and it was my son that pressed me to prepare a volume of lectures for the press. I had no idea of publishing them when I delivered them. I wrote a new volume and published it. This led me to remodel and enlarge, and now the third volume will be out in a few days; and I am obliged to write a fourth to complete my plan."

The first volume of the Commentaries was published in 1826, the second in 1827, the third in 1829, and the fourth in 1830. Up to the time of his death, in 1847, he had revised five other editions. His son Judge William Kent superintended the preparation of the seventh edition in 1852, the eighth in 1854, the ninth in 1858, and the tenth in 1860. The eleventh edition was prepared by Judge George F. Comstock, in 1866, the twelfth by Oliver Wendell Holmes, Jr., in 1873, and the thirteenth by C. M. Barnes, in 1884.

Of part of Kent's judicial labors Story said that "to unfold the doctrines of chancery in our country and to settle them upon immovable foundations, it required such a man with such a mind, at once liberal, comprehensive, exact, and methodical; always reverencing authorities and bound by decisions; true to the spirit yet more true to the letter of the law; proving principles with a severe and scrupulous logic, yet blending with them the most persuasive equity." Story also wrote that the Commentaries were new proof of the author's accurate learning, extensive research, and unwearied diligence.[1]

[1] See autobiographical letter of 1828, first published in 1873, in 1 South. Law Rev. 382; re-published in 6 Alb. Law J. 40. See also 13 Alb. Law J. 206-10 (1876); American Cyclopaedia.

KEROSENE. See Oil.

KEY. See Donatio, Mortis, etc.; House.

KIDNAPING.[1] The forcible abduction or stealing away of a man, woman, or child from his or her own country, and sending or taking him or her into another country.[2]

The equivalent of abduction, *q. v.*

Bringing into the United States any person inveigled or kidnaped in any other country with intent to hold such person to involuntary servitude (*q. v.*) is a felony, punishable with as much as five years imprisonment and five thousand dollars fine.[3]

Physical force is not necessary. The crime is usually committed by threats. It is sufficient to show a mind operated upon by falsely exciting the fears, by threats, or other undue influence, amounting substantially to a coercion of the will, as a substitute for violence. The condition of the person kidnaped, the age, education, condition of mind, and other circumstances, are to be considered.[4] See Extradition.

KILL. See Defense, 1; Homicide; Wanton.

KIN; KINDRED. Relationship by blood; persons legitimately related by blood.[5]

Next of kin. Nearest of blood relatives.

"Next of kin," "nearest of kin," "nearest of kindred," and "nearest blood relatives" primarily indicate the nearest degree of consanguinity, in which sense also they are most frequently used.[6]

Does not include a husband or wife, unless plainly so intended.[7]

Nor does it ordinarily include a widow; but it may include such one, as, in a will.[8]

Refers to the relatives of an intestate. In general, no one comes within the term who is not included in the provisions of the statutes of distribution.[9]

See Consanguinity; Descent; Heir; Relation, 3; Widow.

KIND. Originally, race, kin; now, genus, generic class.

[1] Orig., to steal a child: *kid*, slang for child; *nap*, to nab. Formerly spelled kidnapping.

[2] [4 Bl. Com. 219.

[3] Act 23 June, 1874: 1 Sup. R. S. 103.

[4] See Moody *v.* People, 20 Ill. 318-19 (1858); State *v.* Rollins, 8 N. H. 565-67 (1837); Click *v.* State, 3 Tex. 283 (1848); 2 Bish. Cr L. §§ 750-56.

[5] McCord *v.* Smith, 1 Black, 470 (1861); 62 Ga. 145; 11 Cush. 25; 72 N. Y. 315; 16 Wis. 635.

[6] Swasey *v.* Jaques, 144 Mass. 138, 137 (1887), cases, Field, J.

[7] Haraden *v.* Larrabee, 113 Mass. 431 (1873), cases; Wetter *v.* Walker, 62 Ga. 145 (1878).

[8] Keteltas *v.* Keteltas, 72 N. Y. 315 (1878), cases.

[9] Steel *v.* Kurtz, 28 Ohio St. 196 (1876). See also 1 Bradf. 495; 28 Md. 412; 67 N. Y. 339; 34 Hun, 15; 39 Barb. 28; 34 *id.* 410; 43 *id.* 162; 63 N. C. 242; 17 Ohio St. 367; 4 R. I. 4; 62 Wis. 135.

In kind. A payment of money, the delivery or deposit of an object, as of rent, or services rendered, are made or rendered "in kind," when of a thing or services which correspond in class or general nature to that intended. Opposed, *in specie:* in the identical state or condition, in exact terms. See DEPOSIT, 2, General. Compare GENUS.

KING; QUEEN. 1. The person in whom is invested the supreme executive power of the government of Great Britain.

2. Sovereign power; government; commonwealth; state.

The crown is hereditary, in the feudal path for succession to landed estates as marked out by the common law; but this does not imply an indefeasible right. Therefore, in his political capacity, the king never dies.[1]

His duty is to govern according to law; disobedience to his command is a high contempt or a misprision.[2]

As the fountain of justice, he is always ubiquitous — always present in his courts; hence he cannot be non-suit, and does not appear by attorney.[3]

He is the steward of the public, to dispense justice to whomsoever it is due.[4]

In foreign affairs he represents the nation: sends and receives ambassadors; makes treaties; proclaims war, and peace; issues reprisals, grants, safe-conducts. In domestic affairs he is part of the supreme legislative power: may negative a new law, and is bound by none unless specially named; is the general of the kingdom — raises armies, defends the kingdom; confines subjects within the realm, recalls them from abroad; is the general conservator of the peace — erects courts, prosecutes offenders, pardons crimes, issues proclamations; is the fountain of office and privilege; is the arbiter of domestic commerce — erects marts, regulates weights and measures and the coinage of money; and is the supreme head of the church — convenes and dissolves synods, nominates bishops, and receives appeals.

His revenue is ordinary: ecclesiastical and temporal — from demesne lands of the crown, from the courts of justice, royal fish, wrecks, jetsam, flotsam, ligan, royal mines, treasure-trove, waifs, estrays, forfeitures for offenses and for deodands; from escheats, and from the custody of lunatics; and extraordinary: aids, subsidies granted by the Commons — now a tax, charged with the civil list, and with which the expenses of the civil government are defrayed.[5]

In the king there can be no negligence; no delay bars his right.[6] See TEMPUS, Nullum, etc.

"The king can do no wrong." This means either that whatever is exceptional in the conduct of public affairs, is not to be imputed to him; or, that the prerogative extends not to an injury: in his political capacity the king is absolute perfection.[1]

The maxim has no place in our systems of constitutional law. The Constitution admits that heads of departments may do wrong, and provides for their impeachment.[2]

A wrong attempted in the name of a State is imputable to its government.[3]

Statutes of parliament are generally cited by the name and the year of the sovereign in whose reign they were passed. In the subjoined table the Roman numerals indicate the year of accession:

1. William I, 1066.	20. Henry VIII, 1509.
2. William II, 1087.	21. Edward VI, 1547.
3. Henry I, 1100.	22. Mary, 1553.[4]
4. Stephen, 1135.	23. Elizabeth, 1559.
5. Henry II, 1154.	24. James I, 1603.
6. Richard I, 1189.	25. Charles I, 1625.
7. John, 1199.	26. The Commonwealth, 1649.
8. Henry III, 1216.	27. Charles II, 1649.[5]
9. Edward I, 1273.	28. James II, 1685.
10. Edward II, 1307.	29. William and Mary, 1689.
11. Edward III, 1327.	30. William III, 1695.[6]
12. Richard II, 1377.	31. Anne, 1702.
13. Henry IV, 1399.	32. George I, 1714.
14. Henry V, 1413.	33. George II, 1727.
15. Henry VI, 1422.	34. George III, 1760.
16. Edward IV, 1461.	35. George IV, 1820.
17. Edward V, 1483.	36. William IV, 1830.
18. Richard III, 1483.	37. Victoria, June 20, 1837.
19. Henry VII, 1485.	

See BENCH; COUNCIL; COUNSEL; COURT, 1; CROWN; FEUD; GOVERNMENT; PARLIAMENT; PATENT, 1; PATRIA; PEACE, 1; PREROGATIVE; TENURE, 1; TREASON; UBIQUITY, 1.

KISS THE BOOK. Placing the Bible to the lips in attestation of the obligation of an oath just administered. See further OATH.

KLEPTOMANIA. See INSANITY.

KNIGHT. See FEUD.

KNOCK DOWN. See AUCTION; BID OFF.

KNOT. See MILE.

KNOW ALL MEN, etc. See PRESENTS, 1.

KNOWLEDGE. 1. A being aware of: information, cognizance; notice.

Absolute knowledge can be had of few things.[7]

[1] 1 Bl. Com. 191, 193, 196.
[2] 1 Bl. Com. 233; 4 *id.* 122.
[3] 1 Bl. Com. 270; 3 *id.* 94.
[4] 1 Bl. Com. 266.
[5] 1 Bl. Com. Ch. VII, VIII.
[6] 1 Bl. Com. 247.

[1] 1 Bl. Com. 246; 2 *id.* 243; 3 *id.* 254; 4 *id.* 32.
[2] Langford *v.* United States, 101 U. S. 343 (1879).
[3] Virginia Coupon Cases, 114 U. S. 290 (1885).
[4] In 1554, married Philip of Spain; hence, Philip and Mary, 1554-58.
[5] Ascended the throne in 1660; his regnal years are counted from 1649 — when Charles I died.
1-4, Normans; 5-12, Plantagenets; 13-15, House of Lancaster; 16-18, House of York; 19-23, House of Tudor; 24-25, 27-31, House of Stuart; 32-37, House of Hanover.
[6] Mary died in 1694.
[7] Story *v.* Buffum, 8 Allen, 38 (1864).

Knowledge and belief. Nothing more than firm belief. Belief applies to the impression on the memory. The difference is in degree.[1] See further BELIEF.

Personal knowledge. Actual knowledge of the truth or falsity of a matter, not derived from another person.[2]

An affidavit filed in an application for a change of venue, alleging that the defendant had not theretofore "full knowledge" of a particular fact, was held to be too indefinite, as an averment. "Full knowledge might never come to him; but he had knowledge, and, for aught that appears, it might have been sufficient to satisfy his mind."[3]

Knowledge is imputed from a duty to exercise ordinary care. Inquiry is a moral duty where the circumstances are such that a person of ordinary prudence would refuse to act.[4]

One who has reason to believe that a fact exists knows that it exists.[5]

Where there is enough to put one concerned upon inquiry, the means of knowledge and knowledge itself are, in legal effect, the same thing.[6]

When a party is about to perform an act which he has reason to believe may affect the rights of third persons, an inquiry as to the facts is a moral duty, and diligence an act of justice. Whatever fairly puts a party upon inquiry in such case is sufficient notice in equity, where the means of knowledge are at hand; and, if he omits to inquire and proceeds to act, he does so at his peril, as he is then chargeable with all the facts which by a proper inquiry he might have ascertained.[7]

Knowledge of facts which will enable a party to take effectual action is implied in such terms as "acquiescence," "estoppel," "waiver,"[8] *qq. v.*

Equal knowledge on both sides makes contracting parties equal.

Information in the agent is information in the principal;[9] but not so, if professional confidence would be betrayed, as, between an attorney and his client.[1] See further AGENT.

Knowingly. Imports that an accused person knew what he was about to do, and with such knowledge proceeded to commit the offense charged.[2]

Known; unknown. In the laws of taxation and seizures of property, apply to owners whose residence is, and is not, known. See NOTICE, 1.

See FRAUD; GUILTY; IGNORANCE; IGNORE; INFORMATION, 1; INNOCENCE; INQUIRY; INTENT; PERMIT; REPRESENTATION, 1; RESCISSION; WILL, 1; WITTINGLY. Compare NOSCITUR; SCIRE.

2. Sexual bodily connection: carnal knowledge.[3]

"Carnally knew" is the technical phrase used in charging rape, *q. v.*

KU KLUX. See *United States* v. *Harris*, CONSPIRACY.

L.

L. An abbreviation, chiefly of large, Latin, law, leading, lord:

L. C. Leading case; lord chancellor.

L. F. Law French; *levari facias.*

L. J. Law Journal; law judge.

L. JJ. Law judges.

L. L. Law, late, or low Latin, *q. v.*

L. R. Law reports.

L. S. *Locus sigilli*, place of the seal, *q. v.*

LL. Laws.

LL. B. Bachelor of laws. *LL. D.* Doctor of laws. *LL. M.* Master of laws. See DEGREE, 3.

LABEL. See BOOK, 1; COPYRIGHT; TRADE-MARK.

LABOR. 1, *n.* Manual exertion of a toilsome nature.[4]

This is the meaning in statutes, unless plainly used in another sense. Toil, or that which does or may produce weariness, and not mere business, is the idea conveyed by the word as ordinarily employed in Sunday laws.[4]

Technically, embraces all sorts of services, whether physical or mental, or whether the

[1] Hatch v. Carpenter, 9 Gray, 274 (1857). See Harrison v. Beard, 30 Kan. 532 (1883).

[2] See West v. Home Ins. Co., 18 F. R. 622 (1883).

[3] McCann v. People, 88 Ill. 103 (1878). Compare White v. Murtland, 71 *id.* 259 (1874); Roberts v. People, 9 Col. 463 (1886).

[4] Lawrence v. Dana, 4 Cliff. 68-69 (1869), cases.

[5] Shaw v. North Pennsylvania R. Co., 101 U. S. 566 (1879).

[6] Jones v. Guaranty, &c. Co., 101 U. S. 633 (1879), Swayne, J.; Hoyt v. Sprague, 103 *id.* 637 (1880); Goodman v. Simonds, 20 How. 367 (1857).

[7] Angle v. N. W. Mutual Life Ins. Co., 92 U. S. 342 (1875), cases, Clifford, J. See also Commissioners of Leavenworth Co. v. Chicago, &c. R. Co., 18 F. R. 210 (1883); Martin v. Smith, 1 Dill. 96 (1870), cases; Filmore v. Reithman, 6 Col. 129 (1881), cases; Effingar v. Hall, 81 Va. 106 (1885), cases.

[8] Pence v. Langdon, 99 U. S. 581 (1878), Swayne, J.

[9] Smith v. Ayer, 101 U. S. 327 (1879); Rogers v. Palmer, 102 *id.* 263 (1880).

[1] The Distilled Spirits, 11 Wall. 366-67 (1870), cases. As to presumptions of knowledge, in general, see 18 Alb. Law J. 7-9 (1883), cases.

[2] United States v. Claypool, 14 F. R. 128 (1882); Gregory v. United States, 17 Blatch. 330 (1879). See generally 2 Steph. Hist. Cr. Law Eng. 114-18.

[3] Commonwealth v. Squires, 97 Mass. 61 (1867), cases.

[4] Bloom v. Richards, 2 Ohio St. 401 (1853), Thurman, J.; More v. Clymer, 12 Mo. Ap. 15-16 (1882); Richmond v. Moore, 107 Ill. 427-28 (1883).

main ingredient is manual toil or professional or other skill; but in the narrower and popular signification, is restricted to physical toil.[1]

In its most extended sense, includes every possible human exertion, mental or physical.[2]

Common labor. Ordinary manual labor, as distinguished from intellectual labor.

In the Sunday law of Ohio, embraces "trading, bartering, selling, or buying any goods, wares, or merchandise."[3]

Gaming is not an act of "common labor" or of one's usual vocation.[4]

Hard labor. State's prison convicts often are sentenced to perform "hard labor." This imports nothing more than ordinary industry at some mechanical trade.[5]

Imprisonment at hard labor may be changed to mere imprisonment, where an act provides for imprisonment only.[6]

Where hard labor is prescribed as part of the punishment it must be included in the sentence; but where mere imprisonment is required, a Federal court is authorized, in its discretion, to order its sentence to be executed at a place where, as part of the discipline, hard labor is required.[7]

When the use of the word "hard" may be treated as surplusage, the sentence will still stand.[8]

Hard labor was first introduced into English prisons in 1706. See further IMPRISONMENT; INFAMY.

Laborer. One who labors in a toilsome occupation.[9]

One who gains a livelihood by manual toil; one who depends on hand work, not on head work, for a living.[10]

He is a species of servant, hired by the day or week, and not part of the family of the employer.[11]

In statutes giving laborers a lien or priority, or a special remedy, "laborer" means a person engaged in manual occupation, rather than one engaged in a learned profession.[12]

Within the meaning of lien laws "labor" has been held to include the services of an architect;[13] but not of one who superintends the erection of a building;[1] nor of a civil or consulting engineer;[2] nor of the foreman of a mine;[3] nor of an overseer of a plantation;[4] nor of a teamster;[5] nor of a time-keeper and superintendent;[6] nor of a cook in a hotel.[7]

Bodily labor bestowed upon a subject which before lay in common to all men, gives the most reasonable title to an exclusive property therein.[8]

Labor is property. As such it merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies, to a large extent, at the foundation of most forms of property, and of all solid individual and national prosperity.[9]

The act of Congress of February 26, 1885 (23 St. L. 333), makes it unlawful for any person to assist or encourage the importation or migration of *foreigners* under contract to perform labor or service of any kind, made previous to the importation. The penalty is a forfeiture of one thousand dollars for every laborer brought into the country; and the master of any vessel who knowingly brings in such emigrant laborer shall be guilty of a misdemeanor, pay a fine of not more than five hundred dollars, and be imprisoned for a term not exceeding six months. The act excepts foreigners engaged as private secretaries, servants or domestics of foreigners, skilled workmen performing labor in a new industry, professional actors, artists, lecturers, singers, domestic servants, and relatives and friends assisted to come here for settlement.

That act was amended by the act of February 23, 1887 (24 St. L. 414), empowering the secretary of the treasury to execute the original act, and, for that purpose, to make contracts with State officers — to take charge of immigration, to examine ships as to the condition of passengers, to report to the collector of the port any persons within the prohibition of the act, and that such persons shall not be permitted to land, but shall be sent back to the country whence they came, at the expense of the owners of the vessel in which they emigrated.

Labor, bureau of. An act approved June 27, 1884 (23 St. L. 60), provides that there shall be established in the department of the interior a bureau of labor, to be under the charge of a commissioner of labor, appointed by the President, with the consent of the Senate. The commissioner shall hold office for four years, and, until his successor shall be qualified, unless sooner removed, at a salary of $3,000 a year. He "shall collect information upon the subject of la-

[1] Weymouth *v.* Sanborn, 43 N. H. 173 (1861), Bellows, Judge.

[2] Brockway *v.* Innes, 39 Mich. 48 (1878); Peck *v.* Miller, *ib.* 597 (1878).

[3] Cincinnati *v.* Rice, 15 Ohio, 240-41 (1846).

[4] State *v.* Conger, 14 Ind. 396 (1860).

[5] See 4 Bl. Com. 370, 377.

[6] Reynolds *v.* United States, 98 U. S. 169 (1878).

[7] *Exp.* Karstendick, 93 U. S. 396 (1876); United States *v.* Coppersmith, 2 Flip. 553 (1880).

[8] Weaver *v.* Commonwealth, 29 Pa. 448 (1857). See *Re* Edwards, 43 N. J. L. 555 (1881), cases.

[9] Blume *v.* Richards, 2 Ohio St. 401 (1853).

[10] Pennsylvania, &c. R. Co. *v.* Leuffer, 84 Pa. 171 (1877); Caraker *v.* Mathews, 25 Ga. 576 (1858); *Re* Hoking, 8 Saw. 439-40 (1883).

[11] [1 Bl. Com. 426.

[12] 18 La. An. 20; 13 Minn. 475; 26 N. J. E. 29, 339; 24 N. Y. 482; 37 *id.* 640; 76 *id.* 50; 35 Pa. 423; 90 *id.* 47. *Contra*, 12 Bush. 75; 41 Me. 397; 6 Mo. Ap. 445.

[1] 2 Monta. 443.

[2] 38 Barb. 340; 39 Mich. 47; 84 Pa. 171.

[3] 16 Hun, 186; 17 *id.* 463. *Contra*, 11 Nev. 304; 104 U. S. 177.

[4] 81 N. C. 340.

[5] 46 N. Y. 521; 100 Pa. 550; 49 Wis. 169.

[6] 14 Kan. 566.

[7] 77 Pa. 107. See generally Flagstaff Mining Co. *v.* Collins, 104 U. S. 177-79 (1881), cases.

[8] 2 Bl. Com. 5.

[9] Slaughter-House Cases, 16 Wall. 127 (1872), Swayne, Judge.

bor, its relation to capital, the hours of labor, and the earnings of laboring men and women, and the means of promoting their material, social, intellectual, and moral prosperity." The secretary of the interior, upon the recommendation of the commissioner, shall appoint a chief clerk, at a salary of $2,000 a year, and such other employees as may be necessary for the bureau. During the necessary absence of the commissioner, or when the office shall become vacant, the chief clerk shall perform the duties of the commissioner. The commissioner shall annually report in writing to the secretary of the interior the information collected and collated by him, and such recommendations as he may deem calculated to promote the efficiency of the bureau.

See AUTHOR; CHINESE; EMPLOYMENT; LIEN, Mechanic's; MATERIAL-MAN; OCCUPANCY; SERVANT, 2; STRIKE, 2; SUNDAY; TRADE; WAGES.

2, *v.* To influence a jury against its duty; to persuade a juror not to appear at court.

The first lawyer who came from England to practice in Boston is said to have been sent back for "laboring" a jury.

LACHES.[1] Neglect, negligence; default.[2]

Inexcusable delay in asserting a right.

An infant loses nothing by non-claim or neglect to demand his rights; nor, in general, shall any other "laches" or negligence be imputed to him.[3]

Neglect to do something which by law a man is obliged to do.[4]

Such neglect or omission to do what one should do as warrants the presumption that he has abandoned his claim, and declines to assert his right.[5]

The term implies knowledge of one's rights.[6]

The law of laches was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and the life of witnesses, the muniments of evidence, and other means of proof. The law is necessary to the peace, repose, and welfare of society.[7]

If the case of the plaintiff, as stated in his bill, will not entitle him to a decree, the judgment of the court may be required by demurrer whether the defendant ought to be required to answer the bill.[8]

Where, from delay, no correct account can be taken, and any conclusion the court may arrive at must at best be conjectural, and the original transaction has become so obscured by lapse of time, loss of evidence, and death of parties, as to render it difficult to do justice, the case is one of "laches," and the court will not relieve the plaintiff.[1]

The question is one of fact, is an equitable defense determinable by the particular facts.[2]

Laches is not imputable to the government: upon considerations of public policy. The government acts through agents, and these are so numerous and scattered that the utmost vigilance would not save the public from serious loss, if the doctrine applied.[3]

The rule is essential to the preservation of the interests and property of the public. The state's agents have not the incentive of personal interest to prosecute her claims.[4]

See ESTOPPEL; DELAY; DISABILITY; LIMITATION, 8; REFORM; RESCISSION; STALE.

LADING. That which constitutes a load; burden; freight.

Laden. May not mean "fully" laden.[5]

Bill of lading. A contract by which a common carrier engages to carry and deliver goods to the consignee, or to the order of the shipper.[6]

A written acknowledgment, signed by the master of a vessel, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated.[7]

A receipt as to quantity and a description of the goods, and a contract to deliver them, acknowledging the goods to be on board. As between the original parties, being like a receipt, is open to explanation.[8]

Usually executed in triplicate: one part each for the consignor, the carrier, and the consignee.

Termed a "clean bill" when silent as to the place of stowage. The understanding is that the goods are to be stowed "under" deck; parol evidence of an agreement for stowage "on" the deck is inadmissible.[9]

A bill of lading is a symbol of property, and, when properly indorsed, operates as a delivery of the property itself, investing the indorsee with a constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and

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[1] Läsh'-es. F. *lache* (läsh), indolent, lax: L. *laxus*, loose.

[2] [1 Bl. Com. 247; 3 *id.* 317; 4 *id.* 402.

[3] [1 Bl. Com. 465.

[4] Sebag *v.* Abitbol, 4 Maule & S. 462 (1816), Ellenborough, C. J.

[5] Wissler *v.* Craig, 80 Va. 30 (1885), Richardson, J.

[6] Massie *v.* Heiskell, 80 Va. 805 (1885).

[7] Brown *v.* County of Buena Vista, 95 U. S. 161 (1877), Swayne, J. See also 77 Va. 576, 588.

[8] Lansdale *v.* Smith, 106 U. S. 392-98 (1882), cases.

[1] Wissler *v.* Craig, 80 Va. 22, 29 (1885), cases.

[2] Pike *v.* Martindale, 91 Mo. 285 (1886), Ray, J.

[3] United States *v.* Kirkpatrick, 9 Wheat. 735 (1824), Story, J.

[4] Weber *v.* Harbor Commissioners, 18 Wall. 70 (1873); United States *v.* Thompson, 98 U. S. 489 (1878); United States *v.* City of Alexandria, 19 F. R. 609 (1883); United States *v.* Barnes, 31 F. R. 709 (1887), cases.

[5] Searight *v.* Stokes, 3 How. 169 (1845).

[6] [The Farwell, 8 Biss. 64, 71 (1877), Dyer, J.

[7] The Delaware, 14 Wall. 600 (1871), cases, Clifford, J.

[8] See 14 Wall. 600, *supra;* 105 U. S. 8, *post;* 1 Biss. 379; 5 Ala. 432; 3 Iowa, 103; 33 *id.* 32; 34 Me. 559; 16 Mich. 113; 9 Mo. 194; 4 Denio, 330; 14 Wend. 28; 12 Barb. 310; 4 Ohio, 346; 28 Vt. 124; L. R., 2 C. P. 43.

[9] 14 Wall. 602, 579, *supra;* 2 Wharf. Ev. § 1079.

complete delivery under and in pursuance of the bill of lading, to the person entitled to receive the property.[1]

It is not a representative of money; does not pass from hand to hand as a bank-note or coin. It is a contract for the performance of a certain duty, at the same time that it is a symbol of ownership of the goods covered by it, a representative of those goods, and regarded as so much cotton, grain, iron, or other merchandise which is sold or pledged by a transfer of the bill.[2]

In the hands of the holder, a bill of lading is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive the property at the place of delivery. Notwithstanding that it is designed to pass from hand to hand, with or without indorsement, and is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument in the sense that a bill of exchange or a promissory note is negotiable. Its transfer does not preclude, as with them, inquiry into the transaction in which it originated, because it has come into the hands of a person who has innocently paid value for it. The doctrine of *bona fide* purchaser applies only in a limited sense. It may therefore be shown that neither the master of a vessel, nor the shipping agent had the authority to bind the vessel or its owner by giving a bill for goods not received for shipment.[3]

The holder of a lost or stolen bill of lading is no more protected in his title than the buyer of lost or stolen property.[3]

The transfer and delivery of a bill of lading of goods, by the consignee to a person who advances money upon them, is not in effect a mortgage, but vests in the lender a property in the goods which entitles him to maintain an action against one who wrongfully converts them. It is not necessary for the person to whom an inland bill is delivered for valuable consideration to take possession of the property upon its arrival, or to give notice to the person who has the actual possession of the property. Delivery to an unauthorized person, who does not produce the bill, is a conversion.[4]

Placing in a bill a direction to notify a certain person is a plain indication, in the absence of further directions, that he is not the consignee.[5]

When a shipper attaches his bill to a draft upon the consignee, he intends that the goods shall be delivered only upon payment of the draft.[1]

When indefinite in its terms, a bill will be construed reasonably, according to the presumed intention to be gathered from the situation of the parties, and their relations to the ship and to each other.[2]

See DAMAGE; FREIGHT.

LAGAN. See LIGAN.

LAITY. See LAY, 1.

LAKE. See RIPARIAN; TIDE.

A grant of land to a natural pond or lake extends only to the water's edge. . . Mere proprietorship in the surrounding lands will not, in all cases, give ownership to the beds of natural non-navigable lakes, regardless of their size. Each case depends largely upon its own facts.[3]

Lakes Ontario, Erie, Superior, etc., are inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them, subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which exists for the grant of admiralty jurisdiction to the general government on the Atlantic seas applies with equal force to the lakes. . . The lakes and the waters connecting them, although not tide-waters, are undoubtedly public waters, and within the grant of admiralty and maritime jurisdiction in the Constitution.[4]

See ADMIRALTY; SEA, High.

LAMB. See SHEEP.

LAND. 1. Comprehends all things of a permanent, substantial nature; being a word of very extensive signification.[5] Real property; realty.

All corporeal hereditaments — ground, soil or earth, with all objects under or upon the same, as, trees, herbage, water, minerals, buildings. By the simple word "land" everything terrestrial passes.[6]

Land often passes by other terms; as, house, mill, messuage, *qq. v.*

The "tunnels, tracks, substructures, superstructures, stations, viaducts, and masonry" of a railroad are "land," within the meaning of a tax law.[7]

[1] Hieskell *v.* Farmers', &c. Bank, 89 Pa. 155 (1879), cases; Dows *v.* Nat. Exchange Bank, 91 U. S. 618, 629 (1875), cases; Moors *v.* Kidder, N. Y. Ct. Ap. (1888): 27 Am. Law Reg. 107, 115–17, cases.

[2] Shaw *v.* North Pennsylvania R. Co., 101 U. S. 564 (1879), Strong, J.; Steiger *v.* Third Nat. Bank, 2 McCrary, 499–500 (1881); Wertheimer *v.* Pennsylvania R. Co., 17 Blatch. 422 (1880), cases.

[3] Pollard *v.* Vinton, 105 U. S. 8 (1881), Miller, J.; Iron Mountain R. Co. *v.* Knight, 122 *id.* 87 (1887); Seeligson *v.* Philbrick, 30 F. R. 601 (1887).

[4] Forbes *v.* Boston & Lowell R. Co., 133 Mass. 154–58 (1882), cases, Morton, C. J.

[5] Furman *v.* Union Pacific R. Co., 106 N. Y. 579 (1887); North Pennsylvania R. Co. *v.* Commercial Bank, 123 U. S. 727 (1887).

[1] Wells, Fargo & Co. *v.* Oregon Ry. & Nav. Co., 32 F. R. 54 (1887), cases; The John K. Shaw, *ib.* 491 (1887), cases.

[2] Gronstadt *v.* Witthoff, 15 F. R. 265 (1883).

[3] State of Indiana *v.* Milk, 11 Biss. 197, 206 (1883), cases, Gresham, J.; Forsyth *v.* Smale, 7 *id.* 201 (1876), cases; Smith *v.* City of Rochester, 92 N. Y. 473 (1883), cases.

[4] The Propeller Genesee Chief *v.* Fitzhugh, 12 How. 453, 457 (1851), Taney, C. J.; Act 26 Feb. 1845: 5 St. L. 726. See also The Hine *v.* Trevor, 4 Wall. 562 (1866); The Eagle, 8 *id.* 20 (1868).

[5] 2 Bl. Com. 16; 3 *id.* 217.

[6] 2 Bl. Com. 16; 33 Miss. 464; 1 N. Y. 564; 33 Ind. 403; 5 Conn. 517; 9 *id.* 377.

[7] People, *ex rel.* New York & Harlem R. Co. *v.* Commissioners, 101 N. Y. 322 (1886).

Everything essential to the beneficial use and enjoyment of the designated property, in the absence of language indicating a different intention in a grantor, passes by a conveyance of the property.[1]

Lands. The same as land; one piece will satisfy the term.[2]

Landed. Consisting of realty: as, landed — estate, property, security.

"Landed estate" is an interest in or pertaining to lands. A "landed proprietor" is a person who has an estate in lands, whether highly improved or not.[3]

Improved land. Reclaimed, cultivated land; land used for purposes of husbandry. **Wild land.** Land in a state of nature.[4] See IMPROVE; SEATED; VACANT.

"Improved land" has no precise legal meaning.[5]

Interest in lands. In the Statute of Frauds, does not include ripe though ungathered fruits, or crops annually removed; otherwise as to such produce of the soil as is capable of permanent attachment to it.[6] See FRAUDS, Statute of.

Land warrant. The evidence in writing which the state, on good consideration, gives that the person therein named (the warrantee) is entitled to the quantity of land specified.[7]

The issue of the warrant and the rights of the warrantee are regulated by statute. The application marks the inception of the title, and prevails against a later settler with notice; but not so as to a warrant and survey which differ from the application.[8]

Presumption of abandonment from neglect to return a warrant is rebutted by possession in the warrantee.[9]

A warrant descriptive of the land confers title from date, if followed up with diligence in obtaining a survey.[10]

Shifted land warrant. A warrant which calls for the survey of other land than that surveyed.

When fairly made, returned, and accepted by the proper authorities, holds the land from the time of acceptance, provided there is no intervening opposing right.[11]

[1] Sheets v. Selden, 2 Wall. 187 (1864), cases.

[2] Birch v. Gibbs, 6 Maule & S. 116 (1817).

[3] St. Mary v. Harris, 10 La. An. 677 (1855), Merrick, Chief Justice.

[4] Clark v. Phelps, 4 Cow. 208 (1825).

[5] Bond v. Fay, 8 Allen, 215 (1864), Hoar, J.

[6] 1 Whart. Ev. § 866, cases.

[7] Neal v. East Tennessee College, 6 Yerg. 205 (1834).

[8] Mix v. Smith, 7 Pa. 75 (1847); 5 Binn. 204.

[9] Burford v. McCue, 53 Pa. 427 (1866).

[10] Fox v. Lyon, 27 Pa. 9 (1856); 33 *id.* 474; 34 *id.* 74; 43 *id.* 197; 73 *id.* 316.

[11] Smith v. Walker, 98 Pa. 141 (1881).

Public lands. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[1] See TERRITORY, 2.

"Public lands" is habitually used in legislation to describe such lands as are subject to sale or other disposal under general laws.[2]

In the act of July 4, 1866, applied to all unsurveyed lands, whether previously granted or not, and distinguishes such lands from surveyed and segregated lands, where the right of private proprietorship has attached.[3]

The laws prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. They require personal settlement upon the lands desired and their inhabitation and improvement, and a declaration of the settler's acts and purposes to be made in the proper office of the district, within a limited time after the public surveys have been extended over the lands. By them a land department has been created to supervise the steps required for the acquisition of the title of the government. Its officers are required to receive, consider, and pass upon the proofs furnished as to the alleged settlements upon the lands, and their improvement, when pre-emption rights are claimed, and, in case of conflicting claims to the same tract, to hear the contesting parties. The proofs offered in compliance with the law are to be presented, in the first instance, to the officers of the district where the land is situated, and from their decision an appeal lies to the commissioner of the general land-office, and from him to the secretary of the interior. For mere errors of judgment as to the weight of evidence on these subjects, by any of the subordinate officers, the only remedy is by an appeal to his superior of the department. The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers or of their superior in the department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties. It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the land department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action. . . The misconstruction of the law, which will authorize the interference of the court, must be clearly manifest, and not alleged upon a possible finding of the

[1] Constitution, Art. IV. sec. 3, cl. 2.

[2] Newhall v. Sanger, 92 U. S. 763 (1875), Davis, J.; Wirth v. Branson, 98 *id.* 118 (1878), cases.

[3] Heydenfeldt v. Daney Mining Co., 10 Nev. 314 (1875), Hawley, C. J.

facts from the evidence different from that reached by them. And where fraud and misrepresentations are relied upon as grounds of interference, they should be stated with such fullness and particularity as to show that they must necessarily have affected the action of the officers of the department.[1]

The testimony proving fraud in the government officials must be clear, unequivocal, and convincing. A bare preponderance of evidence which leaves the issue in doubt is not sufficient. To raise a suspicion of wrong-doing in its own officers, is not enough to justify the government in casting upon the defendant, alleged to be a *bona fide* purchaser for value without notice of the supposed fraud, the burden of establishing his title.[2]

The government can proceed by a bill in equity to have a decree of nullity and an order of cancellation of a patent issued in mistake, or obtained by fraud, where it has a direct interest or is under obligation to make good a title to an individual, or duty to the public requires such action.[3]

There was a time when a party who settled in advance of the public surveys was regarded as a trespasser, to be summarily ejected. But all this has been changed within the last half century. The settlers of Oregon, and of California, organized a provisional government embracing guaranties of all private rights. When the laws of the United States were extended over the country, the regulations for the occupation of the land were respected, and the rights acquired under them recognized and enforced. In no instance have the claims of an intruder upon the prior *bona fide* possession of others, or in disregard of those rights, been sustained. When the legal title has passed from the United States to one party, when in equity, and in good conscience, and by the laws of Congress, it ought to go to another, a court of equity will convert the holder into a trustee of the true owner, and compel him to convey the legal title.[4]

Congress has the sole power to declare the dignity and effect of titles emanating from the United States. All legislation declares the patent the superior and conclusive evidence of legal title. Until its issuance, the fee is in the government, which, by the patent, passes to the grantee, who may recover the possession by ejectment.[5]

The certificate which is given vests an *equitable* right to demand the patent after such further proceedings as the laws, and the course of business in the departments, require. The fact of the issue of a patent is a matter of record, a copy of which may be so easily obtained that no necessity exists for accepting the receipt of a register as a substitute; if never issued, it is obvious that the title remains in the United States.[1]

All that can be claimed as to the effect of documents of title executed by officers of the government is, that they pass such an estate as the government itself, on whose behalf the official acts appear to have been done, had at the time, but do not conclude the fact that the estate conveyed was lawfully vested in the grantor.[2]

Lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at common law. Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit and a judgment establishing the right, it should be direct, positive, and free from all doubt or ambiguity.[3]

When the United States acquire lands within a State by purchase, with the consent of the legislature of the State, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings, the Constitution confers upon them exclusive jurisdiction of the tract; but when they acquire such land in any other way, their exclusive jurisdiction is confined to the structures and land used for public purposes. A State making a grant may prescribe conditions not inconsistent with the effective uses of the property for the purposes intended; as, by reserving the right to tax private property within the limits of the tract.[4]

An act of Congress approved March 3, 1887 (24 St. L. 476), provides that it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become citizens, or for any corporation not created by or under the laws of the United States or of some State or Territory, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the Territories or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created: *Provided*, That the prohibition of this section shall not

[1] Quinby *v.* Conlan, 104 U. S. 425-26 (1881), cases, Field, J.; Steel *v.* Smelting Co., 106 *id.* 450-52 (1882), cases; Johnson *v.* Towsley, 13 Wall. 72, 80-85 (1871), Miller, J.

[2] Colorado Coal & Iron Co. *v.* United States, 123 U. S. 307 (1887), cases, Matthews, J. See further Doolan *v.* Carr, 125 *id.* 624-25 (1888), cases.

[3] United States *v.* San Jacinto Tin Co., 125 U. S. 273 (1888); United States *v.* Beebe, 127 *id.* 342 (1888).

[4] Rector *v.* Gibbon, 111 U. S. 284-87, 291 (1884), cases, Field, J. See especially Lamb *v.* Davenport, 18 Wall. 307, 312-15 (1873), Miller, J.

[5] Bagnell *v.* Broderick, 13 Pet. 436 (1839).

[1] Langdon *v.* Sherwood, 124 U. S. 83 (1888), Miller, J. See also Fenn *v.* Holme, 21 How. 488 (1858); Hooper *v.* Scheimer, 23 *id.* 249 (1859); Foster *v.* Mora, 98 U. S. 425 (1878).

[2] Sabariego *v.* Maverick, 124 U. S. 283 (1888); Herron *v.* Dater, 120 *id.* 464 (1886).

[3] St. Louis, &c. R. Co. *v.* McGee, 115 U. S. 473-74 (1885), cases, Waite, C. J.; New Orleans Pacific R. Co. *v.* United States, 124 *id.* 129 (1888), cases; Southern Pacific R. Co. *v.* Orton, 32 F. R. 457 (1879); Same *v.* Poole, *ib.* 451 (1887); Denny *v.* Dodson, *ib.* 899 (1887).

[4] Fort Levenworth R. Co. *v.* Lowe, 114 U. S. 525, 530 538 (1885), Field, J.; Chicago, &c. R. Co. *v.* McGlinn, *ib.* 545 (1885); Foley *v.* Shriver, 81 Va. 568, 571-75 (1886). cases

apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty shall continue to exist so long as such treaties are in force, and no longer.

Sec. 2. That no corporation or association more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall hereafter acquire or hold or own any real estate hereafter acquired in any of the Territories or of the District of Columbia.

Sec. 3. That no corporation other than those organized for the construction or operation of railways, canals, or turnpikes shall acquire, hold, or own more than five thousand acres of land in any of the Territories; and no railroad, canal, or turnpike corporation shall hereafter acquire, hold, or own lands in any Territory, other than as may be necessary for the proper operation of its railroad, canal, or turnpike, except such lands as may have been granted to it by act of Congress. But the prohibition of this section shall not affect the title to any lands now lawfully held by any such corporation.

Sec. 4. That all property acquired, held, or owned in violation of the provisions of this act shall be forfeited to the United States, and it shall be the duty of the attorney-general to enforce every such forfeiture by bill in equity or other proper process. And in any suit or proceeding that may be commenced to enforce the provisions of this act, it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights either of the United States or of the parties concerned in any such proceeding arising out of the matters in this act mentioned.

Similar legislation has been enacted in several of the Western States.

An act approved March 9, 1888 (25 St. L. 45), provides that the foregoing act shall not apply to or operate in the District of Columbia, so far as relates to the ownership of legations, or the ownership of residences by representatives of foreign governments, or attaches thereof.

See, as to public lands, BOUNTY; DOMAIN, 1; GRANT, 3; PATENT, 3; PRE-EMPTION; PROCLAMATION, 2; RESERVE, 3; RESTORE; SCHOOL; TIMBER.

See generally ABANDON, 1; AIR; ALLUVION; ALONG; CONVERSION, 2; COVENANT, Real; CROP; DEDICATION, 1; DEED, 2; DERELICT; DESCRIPTION, 1; DOMAIN, 1; DONATION; EASEMENT; EJECTMENT; ENTRY, I, III; ESCHEAT; ESTATE, 3; EVICTION; EXECUTION; FARM; FEUD; FIXTURES; GRANT, 2, 3; HEREDITAMENT; HOMESTEAD; ICE; INCLOSE; INCUMBRANCE; LIEN; MAP; MEADOW; MINE; MINERAL; MORTGAGE; NUISANCE; OCCUPY; PARCEL, 2; PARTITION; RAILROAD; REALTY; RUN; SUPPORT, 2; SURVEY; TAKE, 8; TAX, 2; TENEMENT; TENURE, 1; TITLE, 1; TRESPASS; WALL; WATER; WOODS. Compare SOLUM; TERRA.

2. Place; country; sovereignty; territorial jurisdiction: as, in inland, law of the land.

LANDING. A place on a river or other navigable water for lading and unlading goods, or for the reception and delivery of passengers. . . The terminus of a road on a river or other navigable water, for the use of travelers, and the loading and unloading of goods.[1]

Whether it is public or private, depends on the character of the road which leads to it.[2]

Either the bank or wharf to or from which persons or things may go from or to some vessel in the contiguous water; or the yard or open place used for deposit and convenient communication between the land and the water.[3]

A road to it is essential to make it public, unless where it may be used only in connection with transportation by water. Obstructing the road one hundred yards from the landing is not obstructing the landing itself.[3]

A landing for loading and unloading boats engaged in the coal trade differs from that of a harbor or place to lay up boats empty or laden.[3] See RIPARIAN.

LANDLORD. 1. He of whom land is held subject to the rendering or payment of rent or service.[4] Correlative, *tenant*, q. v.

One who owns lands or tenements which he has rented to another or others.

In feudal times, the proprietor of lands. He gave the possession and use to another person, in consideration of a return in services or goods, and retained the ultimate property in the fee.[5] See FEUD.

Landlord and tenant. Describes the relation which subsists between the parties to a contract for the occupation of land or buildings thereon.

Arises by implication from the use of lands; or is created in express terms by a lease. Paying rent acknowledges, *prima facie*, a tenancy.

Landlord's warrant. Written authority from a landlord, to a constable or other person, to levy upon property of his tenant, and, within the time prescribed by law or by agreement, to make public sale of the same, in order to constrain the tenant to observe one or more of the conditions in the contract for occupancy, as, that he will pay rent as it becomes due.

After the tenant has entered, the landlord's rights respect the rent and the reversion. If the tenant is to repair, the landlord is not liable for a nuisance from

[1] State *v.* Randall, 1 Strobh. 111 (S. C., 1846), Frost, J.
[2] State *v.* Graham, 15 Rich. L. 310 (S. C., 1868), Wardlow, A. J.
[3] Hays *v.* Briggs, 74 Pa. 385 (1873).
[4] Hosford *v.* Ballard, 39 N. Y. 151 (1868).
[5] Patty *v.* Bogle, 59 Miss. 498 (1881).

son-repair. The landlord's principal obligation is for quiet enjoyment. Unless otherwise stipulated, he pays taxes, municipal assessments, ground-rent, interest upon a mortgage, and insurance. The tenant, upon entry, is invested with all the rights incident to possession; must so use the premises as not to injure private persons or the public, or the owner's reversion; and must make reasonable repairs. His estate may merge in the fee by his purchase or by descent, and he may surrender his lease to the landlord.

See further DISCLAIMER, 1; DISPARAGEMENT, 2; DISTRESS; EJECTMENT; EMBLEMENTS; ENTRY, I; EVICTION; FIXTURES; GROUND; LEASE; MONTH; QUIT, 2; RENT; TENANT; USE, 2, Occupation; WAIVER; WASTE.

LANDMARK. See MARK, 1 (2); MONUMENT, 1.

LANDSCAPE. The law does not recognize any easement or right of property in a landscape or prospect.

Therefore the owner of a villa has no right to abate, as a nuisance, a building which mars the prospect.[1] See LIGHT.

LANGUAGE. See ART, 8; CONSTRUCTION; FRENCH; LATIN; LIBEL, 5; SLANDER.

LANGUIDUS. L. Sick; ill.

The return made by an officer, when a person, who is to be arrested, is so sick that to remove him would endanger his health or life.

Such defendant may be left in the charge of a deputy.

LAPSE.[2] A failure, defeat; also, to fail, pass by or aside.

Lapsed. Failed in its destination; become ineffectual.

Said of a *devise* or *legacy* when the devisee or legatee dies before the testator, or before a given age or event;[3] of *land* when the right to pre-empt it is lost; of a *patent* to land when a petitioner neglects to complete his application and secure a grant; of a *policy* of insurance which is allowed to expire for non-payment of one or more premiums; of *time* when a reasonable period in which to assert a right has passed.

LARCENY.[4] Theft; the felonious taking and carrying away of the personal goods of another.[5]

The wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with the felonious intent to convert them to his (the taker's) own use, and make them his property, without the consent of the owner.[1]

A taking and a carrying away of personal property with an intent to steal it.[2]

Larcenist. One guilty of larceny.

Larcenous. Of the nature of larceny.

Grand larceny. Larceny of goods above the value of twelve pence.[3]

Mixed or compound larceny. Includes the aggravation of a taking from one's house or person.[3]

Petit larceny. When the goods are of the value of twelve pence or under.[3]

Simple larceny. Plain theft, unaccompanied by any other atrocious circumstance.[3]

"Petit larceny" having ceased to exist in England by 7 and 8 Geo. IV. (1827), c. 29, and largely in the United States, the single word "larceny" means "grand larceny," not of the compound sort. Further, having no "simple larceny," we have no use for the correlative "grand."[4]

Larceny is an offense against the right of private property. The "taking" implies a want of consent in the owner: therefore, a delivery to another upon trust cannot become the ground of a larceny at common law. But if the bailee opens a package and takes away a part he is guilty of larceny; for then the *animo furandi* is manifest. Nor was it, at common law, more than a breach of trust for a servant to run away with goods committed to him.[6] See EMBEZZLEMENT, 2.

There must be a "carrying away"—some removal from the place where the goods are found.[6] See CARRY AWAY.

The intent must be "felonious"—*animo furandi;* taking to use and return is a mere trespass.[7]

The property must be "personalty." At common law, taking a tree, flowers, fruit, or title-deeds is a trespass upon the land. But if any such object was severed by the owner, or by the thief at another time, that act made it personalty. Statutes have made felonious, appropriations of many such articles as, formerly, constituted trespasses.

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[1] Bowden *v.* Lewis, 13 R. I. 191 (1881); Aldred's Case, 9 Rep. 57, *b*, 58 *b:* 5 Coke, *58 (1611).

[2] L. *labi, lapsus,* to fall, slip.

[3] [2 Bl. Com. 513; 94 Am. Dec. 156, cases; 13 East, 534; 9 B. Mon. 206.

[4] Contracted from latrocinγ: L. *latrocinium,* robbery: *latro,* a robber, free-booter,—4 Bl. Com. 229. O. F. *larrecin:* F. *larcin.* The *y* is an English addition,—Skeat.

[5] 4 Bl. Com. 229: 3 Coke, Inst. 107.

[1] 2 East, Pl. Cr. 553. "The most approved definition"—Ransom *v.* State, 22 Conn. *156 (1852), Storrs, J.

[2] Commonwealth *v.* Adams, 7 Gray, 44 (1856), Metcalf, J. See also State *v.* South, 28 N. J. L. 29–30 (1859), cases, Green, C. J.; State *v.* Wingo, 89 Ind. 206 (1883): 4 Cr. Law M. 661, 664–69 (1888), cases; 70 Ala. 9; 62 Cal. 141; 66 Ga. 193–94; 94 N. Y. 90, 95; 31 Hun, 58; 1 McAll. 196; 5 Cranch, C. C. 493; 2 Bish. Cr. L. § 757.

[3] 4 Bl. Com. 229, 239; 59 Cal. 391.

[4] 2 Bish. Cr. Law, §§ 757–58, cases.

[5] 4 Bl. Com. 230; 59 Miss. 279; 62 Wis. 62.

[6] 4 Bl. Com. 231; 76 Mo. 245.

[7] 4 Bl. Com. 232; 82 Ala. 51.

Formerly, also, bonds, bills, notes, and other evidences of debt, having no intrinsic value and not importing property in the possession of the holder, were not subjects of larceny.

"Property" includes money, goods, chattels, things in action, and evidences of debt.[1]

Nor, at common law, are animals, at their natural liberty and unreclaimed, which are unfit for food, as, dogs; for these a civil action for damages may be had.[2]

Obtaining possession of personalty by fraud, with intent to convert the same to one's own use, the owner intending to part with the possession only, is larceny.[3]

See CRIME; DECOY; INDICTMENT; LUCRUM; PRETENSES, False; ROBBERY.

LARGE. See AT LARGE; ENLARGE; GREAT; GROSS.

LASCIVIOUS.[4] Lustful; wanton; lewd.

Any wanton act between persons of different sexes, who are not inter-married, originating in lustful passion, and not otherwise punished as a crime against chastity or public decency, is called "lascivious carriage." May also include an indecent act against the will of another.[5]

To sustain an indictment under the Virginia act of 1878, forbidding lascivious cohabitation, the evidence must establish that the parties, not being married, lewdly and lasciviously associated and cohabited, that is, lived together in the same house and as man and wife live together.[6] See LEWD; MORALS.

LAST. See SAID; WILL, 2.

LATE. 1. Existing not long ago, but now departed this life:[7] as, the late A. B.

2. Last or recently in a place: as, A. B, late a resident, etc.[8]

3. Recently in office: as, A. B, late sheriff. Compare EX, 2.

LATENT.[9] 1. Not observable; not apparent: as, latent defects in an article of merchandise or machinery, or in an animal. See CAVEAT, Emptor; NEGLIGENCE.

2. Applying equally to two or more different things; opposed to *patent:* as, a latent ambiguity, *q. v.*

LATERAL.[10] Proceeding from, or connected with, a side or one side: as, a lateral railroad, lateral support, *qq. v.* Compare BILATERAL; COLLATERAL.

[1] Cal. Penal Code, § 7; 70 Cal. 533.

[2] 4 Bl. Com. 232-35; 72 N. Y. 349, *infra.*

[3] Commonwealth *v.* Barry, 124 Mass. 325 (1878): 125 *id.* 393 (1878), cases; Phelps *v.* People, 72 N. Y. 334, 348 (1878), cases.

[4] L. *lascivus: laxus.* loose.

[5] [Bouvier's Law Dict.

[6] Jones *v.* Commonwealth, 80 Va. 18, 20 (1885), cases.

[7] Pleasant *v.* State, 17 Ala. 191 (1850), Dargan, C. J.

[8] Beckett *v.* Selover, 7 Cal. 233, 236 (1857).

[9] L. *latens: latere,* to lie hid.

[10] L. *latus,* a side.

LATH. See TIMBER.

LATIN. Compare FRENCH.

Pleadings and records were at first written in the Latin language; later, in the Norman or law-French. The arguments of counsel and the decisions of the courts were likewise in Latin.

"Law-Latin" is a technical language, easily apprehended, and durable. On these accounts it is suited to preserve memorials intended for perpetual rules of action.

In the time of Cromwell (1649-60), records were written in English. Upon the restoration of Charles II (1660), that innovation was discountenanced: practitioners found the Latin the more concise and significant. Statute of 4 Geo. II (1730), c. 26, directed that proceedings should again be written out in English, that the common people might understand somewhat of processes, pleadings, record entries, etc. But the translations of many phrases, names of writs and processes (such as *nisi prius, fieri facias, habeas corpus*), sounded so ridiculous that, two years later, by 6 Geo. II, c. 14, all technical terms were allowed to remain in Latin. As regards its technical expressions, the law merely stands upon the same footing as other studies.[1]

The conciseness, expressiveness, and condensability of the Latin language fitted it for preserving the principles of jurisprudence. The civil and canon laws were in Latin, and quoted in the original, as often as translated. After the Conquest, the conflict between Saxon and French promoted the use of an available neutral speech. As the use and knowledge of Latin declined, misuse of its terms became frequent. See ARRAIGN.

LAUNCH. A vessel already in the water cannot be "launched," the meaning of which in such cases is, "to cause to move or slide from the land into the water."[2]

LAUNDRIES. See CHINESE.

A city ordinance which makes it an offense to keep a laundry wherein clothes are cleansed for hire, within the limits of the larger part of a city, without regard to the character of the structure or the appliances used for the purpose, or the manner in which the occupation is carried on, is unconstitutional.[3]

To make an occupation, indispensable to the health and comfort of civilized man, and the use of the property necessary to carry it on, a nuisance, by an arbitrary declaration in a city ordinance, and suppress it as such, is to confiscate the property and to deprive its owner of it without due process of law. It also abridges the liberty of the owner to select his own occupation and methods in the pursuit of happiness, and thereby prevents him from enjoying his rights, privileges and immunities, and deprives him of the equal protection of the laws, secured to every person by the Constitution.[3]

The ordinances of San Francisco giving the board of supervisors authority, in their discretion, to refuse

[1] 3 Bl. Com. 317-23; 4 *id.* 418.

[2] Homer *v.* Lady of the Ocean, 70 Me. 352 (1879).

[3] *Re* Sam Kee, 31 F. R. 680 (1887), Sawyer, J.

permission to carry on laundries, except when located in buildings of brick or stone, are unconstitutional.[1]

So is an ordinance providing that permission shall be granted only upon recommendation of twelve citizens and taxpayers in the particular block.[2]

So is an ordinance which makes it an offense for any person to carry on a laundry for pay, within the habitable portion of the city.[3]

But an ordinance prohibiting washing and ironing between certain hours of the night may be constitutional.[4]

LAW.[5] 1. A rule of action dictated by a superior being.[6] The command of a superior.[7]

A command addressed by the sovereign of the state to his subjects, imposing duties, and enforced by punishments.[8]

Laws are made for the government of actions.[9]

The parts of a law are: the "declaratory" part, which defines the right to be observed and the wrong to be eschewed; the "directory" part, which enjoins observance of the right and abstaining from the wrong; the "remedial" part, which provides a method to recover a right or to redress a wrong; and, the "vindicatory" part, which prescribes the penalty for a transgression.[10]

2. In an important use "law" excludes the methods and remedies peculiar to *equity* and *admiralty*, and confines the idea to the action of tribunals proceeding by fixed rules, and employing remedies operative directly upon the person or property of the individual; as, in the expressions, a court of law, a remedy at law, an action at law, at law.[11] Compare *Common Law*.

3. A positive law; an enactment; an act of the legislative department of government; a statute.[12]

4. "Law" and "the law" frequently refer to systematized rules of action,—the science of jurisprudence as a study or a profession.

The primary end of law is to maintain and regulate the absolute rights of individuals.[1]

The law is a science which distinguishes the criterions of right and wrong, and teaches to establish the one and to prevent, punish, or redress the other.[2]

Locke's division of law: divine law—the law of God, natural or revealed; civil law—the municipal law; law of reputation—morality.

Austin's division: divine law—the revealed law of God; positive human law—municipal law; positive morality—morality; laws metaphorically so called—the laws of animate and inanimate nature.[3]

The "laws of a state" usually mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. The decisions of the courts are only evidence of what the laws are.[4]

The term "laws" includes not only written expressions of the governing will, but also all other rules of property and conduct in which the supreme power exhibits, and according to which it exerts, its governmental force.[5]

Natural law, or law of nature. The rule of human action prescribed by the Creator, and discoverable by the light of reason.[6]

Divine or revealed law. The law of nature, imparted by God himself.[6]

Law of nations, or international law. The law which regulates the conduct and mutual intercourse of independent states with each other by reason and natural justice.[7]

Law of the flag. The law of the nation to which a vessel belongs.

Civil law. The law of citizens: the law which the people of a state ordain for their own government.

(1) By "the civil law," absolutely taken, is understood the civil or municipal law of the Roman empire, as comprised in the institute, code, and digest of the emperor Justinian, and the novel constitutions of himself and predecessors.[8]

Whatever strength these imperial laws may have obtained in Great Britian is due to immemorial usage

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[1] Yick Wo *v.* Hopkins, 118 U. S. 356, 365 (1886), Matthews, J.

[2] *Re* Quong Woo, 13 F. R. 229 (1882), Field, J.

[3] *Re* Tie Loy, 26 F. R. 611 (1886)—Stockton Case, Sawyer, J.

[4] Soon Hing *v.* Crowley, 113 U. S. 703 (1885), Field, J.; Barbier *v.* Connolly, *ib.* 27 (1885).

[5] A. S. *lagu*, that which is laid, set, fixed: L. *lex*. Compare Statute, Constitution.

[6] 1 Bl. Com. 38.

[7] 1 Shars. Bl. Com. 39.

[8] 2 Stephen, Hist. Cr. Law Eng. 76: Austin.

[9] Reynolds *v.* United States, 98 U. S. 166 (1878), Waite, Chief Justice.

[10] [1 Bl. Com. 53.

[11] [Abbott's Law Dict.; Austin *v.* Rutland R. Co., 17 F. R. 469 (1883).

[12] See Walter *v.* Greenwood, 29 Minn. 89 (1882).

[1] [1 Bl. Com. 124.

[2] [1 Bl. Com. 27. See 25 Tex. 253.

[3] Austin, Jurisp., Lect. I, sec. 8. See Maine, Anc Law, Ch. V.

[4] Swift *v.* Tyson, 16 Pet. 18 (1842), Story, J.

[5] Phelps *v.* The City of Panama, 1 Wash. T. 529 (1877), Greene, A. J.

[6] 1 Bl. Com. xxiv, 39-42; 11 Ark. 527; 54 Am. Dec. 317.

[7] 1 Bl. Com. xxiv, 43.

[8] 1Bl. Com. 80, 14; 5 La. 493.

in particular cases and in particular courts, or to introduction by express consent of Parliament.[1] See PANDECTS.

(2) The laws which a community or state has established for the regulation of its own affairs, as distinguished from the law of nations; also, that portion of such laws which regulates dealings between subjects or citizens, in distinction from criminal law, military law, maritime law, and the general law-merchant. Compare *Municipal Law.*

Organic law. The fundamental law of a community or state, whether written or unwritten.

Positive law. May refer to law actually existing at a given time, or to enacted law.

General law. Relates to a whole genus or kind, to a whole class or order. Opposed, **local** or **special law.** See *Public Law.*

A law which affects a class of persons or things less than all, may be a "general" law.[2]

A general law may not import universality in the subjects or in its operation.[3]

General laws relate to or bind all within the jurisdiction of the law-making power, limited as that power may be in its territorial operation or by constitutional restraints.[4]

A "special" law is such as, at common law, the courts would not notice unless it were pleaded and proved like any other fact.[5]

That a statute be "public" it is not necessary that it be equally applicable to all parts of the State. All that is required is that it apply to all persons within the territorial limits described in the act. "Special" laws provide for individual cases. "Local" laws, while applicable to all persons, are confined in their operation to certain prescribed or defined territorial limits.[6]

Public law. (1) International law.

(2) A law involving public interests. Opposed, **private law:** a law for the benefit of an individual or individuals.

In one sense "public" law designates international law, as distinguished from the laws of a particular nation or state; and in another sense, a law or statute that applies to the people generally of the nation or state adopting or enacting it, as opposed to a "private" law which affects an individual or a small number of persons.[1]

Legislative acts concerning public interests are necessarily "public" laws. These may be abolished at the will of the legislature. . . The Dartmouth College Case has no application where a statute is a public law relating to a public subject within the dominion of the general legislative power of the State, and involving the public rights and public welfare of the entire community.[2]

Foreign law. A law of another sovereignty or nation.

Foreign laws and usages are to us matters of fact,[3] and must be proved as facts; but not so with the law of nations.[4]

The existence of a foreign law is not judicially noticed, unless proved as a fact. A written law is proved by a copy properly authenticated; unwritten law, by the testimony of experts, that is, by those acquainted with the law. As to the manner of authentication there is no general rule, except this: that no proof shall be received which presupposes better attainable testimony. A written law may be verified by an oath, or by an exemplification of a copy, under the seal of the state, or by a copy proved to be a true copy by a witness who has examined and compared the copy with the original, or by a certificate of an officer authorized to give a copy, the certificate being duly proved. But these modes are not exclusive of others, especially of codes and accepted histories.[5]

The courts of one state not being presumed to know, are not bound to take judicial notice of, the laws of another State. In this respect they are foreign to each other. The Supreme Court, exercising an appellate jurisdiction, takes judicial notice of the laws of every State, because those laws are known to the court below as laws alone, needing no averment or proof.[6] See COMITY; FAITH AND CREDIT.

Municipal law. The rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong;[7] also, the laws of a locality.

The municipal laws of England are the unwritten or common law, and written or statute laws.[8] See *Written Law.*

Pertains solely to the citizens and inhabitants of a state, and is thus distinguished from political law,

[1] 1 Bl. Com. 80, 14; 5 La. 493.

[2] Brooks *v.* Hyde, 37 Cal. 376 (1869), Sanderson, J.

[3] Van Riper *v.* Parsons, 40 N. J. L. 8 (1878), Beasley, C. J.; *ib.* 125.

[4] Sedgwick, Stat. & Const. Law, 80: People *v.* Cooper, 83 Ill. 589 (1876); 102 *id.* 219, 229.

[5] Hingle *v.* State, 24 Ind. 34 (1865), Fraser, J.; 26 *id.* 681; 27 *id.* 95.

[6] State *v.* Commissioners of Baltimore County, 29 Md. 520 (1868), Alvey, J. See also 17 Cal. 547; 19 Iowa, 63; 22 *id.* 391; 26 *id.* 340; 46 N. J. L. 473, 513; 29 N. J. E. 126, 391; 106 Pa. 377.

[1] Morgan *v.* Cree, 46 Vt. 786 (1861), Peck, J.

[2] Newton *v.* Commissioners of Mahoning County, 100 U. S. 557-59 (1879), cases, Swayne, J.

[3] Dainese *v.* Hale, 91 U. S. 20 (1875).

[4] The Scotia, 14 Wall. 188 (1871).

[5] Ennis *v.* Smith, 14 How. 426 (1852), cases, Wayne, J.; Pierce *v.* Indseth, 106 U. S. 551 (1883); 1 Whart. Ev. §§ 287-316, cases.

[6] Hanley *v.* Donoghue, 116 U. S. 4, 6 (1886), cases, Gray, J.; Fourth Nat. Bank *v.* Francklyn, 120 *id.* 751 (1887). See generally 19 Cent. Law J. 296-99, 342-47 (1884), cases.

[7] 1 Bl. Com. 44; 15 Barb. 114.

[8] 1 Bl. Com. 63.

commercial law, and the law of nations. Is now more usually applied to the customary laws that obtain in any particular city, or province, and which have no authority in neighboring places.[1]

Defines the just and necessary limits of natural liberty.[2]

A city ordinance (*q. v.*) is not a law in this sense.

A constitution is a law in the sense that no State shall pass any law impairing the obligation of contracts.[3] See further IMPAIR.

Common law. The law common to all the realm. A collection of maxims and customs, of higher antiquity than memory or history can reach.[4]

Nothing else but custom, arising from the universal agreement of the whole community.[5]

Custom handed down by tradition, use, and experience.[6] See *Unwritten Law.*

Reason dealing by the light of experience with human affairs.[7]

A system of elementary principles and of general juridical truths, which are continually expanding with the progress of society.[8]

Common law develops with new ideas of right and justice.[9]

Common law grows out of the general customs of the country, and consists of definitions of them and of those ancillary principles that naturally accompany them, or are deduced from them. The common law of our country or century is not necessarily the common law of another, because customs change. It is a sort of law created by the people themselves. When the judges declare it, they merely discover and declare what they find existing in the life of the people as a rule of their relations. When the custom ceases, the law ceases. It is this law that people emigrating take with them — by tacit adoption, as far as is consistent with their new circumstances.[10]

The term may be used in distinction to "statute law," to "equity law," and the "Roman law" or "civil law."

Every country has its common law. Ours is composed partly of the common law of England, and partly of our own usages. When our ancestors emigrated from England they took with them such of the English principles as were convenient for the situation in which they were about to place themselves. . . By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants, till at length, before the time of the revolution, we had formed a system of our own, founded in general on the English constitution, but not without considerable variations.[1]

The common law of England is not to be taken in all respects as that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.[2]

The common law of England can be made part of our Federal system only by legislative adoption. The United States has no common law. Each State may have its own local customs and common law. The power of the United States is expressed in the Constitution, laws, and treaties. The English common law was adopted by the original Thirteen Colonies only so far as it suited their conditions, from which circumstance what is common law in one State is not so considered in another. The judicial decisions, the usages and customs of the respective States, determine to what extent the common law has been introduced into each State.[3]

The old common law is the basis of all State laws, modified as each sees fit.[4]

It has been repeatedly held that the common law of England, up to the time of the Declaration of Independence, is as much a part of our system of jurisprudence as it is of that of Great Britain. The decisions of the common-law courts of the country show what that common law is. We have modified the law by enactments and practice.[5]

The common law being the substratum of the jurisprudence of the Thirteen States by which the Constitution was adopted, and the framers being educated under it, the terms of the instrument are to be construed by the common law.[6]

Nor have the Federal courts jurisdiction of common-law offenses. The laws of the Federal govern-

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[1] [Wharton's Law Dict.

[2] [1 Shars. Bl. Com. 127.

[3] Ohio, &c. R. Co. *v.* McClure, 10 Wall. 515 (1870); Pacific R. Co. *v.* Maguire, 20 *id.* 36 (1873); Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. E. 728 (1879); Fisk *v.* Jefferson Police Jury, 116 U. S. 135 (1886).

[4] 1 Bl. Com. 67; 2 *id.* 95.

[5] [1 Bl. Com. 472.

[6] [1 Bl. Com. 17.

[7] Dickerson *v.* Colgrove, 100 U. S. 584 (1879), Swayne, J.

[8] Pierce *v.* Proprietors of Swan Point Cemetery, 10 R. I. 240 (1872).

[9] Hurtado *v.* California, 110 U. S. 531 (1884).

[10] Effinger *v.* Lewis, 32 Pa. 369 (1859), Lowrie, C. J.; 37 *id.* 19. See also Jacob *v.* State, 3 Humph. 514-15 (1842); Morgan *v.* King, 30 Barb. 13-15 (1858).

[1] Guardians of the Poor *v.* Greene, 5 Binn. *558 (1813), Tilghman, C. J.

[2] Van Ness *v.* Pacard, 2 Pet. *144 (1829), Story, J. See also 1 Story, Const. § 157; State *v.* Rollins, 8 N. H. 561 (1837); Clawson *v.* Primrose, 4 Del. Ch. 652-53 (1873); Chisholm *v.* Georgia, 2 Dall. 435 (1793).

[3] Wheaton *v.* Peters, 8 Pet. *658-59 (1834), M'Lean, J.

[4] The Lottawanna, 21 Wall. 572 (1874); Clark *v.* Clark, 17 Nev. 128 (1882).

[5] Brown *v.* Philadelphia, &c. R. Co., 9 F. R. 185 (1881)

[6] 1 Shars. Bl. Com. 66-67.

ment, as stated, are embodied in the Constitution, acts of Congress, and treaties made by its authority.[1]

The Federal courts do not enforce the common law in municipal matters in the States because it is Federal law, but because it is the law of the State.[2]

The common law is necessarily referred to by the Federal authorities for definitions.[3] It is a general repository of rules, principles, and forms.[4]

Because the Federal criminal jurisprudence has no substratum of common-law crimes upon which to draw for elements of an offense, the courts must follow the statutes exclusively; using the common law, if necessary, only for definitions of terms.[5]

When acts of Congress use words which are familiar in the law of England, they are supposed to be used with reference to their meaning in that law.[6]

By "common law" and "law," the framers of the Constitution meant not merely suits which the common law recognized; but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights and remedies were regarded; or, where, as in admiralty, a mixture of public law and of maritime law and equity were often found in the same suit.[7] See JUDICIAL, Power.

While we have no general system of judicial national common law, in matters not subject to judicial jurisdiction, we have a complete system of "executive national common law," which frequently differs from the common law administered in the courts. . . In the administration of the various executive departments, usages have prevailed and are growing up; national and international common-law principles have been, and are being, announced and settled; construction has been, and is being, given to all the written laws,—an entire system of executive national common law is in full operation. This grows out of executive administration, and the perfect independence of co-ordinate departments.[8]

There is no common law of the United States, in the sense of a "national customary law," distinct from the common law of England, as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statute. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the state in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. . . There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of the Supreme Court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting upon national authority.[1]

One of the merits of the common is that, instead of being a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete when the course of business ceased or changed, it consists of a few comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the cases which fall within it. These general principles are rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general convenience, but still more by judicial exposition; so that, when in a course of proceeding by tribunals of the highest authority, the general rule has been modified, limited and applied, according to particular cases, such exposition, when settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases under like circumstances. The effect of this expansive character of the common law is, that while it has its foundations in the principles of equity, natural justice, and that general convenience which is public policy,—although these general considerations would be too uncertain for practical purposes, in the business of an active community,—yet the rules of that law, so far as cases have arisen and practices actually grown up, are rendered precise and certain by usage and judicial precedent. Another consequence is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in decision, they must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances. Hence, when a new practice or course of business arises, the rights and duties of

[1] Pennsylvania *v.* Wheeling Bridge Co., 13 How. 563 (1851), M'Lean, J.

[2] Transportation Co. *v.* Parkersburg, 107 U. S. 700 (1882), Bradley, J. See Livingston *v.* Jefferson, 4 Hughes, 606 (1811); 1 Kent, 378.

[3] United States *v.* Durkee, 1 McAllister, 201 (1856).

[4] Commonwealth *v.* Webster, 5 Cush. 303, 323 (1850).

[5] United States *v.* De Groat, 30 F. R. 766 (1887), Hammond, J.

[6] United States *v.* San Jacinto Tin Co., 125 U. S. 280 (1888). The Judiciary Act of 1789, § 3, which created the office of attorney-general, without accurate definition of his powers, in saying that "there shall be appointed a meet person, learned in the law," etc., must have had reference to the similar office, with the same designation, existing under the English law. And see, as to a treaty between Mexico and the United States, Benson *v.* McMahon, 127 U. S. 466 (1888).

[7] Parsons *v.* Bedford, 3 Pet. *447 (1830), Story, J. See Fenn *v.* Holme, 21 How. 486 (1858), cases; Ellis *v.* Davis, 109 U. S. 497 (1883), cases.

[8] 3 Lawrence, Compt. Dec. xxii-iv; United States *v.* Macdaniel, 7 Pet. *15 (1833).

[1] Smith *v.* Alabama, 124 U. S. 478 (1888), cases, Matthews, J.

parties are not without a law to govern them; the general considerations of reason, justice, and policy, which underlie the rules of the common law, will still apply, modified and adapted, by the same considerations, to the new circumstances. If these are such as give rise to litigation, they, like previous cases, soon come to be settled by judicial exposition, and the principles thus settled come to have the effect of precise and practical rules.[1]

Law of the States. The general system of law regulating the relative rights and duties of persons within the jurisdiction of a State, operating upon them even when engaged in inter-State commerce, and subject to be modified by State legislation, whether consisting in that customary law which prevails as the common law of the land in each State, or as a code of positive provisions expressly enacted, is nevertheless the law of the State in which it is administered, and derives its force and effect from the actual or presumed exercise of its legislative power.

This law does not emanate from the authority of the National government, nor flow from the exercise of any legislative powers conferred upon Congress, nor can it be implied as existing by force of any other legislative authority than that of the several States in which it is enforced. It has never been doubted that this entire body and system of law, regulating in general the relative rights and duties of persons within the territorial jurisdiction of the State, without regard to their pursuits, is subject to change at the will of the legislature of each State, except as that will may be restrained by the Constitution of the United States. It is to this law that persons within the scope of its operation look for the definition of their rights and for the redress of wrongs. It is the source of all those relative obligations and duties enforceable by law, the observance of which the State undertakes to enforce as its public policy. And it was in contemplation of the continued existence of this separate system of law in each State that the Constitution was framed and ordained with such legislative powers as are therein granted expressly or by reasonable implication.[2]

Written law; unwritten law. The municipal laws of England are: (1) The *unwritten* or *common law*, which includes customs, general and particular, and particular laws. General customs, or the common law properly so called, are founded on immemorial universal usage, whereof judicial decisions are the evidence. Particular laws are such as, by special custom, are adopted and used only in particular courts, and under the control of the common and statute laws; namely, the Roman civil, and canon laws. (2) The *written* or *statute law;* being acts of legislative bodies, to supply what is defective, or to amend what is amiss, in the unwritten laws.[1] See STATUTE.

Law of the land. (1) The general public law of a State, binding upon all the members of the community under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals.[2] Also, due process of law. See PROCESS, 1, Due, etc.

(2) "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[3]

This means that the Federal Constitution, laws and treaties, are to be of paramount obligation when State and Federal laws conflict — the principle on which the authority of the Constitution is based.[4] See GOVERNMENT.

The term "law" accompanies many common words as a prefix or adjective, in senses largely self-explanatory: as, law-*adviser*, law-*blanks*, law-*clerk*, law-*firm*, law-*publications*, law-*writer*, law-*language*, law-*terms*, law-*Latin*, law-*judge*, law-*maxims*, law-*maker*, law-*officer*, law-*practice*, law-*reports*, law-*side*, law-*student*.

Maxims: The contract makes the law. The law aids the vigilant; forces no one to do a vain, useless, or impossible thing; injures no one — never works an injury; does nothing in vain; regards not trifles; regards equity; always gives a remedy; speaks to all with one mouth — is no respector of persons. What is just and right is the law of laws.

Law day. The day appointed in a mortgage for the payment of the money; originally, the time after which all legal rights were to be forfeited.[5]

Compare LEX. See BY-LAW; CANON; CHURCH; CODE; COMMERCIAL; CONSTITUTION; LYNCH; MARITIME; MARTIAL; MERCHANT; MILITARY; PAMPHLET; POLITICAL.

See also ACT, 3; BILL, II; CONFLICT; COURT; DECIS-

[1] Norway Plains Co. *v.* Boston, &c. R. Co., 1 Gray, 267–68 (1854), Shaw, C. J. See also, in general, 22 Am. Law Rev. 1–29, 30–56, 57–65 (1888); 21 *id.* 270–84 (1887).

[2] Smith *v.* Alabama, 124 U. S. 475 (1888), Matthews, Justice.

[1] [1 Bl. Com. 63–91, XXIV.

[2] Millett *v.* People, 117 Ill. 301 (1886), cases, Scholfield, J. See also 61 Ill. 118; 5 Mich. 254; 50 Miss. 479; 48 N. H. 61; 20 Barb. 199; 67 Pa. 479; 6 R. I. 146; 6 Heisk. 189; 30 Wis. 146.

[3] Constitution, Art. VI, par. 2.

[4] *Exp.* Siebold, 100 U. S. 399, 392 (1879), Bradley, J.; *Exp.* Wall, 107 *id.* 289 (1882); 21 Cent. Law J. 147–48 (1885), cases; Cooley, Const. Lim. 353.

[5] Kortright *v.* Cady, 21 N. Y. 345, 365, 367 (1860); 11 *id.* 365; 10 Conn. 280; 24 Ala. 149; 70 *id.* 265–66; 17 F. R. 778.

SON; FORUM; JUDGE; JUDGMENT; JURY; LAWFUL; LAWYER; LEARNED; OUTLAW; PLACE, 1; PRESCRIPTION, 1; PROTECTION; PROVIDED; RELIGION; REPEAL; RETROSPECTIVE; RIGHT; ROAD, 1; SANCTION; TECHNICAL; UNIFORM.

LAWFUL. In accordance with the law of the land; according to the law; permitted, sanctioned, or justified by law.

Unlawful. Implies that an act is done or not done as the law allows or requires.[1]

"Lawful," "unlawful," and "illegal," refer to that which in its substance is sanctioned or prohibited by the law. "Legal" occasionally refers to matter of form alone. Thus, an oral agreement to convey land, though void by law, is not "unlawful:" it is "illegal," because not in lawful form.[2]

"Lawful" properly implies a thing conformable to or enjoined by law; "legal," a thing in the form or after the manner of law or binding by law.[3] See further LEGAL.

A "lawful" writ, warrant, or other process does not imply a process legally sufficient, but is the same as "legal" process or process "of law." A writ or warrant issuing from any court, under color of law, is a "legal" process, however defective.[4]

The insertion of "unlawfully" in an indictment may not dispense with the necessity of specifically alleging the elements of the offense.[5]

But the charge of an offense in the precise words of the statute will dispense with the addition of "unlawfully."[6]

"It shall be lawful" may, or may not, impose an imperative duty.[7]

Other expressions are: lawful age;[8] lawful and unlawful assembly, *q. v.*; lawful and unlawful condition or covenant, *qq. v.*; lawful deed, *q. v.*; lawful discharge;[9] lawful goods;[10] lawful issue;[11] lawful juror;[12] lawful money,[13] *q. v.*; lawful trade;[14] lawful authorities.[15]

Compare JURIDICAL; LEGITIMATE; ILLICIT; VALID; VOID.

LAWSUIT. An action between adversary parties; opposed to an *ex-parte* proceeding.

May include an arbitration.[16] See LIS, Pendens; MAINTENANCE, 1.

LAWYER.[1] A popular term for a person whose business it is to know and to practice law: give advice, prepare papers, conduct proceedings, etc.

The term does not discriminate between the functions of an advocate, attorney, barrister, counsellor, conveyance, proctor, and solicitor.

Any person who, for fee or reward, prosecutes or defends causes in courts of record, or other judicial tribunals of the United States, or of any of the States, or whose business is to give legal advice in relation to any cause or matter whatever.[2] See ATTORNEY.

LAY. 1, *adj.* (1) Pertaining to the laity, not of the legal profession.

Layman. A person not admitted to practice law; one not learned in the law.[3]

(2) Not ecclesiastical; organized for secular purposes: as, a lay corporation, *q. v.*[4]

2, *v.* To state, name, allege, charge: as, to lay an offense, damages, venue.[4] Compare LIE, 1 (2).

Lay days. Days allowed for loading and unloading the cargo of a vessel.[5] See WORKING-DAYS.

Lay out. In highway laws, embraces, ordinarily, all the acts necessary to the complete establishment of a highway.[6]

May include every order of municipal authorities by which private property is taken for public use.[7]

To locate and establish a new highway.[8]

May mean to take and maintain a road.[9]

"Lay out and complete a street:" to determine the time at which it shall be graded, finished, and fitted for travel; to make a *de facto* street.[10]

"Lay out" and "lay off" a road: to lay down the whole ground covered, specifying the width.[11]

LEAD, *v.* To conduct in the way of duty. More frequently, "mislead." See INSTRUCT, 2.

Lead a use. To declare or specify what use.[12]

Lead a witness. To suggest, by interrogation, the nature of the answer or answers

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[1] State *v.* Massey, 97 N. C. 468 (1887).

[2] [Bouvier's Law Dict.]

[3] [Crabbe, Syn. 579, ed. 1879.

[4] Nason *v.* Staples, 48 Me. 128 (1857).

[5] Commonwealth *v.* Byrnes, 126 Mass. 249 (1879), cases.

[6] United States *v.* Thompson, 6 McLean, 56 (1853).

[7] See 17 N. J. L. 169; 1 Edw. 84; 11 Ad. & E. 223

[8] 4 Md. Ch. 228.

[9] 1 Wheat. 447; 12 *id.* 377.

[10] 1 Johns. Cas. 1; 2 *id.* 77, 120.

[11] 3 Edw. 1; 10 B. Mon. 188; 21 Tex. 804.

[12] 10 Yerg. 524.

[13] 16 Ark. 85; 3 Ind. 358; 2 How, 244; 3 *id.* 717.

[14] 15 Wend. 18; 3 T. R. 782.

[15] 8 Pet. 449; 9 *id.* 711.

[16] Packard *v.* Hill, 7 Cow. 434, 441 (1827).

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[1] *-yer* is a suffix, as in sawyer.

[2] Revenue Act 13 July, 1866, § 79: 14 St. L. 121.

[3] Gk. *laos*, the people.

[4] A. S. *lecgan*, to cause to lay: *licgan*, to lie.

[5] 3 Kent. 202.

[6] [Cone *v.* Hartford, 28 Conn. 375 (1859), Storrs, C. J.; 19 *id.* 597.

[7] Fuller *v.* Springfield, 123 Mass. 291 (1877), Gray, C. J.

[8] Foster *v.* Park Commissioners, 133 Mass. 329 (1882), Field, J.

[9] Charlestown, &c. R. Co. *v.* County Commissioners, 7 Metc. 84 (1843).

[10] Bowman *v.* Boston, 5 Cush. 8 (1849); Fernald *v.* Boston, 12 *id.* 578-79 (1853).

[11] Small *v.* Eason, 11 Ired. L. 97 (1850).

[12] See 2 Bl. Com. 363.

it is desired that the witness shall make. See *Leading Question.*

Lead in a cause or trial. To have the chief management of one side of a matter in litigation. See *Leading Counsel.*

Leading case. A decision which is regarded, more or less generally, as settling the law upon the question involved.

The idea may have been originally that such case stands first, in time, in a series of cases — takes the lead, is followed by others, enunciates the rule.

Decisions, with and without annotations, and illustrative of different branches of the law, have been collected and styled "Leading Cases."

Leading counsel. That attorney, of two or more employed upon the same side of a cause, who has the principal management of his client's case.

Leading question. A question which plainly suggests the answer wanted from a witness. See further QUESTION, 1.

LEAD-WORKS. See NUISANCE.

LEAF. See FOLIO.

LEAGUE. The jurisdiction of the United States extends into the sea a marine league or three geographical miles,[1] *q. v.*

LEAKAGE. An allowance for loss by leaking.

When bottles which have been filled and corked are found partly empty, while still whole, and the corks in their places, the deficiency, whether called "ullage" or "wantage" or by any other name, can only have arisen from leakage.[2]

LEANING. The courts are said to lean or to have a leaning against a particular construction or result, when some rule of policy or expediency directs them to presume in favor of another view or result.[3]

LEAP. See YEAR.

LEARNED. Judges who have been regularly educated in the law by study and practice are said to be "learned in the law," in distinction from judges, not possessing such qualifications and said to be "not learned" or "unlearned" in the law, who formerly, as advisers or associates, sat with such law-judges.

LEASE.[4] A conveyance of any lands or tenements (usually in consideration of rent or other annual recompense,) made for life, for years, or at will, but always for a less time than the lessor has in the premises.[1]

A conveyance of the whole interest constitutes an assignment.[2]

Also, to convey the use of realty by a lease. See LET, 2.

A contract for the possession and profits of land and tenements on the one side, and a recompense of rent or other income on the other; in other words, a conveyance to a person for life, or years, or at will, in consideration of a return of rent or other recompense.[3]

The creation of an estate for years, commonly called a term. While this is both the ordinary and the strictly legal signification, the word may be used in a different sense.[4]

A lease for years is a contract for the possession and profits of lands for a determinate period, with the recompense of rent.[5]

A conveyance by the owner of an estate to another of a portion of his interest therein, for a term less than his own, in consideration of a certain annual or stated rent, or other recompense.[6]

Lessor. A person who grants a lease.

Lessee. He to whom a lease is made.

The usual words are "demise, grant, and to farm let."[7] It is not necessary that "lease" be used. Whatever is equivalent will be equally available, if the words assume the form of a license, covenant, or agreement, and the other requisites of a lease as a contract are present.[8]

A lessee entering into possession under a lease is estopped, while retaining possession, to deny his landlord's title. This arises from the nature of the contract of lease, which is for the possession and use, for a prescribed period, of the lessor's property, under considerations to him by way of rent or otherwise. It implies an obligation to surrender the premises to the lessor on the termination of the lease, that is, at the expiration of the time during which the owner has stipulated that the lessee may have the use and possession of his property. The lessee cannot be allowed

[1] Acts 5 June, 1794, 20 April, 1818; 1 Story, Laws, 352; 3 *id.* 1694.

[2] Cory *v.* Boylston Ins. Co., 107 Mass 144 (1871).

[3] See First Nat. Bank of Kansas City *v.* Hartford Fire Ins. Co., 95 U. S. 673 (1877), Harlan, J.; 111 *id.* 341-42.

[4] F. *laisser*, to let go: L. *laxare*, to slacken, let go.

[1] 2 Bl. Com. 317.

[2] 2 Bl. Com. 317; 105 Pa. 473; 13 R. I. 353.

[3] Branch *v.* Doane, 17 Conn. 411 (1845), Storrs, J., quoting 4 Cruise, Dig. 67. See also 24 Me. 545; 21 N. J. L. 388; 42 N. J. E. 333; 7 Cow. 326; 1 Pars. Contr. 505.

[4] Jamaica Pond Aqueduct Corporation *v.* Chandler, 9 Allen, 167-69 (1864), Bigelow, C. J.

[5] United States *v.* Gratiot, 14 Pet. 538 (1840), Thompson, J.; Thomas *v.* West Jersey R. Co., 101 U. S. 78 (1879).

[6] Gray *v.* La Fayette County, 65 Wis. 570 (1886), Lyon, J.

[7] 2 Bl. Com. 317.

[8] Moore *v.* Miller, 8 Pa. 268 (1848), Coulter, J.

to controvert the title of the lessor without disparaging his own, and he cannot set up the title of another without violating that contract by which he obtained and holds possession, and breaking that faith which he has pledged, and the obligation of which is still continuing and in full operation.[1]

A lease may be at will, for years, for life, of perpetual duration,— for any period which will not exceed the interest of the lessor, and subject to a condition, which is a qualification annexed to the estate by the grantor, or lessor, whereby the estate or term granted may, among other things, be defeated or terminated.[2]

A lease not to exceed three years from the making need not be in writing. But in Maine, Massachusetts, New Hampshire, Ohio, Vermont, and perhaps in other States, a parol lease creates merely a tenancy at will.[3]

Lease and release. A conveyance for transferring a fee-simple.

Invented after the Statute of Uses was enacted. A lease (a bargain and sale) for years was made by the tenant of the freehold. This, unrecorded, made the bargainor stand seized to the use of the bargainee, and vested in the latter the *use* of the term; whereupon the statute immediately vested the *possession*. The bargainee, being in possession, could receive a release of the freehold and reversion, which was made the next day — and this supplied the place of livery of seisin, and amounted to a feoffment.[4]

Leasehold. An estate in land for a fixed term of years.

The disposition has been to assimilate leaseholds, at least for long terms, to real estate. The courts have sometimes construed the words "realty" and "lands" to include them. Some of the States have by statute made them real estate.[5]

At common law, a leasehold interest in land is personal property, and subject to levy and sale as such.[6]

Perpetual lease. A lease unlimited in respect to length of term; a fee-farm. See FARM.

Short lease; long lease. In common speech, refer, somewhat indefinitely, to the period of time a lease is to run.

Sublease; underlease. A lease of premises already leased, made by the first lessee. Whence sub-lessee, under-lessee: a sub-tenant, an under-tenant.[1]

See CONDITION; CROP; DEMISE; ENJOYMENT; FLOOR; GRANT, 2, 3; LANDLORD; MINERAL; MONTH; NUISANCE; PARTIES; RELEASE; RENT; SURRENDER, 3; WAIVER; YEARS; YIELDING.

LEAST. See AT LEAST.

LEAVE. 1. To die seized of or owning.[2]

2. To dispose of by will: as, for a decedent to "leave" property to a certain person.[3]

3. To die with kindred surviving.

"Leave" no issue, referring to realty, means an indefinite failure of issue; referring to personalty, a definite failure of issue.[4]

A posthumous child may be said to be a child whom an intestate "leaves" at his death.[5] See DIE, Without children.

Leave of court. Permission given by a court to do something; as, to withdraw an appearance, or a paper filed.

Compare DESERTION; LICENSE; START.

LECTURES. Compare DRAMA.

Where persons are admitted, as pupils or otherwise, to hear public lectures, it is upon the implied confidence and contract that they will not use any means to injure or take away the exclusive right of the lecturer in his lectures, whether that be to publication in print or to oral delivery.[6]

A professor in a university, orally delivering lectures of his own composition, does not so communicate them to the public as to entitle a hearer, without permission, to republish them.[7]

LEDGE. See VEIN.

LEDGER. See BOOK, Of accounts.

LEGACY.[8] A bequest, or gift, of goods and chattels by testament.[9]

A bequest of personalty; but will be construed to apply to realty, if the context requires it.[10] Compare DEVISE.

Legatee. The person to whom the gift is made.

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[1] Robertson *v.* Pickrell, 109 U. S. 614-15 (1883), Field, Justice. Quotes Marshall, C. J., in Blight's Lessee *v.* Rochester, 7 Wheat. 547 (1822). See also Rector *v.* Gibbon, 111 U. S. 284 (1884); Tilyou *v.* Reynolds, 108 N. Y. 563 (1888), cases.

[2] Warner *v.* Tanner, 38 Ohio St. 120 (1882), cases, Okey, C. J.

[3] 1 Washb. R. P. 614.

[4] 2 Bl. Com. 339; 4 Kent, 462.

[5] Dawson *v.* Daniel, 2 Flip. 317, 318 (1878), Hammond, Judge.

[6] Freeman *v.* Dawson, 110 U. S. 270 (1884), cases. Effect of destruction of the estate, 94 Am. Dec. 662-65, cases. Implied warranties, 24 Cent. Law J. 149 (1887), cases.

[1] See University Publishing Co. *v.* Piffet, 34 La. An. 602 (1882); 24 Cent. Law J. 314 (1887), cases.

[2] [McNitt *v.* Turner, 16 Wall. 363 (1872).

[3] Thorley *v.* Thorley, 10 East, 458 (1809).

[4] Hall *v.* Chaffee, 14 N. H. 231 (1843), cases.

[5] Pearson *v.* Carlton, 18 S. C. 57 (1882). See 1 Roper, Leg. 1553.

[6] Tompkins *v.* Halleck, 133 Mass. 45 (1882), cases.

[7] Caird *v.* Sime, H. L., 12 Ap. Cas. 326 (1887): 36 Alb. Law J. 291; 26 Am. Law Reg. 754; *ib.* 762-69 (1887), cases. Commented on, 36 Alb. Law J. 258-60 (1887): London Law Times.

[8] Mid. Eng. *legacie:* L. *legatum*, a bequest: *legare*, to appoint as deputy.

[9] 2 Bl. Com. 512.

[10] Burwell *v.* Mandeville, 2 How. 578 (1844), cases; Pratt *v.* McGhee, 17 S. C. 432-34 (1882), cases; Bacon *v.* Bacon, 55 Vt. 248 (1882), cases.

Demonstrative legacy. A bequest of a sum of money payable out of a particular fund or thing. A pecuniary legacy, given generally, but with demonstration of a particular fund as the source of its payment.[1]

A "demonstrative" legacy differs from a "specific" legacy in this respect, that if the fund out of which it is payable fails for any cause it is nevertheless entitled to come off the estate as a general legacy; and it differs from a "general" legacy in this, that it does not abate in that class, but in the class of specific legacies.[2]

All cases proceed upon the principle that whether a legacy is demonstrative or specific must be decided by the intent of the testator as it appears from the will; and that, where a legacy is held to be demonstrative, a general intent is shown to have it paid without reference to the fund on which it is primarily charged.[3]

The rule that demonstrative legacies, or such as are payable out of a specific fund, are preferred, as to that fund, in a case of deficiency of assets to pay all legacies, is a rule of intention merely.[4]

General legacy. A legacy so given as not to amount to a bequest of a particular thing or money, distinguished from all others of the same kind. **Specific legacy.** A bequest of a part of the testator's personal estate which is so distinguished.[5]

A legacy is "general" where its amount or value is a charge upon the general assets, and where, if these are sufficient to meet all the provisions of the will, it must be satisfied. A legacy is "specific" when it is limited to a particular thing, subject, or chose in action, so identified as to render the bequest inapplicable to any other; as, the bequest of a horse, a picture, a jewel, or a debt due from a person named, and, in special cases, even of a sum of money.[6]

A "specific" legacy is one that can be separated from the body of the estate and pointed out so as to individualize it, and enable it to be delivered to the legatee as a thing *sui generis*.[7]

A "general" legacy may or may not be a part of the testator's property; but a "specific" legacy must be a part, severed or distinguished.[8]

To make a legacy "specific" it must appear by express words, or by inference resting upon a strong, solid, rational interpretation of the will, that the testator intended that the legatee should take the particular thing and nothing else.[1]

If the thing specifically bequeathed does not remain at the death of the testator, there is no legacy.[2]

Vested legacy. When the interest of the legatee is so fixed as to be transmissible to his personal representatives, although he dies before the period arrives for payment of the money. **Contingent legacy.** When, from the terms of the bequest, or from the uncertainty of the event, upon which the legacy is made payable, no immediate interest passes to the legatee, but his title to the legacy depends upon his being in a condition to receive it when due.[3]

Where a legacy is given to a person to be paid or payable at or when he shall arrive at the age of twenty-one, or at a future definite period, the interest in the legacy vests immediately on the testator's death, the time being annexed to the payment and not to the gift of the legacy. This rule is positive except when clearly overborne by the expressed or necessarily implied intention of the testator.[4]

When there is a substantive bequest of money to be paid at a future time, the legacy is "vested." When there is no antecedent bequest, independent of the period fixed for payment, the legacy is "contingent."[5]

In England, when a legacy is given to a person "as," "if," "when," or "provided" he arrives at a certain age, or "at" that time, and there is no other controlling evidence of intention, the legacy is contingent. The rule is a correct one where the words "if" or "provided" are used, and in cases where the other words are used in giving a legacy to a minor if there is a provision for intermediate support or other evidence of an intention to give contingently.[6] See WHEN.

The words "in case" imply a condition as explicitly as "if," "upon," and the like, and express a contingency.[7]

A direction to pay when the legatee attains a certain age, the interest of the fund being given him in the meantime, shows that a present gift is intended, and the legacy vests in interest at the death of the testator. But a direction to pay at a future period vests in interest immediately, if the payment be post-

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[1] Glass *v.* Dunn, 17 Ohio St. 424 (1867).

[2] Armstrong's Appeal, 63 Pa. 316 (1869); 1 Roper, Leg. 191, 198. See also 47 Ala. 554; 56 Md. 122; 23 N. H. 154; 16 N. Y. 365; 19 Gratt. 438; 1 Ld. Cas. Eq., W. & T., *274.

[3] Stevens *v.* Fisher, 144 Mass. 127 (1887), cases, Devens, Judge.

[4] Rambo *v.* Rumer, 4 Del. Ch. 9 (1866); 1 Rop. 192.

[5] Tift *v.* Porter, 8 N. Y. 518 (1853); Schofield *v.* Adams, 12 Hun, 369 (1877): 1 Rop. 191.

[6] Langdon *v.* Astor's Executors, 3 Duer, 543 (1854), Duer, J.

[7] Harper *v.* Bibb, 47 Ala. 553 (1872), Peters, J.

[8] [Bothamley *v.* Sherson, L. R., 20 Eq. 308-9 (1875), Jessel, M. R. See also Bradford *v.* Haynes, 20 Me. 107 (1841); Loring *v.* Woodward, 41 N. H. 394 (1860); *Re* Estate of Woodworth, 31 Cal. 601 (1867); Smith *v.* McKittrick, 51 Iowa, 551-52 (1879); Ashburner *v.* Maguire, 2 Ld. Cas. Eq., W. & T., *267, 274, 320, cases; 2 Williams, Ex. [1158], cases.

[1] Wyckoff *v.* Perrine, 37 N. J. E. 120-21 (1883): 1 Rop. 234.

[2] Hoke *v.* Herman, 21 Pa. 305 (1853), cases.

[3] 1 Roper, Leg. 550.

[4] Bayard *v.* Atkins, 10 Pa. 17-18 (1848), cases; Pennock *v.* Eagles, 102 *id.* 294 (1883).

[5] Bowman's Appeal, 34 Pa. 23 (1859), cases; Reed's Appeal, 118 Pa. 220 (1888).

[6] Colt *v.* Hubbard, 33 Conn. 285-86 (1866). See also House *v.* Ewen, 37 N. J. E. 374 (1883).

[7] Roberts' Appeal, 59 Pa. 72 (1868).

poned for the convenience of the estate or to let in some other interest.[1]

Ordinarily, an unqualified gift of the use, income and improvement of personal estate vests an absolute interest.[2]

A rule of construction is, that when a bequest is made to individuals by name, although they in fact constitute a *class*, the intention to give to them individually is indicated, and thus the share of one dying before the testator will become intestate property. But this rule, founded on the supposed wish of the testator, may be controlled by those portions of the will, if such exist, which indicate an intent that such shall not be the result. If it appears from the whole will that the testator intended that his beneficiaries should take as a class, the share of one who dies before the testator will go to the survivors.[3]

When a legacy is given to a class as "the children" of a person, and no period is fixed for the distribution of the legacy, it is considered as due at the testator's death, and none but children born or begotten previously are entitled to share in it. Where there is postponement of the division of a legacy given to a class until a period subsequent to the testator's death, any one who answers the description so as to come within the class at the time for division will be entitled to a share, though not *in esse* at the death of the testator, unless the will shows an intention in the testator to limit his bounty to such of the class as would answer the description when the will took effect by his death. Where the bequest is in terms immediate, and so intended to be, and the description of persons to take is general, there none that do not fall within the description at the time of the testator's death can take.[4] See EACH.

Other descriptive terms applied to legacies are: *absolute*, vesting at once, unconditionally; *accumulative*, *cumulative*, or *additional*, superadded to another legacy; *alternative*, of one of two things; *conditional*, dependent upon some event, contingent; *lapsed*, where the legatee dies before the testator, or before a specified event; *residuary*, of the residuum (*q. v.*) of the estate.

The want of permanency in the condition of different kinds of personal property has occasioned much difficulty in construing bequests of future interests in chattels personal. Without considering such bequests, and having in view only general bequests of personal property or money, the rule is that, by means of an express trust, personal property may be subjected to any limitations not inconsistent with the rule against perpetuities, and it is established that, by or without creating an express trust, an executory bequest of personal property to take effect on a contingency that must happen, if at all, on the death of the first taker, may be a valid bequest[1].

In cases of deficiency of assets, general legacies "abate" proportionably; but a specific legacy not at all, unless there is not sufficient without it. Demonstrative legacies abate as between themselves, and *pari passu* with specific legacies, but are preferred to general legacies.[2] See ABATEMENT, 2.

Specific legacies are invariably liable to "ademption;" as a rule, general and demonstrative legacies are not.[3] See ADEMPTION.

A legacy equal to or greater than a debt is a "satisfaction" of the debt; less than the debt, it is not a satisfaction *pro tanto*. But slight circumstances will rebut this presumption. Where there are two legacies of equal amounts, the legatee takes one only; otherwise, if the amounts are unequal.[4]

A bare direction that a devisee shall pay money to a legatee creates a personal obligation. To constitute a "charge upon the land" devised, there must be express words to that effect or a necessary implication that such was the intention.[5]

Realty will not be charged with the payment of debts and legacies when there is personalty more than sufficient to pay them, unless the intention to charge the realty and exonerate the personalty is clear.[6]

When the testator has not created an express trust fund wherewith to pay legacies, but has made a general residuary disposition of his whole estate, blending realty and personalty in one fund, the realty is constructively charged with the legacies.[7]

If a legacy is made a personal charge on a devisee, acceptance of the devise imposes a personal liability on him, and he takes as a purchaser in fee; but if the legacy is charged on the estate, he takes as a beneficial devisee.[8]

A devise or bequest to a person for the benefit of himself and others, though accompanied with power to sell, lease, use, or expend, does not confer an absolute property in the first taker, nor make the object liable for his debts.[9]

A legacy is the transfer of an inchoate interest, and not perfected until the executor consents to pay it. His duty is first to see that the debts of the estate are

[1] Cropley *v.* Cooper, 19 Wall. 174 (1873), cases, Swayne, J.; 2 Bl. Com. 513.

[2] Chase *v.* Chase, 132 Mass. 474 (1882), cases; 26 Cent. Law J. 373-76 (1888), cases.

[3] Towne *v.* Weston, 132 Mass. 516 (1882), cases.

[4] Chasmar *v.* Bucken, 37 N. J. E. 418 (1883), cases, Runyon, Ch. On legacies given in a particular character, see 8 Va. Law J. 198, 266, 325, 396 (1884), cases: 18 Cent. Law J. 87, 104, 126, 146 (1884).— Journ. Jurisp.

[1] Hooper *v.* Bradbury, 133 Mass. 306, 308 (1882), cases, Field, J.

[2] 2 Bl. Com. 513; 4 Ves. 150; 11 Pa. 72; 1 Story, Eq. § 555.

[3] 2 Story, Eq. § 1111.

[4] See 2 Story, Eq. § 1110; 3 Duer, 541; 9 Barb. 87.

[5] Walter's Appeal, 95 Pa. 307 (1880), cases; Cable's Appeal, 91 *id.* 329 (1879).

[6] Eaverson's Appeal, 84 Pa. 178 (1877): 1 Rop. 699.

[7] Lewis *v.* Darling, 16 How. 10-11 (1853), cases; Allegheny Nat. Bank *v.* Hays, 12 F. R. 664 (1882); Newsom *v.* Thornton, 82 Ala. 402 (1886), cases.

[8] Funk *v.* Eggleston, 92 Ill. 534 (1879), Baker, J.

[9] Wetherell *v.* Wilson, 1 Keen, 15 Eng. Ch. R., 61 (1831), cases; 1 Jarm. Wills (Bigelow's ed.), *398, cases; Burt *v.* Herron, 66 Pa. 402 (1870); Biddle's Appeal, 80 *id.* 264 (1876); Pennock's Estate, 20 *id.* 268 (1853).

paid. Interest is payable after a year from the death of the testator.[1]

LEGAL.[2] 1. Pertaining to the understanding, the exposition, the administration, the science and the practice of law: as, the legal profession, legal advice; legal blanks, newspaper, *qq. v.*

2. Allowed or authorized by law: as, legal—discretion, holiday, interest, tender, trade, *qq. v.*

3. Implied or imputed in law; opposed to *actual:* as, legal malice, *q. v.*

4. Sufficient to meet the requirements of law: as, legal—charity, condition, consideration, contract, covenant, cruelty, notice, obligation,[3] *qq. v.*

5. Appointed or designated by law: as, a legal representative, *q. v.*

6. Cognizable in a court of law; as opposed to *equitable*, cognizable in chancery: as, legal—assets, defense, estate, interest, owner, proceedings, remedy, right, title, waste, wrong, *qq. v.*

"Legal" looks more to the letter, and "lawful" to the spirit, of the law. "Legal" is more appropriate for conformity to positive rules of law; "lawful" for accord with ethical principle. "Legal" imports rather that the forms of law are observed, that the proceeding is correct in method, that rules prescribed have been obeyed; "lawful" that the act is rightful in substance, that moral quality is secured. "Legal" is, moreover, the antithesis of "equitable," and the equivalent of "constructive."[4] Compare VALID.

Illegal. Contrary to law.

1. Without authority or support of law, either common or statute.

2. In violation of law; in contravention of the direction, requirement, or prohibition of a law considered with reference to its letter or policy. Compare ERROR, 2 (2), Erroneous; VOID.

"Illegal" and "unlawful" are synonyms.[5]

Legality. The quality of conforming to law. **Illegality.** The quality of being in conflict with law; also, an act or thing contrary to some law.[6]

A contract may be "illegal" because contrary to a constitution or a statute, or inconsistent with sound policy and good morals as to the consideration or the thing to be done.[1]

Illegality is of two sorts: it exists at common law, or is created by some statute. A contract illegal at common law is so because it violates morality, is opposed to public policy, or is tainted with fraud.[2]

Some authorities hold that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and its illegal object has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and a court will not unravel the transaction to discover its origin.[3]

A party to a contract, the making of which, although prohibited by law, is not *malum in se*, may, while it remains executory, rescind it and recover money advanced to the other party who had performed no part of the contract.[4]

There is a distinction between a contract made in excess of power and a contract prohibited by statute or public policy; as there is between suing for the breach of an executory contract and suing to recover the value of property received and retained under a contract executed on the part of the plaintiff.[5]

If in any case it appears from the evidence that the claim of the complaining or moving party is against public policy or the law, so that in no event could he recover a final judgment, whatever be the nature or extent of the testimony upon the point at issue, the tribunal should not hesitate to dismiss the proceeding.[6]

Within the condemned category are: agreements to pay—for supporting a candidate for a public office, or for not being a candidate: for procuring an office; for procuring a government contract; for lobby services on a claim against the government; for not bidding on a contract to carry the mail; for procuring signatures for a pardon; for suppressing evidence; for a conveyance of what may come from an ancestor; for promoting a marriage; for influence in making a will;[4] for part of the fee one may get as special counsel for the government, designated by the plaintiff;[7] for a percentage on arms sold to a foreign gov-

[1] 2 Bl. Com. 512–14.

[2] L. *legalis: lex*, law.

[3] See Mattoon *v.* Monroe, 21 Hun, 92 (1880).

[4] [2 Abbott's Law Dict. 24.]

[5] State *v.* Haynorth, 3 Sneed, 65 (1855). See also Chadbourne *v.* Newcastle, 48 N. H. 199 (1868).

[6] See Hurd, Hab. Corp. 227; 1 Abb. Pr. 429; 31 Cal. 225; 67 Mo. 642–43.

[1] Trist *v.* Child, 21 Wall. 448–49 (1874), cases; Yates *v.* Robertson, 80 Va. 484 (1885).

[2] Smith, Contracts, 178.

[3] Planters' Bank *v.* Union Bank, 16 Wall. 500 (1872), cases, Strong, J. See also Armstrong *v.* Toler, 11 Wheat. 258, 268 (1826); McBlair *v.* Gibbes, 17 How. 236 (1854), cases; Brooks *v.* Martin, 2 Wall. 81 (1863), cases; Thomas *v.* City of Richmond, 12 *id.* 355 (1870), cases; Clarke *v.* Lincoln Lumber Co., 59 Wis. 662–65 (1884), cases; 31 *id.* 254; 10 Biss. 63; 102 U. S. 420.

[4] Congress & Empire Spring Co. *v.* Knowlton, 103 U. S. 49, 58–60 (1880), cases, Woods, J.

[5] Slater Woolen Co. *v.* Lamb, 143 Mass. 421–22 (1887), cases.

[6] Lee *v.* Johnson, 116 U. S. 52 (1885), Field, J. See also Farley *v.* St. Paul, &c. R. Co., 14 F. R. 114 (1882).

[7] Meguire *v.* Corwine, 101 U. S. 111 (1879), cases.

ernment through the influence of a consul of that government.[1]

See DELICTUM, In pari, etc.; ESTOPPEL; FRAUD; MANDATORY; PROHIBITION, 1; RATIFICATION; USUS, Utile.

Legalize. To give the authority of law to that which lacks such authority: as, to legalize a nuisance; length of time will not legalize a nuisance; slavery was a legalized social relation.

To confirm or make valid what has been already done.[2]

LEGATE. See MINISTER, 3.

LEGATEE. See LEGACY.

LEGES. See LEX.

LEGISLATE.[3] To make a law or laws; to exercise sovereignty, *q. v.*

Legislation. The enactment of a law or laws.

General legislation. Legislation for all the people of a State or union of States. *Local* or *special legislation.* Legislation for individuals or a section of country.

A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful and conceals nothing, all is well; if he uses nefarious means with success, the spring-head and stream of legislation are polluted.[4] See LOBBY.

Local and special legislation, as preventing uniformity, and for other reasons, is much restricted by modern constitutions.[5]

Judicial legislation. The making of law by the decisions of the courts; often, an expression of contempt for such judicial interpretation of a statute as passes by the intent of the law-maker and virtually makes a new law.[6] See JUS, Dare; LAW, Common.

Legislative. 1. For the enacting of laws: as, a legislative body.

2. Pertaining to the law-making body: as, legislative — construction, discretion, intent, power.

"Legislative power" is the power to enact laws or to declare what the law shall be.[7]

3. Done by enactment: as, a legislative act.

Legislator. A law-maker; a member of a law-making body. See ARREST, 2 (2, 3); COMMUNICATION, Privileged, 1; LIBERTY, 1, Of speech.

Legislatorial. Pertaining to a legislature.

Legislature. The law-making power in a State.

The intent of the law-maker is the law.

One legislature cannot bind another.[1]

The journal of a legislative body is evidence for all legal purposes.[2]

It is no part of the duty of the judiciary to go behind a law duly certified to inquire into the observance of form in its passage.[3]

The action of a legislature should not be held invalid unless it is so beyond reasonable doubt; and it is then so held, not because of judicial supremacy over a co-ordinate branch of the government, but because the law must be declared and the fundamental law maintained.[4]

Well-settled rules of construction forbid courts assuming to declare an act void because in their opinion it is opposed to a spirit supposed to pervade the constitution, but not expressed in words.[5]

The legislature is to judge of the wisdom and policy of enactments, and no court has the right to overrule that judgment, even to the extent of its own powers, unless the legislature has clearly exceeded its functions.[6]

See further ACT, 3; BILL, II; CONGRESS; CONSTITUTIONAL; CONTEMPT, 2; CORPORATION, Municipal; DISCRETION, 4; DOCUMENT; GOVERNMENT; JOURNAL; LOG-ROLLING; POLICE, 2; POLICY, 1; RATIFICATION; SNAKE; STATUTE; UNIFORM; VETO; YEAS AND NAYS.

LEGITIMACY.[7] Lawfulness; in particular, the civil condition of a child born in lawful wedlock. Opposed, *illegitimacy.*

Legitimate. 1, *v.* To confer a legal status upon: as, to legitimate a bastard.

2, *adj.* (1) Born in lawful wedlock, or within a competent time afterwards.[8] Opposed, *illegitimate.*

(2) Authorized, constitutional, or lawful: as, the legitimate government.

Legitimation. Changing the civil status of a bastard to the status of a lawful child.

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[1] Oscanyan *v.* Winchester Arms Co., 103 U. S. 273-77 (1880), cases; 116 *id.* 52.

[2] [Barker *v.* Chesterfield, 102 Mass. 128 (1869).

[3] L. *lex*, *legis*, law; *latio*, a proposing.

[4] Trist *v.* Child, 21 Wall. 451 (1874), Swayne, J.

[5] Hoyt *v.* Sprague, 103 U. S. 633 (1880).

[6] See Bishop, Contr. § 1123.

[7] Wolfe *v.* M'Caull, 76 Va. 880 (1881).

[1] Newton *v.* Commissioners, 100 U. S. 559 (1879).

[2] Southwark *v.* Commonwealth, 26 Pa. 450 (1851).

[3] Kilgore *v.* Magee, 85 Pa. 412 (1877).

[4] Sullivan *v.* Berry, 88 Ky. 206 (1885).

[5] State *ex rel.* Herron *v.* Smith, 44 Ohio St. 374 (1886).

[6] Adler *v.* Whitbeck, 44 Ohio St. 562 (1886). As to constitutional regulations of proceeding, see 24 Am. Law Reg. 153-70 (1885), cases.

[7] L. *legitimus*, lawful: *lex*, law.

[8] 1 Bl. Com. 446; 70 Iowa, 412; 3 Kan. 52; 91 N. Y. 315, 320; 18 Hun, 509; 1 Grant (Pa.), 381; 2 Kent, 208. As to proof of legitimacy, see 18 Cent. Law J. 262-67 (1884), cases.

Legitimatize; legitimize. To make lawful; to legitimate, *q. v.*

In most of the States, subsequent marriage of the parents, and recognition by the father, legitimizes an illegitimate child.[1] See BASTARD.

LEND. See HIRE.

LESS. See MORE OR LESS.

LESSEE; LESSOR. See LEASE.

LET. 1, *v.* To give leave to; to permit.

(1) To grant the use of realty for a compensation. Correlative, to *hire*.

Re-let. To let again or anew.

Sub-let. To let to a third party as a second lessee. See further LEASE. Compare FARM, Let.

(2) To award: as, to let a contract after proposals have been considered.[2] Whence *letting, sub-letting*.

The act of May 17, 1878, regulates the advertisement of "mail-lettings" by the postmaster-general.[3]

2, *n.* In old English, interruption, obstruction, impediment: as "without let or hinderance."

LETTER. 1. One of the characters which constitute the alphabet.

Many letters of the alphabet, standing alone, denote abbreviations (*q. v.*) of words; and all the letters, in their order, may be used to mark exhibits, *q. v.*

2. Verbal expression, as opposed to the spirit and reason, of language: as, "the letter" of a document, of a law. See LITERA; CASUS, Omissus; SPIRIT.

3. A written communication, sealed or unsealed.[4]

A letter is certainly a "writing." If addressed by one person to another, while we may call it a letter, it is also a writing, whether the characters are made with the pen, by type, or in any other manner.[5]

The word "letter" will include the envelope in which it is sent; as, in a notice to produce a letter.[6]

That a sealed letter is not a publication, see PUBLICATION, 2.

The postmark on a letter is *prima facie* evidence that the letter was in the post-office at the time and place specified.[7]

A letter is presumed to reach its destination at the regular time, and to be received by the addressee, if living at the place and usually receiving letters there; as, in cases where notice of the protest of paper is to be sent to an indorser.[1] See PROTEST, 2.

Congress has forbidden interference with the rapid transportation of the mails; detaining or opening letters, secreting the contents, or otherwise tampering with the mails; competition by private persons; sending obscene, scurrilous, disloyal letters or publications; and letters and circulars regarding illegal lotteries.[2] See DELIVERY, 2; EMBEZZLEMENT, 1; LOTTERY; OBSCENE.

Negotiations merge into a *contract* the moment a stamped letter assenting to the proposed terms is mailed.[3] See further OFFER, 1.

That a witness may refresh his memory by referring to a letter, see REFRESH.

If a letter offered in evidence purports to be a *reply* to a letter referred to, the latter must be called for, in order to be put in evidence with it.[4] See VERBUM, Verba illata.

The author of letters, whether they are literary compositions, familiar letters, or letters of business, possesses the exclusive *copyright* in them. No person, other than he or his representative, not even the addressee, has a right to publish them upon any account, except upon such occasions as require or justify their public use; as, in a lawsuit, a letter necessary to establish one's rights, or a letter sent to a paper to vindicate the writer's reputation. For the stronger reason the addressee may not publish them for profit. In short, the addressee has but a limited right or special property in letters, as a trustee or bailee, for particular purposes, either of information or protection, or of support of his own rights and character. The general property belongs to the writer, whatever the character of the letters. An exception is made in favor of the government, as to official letters by public officers.[5]

The receiver of private letters cannot make them the subject of sale without the writer's consent. Therefore, a contract to sell letters written to another person who advertised remedies for diseases, the purchaser intending to send an advertisement to the writers, is contrary to good morals, and void.[6] See MANUSCRIPT.

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[1] See Succession of Caballero *v.* The Executor, 24 La. An. 580 (1872).

[2] See Eppes *v.* Mississippi, &c. R. Co., 35 Ala. 55 (1859).

[3] 20 St. L. 61, 141, 356.

[4] United States *v.* Bromley, 12 How. 97 (1851).

[5] United States *v.* Gaylor, 17 F. R. 441 (1883); United States *v.* Britton, *ib.* 732 (1883).

[6] United States *v.* Duff, 19 Blatch. 10 (1881).

[7] 1 Greenl. Ev. § 40, cases; Bussard *v.* Levering, 6 Wheat. 102 (1821); Lindenberger *v.* Beall, *ib.* 104 (1821); Riggs *v.* Hatch, 17 F. R. 838 (1883); *ib.* 842-50, cases; Rosenthall *v.* Walker, 111 U. S. 193 (1884), cases; Montelius *v.* Atherton, 6 Col. 227 (1882); Breed *v.* First Nat. Bank, *ib.* 238 (1882).

[1] 1 Greenl. Ev. § 40, and cases, *ante*.

[2] See R. S. §§ 3890-94; United States *v.* McCready, 11 F. R. 225 (1882).

[3] Darlington Iron Co. *v.* Foote, 16 F. R. 646 (1883). Blake *v.* Hamburg-Bremen Fire Ins. Co., 67 Tex. 169 (1886).

[4] Harvey *v.* Pennypacker, 4 Del. Ch. 454 (1872); 41 Ga. 186; 33 Iowa, 508; 14 Allen, 285; 104 Mass. 319; 7 Mich. 331; 19 Minn. 396.

[5] Folsom *v.* Marsh, 2 Story, 110-13 (1841), cases. Story, J. See also Woolsey *v.* Judd, 4 Duer, 379 (1855).

[6] Rice *v.* Williams, 32 F. R. 438, 440-42 (1887), cases, Eng. and Am.

The courts will enjoin an improper use of a letter by the addressee.[1]

Letter-book. A book containing copies of letters, the copies being made by mechanical process.

A letter in such a book is *prima facie* evidence after notice to produce the original.[2] See COPY.

Letter-carrier. An employee of the post-office who delivers letters directly to addressees at their street and number.[3]

Letter-head. See SIGN.

Letter of advice. A communication from a factor to his principal, respecting their common business; also, a letter from the drawer of a bill of exchange informing the drawee of some fact respecting the bill. See ADVICE.

Letter of credit. A letter written by one merchant or correspondent to another, requesting him to credit the bearer with a sum of money.[4]

A letter of request whereby one person requests some other person to advance money or give credit to a third person, and promises that he will repay or guarantee the same to the person making the advancement.[5]

Special letter of credit. A letter addressed to a particular individual by name, and gives no other person a right to act upon it.

General letter of credit. A letter addressed to any and every person, and gives any one authority to advance money upon it.[6]

The language should receive a reasonable interpretation, according to the intent as disclosed by the instrument and the surrounding circumstances. Any ambiguity should be taken most strongly against the party who induces the other to give credit to the supposed intent.[7]

To construe the words with wise and technical care would not only defeat the intentions of the parties, but render such instruments too unsafe a basis to rely upon for extensive credits.[8] See further EXCHANGE, 2, Bill of; GUARANTY (2).

Letter of recommendation. If the person who gives a commercial letter of recommendation honestly states his opinion, believing at the time that he states the truth, he is not liable in an action of deceit, although the representation turns out to be untrue.[1] See COMMUNICATION, Privileged, 2.

Letter-press. See *Letter-book.*

See also CIRCULAR, 2; COMMUNICATION; DECOY; MAIL, 2; POST, 2; PREJUDICE, 2; REFER, 2; THREAT.

4. An instrument attesting the grant of a right or of authority. In this sense "letters" is used where only one instrument is referred to. Compare PRESENTS (1).

Letters missive. (1) In England, a communication from the lord chancellor to a peer, made a defendant in equity, requesting him to appear and answer the bill.[2]

(2) In civil law, the papers sent, on appeal, to the court of review; letters dimissory; apostles, *q. v.*

Letter of attorney. An instrument conferring power of attorney upon an agent. See ATTORNEY, Power of.

Letter of license. See LICENSE.

Letter of recall. Informs a government that a minister sent to it has been called home.

Letters of administration. The instrument by which a person is empowered to take charge of the property of an intestate (generally), to collect the credits and pay the debts of the estate. Compare *Letters Testamentary.* See further ADMINISTER, 4.

Letters of marque and reprisal. See MARQUE.

Letters patent. Open letters: an unsealed document addressed by a government to all persons whom it may concern. Opposed, **letters close:** a document directed to a particular person, for some special purpose, and therefore closed up and sealed.

Letters patent evidence grants from the government, as, of land, or a franchise.[3] See further PATENT, 2; GRANT, 3.

Letters requisitory. See *Letters Rogatory.*

Letters rogatory. A request by one court of another court in an independent

[1] United States *v.* Tanner, 6 McLean, 128 (1854); Bartlett *v.* Crittenden, 5 *id.* 32 (1849); 2 Story, Eq. §§ 944-49.

[2] 1 Greenl. Ev. § 116; 1 Whart. Ev. §§ 72, 133; 119 U. S. 494.

[3] See R. S. §§ 3865, 3874, 3980, 3996; 1 Sup. R. S. pp. 95, 414, 415.

[4] Mechanics' Bank *v.* New York, &c. R. Co., 4 Duer, 586 (1855); McCulloch, Com. Dict.

[5] 2 Daniel, Neg. Inst. p. 666; Lafargue *v.* Harrison, 70 Cal. 384 (1886), cases.

[6] Union Bank *v.* Coster, 3 N. Y. 214 (1850).

[7] Lafargue *v.* Harrison, 70 Cal. 385-89 (1886), cases.

[8] Lawrence *v.* McCalmont, 2 How. 449 (1844), Story, J. See generally Mechanics' Bank *v.* New York, &c. R. Co., 13 N. Y. 630 (1856); Evansville Nat. Bank *v.* Kaufman, 93 *id.* 279, 282, 285, 291 (1883), cases; Pollock *v.* Helm, 54 Miss. 5-6 (1876) cases; Douglass *v.* Reynolds, 7 Pet. *122-23 (1833), cases; State Nat. Bank *v.* Young, 14 F. R. 890 (1883), cases; Byles, Bills, 99; Story, Bills, § 640.

[1] Lord *v.* Goddard, 13 How. 198 (1851).

[2] 3 Bl. Com. 445; 1 Daniel, Ch. Pr. 306.

[3] [2 Bl. Com. 346.

jurisdiction, that a witness be examined under interrogatories sent with the request.

Coming from the court of a foreign country, the witness may be compelled to appear and depose in the circuit court to which the letters are sent.[1] Compare DEDIMUS.

Letters testamentary. The instrument under which a person named as executor in a will formally takes charge of the estate, and proceeds to carry out the directions in the will.[2] Compare *Letters of Administration*. See further EXECUTOR.

LEVANT ET COUCHANT.[3] Rising up and lying down.

Where lands are not sufficiently fenced to keep out cattle, the landlord, at common law, cannot distrain them until they have been long enough on the land to have lain down and risen up to feed — one night at least. After that period the law presumes that the owner may have notice that his cattle have strayed, and it is negligence not to have taken them away.[4]

LEV. FA.; LEVARI FACIAS. See EXECUTION, 3, Writs of.

LEVEE. An embankment intended to prevent inundation.

A State, in the exercise of police powers, has the exclusive right to determine the propriety, location, and mode of building levees within her borders. After she has so decided, and contracted for the enterprise, a person, on whose land the levee is to be built, cannot require that it be constructed differently; and, in case of non-compliance with his demand, he cannot hold the State liable for compensation for the property taken or for any injury sustained.[5] See COMPENSATION, 3.

LEVITICAL. See DEGREE, 1.

LEVY.[6] 1. To raise, lift up; to create, erect, construct; to institute: as, to levy a fine. See FINE, 1.

Levy war. To constitute levying war against the United States, there must be an assemblage of persons with force and arms to overthrow the government or resist the laws.[7] See WAR; TREASON.

2. (1) To do the acts by which a sheriff sets apart and appropriates, for the purpose of satisfying the command of a writ of execution, a part or the whole of a defendant's property.[1a]

(2) The taking possession of property by an officer.[2]

Generally, all that is required is that the property should be present before the officer, subject to his control, and that he openly state that he levies upon it by virtue of an execution. He must perform some act which not only indicates an intention to seize the property, but he must reduce the property to possession, or at least bring it within his immediate control. A "pen-and-ink" levy is not sufficient. He must do some act which, if not protected by the writ, would make him a trespasser.[3] See CUSTODY, Of law; DISTRESS.

Equitable levy. Filing a creditor's bill and serving process creates a lien in equity upon the effects of the judgment debtor, aptly termed an "equitable levy."[4]

3. (1) To exact by authority of government: as, to levy a tax, or troops. (2) That which is called for or obtained by the requisition: as, a levy of men, a tax levy.

"Levy" is synonymous with "collect" or "raise" by execution. To "assess" a tax is to declare it payable.[5] See TAX, 2.

Levy court. The body charged with the administration of the ministerial and financial duties of Washington county, District of Columbia, as to roads, bridges, the poor, taxes, etc.

Its functions were those which in the States are performed by county commissioners, overseers of the poor, county supervisors, and similar bodies.[6] Abolished by Acts 21 Feb. 1871, 22 June, 1874: R. S., D. C., 10.

LEWD.[7] Given to unlawful indulgence of lust; dissolute; lustful; proceeding from unlawful lust.[8]

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[1] See R. S. §§ 875, 4071–74, 4761–62; 1 Sup. R. S. p. 266; Weeks, Dep. §§ 128–30; 1 Greenl. Ev. § 320.

[2] See Mutual Benefit Life Ins. Co. *v.* Tisdale, 91 U. S. 243 (1875).

[3] F.: L. *levantes et cubantes*. Eng. pronunciation, le'-vant; couch'-ant.

[4] [3 Bl. Com. 9; 1 B. & A. 711; 5 T. R. 48.

[5] Bass *v.* State, 34 La. An. 494 (1882), Bermudez, C. J. *Contra*, Hollingsworth *v.* Parish of Tensas, 17 F. R. 109 (1883).

[6] F. *lever:* L. *levare*, to raise.

[7] United States *v.* Greathouse, 4 Saw. 465–66, 475–79 (1863), *Exp.* Bollman, 4 Cranch, 75 (1807); Burr's Case, *id.* 471, 473, 125 (1807), Marshall, C. J.; 2 Dall. 346, 348.

[1] [Lloyd *v.* Wyckoff, 11 N. J. L. 227 (1830); 22 *id.* 383.

[2] Pracht *v.* Pister, 30 Kan. 573 (1883).

[3] Chittenden *v.* Rogers, 42 Ill. 105 (1866), cases; Crisfield *v.* Neal, 36 Kan. 282 (1887), cases; Long *v.* Hall, 96 N. C. 293 (1887).

See also 9 Ala. 519; 23 How. 469; 10 B. Mon. 120; 27 La. An. 265, 539; 28 Miss. 283; 24 N. J. L. 150; 14 N. Y. 270; 29 *id.* 471; 31 *id.* 102; 3 Wend. 446; 14 *id.* 123; 19 *id.* 495; 23 *id.* 462, 490; 16 Johns. 287; 34 Barb. 553; 10 Ohio St. 488; 9 Pa. 349; 37 *id.* 500; 46 *id.* 294; 58 *id.* 70; 77 *id.* 108.

[4] Miller *v.* Sherry, 2 Wall. 249 (1864); 7 Dana, 110.

[5] Vallé *v.* Fargo, 1 Mo. Ap. 345, 351–53 (1876).

[6] Levy Court *v.* Coroner, 2 Wall. 507 (1864).

[7] Old Eng. *lewd*, ignorant, vile: A. S. *læwed*, enfeebled, ignorant, lay; base, licentious.

[8] State *v.* Lawrence, 19 Neb. 313 (1886): Webster's Dict.; Snow *v.* Witcher, 9 Ired. L. 348 (1849).

Before a person can be convicted of "lewd and lascivious cohabitation," it must appear on the face of the indictment that both parties lewdly and lasciviously associated "together" or "with each other."[1]

A "lewd house" is a house in which fornication or adultery is practiced; a house given to the unlawful indulgence of lust.[2]

But the sexual cohabitation of persons who have in good faith but illegally married is not "lewd and lascivious."[3]

Lewdness. An offense against morality by frequenting houses of ill-fame, or by some grossly scandalous and public indecency.[4]

Includes illicit sexual intercourse, and the irregular indulgence of lust, whether public or private; as, in the nuisance of keeping a house for lewdness.[5]

No particular definition of what constitutes "open and gross lewdness" is given in statutes prohibiting it. The indelicacy of the subject forbids it, and does not require of the court to state what particular conduct will constitute the offense. The common sense of the community, as well as the sense of decency, propriety, and morality which most people entertain, is sufficient to apply the statutes to each case, and point out what particular conduct is rendered criminal by it.[6]

The word "open" qualifies the intention of the perpetrator of the the act; it does not fairly imply that the act must be public, in the sense of being in a public place, or in the presence of many people. The offense does not depend upon the number present; it is enough if it be an intentional act of lewd exposure, offensive to one or more persons present. "Open" in such cases is opposed to "secret."[7]

Compare BAWD; OBSCENE; OPEN, 2 (2).

LEX. L. That which is laid, or fixed: the law, *q. v.*

In Roman law, often synonymous with *jus*, q. v.; also, a written law, a statute, an enactment; the law of the Twelve Tables. In old English law, a collection of laws; as, the Roman or civil law.

Lex denoted law in its concrete sense; *jus*, in the general or abstract sense; like *loi* and *droit* in French, and *gesetz* and *recht* in German.

A verbis legis non est recedendum. From the words of the law let there be no departing.

If the language of a statute expresses a single meaning, effect must be given to it.[8] Compare *Ita lex*, etc.; see STATUTE.

[1] State *v.* Foster, 21 W. Va. 775 (1883).

[2] Clifton *v.* State, 53 Ga. 244 (1874).

[3] Commonwealth *v.* Munson, 127 Mass. 470 (1879).

[4] [4 Bl. Com. 64.

[5] Commonwealth *v.* Lambert, 12 Allen, 179 (1866).

[6] State *v.* Millard, 18 Vt. 577 (1846), Williams, C. J.

[7] Commonwealth *v.* Wardell, 128 Mass. 54 (1880), Colt, J.

[8] Broom, Max. 622; 66 Pa. 186.

De minimis non curat lex. The law does not concern itself with trifles.

To this maxim there are numerous exceptions and reservations. Every legal right, regardless of its extent or value, may be enforced; and every wrong, however slight, has its remedy.[1]

Every felonious taking of property is criminal. Any rude, violent, or insolent touching of another's person is a battery; and any apprehension whatever is an arrest. Any stepping upon another's land is a trespass.[2] In burglary, thrusting any part of the body within the building is an entering. And in arson, the extent of the burning is not regarded, only that some integral part be destroyed. In petty misdemeanors, shades of guilt are not distinguished.[3]

One cent may do for earnest-money, or as a consideration.[4] Any indulgence whatever to the debtor will discharge the surety, *q. v.* A trust accepted for a moment is thoroughly accepted.[5] If land abide in the husband as his own a single moment, the wife has dower.[6]

But for a trifling deficiency in the quantity of land a purchaser may not rescind.[7] Trifling waste is not considered.[8] Ground made by alluvion, little by little, belongs to the adjoining land.[9]

Where the new evidence is slight, a new trial will be refused. In practice, trifling defects and deviations are not noticed Equity will not relieve where the injury is trifling.[10] See SCINTILLA.

Ita lex scripta est. The law is so written. The law, as enacted, must be applied.

Where an act allowed an appeal from the granting of a preliminary injunction, but none for a refusal of it, the court observed "Whether the reason be sufficient for the distinction or not, it is enough for us to say, *Ita lex scripta est* — the legislature has plainly so declared.[11] See HARDSHIP.

Lex domicilii. The law of the place of domicil. **Lex fori.** The law of the forum: the place where a remedy is sought. **Lex loci.** The law of the place.

"*Lex loci:*" *lex loci contractus*, the law of the place where the contract is entered into or is to be performed. It may mean *lex loci domicilii*, the law

[1] 5 Hill, 170; 20 Barb. 651.

[2] 3 Bl. Com. 209.

[3] 4 Bl. Com. 36.

[4] 3 Pars. Contr. 52.

[5] Armstrong *v.* Morrill, 14 Wall. 139 (1871).

[6] 2 Bl. Com. 132.

[7] D'Wolf *v.* Pratt, 42 Ill. 198 (1866).

[8] 3 Bl. Com. 228.

[9] 2 Bl. Com. 16, 262.

[10] See generally 4 Barb. 614; 6 Duer, 596; 6 Exch. 869; 4 Durnf. & E. 753; 59 Cal. 267; 70 *id.* 521; 58 N. H. 39; 37 Hun, 14; 22 Pa. 363; 57 *id.* 52, 432; 78 *id.* 129; 97 Mass. 83; 118 *id.* 175; 76 Va. 906; 57 Wis. 110; 61 *id.* 264, 615; 66 *id.* 288; 67 *id.* 247; 21 Alb. Law J. 186, cases; Broom, Max. 142.

[11] Hilbish *v.* Catherman, 60 Pa. 444 (1869). See also 39 *id.* 136; 54 *id.* 508; 66 Ga. 317; 30 Kan. 762; 3 McCrary, 275; 111 Mass. 408; 1 Bl. Com. 33.

of the domicil; or *lex loci rei sitæ*, the law of the place where the subject-matter is situated; or *lex fori*, the law of the place of remedy. See PLACE, 1, Of contract.

Lex mercatoria The law-merchant. See MERCHANT.

Lex neminem cogit ad vana seu inutilia peragenda. The law forces no one to do vain or useless things.[1]

Lex non cogit ad impossibilia. The law does not require impossible things.[2] See POSSIBLE.

Lex non scripta. The unwritten law; the law of custom; the common law. **Lex scripta.** The written law; statute law.[3]

Lex rei sitæ. The law of the place where the thing in dispute is situated. See *Lex Loci*.

Lex solutionis. The law of the place of performance.

Lex talionis. The law of retaliation, *q. v.*

Lex terræ. The law of the land.

Lex vigilantibus favet. The law sustains the watchful. See VIGILANS.

Salus populi, suprema lex. The welfare of the people is the highest law.

Individual interests yield to the public welfare; as, in destroying private property to stay a conflagration, or to aid the common defense in time of war. The powers of taxation, of eminent domain, and of general or internal police, all rest upon this principle.[4] See POLICE, 2.

Silent leges inter arma. Or, *inter arma silent leges.* Laws are silent amidst arms.

The law of military necessity supersedes all civil law. In time of war administration of the municipal law may be suspended.[5] See MARTIAL, LAW.

LEXICOGRAPHERS. See DICTIONARY.

LIABLE.[6] 1. Bound, bound for, obligated; responsible, answerable, accountable, chargeable with: as, liable for money.

2. Subject to; exposed to.

That a vessel shall be "liable" to forfeiture for using a certificate of registry to which it is not entitled, implies that the government may not discover or enforce the forfeiture.[7]

Liability. 1. The state of being bound or obliged in law or justice.[1]

That condition of affairs which gives rise to an obligation to do a particular thing to be enforced by action.[2]

May include every form of punishment to which a man subjects himself by violating the common laws of the country.[3]

2. Obligation to pay money; indebtedness; a debt.[4] See INCUR.

A man's liability for a demand is measured by the amount of property that may be taken from him to satisfy the demand.[5]

Conditional or *contingent liability.* A liability which is not "absolute," but depends upon an uncertain event; as, the liability that an indorser will be required to pay the note.

Before demand and notice, the claim of the holder of a note against the indorser is a contingent liability.[6] See INDORSEMENT, 2.

As soon as a surety's obligation becomes absolute he may require the principal to exonerate him, although the creditor may not have demanded payment.[7] See SURETY.

Individual liability. (1) That of a member of an association for the obligations of the whole body. See STOCK, 3 (2).

(2) That of one of two or more wrong-doers for the acts of all. See CONTRIBUTION.

Joint liability. When two or more persons are bound as one person to do a thing; as, to pay money. *Joint and several liability.* When two or more persons together, or any one of them singly, may be required to do the thing.

Limited liability. A liability restricted in any way; in particular the liability of a partner for the debts of a limited partnership, *q. v.*; also, of a ship-owner for loss or damages to goods,[8] as see COLLISION, 1.

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[1] Broom, Max. 242-51; 110 U. S. 460; 14 Gray, 78; 8 Johns. 598; 102 N. Y. 347; 44 Ohio St. 171; 7 Pa. 206, 214.

[2] Broom, Max. 242; 8 Cranch, 246; 17 N. H. 411; 55 *id.* 211; 55 Vt. 152.

[3] 1 Bl. Com. 63.

[4] 6 How. 545; 94 U. S. 645; 97 *id.* 33; 30 F. R. 55; 105 Ill. 246; 97 N. C. 479; 17 Wend. 285; 23 N. J. L. 590.

[5] 4 Inst. 70; 30 F. R. 179; 79 Va. 641.

[6] F. and L. *id.*, to bind.

[7] The Mary Celeste, 2 Low. 354 (1874).

[1] Joslin v. New Jersey Car Spring Co., 36 N. J. L. 145 (1873). See also McElfresh v. Kirkendall, 36 Iowa, 226 (1873); Choate v. Quinichett, 12 Heisk. 432 (1873).

[2] Haywood v. Shreve, 44 N. J. L. 104 (1882). See also Wood v. Currey, 57 Cal. 209 (1881).

[3] United States v. Ulrici, 3 Dill. 534 (1875); R. S. § 13

[4] See Stanton v. Wilkeson, 8 Bened. 357, 365 (1876), McGaffin v. City of Cohoes, 74 N. Y. 389 (1878).

[5] The City of Norwich, 118 U. S. 503 (1886), Bradley, J.

[6] *Re* Loder, 4 Bened. 308, 329 (1870); French v. Morse, 2 Gray, 111 (1854).

[7] Ardesco Oil Co. v. North America Mining & Oil Co., 66 Pa. 381 (1870).

[8] Providence, &c. Steamship Co. v. Hill Manufacturing Co., 109 U. S. 578 (1883).

Vicarious liability. An obligation incurred as agent or representative.

LIBEL.[1] 1. In the civil law, the declaration in an action.

2. In ecclesiastical law, the formal complaint.[2]

Simple, when the cause of action is briefly set forth; *articulate*, when stated in distinct averments.

3. A petition for a decree of divorce from the marriage relation; a statement in writing of charges of such misconduct in a husband or wife as will justify a dissolution of the contract of marriage, presented to a court empowered to grant divorces.

Filed by the husband in his own person, or for the wife by her next friend (*q. v.*), at the place of domicil; alleges, under oath, a legal marriage contracted and existing, the cause of complaint or the grounds for a divorce, non-collusion in the proceeding, and residence for the required period; and prays that the respondent be subpœnaed to appear and answer, and that, after the evidence has been heard, a decree of absolute divorce be granted.[3] See DIVORCE.

4. The first proceeding taken in a suit in admiralty; also, to proceed against some *res* or subject-matter: as, to libel a vessel for materials furnished, for wages due, for damages suffered.

Thus, for example, a libel for a collision avers jurisdiction in the court; describes the vessel, her condition, ownership, whereabouts, etc.; states the time and place of the collision, and how, by negligence, it happened, and the extent of the damage done; and prays that process issue against the offending ship, that all persons interested in her be cited to appear and answer, and that the court decree relief in the premises.[4] See ADMIRALTY.

Libel, in the foregoing senses, corresponds to the "declaration" at common law, to the "complaint" or "petition" of modern codes, and to the "bill" filable in equity practice.

Libelant.[5] The person who institutes proceedings in an ecclesiastical court, in a court of divorce, or in admiralty.

Libelee. The person who is called upon to answer the charge exhibited in a libel.

5. Slander by written or printed words, pictures, signs, or the like.[6]

Malicious defamation of a person made public either by printing, writing, signs or pictures, in order to provoke him to wrath or expose him to public hatred, contempt, and ridicule.[1] See DEFAMATORY.

That species of defamation which is effected by writing or printing or by pictures and signs.[2]

A publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred or contempt.[3]

Any publication the tendency of which is to degrade and injure another person, or to bring him into contempt, ridicule, or hatred, or which accuses him of a crime punishable by law, or of an act odious and disgraceful in society.[4]

Every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and imputes malice in the author or publisher toward the person concerning whom such publication is made.[5]

Every publication in writing or in print which charges upon or imputes to a merchant or business man insolvency or bankruptcy, or conduct which would prejudice him in his business or trade, or be injurious to his standing and credit as a merchant or business man.[6]

A false and malicious publication concerning the person, which exposes him to public ridicule, hatred, or contempt, or hinders virtuous men from associating with him.[7]

A censorious or ridiculous writing, picture, or sign, made with a mischievous and malicious intent toward government, magistrates, or individuals.[8]

[1] Mid. Eng. *libel*, a brief writing: L. *libellus*, a little book, a pamphlet. *Libellus famosus*, a defamatory pamphlet,—4 Bl. Com. 150; 3 *id.* 100; 5 Coke, *125; 2 Bin. *517.

[2] See 3 Bl. Com. 100; 3 Steph. Com. 314.

[3] See Hancock's Appeal, 64 Pa. 470 (1870); Realf *v.* Realf, 77 *id.* 31 (1874).

[4] See Dunl. Adm. Pr. 113; 7 Cranch, 389, 394; 9 Wheat. 386, 401; 3 Mas. 503; 2 Gall. 485.

[5] Lī'-bel-ant. Also spelled libellant.

[6] 3 Bl. Com. 125.

[1] 4 Bl. Com. 150.

[2] White *v.* Nichols, 3 How. 285 (1845), Daniel, J.

[3] Whitney *v.* Janesville Gazette, 5 Biss. 331 (1873), Davis, J.

[4] Dexter *v.* Spear, 4 Mas. 116 (1825), Story, J.

[5] White *v.* Nicholls, 3 How. 291 (1845), Daniel, J.; Steele *v.* Southwick, 1 Am. L. C. *106–17, cases.

[6] Erber *v.* Dun, 12 F. R. 531 (1882), Caldwell, D. J.

[7] Donaghue *v.* Gaffy, 54 Conn. 268 (1886), Pardee, J.

[8] People *v.* Croswell, 3 Johns. Cas. *354 (1804), Alexander Hamilton. "That definition is drawn with the utmost precision,"—Steele *v.* Southwick, 9 Johns. *215 (1812), Kent, J. See also 6 Conn. 407; 7 *id.* 268; 27

Words of comparison may be as libelous as those in importing a direct charge: they tend to bring the person into ridicule and contempt.[1]

Words relating merely to the quality of articles made, produced, furnished, or sold by a person, though false and malicious, are not actionable without special damage,—unless they attack the individual.[2]

Libeler.[3] One chargeable with a libel.

Libelous. Of the nature of, pertaining to, a libel or libels.

Blasphemous libel. See BLASPHEMY.

Criminal libel. Such defamatory publication as tends to cause a breach of the public peace.

Seditious libel. Such publication as tends to disturb the tranquillity of society by exciting the people against the government.[4] See SEDITION.

The communication of a libel to one person is a publication,[5] *q. v.*

Where the publication is in terms so clear that no circumstances are required to make it clearer, the question of libel or no libel is one of law for the court.[6]

Every libel tends to a breach of the peace, by provoking the person libeled to break it. In criminal prosecutions this tendency is all that the law considers; it pays no regard to the falsity, except, perhaps, as a matter in aggravation of guilt, enhancing the punishment.[7]

Upon this principle is explained Lord Mansfield's observation that "the greater the truth, the greater the libel;" that is, in criminal law, the greater the appearance of truth in malicious invective, the more it tends to produce a disturbance of the peace by stirring up the object of it to revenge, perhaps to bloodshed.

The maxim used to be "the greater the truth, the greater the libel:" the injurious publication of the truth about a person would be more likely to sting him to a breach of the peace than would the publication of a falsehood which he could refute. But now, under the sixth section of Lord Campbell's Act, 6 and 7 Vict. (1843) c. 96, the defendant, in an action for criminal libel, may prove not only that his assertion was true, but also that it was for the public benefit that the statement should be published. The statute does not apply in cases of blasphemous, obscene, or seditious libels.[8]

Remedies: indictment for the public offense; an action on the case for damages for the private injury.[1]

Author, printer, and publisher are alike liable.

As to signs or pictures, it is necessary to show, by innuendoes and averments of the defendant's meaning, the import and application of the scandal, and that special damage has followed.[2]

In a civil action, the libel must appear to be false as well as scandalous; for, if the charges are true, the plaintiff has received no legal injury. Therefore it is that the defendant may "justify," that is, prove the truth.[3]

The truth of the matter, as a defense, must be specially set up, for use by way of justification or in mitigation of damages. It makes no difference that the matter is not libelous *per se*, so long as it shows on its face personal animosity equivalent to actual malice.[4]

Innocence is not presumed; nor is proof of malice required: proof of the publication alone is sufficient. Justification, excuse, or extenuation proceed from the defendant.[5]

If the charge is false, malice need not be proved: it is implied. The only perfect answer and bar is the truth of all of the publication. The words are to be taken in their ordinary sense; and they are actionable *per se* if directly calculated to degrade, or to injure one in his business.[6] A witness may not give his opinion as to the meaning of the words.[7]

Malice may consist either in a direct intention to injure another or in a reckless disregard of his rights and of the consequences that may result to him.[8]

The essence is malice: the mind must be at fault. If the language is actionable, the publication is presumed to have been malicious, unless the occasion rendered it *prima facie* privileged — which circumstance will rebut the legal inference of malice, and place the burden of proving malice in fact upon the plaintiff.[9]

The rules applicable are about the same as in slander. But, because effected with greater coolness and deliberation, and more permanent and extensive in its operation, libel is treated with sterner rigor.[9]

The later constitutions declare, as a right, that "No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or in any other matter proper for public investigation or infor-

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id. 61; 3 Del. 407; 3 Harring. 407; 5 Ind. 364; 70 Iowa, 214; 68 Me. 295; 60 Md. 175; 4 Mass. 168; 2 Pick. 113; 28 Mich. 375; 30 Minn. 43; 11 Neb. 281; 3 Johns. 354; 9 *id.* 215; 24 Wend. 440; 25 *id.* 198; 87 Pa. 390; 13 R. I. 327; 4 McCord, 321; 4 Wis. 238; 6 M. & W. 108; 15 *id.* 344, 435; 2 Kent, 13; Towns. Sland. 75, § 20, cases; Stark. Sl. 4.

[1] Solverson *v.* Peterson, 64 Wis. 201 (1885), cases.

[2] Dooling *v.* Budget Publishing Co., 144 Mass. 259 (1887), cases.

[3] Spelled also libeller.

[4] See Queen *v.* O'Brien, 4 Crim. Law Mag. 424 (1883).

[5] 4 Bl. Com. 150.

[6] Donaghue *v.* Gaffy, 54 Conn. 266 (1886), cases.

[7] 3 Bl. Com. 125; 4 *id.* 150.

[8] Odgers, Libel & Sland. *388-90; Folkard's Starkie, Sland. & Lib. *21-22; Queen *v.* O'Brien, 4 Cr. Law M. 494 (1883); Saffyn's Case — De Libellis Famosis, 5 Coke, *125 (1606).

[1] 3 Bl. Com. 125.

[2] 3 Bl. Com. 126.

[3] 3 Bl. Com. 126; 4 *id.* 151.

[4] Donaghue *v.* Gaffy, 53 Conn. 51-52 (1885).

[5] White *v.* Nicholls, 3 How. 291 (1845); 1 Greenl. Ev. § 35.

[6] Whitney *v.* Janesville Gazette, 5 Biss. 331 (1873); Dexter *v.* Spear, 2 Mas. 115 (1825); Commonwealth *v.* Morgan, 107 Mass. 199 (1871).

[7] Gribble *v.* Pioneer Press Co. Sup. Ct. Minn. (1887); 26 Am. Law Reg. 797-802 (1887), cases.

[8] Gott *v.* Pulsifer, 122 Mass. 239 (1877), cases, Gray, Chief Justice.

[9] Stewart *v.* Hall, 83 Ky. 380, 382 (1885).

mation, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."[1]

In discussions, in good faith, of the public conduct and qualifications of public men, the defendant is not bound to prove the exact truth of his statements and the soundness of his inferences, provided that he is not actuated by express malice, and that there is reasonable ground for such utterances.[2]

Voters have the constitutional right publicly to discuss and canvass the qualifications of candidates for public office, and information honestly communicated at a public meeting, to the effect that a candidate had been charged by a reputable citizen with grave misconduct, is a privileged communication, and the person is not liable in an action of libel, although the falsity of the charge could have been discovered by inquiry. In such a case, in the absence of proof of actual malice, the court may nonsuit the plaintiff.[3]

Charges of crime, which are false, made in a newspaper, against a candidate, though made without malice, and in honest belief of their truth, are not privileged communications; but, if published in good faith, after proper investigation, this fact may go in mitigation.[4]

The constitutional provision referred to does not apply to a civil action for damages.[5]

See COMMUNICATION, Privileged, 2; DAMAGES; INNUENDO; LIBERTY, Of the press, Of speech; MAINER; MALICE; NEWSPAPER; REVIEW, 3; RUMOR; SHYSTER; SLANDER.

LIBER. See HOMO.

LIBERAL. See CONSTRUCTION, 2.

LIBERARI. See EXECUTION, 3, Writs of.

LIBERTY.[6] 1. The condition of a freeman; freedom from restraint; freedom.

In its broad sense, the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.[1]

Natural liberty. Consists in the power of acting as one thinks fit, without any restraint or control, unless by the laws of nature.[2] **Political or civil liberty.** The power of doing whatever the laws permit;[3] that liberty of a member of society, which is no other than natural liberty so far restrained by human laws as is necessary for the general advantage of the public.[4]

"Moral liberty" or "natural liberty" is the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and that they do not in any way abuse it to the prejudice of any other man.[5]

"Civil liberty" is the power of doing whatsoever we will, except when restrained by just and equal laws. "Political liberty" is that condition in which a man's civil liberty is fully secured.[6]

In constitutional law "liberty" means, not merely freedom to move about unrestrained, but such liberty of conduct, choice, and action as the law gives and protects. Liberty is classified as natural, civil, and political liberty. "Natural liberty" is commonly employed in a somewhat vague and indeterminate sense. One man will understand by it a liberty to enjoy all those rights which are usually regarded as fundamental, and which all governments should concede to all their subjects; but as it would be necessary to agree what these are, and the agreement could only be expressed in the form of law, the natural liberty, so far as the law could take notice of it, would be found at last to resolve itself into such liberty as the government of every civilized people would be expected by law to define and protect. Another by natural liberty may understand that freedom from restraint which exists before any government has imposed its limitations. But as without government only a savage state could exist, and any liberty would be only that of the wild beast, in which every man would have an equal right to take or hold whatever his agility, courage, strength, or cunning could secure, but no available right to more, it is obvious that a natural liberty of the sort would be inconsistent with any valuable right whatever. A right in any valuable sense can only be that which the law secures to its possessor, by requiring others to respect it, and to abstain from its violation. Rights, then, are the offspring of law; they are born of legal restraints. "Civil liberty" is the condi-

[1] Penn. Const. Art. I, sec. 7. Compare Const. Ala. I, 5, 13; Ark. II, 6; Cal. I, 9; Col. II, 10; Conn. I, 5-7; Del. I, 5; Fla. D. R. 10; Ga. I, 9; Ill. II, 4; Ind. I, 9-10; Iowa, I, 7; Kan. B. R. 11; Ky. XIII, 9-10; La. 4; Me. I, 4; Mass. I, 16; Mich. IV, 42, VI, 25; Minn. I, 3; Miss. I, 4; Mo. II, 14; Neb. I, 5; Nev. I, 9; N. H. I, 22; N. J. I, 5; N. Y. I, 8; N. C. I, 20; Ohio, I, 11; Oreg. I, 8; R. I. I, 20; S. C. I, 7-8; Tenn. I, 19; Tex. I, 8; Vt. I, 13; Va. I, 14; W. Va. I, 7-8; Wis. I, 3.

[2] Crane *v.* Waters, 10 F. R. 620-21 (1882), cases, Lowell, C. J.; Express Printing Co. *v.* Copeland, 64 Tex. 354 (1885), cases: 24 Am. Law Reg. 644-48 (1885), cases.

[3] Briggs *v.* Garrett, 111 Pa. 404 (1886), cases; 18 Cent. Law J. 112-14 (1884), cases.

[4] Bronson *v.* Bruce, 59 Mich. 467 (1886), cases. See also Crane *v.* Waters, 10 F. R. 619 (1882); 21 Cent. Law J. 86-90 (1885), cases.

[5] Barr *v.* Moore, 87 Pa. 392 (1878). See generally Cooley, Const. Lim. 414-26, 431-42, cases.

[6] L. *libertas; liber*, free.

[1] *Re* Jacobs, 98 N. Y. 106 (1885), Earl, J. See also People *v.* McCoy, Cr. Ct. Cook Co., Ill., 20 Chic. Leg. N. 151 (1888) — on right of a physician to advertise.

[2] 1 Bl. Com. 125; 20 Barb. 231.

[3] [1 Bl. Com. 6.

[4] Snyder *v.* Warford, 11 Mo. 515 (1848): Burlamaqui.

[5] 1 Shars. Bl. Com. 6.

tion in which rights are established and protected, by means of such limitations and restraints upon the action of individual members of the political society, as are needed to prevent what would be injurious to other individuals, or prejudicial to the general welfare. This condition may exist in any country, but its extent and securities must depend largely upon the degree of political liberty which accompanies it. "Political liberty" may be defined as consisting in an effectual participation of the people in the making of the laws.[1]

The Constitution provides that "No person shall be . . deprived of . . liberty . . without due process of law." Liberty here means freedom from all restraints but such as are justly imposed by law;[2] more, then, than freedom from physical restraint or the bounds of a prison: freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give them their highest employment.[3]

"Civil liberty" exists only where every individual has the power to pursue his own happiness according to his own views, unrestricted, except by equal, just, and impartial laws.[4]

Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained. Such concessions make up the consideration he gives for the obligation of the body politic to protect him in life, liberty, and property.[5]

Personal liberty. Consists in the power of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law.[6]

Next in importance to personal security, *q. v.* Violated by false imprisonment, *q. v.* The right forbids that a man be excluded from his country unless by sentence of law.[7]

See ARREST, 2 (2, 3); HABEAS CORPUS; IMPRISONMENT; LIFE; MAGNA CHARTA; POLICE, 2; RIGHT, 2 (2), Absolute.

Liberty of conscience. See CONSCIENCE; RELIGION.

Liberty of speech. The right to state facts and express an opinion.

Members of legislatures, "for any Speech or Debate in either House, . . shall not be questioned in any other Place."[1] But a printed and published speech might not bear this privileged character.

Counsel, in presenting his client's view of a case, may use language derogatory to adverse persons; but if he goes out of the way of fair criticism, pertinent to the matters in dispute, and maliciously defames a party or witness, he becomes liable to damages in an action for the slander.[2] See further ATTORNEY.

Liberty of the press. Consists in laying no previous restraints upon publication; not, in freedom from censure for criminal matter when published.[3]

Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done [down to 1694], is to subject all freedom of sentiment to the prejudices of one man. But to punish dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of the individual is left free; the abuse only of that free will is the object of legal punishment.[4]

"The liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy or individuals."[5]

The right, in the conductor of a newspaper, to print whatever he chooses without any previous license.[6]

"Congress shall make no law . . abridging the freedom of speech, or of the press."[7]

Provisions of like import are embodied in the constitutions of the States. Thus, the constitution of New York provides that "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."[8]

That a legislature may not pass any such law, ap-

[1] [Cooley, Princ. Const. Law, 225-26, Torts, 8-10.

[2] Constitution, Amd. Art. V; Slaughter-House Cases, 16 Wall. 127 (1872), Swayne, J., dissenting.

[3] Munn *v.* Illinois, 94 U. S. 142 (1876), Field, J., dissenting. See also People *v.* Marx, 99 N. Y. 386 (1885).

[4] Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 758 (1884), Field, J., dissenting; *ib.* 762.

[5] Canada Southern R. Co. *v.* Gebhard, 109 U. S. 536 (1883), Waite, C. J.

[6] 1 Bl. Com. 134.

[7] 3 Bl. Com. 127; 1 *id.* 124, 137.

[1] See Constitution, Art. I, sec. 6, cl. 1.

[2] See 3 Chitty, Pr. 887; Maulsby *v.* Reifsnider, Md. Sup. Ct. (1888), cases.

[3] 4 Bl. Com. 151.

[4] 4 Bl. Com. 152.

[5] People *v.* Crosswell, 3 Johns. Cas. *394 (1804), Kent, Judge.

[6] Sweeney *v.* Baker, 13 W. Va. 182 (1878), Green, P. J. See, at length, Commonwealth *v.* Kneeland, 20 Pick. 219 (1838), Shaw, C. J.; Negley *v.* Farrow, 60 Md. 176-77 (1882).

[7] Constitution, Amd. Art. I.

[8] N. Y. Const. Art. I, sec. 8. See references LIBEL, 5; also, State *v.* Judge of District Court, 34 La. An. 748 (1882).

plies to all citizens, whether in private or official station [1]

During a political canvass, every person has a right to speak, write and publish "his sentiments" and opinions, and to discuss the character, fitness, qualifications, habits, opinions, defects, merits or lack of them, of any candidate for office, in such form and manner as to him shall seem proper, subject, in law, only to responsibility for the abuse of that right. For such discussions the law sets up no standard of morality, taste, humanity or decency, but leaves those matters wholly to the censorship of the moral sense of the people, except that when such writings or publications are libelous in their character, and are not privileged, the publisher must be able, on a criminal prosecution, to show to a jury not only that they are true, but that they were published with good motives and for justifiable ends. But these provisions will be searched in vain to find any right to publish as genuine any false or forged letter or instrument purporting to be the act of another, although he be a candidate for office. In such a case, neither the forger nor the publisher of the forgery is writing or publishing his sentiments or opinions within the protection of the constitution, or discussing any question within the range of his lawful rights and privileges.[2]

The general liberty of the press must be construed in subordination to the right of any person calumniated thereby to hold it responsible for an abuse of that liberty.[3]

Liberty of circulating is as essential to the liberty of the press as liberty of publishing. Hence, printed matter excluded from the mails may be transported otherwise, as merchandise.[4]

Liberty of worship. See RELIGION.

2. The expression "improper liberties," taken with a woman, is ambiguous. It may mean no more than undue familiarities, but it may also refer to unlawful sexual commerce.[5] See BATTERY.

3. A franchise; also, the place or district where any such special privilege is enjoyed: as, the northern liberties of Philadelphia, the northern and eastern liberties of Pittsburgh. See FRANCHISE, 1.

Jail liberties. See JAIL.

LIBRARY. The room or place where books are kept, or the books in the aggregate.[6]

LICENSE.[7] Permission or authority: as, a license to do a particular thing.[8] See PERMIT.

Licensor. He who has given a license.

Licensee. He who has received a license.

Letter of license. An agreement whereby the creditors of an insolvent debtor consent to a temporary suspension of their rights, and bind themselves not to sue or molest the debtor for a specified time, during which he is allowed to carry on his business at his own discretion.[1] See COMPOSITION, 3.

More specific significations of license are:

1. Authority given to do some one act, or a series of acts, on the land of another, without passing any estate in the land: as, a license to hunt on another's land, or to cut down trees.[2]

"A mere license passes no interest . . only makes an action lawful, which, without it, would have been unlawful." If the instrument passes an interest, it is a *grant*.[3]

Imports leave, permission, sufferance, authorization: as, a license to enter upon land to erect a party-wall.[4]

In this sense, license is contrasted with *easement*, which implies an interest in another's land, distinct from the ownership of the soil, and enjoyable at all times; and with *lease*, which transfers the right to take the profits of the land.[5]

Any such license may be oral, or implied from acts, and executed or executory. An executory license, not founded on a consideration nor coupled with an interest, may be revoked.

A mere license to a party, without words showing it was meant to be assignable, is the grant of a personal power to the licensee, and not transferable.[6]

A license to do a particular act need not be in writing: it amounts to nothing more than an excuse for an act which would otherwise be a trespass. But a permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his consent, is an important interest, which ought not to pass without writing.[7]

A licensee (of a mine) is not a lessee.[8]

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[1] Louthan *v.* Commonwealth, 79 Va. 196 (1884).

[2] People *v.* Morey, N. Y. (1881), Davis, J.

[3] Barr *v.* Moore, 87 Pa. 393 (1878).

[4] *Exp.* Jackson, 96 U. S. 733, 735 (1877).

[5] State *v.* Carr, 60 Iowa, 455 (1883), Day, C. J.

[6] Carter *v.* Andrews, 16 Pick. 9 (1834), Shaw, C. J.

[7] F. *licence:* L. *licentia*, freedom to act: *licere*, to be left free, to be allowable.

[8] Gibbons *v.* Ogden, 9 Wheat. 213 (1824), Marshall, C. J.; 22 How. 240.

[1] [4 South. Law Rev. 639 (1878), cases.

[2] Cook *v.* Stearns, 11 Mass. *537 (1814), Parker, C. J.; Cheever *v.* Pearson, 16 Pick. 273 (1834), Shaw, C. J.; Morgan *v.* United States, 14 Ct. Cl. 327 (1878); 19 Ark. 32-33; 41 N. J. L. 75; 31 Pa. 477.

[3] Washburn *v.* Gould, 3 Story, 162 (1844), Story, J.: Thomas *v.* Sorrell, 1 Vaugh. 351 (1706), Vaughan, C. J.; Wood *v.* Leadbitter, 13 M. & W. *844 (1845).

[4] Sun Printing, &c. Association *v.* Tribune Association, 44 N. Y. Super. Ct. 140 (1878), Sanford, J.; 7 How. Pr. 84.

[5] See 1 Washb. R. P. 398; 19 Ark. 33; 74 Ill. 185; 40 Iowa, 456.

[6] Troy Iron, &c. Factory *v.* Corning, 14 How. 216 (1852); Oliver *v.* Rumford Chemical Works, 109 U. S. 82 (1883), cases.

[7] Cook *v.* Stearns, 11 Mass. *537 (1814), Parker, C. J.

[8] Wheeler *v.* West, 71 Cal. 129 (1886), cases.

A license creates no interest in the land. It is a mere power or authority, founded on personal confidence, not assignable, and revocable at pleasure, unless subsidiary to a valid grant, to the beneficial enjoyment of which its exercise is necessary, or unless executed under such circumstances as to warrant the interposition of equity. This is the result of the best considered cases. The doctrine of early cases, which converted an executed license into an easement, is now generally discarded as being "in the teeth of the statute of frauds."[1] See NEGLIGENCE; TICKET, Theater.

2. Any conveyance of a patent short of the entire monopoly, for the whole country or a particular district.[2]

Licensee. One who has transferred to him, in writing or orally, a less or different interest than the interest in the whole patent or an undivided part of such whole interest, or an exclusive sectional interest.[3] Compare ASSIGNEE; GRANTEE.

A license to make and use a patented invention, as, a machine, need not be in writing, nor recorded. It conveys neither an interest in a patent itself, nor a power authorizing a third person to construct the invention.[4]

A similar use of the words license and licensee obtains in the law of copyright. See DRAMA.

3. In popular understanding, a permission to do something which without the license would not be allowed. This is also the legal meaning.[5]

Permission granted by some competent authority to do an act which, without such commission, would be illegal.[6]

Evidence of permission to exercise a trade or calling in consequence of the payment of a tax or duty.[7]

Essentially the granting of a special privilege to one or more persons, not enjoyed by citizens generally, or, at least, not enjoyed by a class of citizens to which the licensee belongs.[8]

Vocations which need special surveillance, and others which are fit subjects for the exaction of a revenue, are restricted to persons who procure a formal permit. This system enables the authorities to register all such licensees, and to hold them to answer for any disobedience of law. These licenses are always in writing, in an official form, and run for a limited term.[1]

A "license" to be produced as a defense in a criminal prosecution is the right to do the thing in any mode permitted or not prohibited by law.[2]

Comprehends cases in which statutes declare that persons of certain occupations may do the thing, as, druggists, officers of the law, and other persons allowed to sell or distribute liquors.[3]

In this sense, contrasted with *contract*. Thus, lottery charters are not contracts, but mere licenses, and, as such, subject to future legislation.[4] See LOTTERY.

The privilege of running street cars may be in pursuance of a license, not of a contract, from the city authorities.[5]

Also contrasted with *tax*. A "license" is a right granted by some competent authority to do an act which, without such license, would be illegal. A "tax" is a rate or sum of money assessed on the same person, property, etc., of the citizen. A license is issued under the police power. If the fee required for a license is intended for revenue, its exaction is an exercise of the power of taxation.[6]

A "tax" upon a business is no more the granting of permission to engage in it than is the levying of a tax upon the property employed in the business. The distinction between a "tax" upon a business, and what might be termed a "license," is, that the former is exacted by reason of the fact that the business is carried on, the latter, as a condition precedent to the right to carry it on. In the one case the individual may rightfully engage in the business without paying the tax. A license may exist without the imposition of a tax, and a tax may be imposed without the granting of a license.[7]

A license issued under the act of Congress of June 30, 1864, "to provide internal revenue," conveys no authority to carry on the business within a State. The requirement of paying for such a license is only a mode of imposing taxes on the business.[8]

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[1] Johnson *v.* Skillman, 29 Minn. 97-99 (1882), Vanderburg, J. See Jackson *v.* Philadelphia, &c. R. Co., 4 Del. Ch. 181 (1871), cases; 14 Ct. Cl. 327, cases.

[2] [Curtis, Patents, § 212.

[3] Potter *v.* Holland, 4 Blatch. 211 (1858): Act 4 July, 1836, §§ 13, 14; Kelly *v.* Porter, 17 F. R. 519 (1883); *ib.* 538; 15 Barb. 310; 5 Fish. Pat. Cas. 411; 1 *id.* 327; 1 Holmes, 149; 21 Wall. 205; 12 Blatch. 202.

[4] Baldwin *v.* Sibley, 1 Cliff. 155 (1858); Brooks *v.* Byam, 2 Story, 541 (1843).

[5] Youngblood *v.* Sexton, 32 Mich. 419 (1875), Cooley, J.

[6] State *v.* Hipp, 38 Ohio St. 226 (1882), cases, Okey, C. J.; 50 Ga. 530; 11 Neb. 547.

[7] [United States *v.* Cutting, 3 Wall. 443 (1865), Grier, J.

[8] State *v.* Frame, 39 Ohio St. 413 (1883), McIlvaine, J.; Anderson *v.* Brewster, 44 *id.* 587 (1886).

[1] [Abbott's Law Dict.]

[2] Commonwealth *v.* Carpenter, 100 Mass. 206 (1868), cases.

[3] Commonwealth *v.* Kennedy, 108 Mass. 294 (1871), cases.

[4] Stone *v.* Mississippi, 101 U. S. 814 (1879).

[5] Union Passenger Ry. Co. *v.* Philadelphia, 101 U. S. 528 (1879).

[6] Home Ins. Co. *v.* Augusta, 50 Ga. 537 (1874), Trippe, J. See also Chilvers *v.* People, 11 Mich. 49 (1862); Burch *v.* Savannah, 42 Ga. 596 (1871); Fuller *v.* State, 48 Ala. 293-94 (1872); Wiggins Ferry Co. *v.* East St. Louis, 102 Ill. 560, 566-68 (1882), cases.

[7] Adler *v.* Whitbeck, 44 Ohio St. 558-59 (1886), Minshall, J.; Anderson *v.* Brewster, *ib.* 588 (1886); Home Ins. Co. *v.* Augusta, 50 Ga. 537 (1874).

[8] License Tax Cases, 5 Wall. 462 (1866), Chase, C. J.

It is the generally received doctrine that, in the case of useful employments, prohibition cannot be exercised under authority to license.[1]

The power to license is a police power, although it may also be exercised for the purpose of raising revenue.[2]

A license authorizing a person to retail spirituous liquors does not create a contract between him and the government. The effect is merely to permit him to carry on the trade under certain regulations and to exempt him from the penalties provided for unlawful sales.[3]

A licensee to keep a pool-table for hire takes his license subject to such conditions as the legislature may see fit to impose at any time.[4]

See DRUMMER; LOTTERY; POLICE, 2; PROHIBITION, 2.

LICENTIA. See IMPARLANCE.

LICENTIOUSNESS. 1. Doing as one pleases, without regard to the rights of others. See LIBERTY, Natural.

2. Lewdness, *q. v.*

LICITATION.[5] Where the co-heirs or co-proprietors of a thing by undivided interest put it up at auction among themselves, that it may become the property of the one who will offer the most for it.

The thing remains charged with unpaid shares.[6]

Where there is disagreement between the owners of a vessel, there may be "licitation" and partition for a moiety by order of a court. The petition prays for a sale, and distribution of the proceeds. The proceeding is justified by the necessity, in the interests of commerce, and the relief of the parties, when they have reached a present actual inability to use the vessel.[7]

LIDFORD LAW. See LYNCH LAW.

LIE. 1, *v.* (1) To exist, subsist: as, to "lie in grant:" said of an incorporeal right; a corporeal right is said to "lie in deed." See GRANT, 1.

(2) To be maintainable, sustainable: as, an "action lies." Compare LAY, 2.

(3) To be concealed, or in ambush: as, to lie in wait. See LYING.

2, *n.* A willful untruth; a falsehood. See DECEIT; DECOY; ESTOPPEL; FALSEHOOD; FRAUD; REPRESENTATION, 1; SLANDER.

LIEGE. See ALLEGIANCE; FEUD; LORD, 1.

LIEN.[1] A tie that binds property to a debt or claim for its satisfaction.[2]

Originally, a tie or bond. In the metaphorical sense in which it is used in law, such hold or claim upon a thing, for the satisfaction of a debt, duty or demand, that it cannot be taken away until the same be satisfied and paid.[3]

A hold or claim which one person has upon the property of another, as a security for some debt or charge.[4]

A right to possess and retain property, until some charge attaching to it is paid or discharged.[5]

In its widest sense, includes every case in which personal or real property is charged with the payment of a debt.[6]

Lienor. He who is invested with a right of lien; he who may enforce a lien.[7]

Liens exist at common law, arising from usage, express contract or contract implied from dealings; they are recognized in equity and in admiralty; and are created also by statutory enactment. Common-law liens are displaced by surrender of possession. Liens by contract depend upon the terms of the contract, and statutory liens upon the construction of the statutes.[8]

A court of equity will relieve as against a lien at law, if, from difficulties, the parties are unable to obtain justice at law.[9]

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[1] City of Burlington *v.* Bumgardner, 42 Iowa, 673 (1876).

[2] Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 373 (1882); State *v.* Hipp, 38 Ohio St. 225 (1882).

[3] Calder *v.* Kurby, 5 Gray, 598 (1855), Bigelow, J. See also Van Hook *v.* City of Selma, 70 Ala. 368 (1881), cases; Prohibitory Amendment Cases, 24 Kan. 724 (1881), cases; La Croix *v.* County Commissioners, 50 Conn. 329 (1882), cases; Chilvers *v.* People, 11 Mich. 49 (1862); State *v.* Holmes, 38 N. H. 227 (1859).

[4] Commonwealth *v.* Kinsley, 133 Mass. 579 (1882), cases.

[5] L. *licitatio; liceor*, to offer a price.

[6] Hache *v.* Ayraud, 14 La. An. 179 (1859): Pothier.

[7] The Annie Smith, 10 Benod. 110-17, 135, 138 (1878), cases.

[1] LÏ-en. F. *lien*, band, bond, tie: L. *ligare*, to bind.

[2] Stephani *v.* Bishop of Chicago, 2 Bradw. 253 (1878), Pleasants, J.

[3] Stansbury *v.* Patent Cloth Manufacturing Co., 5 N. J. L. 441 (1819), Kirkpatrick, C. J.

[4] Hardy *v.* Norfolk Manufacturing Co., 80 Va. 418 (1885), Lacy, J.

[5] 1 Story, Eq. § 506.

[6] Sullivan *v.* Portland, &c. R. Co., 4 Cliff. 226 (1874), Clifford, J.

See also 19 Am. Law Rev. 783-89 (1885), cases; 1 Mas. 221; 2 Story, 131; 13 Ala. 434; 12 Fla. 85; 46 Ga. 568; 39 Ill. 594; 69 Me. 427; 1 Mich. 472; 44 Miss. 518; 85 N. C. 432; 49 N. H. 352; 50 *id.* 75; 46 N. Y. 17; 4 Johns. 112; 12 Wend. 262; 26 *id.* 472; 49 Barb. 244; 11 Ohio St. 68; 7 Oreg. 434; 30 Pa. 277; 32 *id.* 360; 81 *id.* 132; 7 Heisk. 290; 2 Utah, 91; 21 Vt. 602; 48 Wis. 253; 2 East, 235; 15 *id.* 554; 2 Camp. 582.

[7] See 10 Benod. 557.

[8] 1 Story, Eq. § 506; Wilkie *v.* Day, 141 Mass. 78 (1886), cases; 4 Cliff. 225; 2 Flip. 413. Effect of taking security, 20 Cent. Law J. 405-7 (1885), cases.

[9] 2 Story, Eq. § 1216, *a*; 1 Ves. Jr. 416.

I. The civil law, under the head of mortgage and privilege, embraces the peculiar securities which in the common and maritime law, and in equity, are termed liens. See *Maritime Lien.*

II. At common law, the essence of a lien is the right of possession or retainer, until the charge is satisfied. Meanwhile, the chattel is regarded as in the custody of the law. The doctrine is based upon principles of natural equity and of commercial necessity; it also prevents circuity of action.[1] See *Particular Lien.*

Common-law liens are acquired by *bailees:* tradesmen, carriers, innkeepers, farriers; by *non-bailees:* vendors, salvors, impounders of estrays, finders — for a reward earned, but not for trouble and expense; and by usage of trade.

III. In equity liens are most largely recognized and liberally treated. They may exist without possession; and they are enforced by decree of foreclosure and sale. Such are vendors' liens, liens by deposit of deeds, partnership liens, liens *pendente lite,* liens of agreement. See *Lien by Agreement, Vendor's Lien.*

A lien in equity is not, in strictness, a *jus in re* or a *jus ad rem;* that is, neither a property in the thing itself, nor a right of action for the thing. It is a charge upon the thing; a right to possess and retain the property, until some charge attaching to it is paid or discharged.[2]

IV. In maritime law, liens do not require possession. They obtain for supplies furnished, for seaman's wages, for damages from collision. See *Maritime Lien.*

V. Liens created by statute cover cases where possession is not had with consent of the owner, or where exclusive possession is impossible. Such are the liens of mechanics, builders of houses, ship-builders, log-drivers, material-men, some claims of judgment and mortgage creditors, the claims of municipal corporations, and of mutual insurance companies.[3] See *Judgment Lien, Mechanic's Lien, Municipal Lien.*

Statutory liens have, without possession, the same operation and efficiency that existed as to common-law liens with possession. Thus, a personal chattel on the premises, sold in the ordinary course of trade, without knowledge of the lien, is not subject to its operation.[4]

A statutory lien implies a security upon the thing before a warrant to seize it is levied. It ties itself to the property from the time it attaches to it, and levy and sale are the means of enforcement. That is, proceedings are not necessary to fix the status of the property. Thus, for example, in the absence of this statutory lien, it is necessary for a landlord to take proceedings to acquire a lien on the property of his tenant.[1]

Although a lien on land constitutes no property or right in the land itself, still it confers a right to levy on the same to the exclusion of other adverse interests acquired subsequently to the judgment, and when the levy is actually made, the title of the creditor generally relates back to the time of the judgment, so as to cut out intermediate incumbrances. Different regulations, however, prevail in different jurisdictions, and in some States neither judgments nor decrees for the payment of money, except in cases of attachment on mesne process, create a preference in favor of the creditor until the execution issuing on the same has been duly levied on the land.[2]

Equitable lien. Such lien as exists in equity, and of which a court of equity alone can have cognizance. In most instances, this lien arises from some constructive trust.[3]

An equitable lien exists in favor of the assignee of a debt, on the money in the hands of the debtor.[4] See ASSIGNMENT, Equitable.

If a mortgagor is bound to insure the premises for the benefit of the mortgagee, the latter, to the extent of his interest in the property destroyed, has an equitable lien upon the money due on a policy taken out by the mortgagor. This is the law though the mortgagee may insure at the mortgagor's expense.[5] See *Vendor's Lien.*

General lien. See *Particular Lien.*

Judgment lien. At common law, a judgment is not a lien upon the land of the debtor; but now, in most of the States, by statute, a lien attaches immediately upon the judgment being regularly docketed. See JUDGMENT.

Lien by agreement. A party by agreement may create a charge in the nature of a lien on realty or personalty whereof he is the owner or in possession, which a court of equity will enforce against him and volunteers or claimants under him with notice of the agreement.[6]

[1] 3 Pars. Contr. 234.

[2] *Exp.* Foster, 2 Story, 144–45 (1842), cases, Story, J.; 1 Story, Eq. § 506; 2 *id.* § 1215.

[3] 3 Pars. Contr. 241.

[4] Beall *v.* White, 94 U. S. 386 (1876), cases, Clifford, J.

[1] Morgan *v.* Campbell, 22 Wall. 390–92 (1874), cases, Davis, J.

[2] Ward *v.* Chamberlain, 2 Black, 437 (1862), Clifford, Judge.

[3] 2 Story, Eq. § 1217.

[4] Trist *v.* Child, 21 Wall. 447 (1874), cases; Ketchum *v.* St. Louis, 101 U. S. 316–17 (1879).

[5] Wheeler *v.* Factors & Traders' Ins. Co., 101 U. S. 442 (1879), cases, Bradley, J.

[6] Ketchum *v.* St. Louis, 101 U. S. 316–17 (1879), cases, Harlan, J.

Lien by deposit of deed. See DEPOSIT, 2.

Lien of a mortgage. See MORTGAGE.

Lien pendente lite. See LIS, Pendens.

Maritime lien. This "privilege" or lien is adopted from the civil law, and imports a tacit hypothecation.

It is the subject-matter of the contract which must be maritime, not the mere object — the ship. Thus, no lien exists for compressing cotton upon land and before an affreightment contract, binding upon the ship, is made.[1]

A *jus in re*, without right of possession; divested by a proceeding *in rem* peculiar to admiralty. This lien is "secret," that is, it may operate to the prejudice of general creditors, and of purchasers without notice; wherefore, it is a *stricti juris*, and cannot be extended by construction, analogy, or inference.[2]

Does not depend upon possession, being a right affecting the right itself, which gives a proprietary interest in the thing and a right to proceed against it to recover that interest. The lien adheres to the proceeds in case of sale, follows the same, and may be attached in admiralty.[3]

Confers upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim or damages. When the lien arises from a tort committed at sea, it travels with the thing, wherever it goes and into whosesoever hands it may pass. The object of the proceeding *in rem* is to make the right available, to carry it into effect.[4]

A collision impresses upon a wrong-doing vessel a maritime lien. This the vessel carries with it. The lien is inchoate at the moment of the wrong, but becomes perfected by subsequent proceedings. It is in the nature of the hypothecation of the civil law. It may be lost by laches.[5]

Advances made upon the credit of a ship for necessary repairs or supplies in a foreign port create a maritime lien. The lien is a *jus in re*, an incumbrance on the property of the ship, which is not divested by the death or insolvency of the owner. The process *in rem* obtains the thing itself or a satisfaction out of it. The interest is insurable.[6]

A carrier by water has a lien for freight. The lien is not an hypothecation, which remains a charge after possession is given, but analogous to the common-law lien of a carrier by water, who is not bound to deliver the goods until the charges are paid, and, if he delivers them, the lien is lost.[7]

Liens equalling or exceeding the whole value of the vessel should be enforced with diligence; otherwise they will be postponed for laches in favor of subsequent liens of navigation acquired without notice. By the general maritime law, liens *ex delicto* are inferior to liens *ex contractu*. A prior lien for supplies is entitled to a preference, as a mere question of rank, and independent of the equitable marshaling of securities or remedies, over a subsequent lien for damage upon the same voyage.[1]

The plaintiff may waive the lien *in rem* in admiralty and pursue his remedy by a suit *in personam*; or, he may institute an action at law, if the common law is competent to give a remedy.[2]

Liens on vessels encumber commerce and are discouraged. While the owner is present, no lien is acquired by a material-man; nor is any lien acquired where the vessel is supplied or repaired in a home port. A lien attaches to a foreign vessel only in a case of necessity and in the absence of the owner.[3]

See ADMIRALTY; CHARTER-PARTY; FREIGHT; HYPOTHECATION.

Mechanic's lien. A lien allowed to a person who furnishes materials or labor toward the construction or improvement of property, as, a building, or a vessel.

Not intended to secure the contractor, but those who lose by confiding in him. The owner of the property is compelled to take care of the material-man and the laborer. The lien prevents one portion of creditors from being paid at the expense of the labor and property of other creditors.[4]

When such liens were unknown, the builder could collect the contract price of the work from the owner, and refuse to pay his subordinates, who could not sue the owner nor reclaim what they had contributed. Now, the claims having been regularly filed, the property may be sold to pay them.[5] See INCIDENTAL; LABORER.

Municipal lien. A claim filed by the proper officer of a city or borough against property specially benefited by a public improvement; as, for the opening, grading, paving, or curbing of a street, the laying of water-pipes, the construction of a sewer, and other like municipal claims.

Such liens are of purely statutory origin. The details of the work of improvement are provided for by ordinance of councils. The requirements of the law must be substantially complied with.[6]

[1] The Paola R, 32 F. R. 174 (1887), cases.

[2] Vandewater *v.* Mills, 19 How. 89 (1856), cases, Grier, J.; 18 F. R. 743; 10 *id.* 489–96, cases.

[3] The Lottawanna, 21 Wall. 598 (1874), Clifford, J.

[4] The Rock Island Bridge, 6 Wall. 215 (1867), Field, J.

[5] The China, 7 Wall. 68 (1868), cases, Swayne, J.; The Belfast, *ib.* 642 (1868), cases.

[6] Merchants' Mut. Ins. Co. *v.* Baring, 20 Wall. 163 (1873), cases, Clifford, J.

[7] Bags of Linseed, 1 Black, 112 (1861), Taney, C. J.

[1] The Young America, 30 F. R. 792–800 (1887), cases.

[2] Norton *v.* Switzer, 93 U. S. 356 (1876); Leon *v.* Galceran, 11 Wall. 190 (1870). See The Woodland, 104 U. S. 180 (1881).

[3] People's Ferry Co. *v.* Beers, 20 How. 401 (1857); The Edith, 94 U. S. 518 (1876); 2 Law Q. Rev. 303 (1886).

[4] Winder *v.* Caldwell, 14 How. 445 (1852), Grier, J.; Bullock *v.* Horn, 44 Ohio St. 425 (1886).

[5] For whom mechanics' liens are created, see 21 Cent. Law J. 306–9 (1885), cases. On the property of married women, 23 *id.* 293 (1886), cases. As to the waiver of, 19 *id.* 262–65 (1884), cases.

[6] See 38 Pa. 339; 18 *id.* 26, 195; 25 *id.* 128; 61 *id.* 255, 399; 65 *id.* 146; 69 *id.* 352; 72 *id.* 89; 79 *id.* 346; 80 *id.* 505; 82 *id.* 360; 85 *id.* 366.

Particular lien. The right to retain a particular piece of property until a claim against it alone is paid. **General lien.** A right to retain property generally, on account of charges attaching to any or all article or articles.

The earliest form of lien was specific in nature. Where not arising from a contract of sale, this form was confined to transactions in which the justice or necessity of the case peremptorily demanded its allowance. The right to a general lien existed at first only by express contract, but it was in time allowed to be claimed, by implication, from the general usage of trade, or the mode of dealing between the parties.[1] See BALANCE.

Partnership lien. See PARTNERSHIP.

Secret lien. By this lien the vendor of personalty, who has delivered possession to the purchaser, is treated as the owner until the purchase money has been paid.

Such arrangement, when it has served to give false credit to the vendee, will be held to be a constructive fraud upon the creditor. The property will be viewed as the vendee's. The transaction is not changed by assuming the form of a lease. The courts look at the purpose rather than at the form of the contract. For these reasons chattel-mortgages are required to be recorded.[2] See *Maritime Lien;* SALE, Conditional.

Vendor's lien; vendee's lien. A vendor's lien on land holds for any part of the purchase-money which remains unpaid, against all persons except a purchaser for a valuable consideration without notice.

A vendee's lien arises in cases where he pays the purchase-money prematurely, and the vendor, from inability or other cause, does not complete the title. Both are equitable liens.[3]

An equitable lien also exists in favor of the vendor of *goods*, provided no innocent third party has acquired an interest in them, where the vendee by fraud conceals his insolvency and his intention not to pay, and induces the owner to sell on credit.[4]

The seller of realty has a lien for the unpaid purchase-money; the buyer has an equitable title only.[5]

This is true, though the seller made an absolute conveyance by deed, and though the consideration is expressed to have been paid; unless there was an express or implied waiver of the lien. Such lien is not affected by the vendor's taking the bond or bill single of the vendee, or his negotiable promissory note, or his check, if unpaid, or any other instrument involving merely his liability. Intent not to rely exclusively upon such security may always be shown. The lien may be enforced against the vendor or vendee, as the case may be, and all holding under him, except *bona fide* purchasers without notice.[1]

The vendee is treated as the equitable owner of the land, and the vendor as the owner of the money. The purchaser may devise the land, even before a conveyance is made, and it will pass to his heir. The vendor stands seized for the benefit of the purchaser. In fine, equity treats contracts respecting lands as if they had been specifically executed.[2]

See IDEM, SONANS; MARSHAL, 2; OTHERS; REGISTRY; TAX, 2.

LIFE. 1. For purposes of inheriting or receiving a beneficial interest, begins with conception.[3]

2. Under the common law as to abortion, began with quickening,[4] *q. v.*

3. For the purpose of transferring civil rights, begins with birth.[5]

Civil life. Ends with extinction of civil rights. **Natural life.** Ends with natural death.

As we have no civil death, nor, practically, any forfeiture of land, there is now no occasion to use the expressions.[6] Compare DEATH, Civil, Natural.

Joint lives. A gift or grant to two or more persons, to be enjoyed while any two of them are alive, is spoken of, most frequently in English books, as for the joint lives of the beneficiaries.

"No person shall . . be deprived of life, liberty, or property, without due process of law."[7]

"Life" here means something more than mere animal existence. The inhibition extends to all those limbs and faculties by which life is enjoyed — life and whatever God has given with it, for its growth and enjoyment.[8]

"Life, liberty, and property" comprehend every right known to the law.[9]

To secure rights of life and liberty, governments are instituted. The foregoing constitutional provision secures the individual from the arbitrary powers of

[1] 3 Pars. Contr. 235.

[2] See Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 672 (1876); 37 Ill. 370; 46 *id.* 488; 15 Conn. 384; 47 Barb. 648; 5 Cranch, 461; 4 Wash. 591; Story, Sales, § 313.

[3] 3 Pars. Contr. 277-78; 4 Kent, 151.

[4] Donaldson *v.* Farwell, 93 U. S. 633 (1876), cases; 19 Cent. Law J. 2-7, 24-29 (1884), cases.

[5] Lewis *v.* Hawkins, 23 Wall. 125 (1874), cases.

[1] Cordova *v.* Hood, 17 Wall. 5-6 (1873), cases, Strong, J.

[2] 1 Story, Eq. § 790, cases; Gunton *v.* Carroll, 101 U. S. 426 (1879); 2 Black, 460; 2 McCrary, 103, 106; 3 *id.* 493-94, cases; 17 F. R. 304; 68 Ga. 159; 34 La. An. 166. As to priority of liens, see 37 Alb. Law J. 308-10 (1888), cases; as to assigning liens, 25 Am. Law Reg. 393-97 (1886), cases.

[3] 1 Bl. Com. 130.

[4] 1 Bl. Com. 129.

[5] See 2 Bl. Com. 121.

[6] Constitution, Amd. Art. V.

[7] Munn *v.* Illinois, 94 U. S. 142 (1876), Field, J.

[8] Cummings *v.* Missouri, 4 Wall. 320 (1866); Bartemeyer *v.* Iowa, 18 *id.* 136 (1873).

government, unrestrained by the established principles of private rights and distributive justice.[1]

See DAMAGES; DEATH; HOMICIDE; LIBERTY, Personal; PUNISHMENT; PROCESS, 1, Due, etc.; SECURITY, 1, Personal; SURVIVE, 2. Compare NATUS; VIE; VIVERE.

Life annuity. A yearly income during life. See ANNUITY.

Life assurance or insurance. Insurance upon a life or lives.

Life policy. A policy of insurance upon a life. *Life risks.* The obligations of a company insuring lives — a life company. See INSURANCE.

Life estate. A right in realty (usually), limited by one or more lives.

Conventional life estate. Is created by the act of the parties. *Legal life estate.* Is created by construction and operation of law.[2]

Legal life estates comprise: tenancy in tail after possibility of issue is extinct; tenancy in curtesy; tenancy in dower. Conventional life estates comprise: an estate for the term of the grantee's own life; an estate for the life of another or the lives of others. That for another's life is the lowest species of freehold. A grant not fixing the term nor mentioning heirs is construed a life-estate. So is an estate held on the uncertain contingency that it may possibly last for life. And so also is a conveyance to a woman as long as she remains a widow, or during coverture; or as long as one shall live in a certain house or place; or, till a sum be paid out of the income of an estate.[3]

LIFT. A promissory note is said to be lifted when any person liable upon it pays it or substitutes another obligation for it.

LIGAN. Goods sunk in the sea, but tied to a buoy that they may be found again.[3] Compare FLOTSAM; JETTISON.

LIGHT. The right to the free access of the sun's rays to one's windows.

A species of easement; spoken of as "the right to light and air," also as "ancient lights:" because the possessor must have enjoyed them for at least twenty years before claiming the right.

At common law, light belongs to the first occupant during the time he holds possession. In England, this doctrine is still recognized, the right arising by prescription, or from an express or implied grant. In this country, the doctrine has been repudiated; at most, the right can be acquired only by express grant.[4] See BAY-WINDOW; OCCUPANCY.

False light. See WRECK; YACHT.

LIGHTNING. A policy of insurance which provides that the insurer shall be liable for fire by lightning, does not cover damage where there is no ignition.[1]

A tornado, due to electrical disturbance, and causing results like those produced by lightning, may be "lightning;" and expert testimony is receivable that lightning accompanying a tornado was the proximate cause of a loss.[2]

Where a horse is described in a policy against fire, to which is attached a clause of indemnity against lightning, "as contained in" a specified building, the animal need not be kept in the building all the time: it may be pastured in an adjoining field, and, if killed there by lightning, the insurance is recoverable.[3]

LIKE. Not, necessarily, identical with.[4]

Likeness. Resemblance; similitude. See COPY; EQUAL; MANNER; NOSCITUR; PHOTOGRAPH. Compare INSTAR; QUASI; SIMILIS.

Likewise. In a will, may mean "also," rather than "in like manner."[5]

A devise commencing with "likewise" was held to be subject to a contingency mentioned in connection with a preceding gift.[6]

LIMB. See BODY, 1; MAYHEM.

Limb of the law. A metaphorical expression, of uncertain origin, for a member of the legal profession.

LIMIT.[7] To mark out, define, indicate the extent or duration of.

"To limit" an estate is to define the period of its duration. The words employed are thence termed "words of limitation," and the act itself "limiting" the estate. See *Limitation*, 2.

Marking out an estate in lands, as, for a life, in tail, or in fee-simple, is "limiting" it.[8]

Limitation. Boundary; circumscription; restriction; curtailment; termination. See PROVIDED.

1. In constitutional law, the bound set to legislative power: as, constitutional limitation. See CONSTITUTION.

[1] United States *v.* Cruikshank, 92 U. S. 554–55 (1875); Bank of Columbia *v.* Okely, 4 Wheat. 234 (1819).

[2] 2 Bl. Com. 120.

[3] 1 Bl. Com. 292.

[4] See Story *v.* Odin, 12 Mass. *160 (1815), cases; Swansborough *v.* Coventry, 9 Bing. (23 E. C. L.) 503–04 (1832), cases; Haversick *v.* Sipe, 33 Pa. 370 (1859); Mullen *v.* Stricker, 19 Ohio St. 142–44 (1869), cases; Keats *v.* Hugo, 115 Mass. 208–11 (1874), cases; Ray *v.* Sweeney, 14 Bush, 8–16 (1878), cases; Hayden *v.* Dutcher, 31 N. J. E. 218–24 (1878), cases; Tunstall *v.* Christian, 80 Va. 4 (1885), cases; 2 Bl. Com. 14; 3 Kent. 466; 2 Washb. R. P. 62.

[1] Babcock *v.* Montgomery Co. Mut. Ins. Co., 4 N. Y. 331–37 (1850), cases.

[2] Spensley *v.* Lancashire Ins. Co., 54 Wis. 433, 440–41 (1882); Same *v.* Same, 62 *id.* 443 (1885). See Kenniston *v.* Mut. Ins. Co., 14 N. H. 341 (1843).

[3] Haws *v.* Philadelphia Fire Assoc. 114 Pa. 431 (1886).

[4] United States *v.* Wallace, 116 U. S. 400 (1886).

[5] State Bank *v.* Ewing, 17 Ind. 74 (1861).

[6] Paylor *v.* Pegg, 24 Beav. 105 (1857).

[7] F. *limite:* L. *limitem; limes*, a boundary.

[8] Williams, Real Prop. 140.

2. In deeds and devises, marking out an interest in property; the restricted duration of an estate.

Collateral limitation. Gives an interest for a prescribed period, but makes the right of enjoyment depend upon some collateral event.

As, an estate vested in one person till another shall go to Rome, or to one and his heirs till the construction of a certain cathedral shall be finished.[1]

Conditional limitation. Where an estate is so expressly confined and limited by the words of its creation that it cannot endure for a longer time than till the contingency happens upon which the estate is to fail.[1]

As, when land is granted to a man "while" he continues unmarried, or "until" out of the income he shall make a specified amount. In such case the estate determines as soon as the contingency happens, and the next subsequent estate becomes immediately vested without any act to be done by him who is next in expectancy.[2]

"An estate upon condition" enures beyond the time when the contingency happens, unless the grantor, his heir or assign, takes advantage of the breach of the condition.[3]

A condition followed by a limitation over to a third person in case the condition be not fulfilled, or there be a breach of it.[4]

A "condition" determines an estate after breach, upon entry or claim by the grantor or his heir, or the heir of the devisor. A "limitation" marks the period which determines the estate without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. A "conditional limitation" is, therefore, of a mixed nature, partaking both of a condition and of a limitation: of a condition, because it defeats the estate previously limited; of a limitation, because upon the happening of the contingency the estate passes to the person having the expectant interest, without entry or claim.[4] See CONDITION.

If the event upon which the estate is limited may by possibility not occur within the term of a life in being and twenty-one years afterward, it is too remote. . . Regard is had to possible not to actual events. That a limitation might include objects too remote is fatal to its validity, irrespective of the event.[5] See ALIENATION.

Limitation over. See DEVISE, Executory.

Special limitation. A qualification serving to mark out bounds of an estate, so as to determine it *ipso facto* in a given event without action, entry, or claim, before it would or might otherwise expire by force of or according to the general limitation.

May be created by the words "until," "so long as," "if," "while," "during." The estate determines as soon as the contingency happens, and the subsequent estate becomes immediately vested.[1]

Words of limitation. Language which marks out the nature of an estate; opposed to "words of purchase."

When it is said, with reference to a conveyance to A and his heirs, that "heirs" is a word of limitation and not of purchase, the meaning is, that "heirs" marks out the nature of the estate taken by A — a fee-simple; and that his heirs take nothing directly (*i. e.*, by purchase) under such limitation.[2]

"Words of limitation" are such as limit or mark out the estate to be taken by a grantee. At the present day, when the heir is perhaps the last person to get the estate, these words are regarded simply as formal means conferring powers and privileges on the grantee — as mere technicalities. In ancient times such words meant what they said, and gave the estate to the "heirs" or the "heirs of the body" of the grantee, after his decease, according to the letter of the gift.[3] See IF; PROVIDED; REMAINDER; SHELLEY'S CASE; THEN; WHEN.

3. In statutes regulating judicial proceedings, the time beyond which a plaintiff cannot lay his cause of action.[4]

A bar to the alleged right of the plaintiff to recover in the action, created by or arising out of the lapse of a certain time after the cause of action has accrued, as appointed by law.[5]

Refers to the time which is prescribed by the authority of the law during which a title may be acquired to property by virtue of simple adverse possession and enjoyment, or the time at the end of which no action at law or in equity can be maintained.[6]

In the Roman law, called *præscriptio*.

But the word also applies to criminal proceedings,

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[1] See 4 Kent, 128; 1 Washb. R. P. 215-16.

[2] 2 Bl. Com. 155; The Fifty Associates *v.* Howland, 11 Metc. 102 (1846).

[3] [2 Bl. Com. 155. See also 4 Kent, 121.

[4] Proprietors of Brattle Square Church *v.* Grant, 3 Gray, 147 (1855), Bigelow, J. See also 4 Hughes, 594; 16 Me. 160; 5 Neb. 407; 73 N. C. 125; 5 R. I. 212; 76 Va. 145; 18 Ves. 433; 2 Washb. R. P. 457-60.

[5] Donohue *v.* McNichol, 61 Pa. 78 (1869): 3 Gray, 153; 8 *id.* 85, 97; 15 Eng. Ch., 2 K., 54; 8 Sim. 615; 10 *id.* 57; 1 Jarm. Wills, 233.

[1] Henderson *v.* Hunter, 59 Pa. 340 (1868): Smith, Ex. Int. 12; Fearne, Rem. 10-13; 2 Bl. Com. 155.

[2] [Mozley & W. Law Dict.

[3] Williams, Real Prop. 245; 2 Washb. R. P. 604.

[4] [3 Bl. Com. 307.

[5] Christmas *v.* Russell, 5 Wall. 300 (1866), Clifford, J.

[6] Campbell *v.* Holt, 115 U. S. 622 (1885), Miller, J., quoting Angell, Lim. Actions.

as to which the period is extended in some proportion to the gravity of the offense. An indictment for murder may be found at any time during the life of the alleged felon. The limitation for other offenses varies from years to days, as from ten years to sixty days. At common law, there is no absolute limitation.[1]

Under the laws of the United States, offenses not capital, except as provided in Rev. St., § 1046, may not be prosecuted after three years.[2]

The statute begins to run from the cessation of criminal conduct, as that of carrying concealed weapons.[3]

The most important English statute relating to civil suits is the famous **Statute of Limitations of 21 James I** (1624), c. 16; the general principles of which underlie, or are embodied in, the American statutes. At the same time, each State has its distinctive legislation, relating to both civil and criminal suits. Provisions of like nature exists in acts of Congress. Equity and admiralty courts apply the principle of these statutes as a matter of discretion. The periods of time vary with the law of the place or courts.[4]

The purpose of such statutes is to preserve the peace, and to prevent perjuries which might ensue if men were allowed to bring actions for injuries committed at any distance of time.[5]

The statutes confer no right of action. They restrict the period within which the right, otherwise unlimited, might be asserted. They are founded upon the general experience that claims which are valid are not usually allowed to remain neglected. The lapse of years, without any attempt to enforce a demand, creates, therefore, a presumption against its original validity, or that it has ceased to subsist. The presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when by loss of the evidence by the death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. Their policy is to encourage promptitude in the prosecution of remedies. For this purpose they prescribe what is supposed to be a reasonable period.[6]

Statutes of limitation are necessary to the welfare of society. The lapse of time carries with it the means of proof. They do not impair the remedy: they require its application within the reasonable time specified.[7]

The common law fixed no time for bringing actions. Limitations derive their authority from statutes.[8]

The statutes are entitled to the same respect as other statutes, and are not to be explained away.[1]

Affecting existing rights, they are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect.[2] See IMPAIR; REMEDY.

They apply, in terms, to legal remedies. Courts of *equity* are bound only in cases of concurrent jurisdiction. In other cases, these courts act by analogy, not in obedience to the statutes.[3]

But a court of equity will not apply the statute, by analogy, when it would be against conscience to do so — when wrong and injustice would be wrought.[4]

If the facts on which any right of action is based have been fraudulently concealed, or if the fraud is such as conceals itself, the statute runs from the discovery of the fraud, or of such information as, diligently followed up, would discover it.[5]

When the object is to obtain relief against a fraud, the bar of the statute does not begin to run until the fraud is discovered or becomes known to the party injured by it. . . . In suits in equity, where relief is sought on the ground of fraud, the authorities, without conflict, hold that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided that suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it, without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. On the question as it arises in actions at law, there is in this country a very decided conflict of authority. Many courts hold that the rule is sustained in courts of equity only on the ground that these courts are not bound by the mere force of the statute as courts of common law are, but only as they have adopted its principle as expressing their own rule of applying the doctrine of laches in analogous cases. They, therefore, make concealed fraud an exception on purely equitable principles. On the other hand, the English courts, and the courts of Connecticut, Massachusetts, Pennsylvania, and others of great respectability, hold that the doctrine is equally applicable to cases at law. . . . The weight of judicial authority, as stated, is in favor of applying the rule to suits at law as well as in equity. This is founded in a sound and philosophical view of the principles of the

[1] See Whart. Cr. Pl. & Pr. §§ 316–29, cases; 1 Bish. Cr. Pr. § 405; 3 Bl. Com. 307.

[2] R. S. § 1044; 1 Sup. R. S. p. 204.

[3] United States *v.* Owen, 32 F. R. 537 (1887).

[4] See 3 Bl. Com. 307; Levy *v.* Stewart, 11 Wall. 249 (1870).

[5] 3 Bl. Com. 307.

[6] Riddlesbarger *v.* Hartford Ins. Co., 7 Wall. 390 (1868), Field, J. See also Spring *v.* Gray, 5 Mas. 523 (1830), Story, J.

[7] Edwards *v.* Kearzey, 96 U. S. 603 (1877); Levy *v.* Stewart, 11 Wall. 249 (1870); United States *v.* Wiley, *ib.* 513 (1870); 17 F. R. 140.

[8] United States *v.* Thompson, 98 U. S. 489 (1878).

[1] United States *v.* Wilder, 13 Wall. 256 (1871); Spring *v.* Gray, 5 Mas. 523 (1830).

[2] Terry *v.* Anderson, 95 U. S. 632–33 (1877), cases.

[3] Hall *v.* Law, 102 U. S. 466 (1880). See also Chewett *v.* Moran, 17 F. R. 823–24 (1883), cases; Hutcheson *v.* Grubbs, 80 Va. 257 (1885), cases.

[4] Buckingham *v.* Ludlum, 37 N. J. E. 147 (1883); 17 F. R. 871.

[5] Yancy *v.* Cothran, 32 F. R. 689 (1887), cases. The courts have engrafted this rule on R. S. § 5057.

statutes of limitations. They are enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing it could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side. . . When there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.[1]

The California statute applies to suits in equity as well as actions at law; and the statute provides all exceptions to the running in ended to be allowed. The remedy at law being complete, there is no ground for equitable relief.[2]

The presumption of a statute of limitations extends only against individuals: their personal interest induces vigilance in the enforcement of their claims. It does not extend against the state, which acts through numerous agents, having no such incentive to prosecute her claims. She, therefore, is not embraced in a statute, unless expressly designated or necessarily included by the nature of the mischiefs to be remedied.[3] See LACHES; TEMPUS, Nullum, etc.

The statute runs against a *cestui que trust* from the time he learns that the trustee repudiates the trust and claims to hold the estate as his own;[4] from the time that the trust is openly disavowed by the trustee insisting upon an adverse interest which is clearly made known to the beneficiary.[5]

The statute does not begin to run till the cause of action is complete and the party capable to sue; but, once begun, nothing stops the running. In civil matters, part payment, or an explicit acknowledgment that a claim is still due, will take a case out of the statute.

A disability to prevent the statute from running must exist at the time the action accrues; and, after the statute has once commenced to run, no subsequent disability will interrupt it.[1]

A defendant who desires to avail himself of the statute as a defense must raise the question in pleading, on the trial, or before judgment.[2]

See further ACCRUE, 2; ACKNOWLEDGMENT, 1; CONCEAL, 4; COUPON, Bond; PAYMENT, Part; POSSESSION, Adverse; PROMISE, New; REPOSE; SAVE; STALE; STATUTE, English.

Limited. Confined; restricted in duration, extent, or scope: as, a limited — administration, divorce, fee, jurisdiction, liability, partnership, *qq. v.* Compare ABSOLUTE.

LINE.[3] 1. Exterior limit; limit of possession or ownership; boundary.

If a boundary line runs to or by the line of an object, such as a house or a lot, ordinarily the exterior limit is intended. And the grantor in a deed may use the word in this sense with respect to the line of a street. But the general rule is that a grantee takes only to the middle of a street as a boundary, unless the deed or the character of the locality indicates a different intention. It will not ordinarily be presumed that the grantor intends to reserve a narrow strip of land, of no special use to him, and of no value, should the way be discontinued.[4] See further ALONG; BOUNDARY; THREAD; WALL.

2. A connected series, as, of facilities, means of conveyance, transportation, or transmission.

As, a continuous line, intersecting lines, competing lines of railroad or telegraph communication. See CARRIER, Common; CONNECTION, 1; EXTEND; PARALLEL; TELEGRAPH.

3. The connection between persons descended from a common ancestor: course of descent.

Direct line. Persons immediately descended one from the other. **Collateral line.** Persons descended from the same ancestor, but not from each other.

Paternal line. Descent as traced through the father. **Maternal line.** Descent traced through the mother.

These lines are in turn spoken of as *ascending*, and *descending:* proceeding upward, and downward.

Lineal; lineage. Lineal implies immediate descent, direct course of descent:[5] as,

[1] Bailey *v.* Glover, 21 Wall. 347–50 (1874), cases, Miller, J. See also United States *v.* Beebe, 127 U. S. 347 (1888); Smith *v.* Clay, Ambl. 645 (1767): 3 Brown, Ch. *639–43, Ld. Camden; Cholmondeley *v.* Clinton, 1 Jac. & W. 138–41 (1820), Pulmer, M. R.; Gresley *v.* Monsley, 4 De G. & J. *95–96 (1859), cases; Jackson *v.* McNabb, 39 Ark. 116 (1882), Eakin, J.; Angell, Lim. 25.

[2] Chemical Nat. Bank *v.* Kissane, 32 F. R. 429 (1887), Sawyer, J.; Norris *v.* Haggin, 28 *id.* 282 (1886).

[3] Weber *v.* Harbor Commissioners, 18 Wall. 70 (1873); United States *v.* Thompson, 98 U. S. 489 (1878); United States *v.* Nashville, &c. R. Co., 118 *id.* 125 (1886), cases; United States *v.* Beebe, 17 F. R. 36, 39–41 (1883), cases: 127 U. S. 344–47 (1888), cases.

[4] United States *v.* Taylor, 104 U. S. 222 (1881), cases; 4 Hughes, 312, 317: 37 N. J. E. 144; 59 Tex. 150, cases.

[5] Speidel *v.* Henrici, 120 U. S. 386 (1887), cases, Gray, J.

[1] McDonald *v.* Hovey, 110 U. S. 621 (1884), cases: R. S § 1008.

[2] Retzer *v.* Wood, 109 U. S. 187 (1883), cases.

[3] L. *linea*, thread, string.

[4] Hamlin *v.* Fairpoint Manuf. Co., 141 Mass. 56 (1886), cases.

[5] See 2 Bl. Com. Ch. XIV.

lineal — consanguinity, descent, warranty, *qq. v.* See also ANCESTOR; PEDIGREE.

LINGUA. See MEDIETAS.

LINK. A "link in the chain of evidence," a "link in the chain of title," a "link in the record," are common figurative expressions.

Such "links" may often be supplied by presumption,[1] *q. v.* See also CHAIN.

LIQUIDATE.[2] To clear off, clear up, clear away.

1. To clear away, to lessen debts, to pay.

To liquidate a balance is, in common parlance, to pay it.[3]

2. To determine the amount to be paid: as, to liquidate a debt, a demand, damages.

Liquidated. A debt or demand is liquidated when the amount due is agreed upon by the parties, or is fixed by the operation of law.[4] **Unliquidated.** Undetermined, unascertained.

Liquidated account. Has its amount certain and fixed, by act of the parties or operation of law.[5]

Liquidated damages. When the amount thereof is ascertained.[6] See DAMAGES, Liquidated.

Liquidated debt. Has certainty as to what is due.[6]

Liquidated demand. Has the amount ascertained, settled, by agreement or otherwise.[7]

Liquidating. The member who settles the affairs of a partnership, by adjusting claims and paying debts, is called the "liquidating" partner. See *Liquidator.*

Liquidation. The act or matter of adjusting claims of indebtedness, or for damages.[8]

Board of Liquidation. In Louisiana, in 1874, an agency of the State government to carry into effect a plan of consolidating its outstanding debt and converting it, with the consent of creditors, into a uniform bond, with the same rate of interest, and providing additional security for the payment of the new bonds.[9]

When, after duties have been liquidated, a reliquidation takes place, the date of the latter is the final liquidation for purposes of protest.[1]

Liquidator. One who settles up the business affairs of an insolvent — individual, partnership, or company.

Under the English bankruptcy act of 1869, the creditors of an embarrassed person may resolve that his affairs shall be liquidated by a trustee, with or without a committee of inspection. The property of the debtor thereupon vests in the trustee, who has the powers of a trustee in bankruptcy. By resolution, at a general meeting, the creditors may close the liquidation and discharge the trustee. See WIND UP; BANK, 2 (2), National.

LIQUOR. "Liquors" commonly includes all liquors that are spirituous, vinous, inferior fermented, and malt.[2]

Intoxicating liquor. Any kind of liquor that will intoxicate, whether distilled or fermented.[3]

In Massachusetts, any beverage that contains more than three *per centum* of alcohol, by volume, at sixty degrees Fahrenheit.[4]

Spirituous liquor. Distilled liquor. All spirituous liquor is intoxicating; yet all intoxicating liquor is not spirituous, as, fermented liquor.[5]

"Spiritous" was held to mean "spirituous" liquor.[6]

Vinous liquor. Liquor made from the juice of the grape.[7]

Liquor dealer. Selling an occasional drink out of a bottle was held not to constitute carrying on the business of a retail liquor dealer.[8]

Liquor shop. A house where spirituous liquors are kept and sold.[9]

Ale. Held to be within the terms of a statute prohibiting the sale of "strong or spirituous liquors" without license.[10] See *Cider.*

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[1] See 2 Whart. Ev. §§ 1347, 1354.

[2] L. L. *liquidare*, to make *liquidus*, clear.

[3] [Fletcher *v.* United States, 8 Wheat. 362 (1823), Story, J.; Richmond *v.* Irons, 121 U. S. 61 (1887).

[4] Hargroves *v.* Cooke, 15 Ga. 332 (1854); 48 Conn. 365.

[5] Nisbet *v.* Lawson, 1 Ga. 287 (1846).

[6] Roberts *v.* Prior, 20 Ga. 562 (1856).

[7] Mitchell *v.* Addison, 20 Ga. 53 (1856).

[8] See Martin *v.* Kirk, 2 Humph. 531 (1841). Durkee *v.* Board of Liquidation, 103 U. S. 647 (1880); Board, &c. *v.* Louisville R. Co., 109 *id.* 221, 228 (1883); N. O. Board, &c. *v.* Hart, 118 *id.* 140 (1886).

[1] Robertson *v.* Downing, 127 U. S. 608 (1888).

[2] People *v.* Crilley, 20 Barb. 248-49 (1855); State *v.* Brittain, 89 N. C. 576 (1883).

[3] State *v.* Reynolds, 47 Vt. 299 (1875); Commissioners *v.* Taylor, 21 N. Y. 173 (1860).

[4] Mass. Act 23 April, 1880, 191, c. 239, § 5.

[5] Commonwealth *v.* Grey, 2 Gray, 502 (1854). See State *v.* Haymond, 20 W. Va. 21 (1882), cases; State *v.* Oliver, 26 *id.* 425-26, 431-33 (1885), cases.

[6] Commonwealth *v.* Burke, 15 Gray, 408 (1860).

[7] Adler *v.* State, 55 Ala. 24 (1876); 38 Iowa, 467.

[8] United States *v.* Jackson, 1 Hughes, 531 (1875): R. S. §§ 3242, 3244.

[9] Wooster *v.* State, 6 Baxt. 534 (1873).

[10] Nevin *v.* Ladue, 3 Denio, 43, 437 (1846); 20 Barb. 246; 105 Mass. 480; 30 Conn. 55; 33 Ind. 206; 12 Mo. 389; 44 N. H. 511.

Beer. The courts will take judicial notice that "lager beer" is a malt liquor.[1]

In the absence of evidence to the contrary, beer will be presumed to be an intoxicating liquor.[2]

In section six of the Illinois Dram-shop act, "intoxicating liquor" means spirituous, malt, or vinous liquors. Proof, therefore, of a sale of beer (to a minor) without showing the kind of beer, and whether malt, vinous, or spirituous, is not sufficient to sustain an indictment. There are kinds of beer which are neither a malt liquor nor intoxicating.[3]

When a witness testifies to the sale of beer under circumstances which make the sale of any intoxicating liquors unlawful, the *prima facie* inference is that the beer was of that quality declared by statute to be an intoxicating liquor.[4]

Whether a particular kind, as, "Schenck beer," is intoxicating, may be a question of fact for a jury; that it contains alcohol may not be conclusive upon this point.[5] So as to "hop beer."[6]

"Strong beer" is within the meaning of the term "strong or spirituous liquors," in a statute to suppress intemperance.[7]

Cider. An averment of the sale of "intoxicating liquor" was held sustained by proof of the sale of unfermented cider.[8]

Whether ale and cider, after fermentation, are intoxicating liquors, is a question for a jury.[9]

Neither cider nor crab-cider are included within the term "spirituous liquors, wine, ale, porter, beer, or any drink of like nature."[10]

Gin. The court will take judicial notice that gin is an intoxicating liquor.[11]

Pop. Where the charge was selling "intoxicating liquors," and the proof was a malt liquor of an intoxicating quality called "pop," a conviction was sustained.[12]

Rum. This is a spirituous liquor, within a statute against selling such liquor without first paying a license tax.[13]

Wine. Is a fermented, not a spirituous, liquor.[14]

Whether "blackberry wine" is a spirituous liquor was left to a jury to decide.[15]

"Champaigne wine" was held to be a liquor.[1]

"Port wine" is an intoxicating liquor.[2]

Alcohol and gum-camphor mixed do not constitute a "spirituous liquor."[3]

Whatever is generally and popularly known as intoxicating liquor, such as *whiskey*, *brandy* and *gin*, is within the prohibitions of the Kansas act of 1881, and may be so declared as matter of law by the courts,—that act prohibiting the sale of intoxicating liquors except for medical, scientific, and mechanical purposes, and providing that no one shall sell for the excepted purposes without a druggist's permit from a probate judge. Whatever is generally and popularly known as medicine, an article for the toilet, or for culinary purposes, recognized, and the formula for its preparation prescribed, in some standard authority, and not among the liquors ordinarily used as intoxicating beverages, such as *tincture of gentian*, *paregoric*, *bay rum*, *cologne*, *essence of lemon*, are not within the statute, and may be so declared as matter of law by the courts, notwithstanding such articles contain alcohol and may produce intoxication. But as to articles intermediate between these two classes, articles not known to the United States dispensatory or other standard authority, compounds of intoxicating liquors with other ingredients, whether provided for a single case, or compounded upon a formula and sold under a specific name, as, *bitters*, *cordials*, *tonics*, whether they are within or without the statute, is a question of fact for the jury alone. The test is this: If the compound be such that the distinctive character and effect of intoxicating liquor are gone, that its use as an intoxicating beverage is practically impossible, by reason of the other ingredients, then it is not included within the statute. But if the intoxicating liquor remains as a distinctive force and the compound is reasonably liable to be used as an intoxicating beverage, then it is within the statute.[4]

Any State may prohibit the manufacture and sale of intoxicating liquors for use as a beverage.[5]

At common law, traffic in intoxicating liquors was a lawful business. The original of the statutes licensing the traffic is found in 5 and 6 Edw. VI (1552), c. 25.[6]

In the exercise of the police power, a State may commit the sale of liquor to any class of persons the legislature deems peculiarly fit for the duty.[7]

Under a statute which imposes a fine for selling liquor to a minor, no conviction can be had if the accused exercised reasonable caution, and honestly believed that the purchaser was of age.[8]

An injunction will not be granted by a Federal court

[1] Watson *v.* State, 55 Ala. 158 (1876).

[2] State *v.* Teissedre, 30 Kan. 484 (1883): 6 *id.* 371; 16 Mo. 389; 14 Ohio, 586; Briffit *v.* State, 58 Wis. 39, 44 (1883): 3 Park. Cr. R. 9; 21 N. Y. 173; 63 *id.* 277; 11 R. I. 522.

[3] Hansberg *v.* People, 120 Ill. 21, 25 (1886), cases.

[4] Myers *v.* State, 93 Ind. 253 (1883), cases: 5 Crim. Law Mag. 360–63 (1884), cases; Commonwealth *v.* Magee, 141 Mass. 118 (1886).

[5] Commonwealth *v.* Bios, 116 Mass. 56 (1874).

[6] State *v.* McCafferty, 63 Me. 223 (1874).

[7] Excise Commissioners *v.* Taylor, 21 N. Y. 173 (1860).

[8] Commonwealth *v.* Dean, 14 Gray, 99 (1859).

[9] State *v.* Biddle, 54 N. H. 379 (1874); 69 Me. 133.

[10] State *v.* Oliver, 26 W. Va. 422, 425, 427 (1885).

[11] Commonwealth *v.* Peckham, 2 Gray, 514 (1854).

[12] Godfriedson *v.* People, 88 Ill. 284 (1878).

[13] United States *v.* Angell, 11 F. R. 34 (1881).

[14] Caswell *v.* State, 2 Humph. 402 (1841); State *v.* Moore, 5 Blackf. 118 (1839); 19 Conn. 493.

[15] State *v.* Lowry, 74 N. C. 121 (1876.)

[1] Kizer *v.* Randleman, 5 Jones L. 428 (N. C., 1858).

[2] State *v.* Packer, 80 N. C. 439 (1879).

[3] State *v.* Haymond, 20 W. Va. 18 (1882).

[4] Intoxicating-Liquor Cases, 25 Kan. 766–68 (1881), Brewer, J., citing 38 Iowa, 426; 130 Mass. 68; 33 Vt. 659. See generally 5 Crim. Law Mag. 360–65 (1884), cases.

[5] Prohibitory-Amendment Cases, 24 Kan. 722 (1881), cases.

[6] State *v.* Hipp, 38 Ohio St. 219 (1882), Okey, C. J.

[7] Koester *v.* State, 36 Kan. 32 (1886).

[8] Kreamer *v.* State, 106 Ind. 192 (1885), cases: 25 Am Law Reg. 517 (1885); *ib.* 518–21, cases *pro* and *con*

to prevent a State court from enforcing its decree restraining plaintiff from selling liquors, and abating his saloon as a nuisance, under State law, after the case has been removed to the Federal court. The injury to the plaintiff may be fully compensated at law, in the event of the removed case being decided in his favor.[1]

A person who knowingly purchases liquor from one unauthorized to sell it does not aid and abet the crime.[2]

See further ALCOHOL; BAR, 2; BOTTLE; COMMERCE; CONDITION; DISTILLER; DRAM; DRUMMER; DRUNKARD; HEALTH; INDIAN COUNTRY; INTEMPERATE; INTOXICATE; KEEP; MERCHANT; MORALS; OPTION, Local; POLICE, 2; PRIVILEGE, 2; PROHIBITION, 2; REPEAL; RETAIL; SALOON; TAVERN.

LIS. A dispute, a controversy; a suit at law.

Lis alibi pendens. An action pending elsewhere: a plea that a suit is pending in another court for the same cause of action.

Not good when the litigation is in a court of foreign jurisdiction. The rule is modified by courts of equity and admiralty, which will require a plaintiff who has a suit elsewhere for the same cause, and with an equally advantageous remedy, to elect which he will prosecute.[3]

Lis mota. A controversy begun.

A declaration which is hearsay evidence is receivable of a matter of general interest, provided it be made *ante litem motam* — before any controversy arose upon the particular matter. People are not wholly indifferent in view of threatened litigation. The rule was familiar to the Roman law; but in that law *lis mota* referred to the commencement of the action. With us, *lis* has its earlier and larger sense of controversy, strife. Opposed to *ante litem motam* is *post litem motam*.[4]

Lis pendens. A suit in progress: a suit pending. *Pendente lite.* While a suit pends; during the continuance of litigation.

Administration may be granted *pendente lite*, till the validity of an alleged will be determined. An allowance to a wife, as complainant or respondent in proceedings for a divorce, is alimony *pendente lite*. And he who buys realty, in actual litigation in court, is a purchaser *pendente lite*, or a holder with notice of *lis pendens*, and affected in his title by the result.

A purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without express or implied notice in point of fact, affects the purchaser as if he had such notice.[5]

The doctrine of *lis pendens* is that realty, or, to some extent, personalty, when put in litigation by a suit in equity, will, if the suit is prosecuted with reasonable diligence, be bound by the final decree, notwithstanding any intermediate alienation. The doctrine is founded on the policy that property which is specifically sued for shall abide the result of the suit; for, otherwise, by successive alienations, the litigation might be indefinitely prolonged. It relates only to changes of ownership, but assumes that the property itself will remain either identically the same or be at least traceable into some new form in which it can be reached. The doctrine will not be extended without strict necessity. A bill in equity seeking to recover the value of wood cut upon realty, the title of which was held to be in the complainant, cannot be maintained: it would be in effect an action of trover and conversion.[1]

The doctrine, as generally understood, is not based upon presumptions of notice, but upon a public policy imperatively demanded by a necessity which can be overcome in no other manner.[2]

Lis pendens is said to be general notice to all the world. The doctrine rests upon public policy, rather than upon notice: the law does not allow parties to give to others, pending the litigation, rights to property in dispute so as to prejudice the opposite party. A *lis*, to affect a person's power of alienation, must be a *lis* in which a decree could be entered against him as to the property. In the earlier cases it was held that *lis pendens* was notice to all the world.[3]

Among the actions to which the doctrine applies are suits: to foreclose unrecorded mortgages, and vendors' liens, to set aside a decree of partition, to enforce the specific performance of a contract for the sale of realty, to enforce a charge against realty whatever the form of the action. Actions in the nature of creditors' bills have been considered as giving notice to subsequent purchasers of the particular property in controversy.[4]

The rule does not apply to negotiable securities purchased before maturity. And the considerations which exclude the operation of the rule apply whether they were created during the suit or before its commencement, and to controversies as to their origin or transfer.[5]

He who intermeddles with property in litigation does so at his peril, and is as conclusively bound by the results of the litigation, whatever they be, as if he had been a party from the outset.[6]

A *lis pendens*, duly prosecuted, and not conclusive, is notice to a purchaser so as to bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed. This is no more than the adoption of a rule in a real action at

[1] Wagner *v.* Drake, 31 F. R. 851 (1887).

[2] State *v.* Teahan, 50 Conn. 100 (1882): 22 Pick. 476; 24 *id.* 306; *contra*, 2 Head, 135.

[3] Lynch *v.* Hartford Fire Ins. Co., 17 F. R. 628 (1883), Lowell, J., citing 22 Ch. Div. 397; 23 *id.* 226.

[4] See 1 Greenl. Ev. § 181; 1 Whart. Ev. §§ 193, 213; 4 Campb. *417; 1 Pet. 337; 77 Va. 689.

[5] 1 Story, Eq. § 405.

[1] Gardner *v.* Peckham, 13 R. I. 103–104 (1880), Durfee, C. J., citing Bellamy *v.* Sabine, 1 De G. & J. *566 (1857).

[2] Freeman, Judg. § 191, cases.

[3] Dovey's Appeal, 97 Pa. 160 (1881), Paxson, J.; 1 De G. & J. 580; 2 Rand. 93.

[4] Smith *v.* Kimball, 36 Kan. 435 (1887), cases.

[5] County of Warren *v.* Marcy, 97 U. S. 105–7 (1877), cases, Bradley, J.; County of Cass *v.* Gillett, 100 *id.* 598 (1879).

[6] Tilton *v.* Cofield, 93 U. S. 168 (1876), cases, Swayne, Justice.

common law, where, if the defendant aliens after the pendency of the writ, the judgment will overreach such alienation. The rule may sometimes operate with hardship, especially where the notice is constructive, as in many cases, but general convenience requires it.[1]

Litis contestatio. A statement in denial; a defense: as, a general answer of denial; in admiralty, a joinder of general issue.[2]

Litis dominus. See DOMINUS.

Litis magister. He who controls a suit.[3]

LIST. 1. A catalogue, roll, or statement, more or less orderly in arrangement, of names, causes, issues, etc.[4] Compare CALENDAR, 2; MEMORANDUM.

Argument list. Consists of causes for argument on issues of law. See ARGUMENT.

Call list. See CALL.

Civil list. (1) A statement of civil causes. **Criminal list.** A list of criminal cases.

(2) The civil officers of a government; also, appropriations to support such officers; in England, the expenses of the sovereign's household.[5]

Jury list. A calendar of the jurors summoned, or in attendance upon a court.

Trial list. A calendar of causes ready for trial by jury.

See also LLOYD'S LIST; SUBSCRIPTION.

2. A schedule of the polls and ratable estate of the inhabitants upon which taxes are to be assessed.[6]

The same as "grand list." A list that represents real estate may answer the requirement of a statute.[6]

Listed. Said of the persons or property so noted or enumerated.

Lister. The person whose business is to prepare such formal statements.

Compare ENLISTMENT; INVENTORY; REGISTER.

LITERA. L. Letter; written character. *Literæ.* Letters, writings, documents.

Qui hæret in litera, hæret in cortice. He who clings to the letter, sticks in the bark. He who regards the mere words of an instrument cannot arrive at its meaning.[1] See CONSTRUCTION.

LITERAL. According to the words, language, or exact terms: as, a literal construction of a document, a literal performance of a contract. See LITERA; OBLITERATION.

LITERARY. Applied to property, refers to the right an author has in his own composition, so that no other person, without his leave, may publish or make profit of the copies: the production of an original work by the exertion of the rational powers.[2] See COPYRIGHT; OCCUPANCY.

In statutes exempting property devoted to literary purposes from taxation, "literary" has no fixed legal signification, but is to be taken in its ordinary meaning. "Literary institutions" are those in which the positive sciences are taught, or persons eminent for learning associate for purposes connected with their professions. It is not then, properly used, descriptive of a school for the instruction of youth.[3]

Literary associations. See ASSOCIATION.

LITHOGRAPH. See COPYRIGHT; NOSCITUR.

LITIGATE.[4] To carry on or defend a suit, at law or in equity.

Litigant. A party to a lawsuit,— usually an active party.

Litigation. A contest in a court of justice; a judicial proceeding. See INTEREST, 1, Rei publicæ, etc.; LIS, Pendens.

Litigious. 1. Subject to judicial recognition. 2. Too ready to go to law; over-fond of lawsuits.

Once, a *thing* which created litigation.

LITIS. See LIS.

LITTER. See PARTUS.

LITTORAL.[5] Belonging to the shore; riparian.[6]

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[1] Murray v. Ballou, 1 Johns. Ch. 576-80 (1815), cases, Kent, Ch. See generally 4 Cent. Law J. 27-29 (1877), cases; 26 *id.* 411-17 (1888), cases; 14 Am. Dec. 774; 1 Story, Eq. §§ 405-7; 3 Pars. Contr. 232.

[2] See 3 Bl. Com. 296; Story, Eq. Pl. § 877.

[3] 37 N. J. E. 397.

[4] See Homer v. Cilley, 14 N. H. 100 (1843); Williams v. Hempstead County, 39 Ark. 179 (1882).

[5] See 1 Bl. Com. 332.

[6] Wilson v. Wheeler, 55 Vt. 452 (1882), Royce, J.

[1] 2 Bl. Com. 379; 118 U. S. 538; 3 How. 255; 59 Iowa, 133; 2 Ga. 252; 22 Pick. 557; 38 N. Y. 433; 74 *id.* 389; 79 Pa. 241, 483; 74 *id.* 201; Sedgw. Const. Laws, 253.

[2] [2 Bl. Com. 405; Woolsey v. Judd, 4 Duer, 379 (1855); 2 Kent, 306-15; Keene v. Wheatley, 9 Am. Law Reg. 44 (1860); 17 Cent. Law J. 268-71 (1883), cases.

[3] Council of Indianapolis v. McLean, 8 Ind. 332 (1856); Kendrick v. Farquhar, 8 Ohio, 197 (1837).

[4] L. *lis*, dispute; *agere*, to carry on.

[5] L. *litus*, the sea-shore.

[6] 17 How. 426; 7 Cush. 94; 3 Kent, 427.

LIVE. 1, *v.* In a devise of "the farm on which F. now lives," held equivalent to subsist, obtain a livelihood, rather than to dwell or reside.[1]

A child *en ventre* will take under a devise to the testator's children "living" at his death.[2]

Occasional acts of intercourse will not constitute "living together." See ADULTERY; COHABIT; DOMICIL; RESIDE.

2, *adj.* Within a duty law, "live animals" was held to include singing birds.[3]

But "live stock" was held not to include fowls.[4] See STOCK. 1; TEAM.

LIVERY.[5] Delivery; tradition.

The act or the form by which possession of land was formerly given or received.

Livery in chivalry. When the heir-male at twenty-one, or an heir-female at sixteen, sued out a delivery of his or her lands from the guardian.[6]

Livery of seisin. Pure feudal investiture, or delivery of corporal possession of land or of a tenement.[7]

Was absolutely necessary to complete a donation; the last act by which a feoffment was perfected. It preserved the testimony of the grant in the community. It was necessary to the grant of an estate of freehold in a corporeal hereditament; impossible in the case of an incorporeal hereditament; and not essential to a lease for years or other chattel interest. Hence, a freehold could not be made to commence *in futuro*, the actual manual tradition of the land being wanting. *Livery in deed.* Livery actually made on the land, before witnesses. *Livery in law.* Livery made in sight of the land. Both were succeeded by delivery in writing.[7]

Land granted by livery of seisin, without defining the quantity of the estate, was treated as a life-estate. Where there was a delivery of possession, without defining the term, there arose only a tenancy at will.[8] See further DELIVERY, 1.

LIVERY-STABLE. A place where horses are groomed, fed, and hired, and where vehicles are let.[9]

Livery-stable keeper. One whose business is to keep horses for hire, or to let, keep, feed, or board, horses for others.[10]

A livery-man is bound to keep safe horses, or fully disclose the character of the horse to the driver at the time of letting him.[1]

A person who hires a public hack and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over him, is not responsible for his negligence, nor prevented from recovering from a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and the driver.[2]

See BAILMENT; CONDITION; NUISANCE.

LIVELIHOOD. See BUSINESS; EMPLOYMENT; TRADE; SLANDER.

LIVING. See LIFE; LIVE, 1.

LLOYD'S. An association in London whose members underwrite each other's marine policies.

Named from Lloyd's coffee-house, the resort of seafaring men and those who did business with them, in the times of William the Third and Anne — 1690–1700.

Lloyd's lists. Accounts of the arrivals, departures, casualties, and losses to ships.

Lloyd's bonds. Sealed acknowledgments of debt by a borrowing company, with covenants for payment.[3]

LOAD. Compare LADEN.

Of a wagon, does not include the weight of any part of the vehicle, nor the weight of the driver.[4] See CAR.

Loading off shore prohibited. These words, in a policy of marine insurance, are capable of being construed by the court without the aid of extrinsic evidence. In the absence of such evidence, they may be held to prohibit loading while the vessel lies at anchor away from the shore, and not to forbid loading at a bridge pier.[5]

LOADED. Charged, and ignitible.

Plugging the touch-hole may destroy a weapon's use as a "loaded" fire-arm. So, too, may the removal of the flint or the priming from a blunderbuss.[6]

A box containing powder and detonators, arranged

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[1] Kendall *v.* Miller, 47 How. Pr. 449 (1874).
[2] Picot *v.* Armistead, 2 Ired. Eq. 230 (1842).
[3] Reiche *v.* Smythe, 7 Blatch. 235 (1870).
[4] The Matilda Lewis, 5 Blatch. 522 (1867).
[5] F. *livrée*, a thing delivered, a delivery.
[6] [2 Bl. Com. 68.
[7] [2 Bl. Com. 313–16; 2 Utah, 45.
[8] Effinger *v.* Lewis, 32 Pa. 370 (1859).
[9] Williams *v.* Garignes, 30 La. An. 1035 (1878).
[10] Revenue Act, 13 July, 1866, § 9: 14 St. L. 116.

[1] Huntoon *v.* Trumbull, 12 F. R. 844 (1880).
[2] Little *v.* Hackett, 116 U. S. 366, 371 (1886), cases, Field, J.; criticising Thorogood *v.* Bryan, 8 C. B. 115 (1847). The last case was expressly overruled in The Bernina, 12 P. D. 58–99 (1887), cases. See cases collected, Noyes *v.* Town of Boscawen, Sup. Ct. N. H., 27 Am. Law Reg. 118 (1888); *id.* 129–32; 35 Alb. Law J. 326, 330 (1887), cases; St. Clair Street Ry. Co. *v.* Eadie, 43 Ohio St. 95–96 (1885), cases; 24 Am. Law Reg. 710–16 (1885), cases.
[3] See 2 Steph. Com. 129, 108, n.; Arn. Mar. Ins., 4 ed., 135; 1 Lindley, Partn. 284; L. R., 2 Ex. 225; 4 Ch. Ap. 748; 11 M. & W. 116; 5 C. & P. 432; 2 Bing. 241; 30 Law Times, 538, 551; 45 Fortn. Rev. 523.
[4] Howe *v.* Castleton, 25 Vt. 167 (1853).
[5] Johnson *v.* Northwestern Nat. Ins. Co., 39 Wis. 87, 90 (1875).
[6] Rex *v.* Harris, 24 E. C. L. 254 (1831); Reg. *v.* Lewis, 38 *id.* 207 (1840); Rex *v.* Carr, 1 Russ. & Ry. 377 (1819); Reg. *v.* Gamble, 10 Cox, C. C. 545 (1867).

to ignite on opening, is not a loaded weapon.[1] See further WEAPON.

LOAN.[2] 1. Referring to a chattel, a bailment without reward; also, the thing itself so bailed.

Loan for consumption. Contemplates a return of the article in kind: strictly, a barter or an exchange.[3] Compare MUTUUM. See LEGACY.

Loan for use. A bailment of goods to be used by the bailee temporarily, or for a certain time, without reward.[4] See BAILMENT; HIRING.

2. (1) Referring to money, never implies a return of the identical coin or notes; yet the idea of a reward for the use is not excluded.

The delivery by one party, the *lender*, to, and the receipt by, another party, the *borrower*, of a given sum of money, upon an agreement, express or implied, to repay the sum with or without interest.[5]

(2) The advance upon a note discounted, without reference to its character as business or accommodation paper.[6]

See DISCOUNT; INTEREST, 2 (3); USURY.

Loan association, or society. See BUILDING, Association.

Loan certificate. During times of financial panic, in New York City, and perhaps elsewhere, what are known as "loan certificates" are issued by the clearing-house to the associated banks, to the amount of seventy-five *per centum* of the value of the collaterals deposited by the borrowing banks with the loan committee of the clearing-house.

LOBBY.[7] 1. The part of a hall of legislation not appropriated to official use.

2. The persons who occupy such space on business concerning proposed legislation.

Lobbying. Seeking to influence the vote of a member of the legislature by bribery, promise of reward, intimidation, or other dishonest means.[8]

Lobby services. Services rendered in procuring the passage or defeat of a bill pending before a legislative body, by persons who influence individual legislators in private.

Lobbying is a felony, by the constitutions of California and Georgia. By the constitutions of several States, any person may be compelled to testify in any investigation or proceeding to establish lobbying, but his testimony cannot be used against him, except to prove perjury.[1]

A contract to take charge of a claim before Congress and prosecute it as agent and attorney for the claimant, is void as against public policy. Such contract is distinct from one for purely professional services as an attorney, within which are included: drafting a petition which sets forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them to a committee or other authority, with other services of like character intended to reach only the understanding of the persons sought to be influenced.[2]

LOCAL. See LOCUS.

Relating to a place: belonging to a particular district; confined to a limited region. Opposed to *general*, *personal*, *transitory*, qq. v.

As, local or a local — act, action, allegiance, commerce, court, custom, government, law, legislation, option, statute, venue, *qq. v.*

The local character of an improvement may depend upon the special benefit which will result to the property adjoining or near the locality in which the improvement is made.[3]

LOCALITY. See PLACE, 1.

LOCATE. See LOCUS; PERMANENT.

1. To ascertain the place where a thing belongs: as, to locate a call in a survey.

Locative. Referring to a physical object by which the boundary of land may be identified.[4] See CALL, 2 (2).

2. Said of a building: to erect, put up; not, necessarily, to complete.[5]

3. To select the line upon which a road or way is to be constructed. Whence *relocate*.

The ordinary meaning of the words "to locate" a way is "to ascertain and determine the place of" the way, and in this sense they might well be used in connection with the technical words "to lay out."[6]

In statutes relating to ways, "location" sometimes

[1] Rex *v.* Mountford, 32 E. C. L. 593 (1835).

[2] A. S. *læn*, a lending.

[3] Story, Bailm. § 439; 3 Mas. 478; 8 N. Y. 433; 4 Ohio St. 68.

[4] Story, Bailm. §§ 6, 219; 2 Kent, 573; 20 Barb. 348; 16 Ga. 25; 7 Pet. 109.

[5] [Payne *v.* Gardiner, 29 N. Y. 167 (1864), Mullin, J. See also 17 N. J. L. 206; 13 Barb. 75.

[6] Nat. Bank of Gloversville *v.* Johnson, 104 U. S. 277 (1881), Matthews, J.

[7] L. L. *lobia*, portico, gallery: G. *loube*, arbor, bower.

[8] Const. California, Art. IV, sec. 35.

[1] 1 Stimson, Am. Stat. Law, § 153.

[2] Trist *v.* Child, 21 Wall. 441, 449-50 (1874), cases, Swayne, J.; Oscanyan *v.* Winchester Arms Co., 103 U. S. 275 (1880).

[3] State *v.* District Court of Ramsey County, 33 Minn. 307 (1885); 22 *id.* 507.

[4] See Johnson *v.* Pannel, 2 Wheat. 211 (1817); McDowell *v.* Peyton, 10 *id.* 463 (1825); 3 Bibb, 414.

[5] Waldron *v.* Marcier, 82 Ill. 550 (1876); Moule *v.* Plank Road Co., 6 How. Pr. 39, 40 (1851).

[6] Foster *v.* Park Commissioners, 123 Mass. 382 (1883), Field, J.

means the land included within the limits of the way as laid out, and sometimes is synonymous with "laying out" — establishing a new highway.[1] See ABANDON, 1; EXTEND; RAILROAD; TAKE, 8.

Locator. (1) He who places, that is, bails, a thing with another for a compensation. See LOCATIO.

(2) One who locates, or is entitled to locate, land. See 4, *infra*.

The claim of a "locator," in Kentucky, is for a portion of the land in compensation for his services.[2]

4. To appropriate land as a mining claim. See MINING, Claim.

LOCATIO. L. A placing: letting out for hire. See LOCUS.

Writers who follow the civil law have divided contracts of hiring into: 1. *Locatio rei*, the hiring of a thing, personalty or realty. 2. *Locatio operis faciendi*, hiring for work to be done or care to be bestowed. To which class belong: the undertakings of a mechanic, artisan, tailor, of a warehouseman, wharfinger, quasi-agister, postmaster. 3. *Locatio operis mercium vehendarum*, a hiring of the labor of carrying goods. To this class belong: a private carrier, with or without pay; a common carrier of goods — express, freight, transfer, packet companies; quasi-carriers — telegraph companies, innkeepers. This class also embraces common carriers of passengers.[3] See BAILMENT.

LOCK. See NAVIGATION.

LOCK-OUT. See STRIKE, 2.

LOCK-UP. A lock-up house: a place for the temporary confinement of law-breakers. See PRISON.

LOCO. See LOCUS.

LOCOMOTIVE. See BICYCLE; RAILROAD.

LOCUM. See LOCUS.

LOCUS. L. Place: locality, territory, jurisdiction; stead, situation; space, room, period; opportunity. Compare SITUS.

Loco parentis. In the situation of a parent.

Predicated of a person who assumes the parental character, or discharges the parental duties. See further PARENS.

Locum tenens. Holding the place: a representative. See ACTIVE.

Locus contractus. The place of contract; where a contract is made or is to be performed. See further LEX, Loci.

Locus criminis. The place of crime: where a crime was perpetrated.

Locus delicti. The place of wrong: where an offense was committed. See DELICTUM.

Locus in quo. The place in which: where an alleged thing was done, as, a trespass committed; or, where land in dispute lies — the place in question.

"The *locus in quo* was not a legally established street."[1] See ALIBI; VIEW.

Locus pœnitentiæ. Place for repentance: an interval or opportunity in which to reconsider and withdraw, as, from a proposed contract, or from unlawful action.

Thus, the law affords a person an opportunity to withdraw from any illegal contract before it has been executed;[2] to recall a bid made at a sale of realty before his name has been written down; to decide not to complete a gift; for a return to a deserted wife or husband within a prescribed period; to go on and perform a contract, after a declaration made not to be bound by it;[3] to abandon any criminal intention. See DELICTUM, In pari, etc.

Locus regit actum. The place governs the act: the law of the locality regulates the thing to be done.[4] See LEX, Loci.

Locus rei sitæ. The place of the situation of a thing. See LEX, Loci.

Locus sigilli. Place of the seal, *q. v.*

Locus standi. Place for standing: right to be heard.[5]

LODE. See VEIN.

LODGE. 1, *v.* (1) To make, prefer: as, to lodge a complaint or information.

(2) To deposit with; to file with, as, for transcribing.

A deed sent to a county clerk for record, unaccompanied with the fee, and, therefore, pigeon-holed by him, is not "lodged" with him so as to be notice to a subsequent creditor of the vendor.[6] See FILE.

2, *n.* A fraternity or brotherhood. See ASSOCIATION; CLUBS.

LODGER. One who occupies hired apartments in another's house; a tenant of part of another's house.[7] See DISTRESS.

In the present state of the decisions, it is not possible to frame a definition which will accurately distinguish between a boarder, a guest, and a lodger.[8] See BOARDER; GUEST; INNKEEPER; RESIDENCE.

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[1] Foster *v.* Park Commissioners, 133 Mass. 332, 329 (1882); 117 *id.* 416; 6 Bradw. 179.

[2] Hollingsworth *v.* Barbour, 4 Pet. 473 (1830).

[3] 2 Kent, 585; Jones, Bailm. 35; 2 Pars. Contr. 121, 130, 136.

[1] 4 Wall. 194; 2 *id.* 42; 109 U. S. 562.

[2] 2 Wall. 154; 4 *id.* 518; 12 *id.* 355; 117 U. S. 502; 72 Pa. 213.

[3] 8 Biss. 16.

[4] 18 Blatch. 154; 91 U. S. 406.

[5] 93 U. S. 277.

[6] Dickerson *v.* Bowers, 42 N. J. E. 296 (1886).

[7] Ullman *v.* State, 1 Tex. Ap. 222 (1876): Burrill's Law Dict.

[8] See 16 Ala. 666; 9 Pick. 280; 36 Barb. 460; 1 Tex. Ap.

LOG. See MILE.

Log-book. Vessels making foreign voyages, or of the burden of seventy-five tons or more, from an Atlantic to a Pacific port, or *vice versa*, must have an official log-book.[1]

The entries shall be of matters occurring during the voyage, such as offenses by the crew, punishments inflicted, any case of illness, injury, death, birth, marriage, discharges of seamen. For neglect of this duty the master is punishable by fine.[2]

LOGIC. See EVIDENCE; PLEADING; PRESUMPTION; REASON.

LOG-ROLLING. Embracing in one bill distinct matters, none of which, perhaps, could singly obtain the assent of the legislature, and procuring its passage by a combination of the minorities in favor of the separate measures.[3] See TITLE, Of act.

LOGS. The stems or trunks of trees cut into convenient lengths for the purpose of being afterward manufactured into lumber of various kinds.

So held in a statute creating a lien in favor of persons who furnish supplies to men engaged in taking logs out of the forest.[4]

A person using a public stream by floating logs is not responsible at common law to a riparian proprietor for damages occasioned by the stranding of logs upon his land, if the driver has used reasonable effort to retain the logs within the stream.[5]

LONDON. See CUSTOM; FEME SOLE; FLEET; GAZETTE; RACK.

LONG. See ACCOUNT, 2; LEASE.

LONGEVITY. See TABLE, 4.

LOOKOUT. A person, upon board a vessel, stationed in a favorable position to see and near enough to the helmsman to communicate with him, and exclusively employed in watching the movements of other vessels.[6]

LOOM. See HEIRLOOM; FIXTURE.

LOOSE. See ANIMAL; AT LARGE; ESTRAY.

220; 12 Mod. 255; L. R., 6 C. P. 327; 8 Q. B. D. 195; 9 *id.* 245; 13 *id.* 79; 51 L. T. R. 124; 30 Moak, 19; Wood, Landl. & T. 177.

[1] R. S. § 4290.

[2] R. S. §§ 4291-92. See 1 Whart. Ev. § 648, cases; 1 Greenl. Ev. § 495, cases.

[3] [Walker *v.* Griffith, 60 Ala. 369 (1877), Manning, J.; 36 Kan. 340.

[4] Kollock *v.* Parcher, 52 Wis. 393 (1881), Taylor, J. See 40 Me. 145.

[5] Carter *v.* Thurston, 58 N. H. 104, 107 (1877), cases.

[6] Genesee Chief *v.* Fitzhugh, 12 How. 462 (1851), Taney, C. J. See also Reed *v.* Steamboat New-Haven, 18 How. Pr. 485 (1859).

LORD. 1. A feudal superior; one of whom an estate was held.

He was a *lord paramount* or a *lord paravail*. *Liege lord* was contradistinguished from "liege man." *Landlord* was originally used in this sense. See FEUD.

2. In England, a title of nobility, belonging, strictly, to the degree of a baron, but applied to the whole peerage.[1]

Lords spiritual. A constituent part of parliament, being two archbishops and twenty-four bishops.[2]

Lords temporal. All the peers of the realm, by whatever title distinguished, and forming another constituent part of parliament.[2]

House of lords. The branch of parliament consisting of the lords spiritual and the lords temporal. See PARLIAMENT.

3. A title bestowed upon persons occupying certain high offices.

Lord advocate. The principal prosecuting officer employed on behalf of the crown. See ADVOCATE.

Lord chancellor. The presiding judge in the court of chancery. See CHANCELLOR, 1.

Lord commissioner. A person charged with the execution of any high public office put into commission.

In lieu of the lord treasurer and the lord high admiral of former times, there are now the lords commissioners of the treasury, and the lords commissioners of the admiralty; there are also lords commissioners of the great seal, etc.

Lord justices. 1. Persons appointed to administer government temporarily during an emergency. 2. Two judges appointed, under an act of 1851, to assist the lord chancellor in hearing appeals.[3]

Lord lieutenant. 1. The principal officer of a county. 2. The representative of the crown in Ireland.[4]

Lord mayor. The chief officer of the corporation of London.

Lord mayor's court. The highest court of record, of law and equity, within the city of London.[5]

Lord treasurer. An officer who had charge of the royal revenues.

[1] [1 Bl. Com. 396.

[2] [1 Bl. Com. 155-57.

[3] 2 Steph. Com. 477; 3 *id.* 331.

[4] 1 Bl. Com. 412; 4 *id.* 272

[5] See 3 Bl. Com. 81.

His functions are now vested in the lords commissioners of the treasury.[1]

LORD, YEAR OF, See YEAR.

Lord's day. See SUNDAY.

LOSS. 1. Privation; injury; damage. See DAMAGE; DAMAGES.

A community of profits implies a community of losses: losses are, in a sense, nothing more than a diminution of profits.[2]

2. Damage to or the entire destruction of an insured subject by a contemplated peril.

Actual loss. Where there is a real destruction of the subject. **Constructive loss, or constructive total loss.** When the injury is so great that the insured may abandon the remnant to the insurer.

Partial loss. When the subject is damaged but not destroyed. **Total loss.** When the subject is wholly destroyed.

Total loss. The total destruction of the thing insured; also, such damage to the thing, though it may remain *in specie*, as renders it of little or no value to the owner.[3]

Actual total loss. When the subject insured wholly perishes, or its recovery is rendered irretrievably hopeless.[4]

It is not necessary to a total loss that there be an absolute extinction or destruction of the thing insured, so that nothing can be delivered. A destruction *in specie*, so that while some of its component elements or parts may remain, the thing which was insured, in the character or description by which it was insured, is destroyed, is a total loss.[5]

As applicable to a building, means, not that its materials were utterly destroyed, but that the building, though part of it remains standing, has lost its identity and specific character as a building, and, instead, has become a broken mass, or cannot longer properly be designated as a building. Absolute extinction is not meant. "Wholly destroyed" may be an equivalent expression.[6]

As long as a vessel exists *in specie* in the hands of the owner, although she may require repairs greater than her value, a case of "utter loss," within the meaning of a bottomry and respondentia bond, does not arise and she continues subject to the hypothecation.[7]

"Freight" may be lost in the sense that by reason of the perils insured against the ship has been prevented from earning freight; and, also, in the sense that it is lost to the owner, after it has been earned, by some circumstance unconnected with the contract between the assured and the underwriters on the freight.[1]

See AVERAGE; INDEMNITY; INSURANCE; OCCUR.

Proof of loss. A written and sworn statement, made to an insurance company by the beneficiary, of the fact of a loss.

In fire insurance, analogous to the "protest" in marine insurance. The time when the loss occurred, the cause of it, the value of the property, the name of the owner, incumbrances, and like facts, are usually required to be furnished.

Waiver of "preliminary proof of loss" by an insurer may be proved indirectly by circumstances, as well as by direct proof; and so also may authority in an agent to make the waiver be proved.[2]

Preliminary proof of a death is not required, when the insurer, on being notified thereof, denies his liability and declares that the insurance will not be paid.[3]

LOST. 1. The finder of lost property has a valid claim against all persons but the true owner. See further FIND, 1.

2. The contents of any written instrument lost, or destroyed, may be proved by competent evidence. Judicial records and all other kinds of documents of a kindred nature are within the rule.[4]

If a note has been destroyed by fire, it may be said to be "lost."[5]

If a bill of exchange or a promissory note, indorsed in blank and payable to bearer, be lost or stolen, and be purchased in good faith without knowledge of want of ownership in the vendor, the holder's title is good.[6]

The rule is otherwise as to a bill of lading, *q. v.*

A lost will may be established by evidence, as in the case of a lost deed, all persons interested being first made parties. The declarations of the testator may be shown, as well to establish its contents as to show the improbability of its destruction by him. The burden is on the party alleging that a will existed, to prove its execution and contents by strong, positive, and convincing evidence.[7]

Although a will is required to be attested by two witnesses, a lost will may be established by the testi-

[1] See 3 Bl. Com. 38, 45, 56.

[2] Priest *v.* Chouteau, 12 Mo. Ap. 256 (1882).

[3] [Livermore *v.* Newburyport Mar. Ins. Co., 1 Mass. *279 (1804), Sedgwick, J.

[4] Burt *v.* Brewers', &c. Ins. Co., 9 Hun, 384 (1876); Burrill's Law Dict.

[5] Great Western Ins. Co. *v.* Fogarty, 19 Wall. 640, 643 (1873), cases, Miller, J.

[6] [Oshkosh Packing, &c. Co. *v.* Mercantile Ins. Co., 81 F. R. 204 (1887), Dyer, J.; May, Ins. § 421 *a*, cases; 1 Wood, Ins. § 107, cases.

[7] Delaware Mut. Safety Ins. Co. *v.* Goesler, 96 U. S. 645, 653 (1877), cases, Clifford, J.

[1] Scottish Mar. Ins. Co. *v.* Turner, 20 E. L. & E. 42 (1853), Ld. Thuro.

[2] Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 546 (1876); 36 Md. 102.

[3] Knickerbocker Life Ins. Co. *v.* Pendleton, 112 U. S. 709 (1885), cases.

[4] Burton *v.* Driggo, 20 Wall. 134 (1873), cases; 18 How. 246; 11 Wall. 672.

[5] McGregory *v.* McGregory, 107 Mass. 543 (1871).

[6] Shaw *v.* North Pennsylvania R. Co., 101 U. S. 564 (1879), Strong, J. See Adams *v.* Edmunds, 55 Vt. 363 (1883).

[7] Southworth *v.* Adams, 11 Biss. 260 (1882), cases.

mony of a single witness; and probate may be granted to the extent to which the provisions are proved.[1]

When an abstract or summary of a lost or destroyed record, deed, deposition, will, or other instrument is offered as the best evidence obtainable, the witness must be sufficiently acquainted with the original, and the court be satisfied that the original is non-producible, and evidence if produced. The loss may be inferentially proved, or admitted. A probable custodian must be inquired of, and search in the proper place be proved — the decree of search being proportioned to the importance of the document.[2]

The maker of paper which has become lost is liable to the owner, after notice of the loss, if he redeems the paper without requiring the holder to establish his title. The holder should be required to furnish indemnity against other claimants.[3] See DEPOSIT, Certificate of; EVIDENCE, Secondary; PROFERT.

LOT. 1. Any appeal or resort to chance for determining a result or for deciding a question. See GAME, 2; LOTTERY.

A verdict arrived at by drawing lots will be set aside.[4]

2. Allotment; share; parcel.

Used of land, does not imply anything as to the size of the parcel.[5]

In a homestead law, held not synonymous with "tract" or "parcel," but to mean a city, town or village lot, according to the official survey.[6]

Under a devise of the "house and lot in which I now reside," the devisee will take the lot which the testator, prior to the date of his will, had separated from other lands. "Lot" generally describes a small parcel of land.[7]

In-lots lie within the boundary of a town or city; *out-lots* lie outside such boundary.

See DEDICATION, 1; FIELD, 1; MAP; STREET.

LOTO. See GAME, 2.

LOTTERY.[8] Has no technical meaning. A result of the accepted definitions is: where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it.[9]

A scheme for the distribution of prizes by chance.[1]

A distribution of prizes — something valuable — by chance or lot, a valuable consideration being given for the chance to draw the prize.[2]

The decision of a question by lot is not a lottery. The term in criminal law refers to something in which there are supposed prizes and blanks. The disposal of any species of property by any of the schemes or games of chance popularly regarded as innocent comes within the terms of the law.[1]

Decided to be lotteries have been: a "gift-exhibition;"[3] a "gift-sale" of books;[4] "prize-candy" business;[5] "prize-concerts;"[6] "prize-tickets" to induce subscriptions to a newspaper;[7] raffles at fairs;[8] drawing works of art;[9] "playing policy."[10]

Lottery-ticket dealer. Any person, association, firm, or corporation, who makes, sells, or offers to sell, lottery tickets, or fractional parts thereof, or any token, certificate, or device, representing, or intending to represent, a lottery ticket, or any fractional part thereof, or any policy of numbers in any lottery, or who manages any lottery, or prepares schemes of lotteries, or superintends the drawing of any lottery.[11]

State lottery. A lottery licensed and regulated by legislative enactment — for the service of the state, or of individuals. **Private lottery.** A lottery instituted or managed for the benefit of one or more private persons, an association or a society.

Lottery schemes, which were formerly very common,[12] are now generally proscribed. Statute of 10 and

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[1] Skeggs *v.* Horton, 82 Ala. 354, 356 (1886), cases; Sugden *v.* Lord St. Leonards, 1 L. R., P. D. 154, 217 (1876).

[2] 1 Whart. Ev. §§ 129–51, cases; 1 Greenl. Ev. § 558, cases. As to lost wills, see also 31 Alb. Law J. 365–67, 385–89 (1885), cases; 23 Cent. Law J. 29 (1886), cases.

[3] Bainbridge *v.* Louisville, 83 Ky. 289–98 (1885), cases; Cobb *v.* Tirrell, 141 Mass. 46 (1886).

[4] Goodman *v.* Cody, 1 Wash. T. 329 (1871); s. c. 84 Am. R. 808, note.

[5] Edwards *v.* Derrickson, 28 N. J. L. 44 (1859).

[6] Wilson *v.* Proctor, 28 Minn. 17 (1881).

[7] Phillipsburgh *v.* Bruch, 37 N. J. E. 486 (1883).

[8] A. S. *hlot*, share, lot.

[9] Hull *v.* Ruggles, 56 N. Y. 424, 427 (1874), Folger, J., quoting Perley, C. J., in State *v.* Clarke, 33 N. H. 335 (1856). Approved, Wilkinson *v.* Gill, 74 N. Y. 66 (1878), Church, C. J.; People *v.* Noelke, 94 *id.* 141 (1883): Penal Code, § 323; State *v.* Willis, 78 Me. 73 (1886), Peters, C. J.

[1] Commonwealth *v.* Manderfield, 8 Phila. 459 (1870); State *v.* Lovell, 39 N. J. L. 461 (1877); Randle *v.* State, 42 Tex. 585 (1875).

[2] United States *v.* Olney, 1 Deady, 464 (1868), Deady, J.; 1 Abb. U. S. 275. See also 30 F. R. 501; 40 Ill. 467; 59 *id.* 160; 94 Ind. 426; 73 Mo. 650; 16 Nev. 142; 89 N. C. 573; 3 Oreg. 291; 41 Tex. 297.

[3] Wooden *v.* Shortwell, 32 N. J. L. 470 (1852); State *v.* Shorts, 32 *id.* 298 (1868); Thomas *v.* People, 59 Ill. 160 (1871); Chavannah *v.* State, 49 Ala. 396 (1873); Buckalew *v.* State, 62 *id.* 334 (1878); Rothrock *v.* Perkinson, 61 Ind. 39 (1878); Kohn *v.* Koehler, 21 Hun, 466 (1880).

[4] State *v.* Clarke, 33 N. H. 329, 334 (1856).

[5] Hull *v.* Ruggles, 56 N. Y. 424 (1874); Holoman *v.* State, 2 Tex. Ap. 610 (1877).

[6] Commonwealth *v.* Thacker, 97 Mass. 583 (1867); Negley *v.* Devlin, 12 Abb. Pr. 210 (1872); State *v.* Overton, 16 Nev. 136 (1881).

[7] State *v.* Mumford, 73 Mo. 647, 650 (1881).

[8] Commonwealth *v.* Manderfield, 8 Phila. 459 (1870).

[9] Governors of Almshouse *v.* American Art Union, 7 N. Y. 228, 240 (1852).

[10] Wilkinson *v.* Gill, 74 N. Y. 63 (1878).

[11] Revenue Act, 13 July, 1866, § 9: 14 St. L. 116.

[12] Governors of Almshouse *v.* American Art Union, 7 N. Y. 237 (1852); 2 McMaster, Hist. Peop. U. S. 28.

11 Will. III (1699), c. 17, prohibited them as public nuisances; and statute of 6 and 7 Will. IV (1836), c. 66, forbade advertising foreign lotteries.[1] Similar statutes exist here; where also, circulars concerning lotteries are not mailable matter.[2]

The effect of Rev. St. § 3894, prohibiting the mailing of lottery circulars, etc., is to make any matter concerning lotteries unmailable, and to subject the sender to the penalty therein provided. When a city, to induce people to buy its bonds, holds out prizes to be drawn by chance, the mailing of circulars concerning such drawings is a mailing of lottery circulars within that section.[3]

A mere license to draw a lottery, not inseparable from the essential functions of a corporation, not acted on, and under which no rights have been vested, may be repealed by a succeeding legislature.[4]

Lotteries are a *malum prohibitum*. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well-ordered community. The right to suppress them is governmental, exercisable in discretion. Any one who accepts a lottery charter does so with the implied understanding that the people, through their proper agency, may resume it whenever the public good requires it. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has a license to enjoy the privilege on the terms named for the specified time, unless it be abrogated by the sovereign power. It is a permit, good as against existing laws, but subject to future legislation and constitutional control or withdrawal.[5] See DECOY; POLICE, 2.

A grant in the constitution of a State of the privilege of establishing a lottery, to a corporation, is not subject to repeal by the legislature.[6]

No other form of gambling operates so extensively in its dealings, or demoralizes so many people. It is this extensive reach, and not merely its speculative purposes, that makes lottery-gambling so dangerous.[7]

LOUISIANA. The territory of Louisiana was ceded by Spain to France, October 1, 1800, and by France to the United States, April 30, 1803.[8]

The State is governed by the civil law; the first body of which, called the "Digest," and adopted in 1808, was in substance the same as the Code Napoleon, with modifications from the Spanish law. Revised and enlarged to suit statutory changes, since 1825 the Digest has been known as the "Civil Code." Punishment for crimes is prescribed by reference to their names; for the definitions, the common law of England is resorted to. The code presents the leading principles of evidence; for application, recourse is had to treatises. The *lex mercatoria*, as an independent system of law, is recognized. The English law as to realty has never been received. In other respects, the law of the State may be said to be like the laws of the other States.[1] See LIQUIDATION, Board of.

LOVE. See CONSIDERATION, 2.

LOW-WATER. See WATER.

LOYALTY. See ALLEGIANCE; TREASON.

LUCID INTERVAL. A period of mental clearness enjoyed by an insane person, during which he is capable of performing an act which will be binding in law.

Not a restoration to reason, but a restoration so far as to be able, beyond doubt, to comprehend and do the act, with such reason, memory, and judgment as to make it a legal act.[2]

An act done in a lucid interval by one who has been found to be a lunatic is binding on him, but the proof of the lucid interval must be clear.[3]

The expression once meant respite, intermission, cessation, relaxation.[4] See LUNATIC.

LUCRATIVE. Refers to an office to which there is attached a compensation for services rendered.[5]

LUCRUM. L. Gain, profit, advantage, benefit.

Lucri causa. For the sake of gain.

A civil-law expression, corresponding to *animus furandi* in the common law. Describes the intention with which personalty is taken in theft — the felonious intention to profit by the act of conversion. But respectable modern authorities hold that it is sufficient if the taking be fraudulent, with an intent to deprive the owner of his property; as, a taking for the purpose of destroying.[6]

LUGGAGE. May consist of any articles intended for the use of a passenger while traveling or for his personal equipment.[7]

"Baggage" and "luggage" mean the same thing. The latter term prevails in England. See further BAGGAGE.

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[1] 4 Bl. Com. 168; 1 C. B. 974.

[2] Act 12 July, 1876: R. S. § 3894; *ib.* §§ 3851, 3929, 4041; 9 Biss. 429; 14 Blatch. 245; 1 F. R. 417, 426.

[3] United States *v.* Zeisler, 30 F. R. 499 (1887).

[4] Louisiana State Lottery Co. *v.* Fitzpatrick, 3 Woods, 222, 248 (1879).

[5] Stone *v.* Mississippi, 101 U. S. 821 (1879), Waite, C. J.; Phalen *v.* Virginia, 8 How. 168 (1850); State *v.* Woodward, 89 Ind. 114 (1883); People *v.* Noelke, 94 N. Y. 142-48 (1883); Kohn *v.* Koehler, 21 Hun, 470-71 (1880); Justice *v.* Commonwealth, 81 Va. 214 (1885).

[6] New Orleans *v.* Houston, 119 U. S. 265 (1886).

[7] People *v.* Reilly, 50 Mich. 388 (1883).

[8] See at length Slidell *v.* Grandjean, 111 U. S. 438-40 (1884).

[1] See 2 Bouvier's Law Dict. 130.

[2] Frazer *v.* Frazer, 2 Del. Ch. 268 (1861), Harrington, Ch. See 3 Brown, Ch. 234, 443; 2 C. & P. 415; 1 Redf. Wills, 68, 108-18, cases.

[3] *Re* Gangwere's Estate, 14 Pa. 417, 428 (1850).

[4] See Trench, Glossary, 114-15.

[5] State *v.* Kirk, 44 Ind. 405 (1873), Downey, C. J.; 35 *id.* 111; 8 Blackf. 329.

[6] 4 Bl. Com. 232; United States *v.* Durkee, 1 McAll. 201-5 (1856), cases; Hamilton *v.* State, 35 Miss. 219 (1858); Keely *v.* State, 14 Ind. 36 (1859); Williams *v.* State, 52 Ala. 418 (1875); 2 Bish. Cr. L. § 843.

[7] California Civil Code, sec. 2181; 70 Cal. 178.

LUMBER. Timber sawed or split for use in building. Material essential for building any kind of a house ordinarily used for business or by families.[1] See TIMBER.

LUNACY. See LUNATIC.

LUNAR. See MONTH.

LUNATIC.[2] One who has had understanding, but by disease, grief, or other accident, has lost the use of his reason. One that has "lucid intervals,"[3] *q. v.*

A person who sometimes has understanding and sometimes not.[4]

In the Revised Statutes, and in any act or resolution of Congress passed since February 25, 1875, "insane person" and "lunatic" includes every idiot, *non compos*, lunatic, and insane person.[5]

Lunacy. Insanity; in particular, acquired as opposed to congenital insanity.[6]

Commission of lunacy. Authority in writing, from a court, to inquire into the mental condition of a person alleged to be of unsound mind; an inquisition *de lunatico inquirendo*.[7]

A lunatic has nothing which the law recognizes as a mind; has no mental conclusions; cannot discern between right and wrong; can assent to nothing. He is not capable, therefore, to make a will, a contract, or to commit a crime; and is incapable, also, to avoid a contract.[8]

While a person of unsound mind remains a minor, an ordinary guardian is all the custodian of either his person or estate that is necessary; and an act done by such guardian in relation to his estate is as valid as if done by a committee appointed to take charge of him and his estate, as a person of unsound mind.[9]

By the common law, a lunatic must make compensation to persons injured by his acts, although, being incapable of criminal intent, he cannot be indicted and punished.[10]

See COMMITTEE, 1; INSANITY; STULTIFY.

LUST. See LEWD.

LUXURY. See SUMPTUARY.

[1] Ward *v.* Kadel, 38 Ark. 180 (1881), Eakin, J.

[2] L. *luna*, the moon: moon-struck.

[3] [1 Bl. Com. 303.

[4] *Re* Barker, 2 Johns. Ch. *333 (1816), Kent, Ch.

[5] R. S. § 1.

[6] See 1 Redf. Wills, 62-63; 1 Bland, Ch. 386.

[7] 1 Bl. Com. 304; 3 *id.* 427.

[8] Dexter *v.* Hall, 15 Wall. 20-25 (1872), cases, Strong, J.

[9] Francklyn *v.* Sprague, 121 U. S. 215, 229 (1887); 2 Ves. Sr. 408.

[10] Morain *v.* Devlin, 132 Mass. 88 (1882), Gray, C. J., citing 2 East, 92, 104; 17 Vt. 499; 32 Md. 581; 4 Barr. 64; 3 Wend. 393-94; 23 Iowa, 343; 78 Pa. 412; 9 Mass. 225; 9 Gray, 85. As to jurisdiction over the estates of insane persons, see 21 Am. Law Rev. 1-13 (1887). On the lunacy laws of England, see 1 Law Q. Rev. 150 (1885).

LYING. See LIE.

Lying at wharf. Floating in the space of water called the dock.[1]

Lying in grant. Refers to the means of transfer of an incorporeal hereditament, *q. v.*

Lying in wait. In ambush, to kill another person.

Implies waiting, watching, secrecy; evidences that deliberation which marks murder in the first degree.[2]

But is not synonymous with "concealed."[3]

LYNCH LAW. The action of private individuals, organized bodies of men, or disorderly mobs, who, without legal authority, punish by hanging, or otherwise, real or suspected criminals, without trial according to the forms of law.

American lexicographers refer the origin of the term to the practice, in the seventeenth century, of a Virginia farmer named Lynch. Others trace it to the act of one Lynch, mayor and warden of Galway, Ireland, in 1493, who "hanged his own son out of the window for defrauding and killing strangers, without martial or common law." Others, again, trace it to the Anglo-Saxon, *linch*, to beat with a club, to chastise.[4]

During the war of Independence, one Lynch was president judge of the county court of Pittsylvania, Virginia. The court in that State for the trial of felonies sat at Williamsburg, two hundred miles distant. Horse thieves, who had established posts from far north, through Virginia, into North Carolina, were frequently arrested and remanded to Williamsburg for trial. Not only was the attendance of witnesses, at that distance, rendered uncertain, but when they did appear they were sure to be confronted by false witnesses for the outlaws. Moreover, the difficulty of conveying the accused to Williamsburg was increased, and the sitting of the court made uncertain, by the presence of the British under Cornwallis. Accordingly, the justices of the county court of Pittsylvania assembled, and Judge Lynch proposed that, since for Pittsylvania the court at Williamsburg had practically ceased to exist, and, in consequence, heinous crimes went unpunished, the court over which he presided should try all felonies committed in the county: that is to say, the place of trial was to be changed by mere resolution. The plan was adopted, with good results: the thieves were disbanded, many being hanged, which was the lawful penalty. This change of forum was against the words of the law, but justified, Lynch and others held, by the circumstances.[5]

Whatever excuse may exist for the execution of lynch law in savage or sparsely settled districts, in order to oppose the ruffian elements which the ordi-

[1] Dewees *v.* Adger, 2 McCord, 105 (1822).

[2] See Riley *v.* State, 9 Humph. 651 (1849); State *v.* Abbott, 8 W. Va. 769 (1875); 2 Va. 488; 1 Leigh, 598.

[3] People *v.* Miles, 55 Cal. 207 (1880).

[4] [Ency. Britannica.

[5] See 18 Harper's Magazine, 794-96 (1859).

sary administration of law is powerless to control, it certainly has no excuse in a community where the laws are duly and regularly administered.[1]

M.

M. 1. A person convicted of manslaughter, in England, was, in former times, branded with an "M" on the left thumb.

2. Treasury notes issued under the act of Congress of October 12, 1888, had an M printed on the face to signify that they bore interest at the rate of one mill *per centum*.[2]

3. The initial letter of other words often abbreviated: as, Mary (queen), master, maxims, mileage, mortgage.

M. D. Middle district. See D, 2.

M. L. Mechanic's lien. See LIEN.

M. R. Master of rolls. See ROLL, 2 (2).

M. T. Michaelmas term. See TERM, 4.

MACADAMIZE. See PAVE.

MACHINE.[3] In the law of patents, includes every mechanical device, or combination of mechanical powers and devices, to perform some function and produce a certain effect or result.[4]

A concrete thing, consisting of parts or of certain devices and combination of devices. The principle of a machine is "its mode of operation," or that peculiar combination of devices which distinguishes it from other machines. A mere principle or idea cannot constitute a machine.[5]

Patentable inventions pertaining to machines are: 1. Entire machines; as, a car for a railroad, a sewing-machine. 2. Separate devices of a machine; as, the coulter of a plow, the driver of a reaping-machine. 3. New devices of a machine in combination with old elements, all embraced in one claim, or with separate claims for what is new, together with a claim for the new combination of all the elements. 4. Devices or elements of a machine in combination, all being old.[6]

All that the law requires of an inventor of a machine is that he shall describe the manner of constructing and using it in such full, clear, and exact terms as will enable any one skilled in the art to which it pertains to make and use the machine; and that he shall explain the principle thereof, and the best mode in which he contemplated applying that principle, so as to distinguish it from other inventions. Under these provisions, it has been held that a patentee is not generally limited to the literal import of his description of his invention, but that, in construction, he may make such modifications of it as do not involve a departure from its principle or a material change in its mode of operation.[1] See EQUIVALENT, 2; MODE, Of operation; PATENT, 2; PROCESS, 2.

Machinery. Means somewhat more than machine. Includes whatever is necessary to the working of a machine; as, dies used in manufacturing tinware, the saw in a sawmill, the pipes of a gas company.[2]

When cars, though used at times, and at other times detached, are formed into a train, to which propelling force is imparted by means of a locomotive, the entire train constitutes machinery connected with or used in the particular business.[3]

In determining whether machinery becomes a fixture, regard must be had to the object, and to the effect and mode, of annexation.[4] See FIXTURE.

An employee who knows that machinery which he is operating is so defective as to be dangerous, protests against further use of it, receives no assurance that the defect will be remedied, but continues to use it, voluntarily assumes the incidental risks.[5] See NEGLIGENCE.

MADE. See MAKE.

MAGISTER. L. Master, ruler.

Magister litis. He who controls a suit.[6]

Magister navis. He who governs a vessel.[7]

Magister societatis. The manager of a partnership; a managing partner or agent.[8]

MAGISTRATE.[9] A governor, ruler, officer. Correlative, the people.

[1] *Exp.* Wall. 107 U. S. 275 (1882), Bradley, J. Wall, an attorney-at-law, was disbarred by the Circuit Court for the Southern District of Florida for advising in a case of lynching, and sought reinstatement by a *mandamus* from the Supreme Court.

[2] United States *v.* Hardyman, 13 Pet. 178 (1839).

[3] F. *machine:* Gk. *mêchanê'*, a device.

[4] Corning *v.* Burden, 15 How. 267 (1853), Grier, J.

[5] Burr *v.* Duryee, 1 Wall. 570 (1863), Grier, J.

[6] Sanford *v.* Merrimac Hat Co., 4 Cliff. 405 (1876), Clifford, J. And see Georgia Pacific R. Co. *v.* Brooks, Sup. Ct. Ala. (1888); also Union Sugar Refinery *v.* Matthiessen, 2 Fish. P. C. 605 (1865).

[1] Grier *v.* Castle, 17 F. R. 524 (1883), McKennan, J. See Winans *v.* Denmead, 15 How. 342 (1853); Gill *v.* Wells, 22 Wall. 24 (1874); Stevens *v.* Pritchard, 4 Cliff. 418 (1876).

[2] Seavey *v.* Central Ins. Co., 111 Mass. 541 (1873); Pierce *v.* George, 108 *id.* 78 (1871); State *v.* Avery, 44 Vt. 629 (1872); Commonwealth *v.* Lowell Gas Light Co., 12 Allen, 78 (1866); Buchanan *v.* Exchange Fire Ins. Co., 61 N. Y. 26, 33 (1874).

[3] Georgia Pacific R. Co. *v.* Brooks, Sup. Ct. Ala. (1888).

[4] Pierce *v.* George, 108 Mass. 78, 81 (1871): 11 Am. R. 314-17, cases; Ottumwa Woolen Mill Co. *v.* Hawley, 44 Iowa, 60-64 (1876), cases: 24 Am. R. 726-32, cases.

[5] Galveston, &c. R. Co. *v.* Drew, 59 Tex. 10 (1883); Whart. Neg. 221, 859, cases.

[6] 37 N. J. E. 397.

[7] Story, Ag. § 36.

[8] Story, Partn. § 95.

[9] L. *magister*, q. v.

Supreme magistrate. One in whom the sovereign power of the state resides. **Subordinate magistrate.** Derives his authority from, and is accountable to, the former, and acts in an inferior, secondary sphere.[1]

Of the former are Parliament and the king; of the latter, sheriffs, coroners, justices of the peace, constables, surveyors of highways, overseers of the poor.[2]

The President is the chief magistrate of the nation; the governors are the chief magistrates of the States.

It is difficult to fix a definite meaning to the word "magistrate," a generic term importing a public officer, exercising a public authority. A consul at a foreign port is a magistrate.[3]

A person clothed with power as a public civil officer. . . The appellation is not confined to justices of the peace, and other persons *ejusdem generis*, who exercise general judicial powers; but it includes others, whose main duties are strictly executive.[4]

Magisterial. Belonging or pertaining to the office or duties of a magistrate.

Magistracy. The office or position of a magistrate, or of all governmental officers as a body or class.

Magistrate's court. In Philadelphia, Pennsylvania, a court, not of record, for police and civil cases, with jurisdiction not exceeding one hundred dollars.

The constitution of 1874 established one such court for every thirty thousand inhabitants. The term of office is five years. The magistrates are elected on a general ticket by the voters at large; and they are compensated by a fixed salary paid by the county. No increase of civil jurisdiction is allowable; and no political duties may be conferred upon them.[5]

MAGNA CHARTA. The Great Charter: the principal guaranty of English liberties, obtained June 19, 1215, from King John. With some alterations, confirmed in parliament by Henry III, his son.

By 25 Edw. I (1296), allowed as part of the common law; and copies were to be read twice a year in the churches.

Contained few new grants — was declaratory of the grounds upon which the fundamental law rested. Redressed grievances incident to feudal tenures, and removed some forms of oppression by the crown.[6]

Copies are preserved in the British Museum. The original was in Latin; in the statute-book it is printed in Latin and English in parallel columns. It consisted of thirty-seven chapters or distinct statutes. The *first chapter* confirms the pre-Norman liberties; the *seventh* chiefly concerns dower, and quarantine; the *eighth* relates to the collection of crown debts, their priority, sureties, etc.; the *ninth* perpetuates the right of self-government in London, and certain boroughs; the *tenth* provides that the court of common pleas should be held in some fixed place; the *fourteenth* forbids excessive fines; the *twenty-ninth* provides that life, liberty, and property shall be forfeited only by judgment of the subject's peers or by the law of the land, and that justice and right are not to be sold, denied, or deferred; the *thirtieth* directs that foreign merchants shall be treated as English merchants are treated while abroad; the *thirty-sixth* relates to gifts to religious houses; the *thirty-seventh* recites that the charter was bought of the crown with a fifteenth of the movable property, in consideration whereof the king, for himself and his heirs, covenanted not to infringe the liberties specified.

Many of its provisions have been modified by later legislation; and many are preserved in the bills of rights or constitutions of the States.

The concessions of Magna Charta were wrung from the king as guaranties against the oppressions and usurpations of his prerogatives. . . The actual and practical security for English liberty against *legislative* tyranny was the power of a free public opinion represented by the Commons.[1]

The words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they originally represented. . . It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.[1]

MAIL.[2] 1. A small piece of money; rent. Extant in *black-mail*, q. v.

2. A bag, valise, or portmanteau, used in the conveyance of letters, papers, packets, etc., by any person acting under the authority of the postmaster-general, from one post-office to another.[3]

Each bag so used is a mail, of which there may be several in the same vehicle; as, the way-mail, the general, the letter, or the newspaper mail.[3]

In its original signification, a wallet, sack, budget, trunk or bag; and in connection with the post-office, the carriage of letters, whether applied to the bag into which they are put, the vehicle by which they are transported, or any other means employed for their carriage and delivery by public authority.[4]

[1] 1 Bl. Com. 146, 338.

[2] Scanlan *v.* Wright, 13 Pick. 528 (1833), Shaw, C. J.

[3] Gordon *v.* Hobart, 2 Sumn. 404-5 (1836), Story, J., after quoting Blackstone, *supra*.

[4] Const. Penn., Art. V, sec. 12.

[5] See 1 Bl. Com. 127-28; 2 *id.* 58, 77; 3 *id.* 38; 4 *id.* 423.

[1] Hurtado *v.* California, 110 U. S. 531, 529, 530 (1884), Matthews, J.

[2] 1. F. *maile*, bit of money. 2. F. *malle*, a trunk.

[3] United States *v.* Wilson, Baldw. 105 (1830), Baldwin, J.

[4] Wynen *v.* Schappert, 6 Daly, 560 (1878), Daly, C. J.

The term came into use referring to the valise which postillions or carriers had behind them and in which they carried letters, at an early period. After the establishment of post-offices, post-routes, and post-chases, it became, as it is now, a general word to express the carriage and delivery of letters by public authority [1]

In an entry of having posted notice of dishonor, "mailed" implies that the postage was prepaid.[2]

Mail matter. Letters, packets, etc., received for transmission, and to be transmitted, by post to the person to whom directed.[3]

Mailable; non-mailable. Refer to matter which may, or may not, be sent through the mails.

Mailable matter shall be divided into four classes: 1. Written matter — letters, postal cards, and all matters wholly or partly in writing, except as otherwise provided. 2. Periodical publications — all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions described. 3. Miscellaneous printed matter — books, transient newspapers, and periodicals, circulars, and other matter wholly in print, proof-sheets, corrected proof-sheets, and manuscript copy accompanying the same. 4. Merchandise — all matter not embraced in the foregoing classes, which is not in form or nature liable to destroy, deface, or otherwise damage the contents of the mail bag, or harm the postal employee, and is above the weight of four pounds for each package, except in the case of single books, and documents published or circulated by order of Congress, or official matter emanating from any department of the government or from the Smithsonian Institution, or which is not declared non-mailable by act of July 12, 1876, or matter appertaining to lotteries, gift concerts, or fraudulent schemes or devices.[4] Also non-mailable are: obscene books, scurrilous and disloyal letters; which matter shall be held subject to the order of the postmaster-general.[5]

An act approved January 20, 1888 (25 St. L. 1), amending the act of March 3, 1879, §§ 22, 23 (1 Sup R. S. p. 457), provides, That mailable matter of the *second class* shall contain no writing, print, or sign thereon or therein in addition to the original print, except as herein provided, to wit: the name and address of the person to whom the matter shall be sent, index figures of subscription book either printed or written, the printed title of the publication and the place of its publication, the printed or written name and address without addition of advertisement of the publisher or sender, or both, and written or printed words or figures, or both, indicating the date on which the subscription to such matter will end, the correction of any typographical error, a mark, except by written or printed words, to designate a work or passage to which it is desired to call attention; the words "sample copy" when the matter is sent as such, the words "marked copy" when the matter contains a marked item or article; and publishers or news agents may inclose in their publications, bills, receipts, and orders for subscriptions thereto, but the same shall be in such form as to convey no other information than the name, place of publication, subscription price of the publication to which they refer and the subscription due thereon. Upon matter of the *third class* or upon the wrapper or envelope inclosing the same or the tag or label attached thereto the sender may write his own name, occupation, and residence or business address, preceded by the word "from," and may make marks other than by written or printed words to call attention to any word or passage in the text, and may correct any typographical errors. There may be placed upon the blank leaves or cover of any book or printed matter of the third class a simple manuscript dedication or inscription not of the nature of a personal correspondence. Upon the wrapper or envelope of third-class matter or the tag or label attached thereto may be printed any matter mailable as third class, but there must be left on the address side a space sufficient for a legible address and necessary stamps. With a package of *fourth-class* matter prepaid at the proper rate for that class, the sender may inclose any mailable third-class matter, and may write upon the wrapper or cover thereof, or tag or label accompanying the same, his name, occupation, residence or business address, preceded by the word "from," and any marks, numbers, names, or letters for purpose of description, or may print thereon the same, and any printed matter not in the nature of a personal correspondence, but there must be left on the address side or face of the package a space sufficient for a legible address and the necessary stamps. In all cases directions for transmitting, delivery, forwarding, or return shall be deemed part of the address; and the postmaster-general shall prescribe suitable regulations for carrying this section into effect.

Sec. 2. That matter of the second, third, or fourth class containing any writing or printing in addition to the original matter other than as authorized in the preceding section shall not be admitted to the mails, nor delivered, except upon payment of postage for matter of the first class, deducting therefrom any amount which may have been prepaid by stamps affixed, unless by direction of the postmaster-general such postage shall be remitted; and any person who shall knowingly conceal or inclose any matter of a higher class in that of a lower class, and deposit or cause the same to be deposited for conveyance by mail, at a less rate than would be charged for both such higher and lower class matter, shall for every such offense be liable to a penalty of ten dollars.

Letter postage was reduced to two cents per half ounce or fraction thereof by act of March 3, 1883.[1]

[1] Wynen *v.* Schappert, *ante*.

[2] National Butchers', &c. Bank *v.* De Groot, 43 N. Y. Supr. 344 (1878). See also Blake *v.* Hamburg-Bremen Fire Ins. Co., 67 Tex. 163 (1886).

[3] United States *v.* Rapp, 30 F. R. 820 (1887), Neuman, J.

[4] Act 3 March, 1879: 1 Sup. R. S. pp. 454–56.

[5] Act 8 June, 1872: R. S. § 3893; Act 3 March, 1879, § 21: 1 Sup. R. S. p. 456.

[1] See 22 St. L. 455. As to rates on other classes, see Act 9 June, 1884 (second class): 23 St. L. 40; Act 3

Mail-route; mail service. See POST-OFFICE; ROUTE.

See also ACCESSARY; FRANK; INDECENT; LETTER, 3; OBSCENE; OBSTRUCT, 2; OFFER, 1.

MAIM.[1] 1. To commit mayhem, *q. v.*

Although both at common law and under our present more liberal practice, it is necessary, in charging the offense of maiming, or mayhem, to set forth what member of the body was actually injured or destroyed, yet under a charge of assault with intent to maim or wound, it has never been necessary to do more than to allege the intent in the words of the statute, without setting forth particularly the manner in which the injury was to be inflicted.[2]

2. Referring to a domestic animal, implies inflicting some permanent injury upon it.

"Disfiguring" is a lower grade of the same offense.[3] See WOUND.

MAIN. 1, *adj.* Eng. Great, high: as, the main sea, *q. v.*

2, *n.* F. A hand.

En owel main. In equal hand. See OWELTY.

Ouster le main. Take out of the hand. See OUSTER.

See MAINER; MAINOR; MAINPERNOR; MAINPRISE; MAINTAIN; MANNER; MORTMAIN.

MAINER. See MAIN, 2.

When a libel is produced written by a man's own hand, and the author is not known, he is "taken in the mainer," and that throws the burden of proof upon him.[4]

MAINOR. A thing stolen, in the hands of the thief.

At common law, when a thief was taken "with the mainour," that is, with the thing stolen *in manu*, in his hand, he might be brought into court, arraigned and tried without indictment. "Mainour" also designated the article itself which was stolen.[5]

The practice was abolished in the reign of Edward the Third.[6]

MAINPERNOR.[6] A surety that a defendant would appear and answer all charges.

"Bail" are sureties for a specified matter, expressly stipulated. They may imprison or surrender at any time; whereas, "mainpernors" can do neither.[6]

Mainprise. The writ or proceeding by which a defendant was committed to mainpernors.[7]

MAINTAIN.[1] 1. To keep up, sustain, preserve.

To maintain a partition fence is to keep it in repair, and, if destroyed, to rebuild it.[2]

A building is not maintained, but a nuisance may be, by prosecuting it in the building.[3]

To maintain a railroad implies no power to change the location after construction.[4]

It is difficult to define what are "works of maintenance" toward a railway. "Maintenance" is a very large term, and useful or reasonable ameliorations are not excluded. You may maintain by keeping in the same state, or by keeping the same state and improving the state, always bearing in mind that it must be maintenance as distinguished from alteration of purpose.[5]

See PROHIBITION, 1.

2. In pleading, to support what has already been brought into existence.[6]

3. To assist in, to promote. See *Maintenance*, 1.

4. To provide for the support of a person. See *Maintenance*, 2.

Maintenance. Support; preservation, continuance. Has two special applications:

1. An unlawful taking in hand, or upholding of quarrels or sides, to the disturbance or hinderance of common right.[7]

An officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it.[8]

Assisting another person in a lawsuit, without having any privity or concern in the subject.[9]

The intermeddling of a stranger in a suit for the purpose of stirring up and continuing the litigation.[10]

Maintainor. One chargeable with maintenance.

At common law, maintenance is an offense against public justice: it keeps alive strife and contention, and perverts the remedial process of the law into an

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March, 1879 (second, third, fourth classes): 1 Sup. R. S. 455; also, R. S. §§ 3896–3913.

[1] F. *mehaing*, abatement of strength from hurt; mutilation.

[2] Ridenour *v.* State, 38 Ohio St. 273 (1882).

[3] State *v.* Harris, 11 Iowa, 415 (1860); Regina *v.* Bullock, 11 Cox, Cr. C. 127 (1868).

[4] Rex *v.* Beare, 1 Ld. Ray. 417 (1698).

[5] 4 Bl. Com. 307; 3 *id.* 71.

[6] F. *main*, hand; *pernor*, taker.

[7] 3 Bl. Com. 128.

[1] F. *maintenir*; L. *manu tenere*, to hold by the hand, to uphold.

[2] Rhodes *v.* Mummery, 48 Ind. 218 (1874).

[3] Commonwealth *v.* Kimball, 105 Mass. 467 (1870), cases. See also State *v.* Main, 31 Conn. 574 (1863).

[4] Moorhead *v.* Little Miami R. Co., 17 Ohio, 340, 358 (1848).

[5] Sevenoaks, &c. R. Co. *v.* London, &c. R. Co., L. R. 11 Ch. D. 625 (1879), Jessel, M. R.

[6] Moon *v.* Durden, 2 Excheq. *30 (1848); Louisville &c. R. Co. *v.* Godman, 104 Ind. 492 (1885).

[7] Coke, Litt. 368 *b*; 51 Me. 63.

[8] 4 Bl. Com. 135; 44 N. H. 303; 30 Wis. 233.

[9] Wickham *v.* Conklin, 8 Johns. *228 (1811).

[10] 2 Pars. Contr. 766; 35 Vt. 69.

engine of oppression. "Champerty" and "barratry" are species.[1]

But a master may maintain, that is, abet and assist, his servant, and a parent uphold his child, in a law-suit.[2]

The ancient English doctrine respecting maintenance has found little favor here.[3] See CHAMPERTY.

2. Provision for the sustenance of a person — a minor, wife, widow, parent.

Separate maintenance. An allowance made for a wife by her husband.

If a husband, without just cause, deserts his wife, leaving her without adequate means of support, a court of equity will compel him to provide a reasonable amount for her.[4] See NECESSARIES.

MAIZE. See GRAIN.

MAJESTY. See PREROGATIVE.

MAJOR; MAJUS. L. The greater; opposed to *minus*, the lesser, the less.

Major in se continet minus. The greater comprises the less within itself.

Omne majus continet in se minus. The greater includes the less. *Omne majus trahit ad se minus.* The greater draws the less to itself — the accessory follows its principal.[5] See GREATER; MAJORITY.

Major vis. The stronger agency. See VIS, Major.

MAJORITY.[6] 1. The civil condition of one who is of the full age of twenty-one years.[7] Opposed, *minority*. See AGE; WHEN.

2. The greater number or portion; more than half of all electors, votes or voters. Opposed, *minority*. Compare PLURALITY.

A director of a school board who does not vote is not virtually absent: he is viewed as not voting at all or else as voting for the candidate who has the minority.[8]

A majority cannot arbitrarily deprive the minority of opportunity to deliberate, and, if possible, convince their fellows.[9] See HOUSE, 2.

In corporations, within the scope of the corporate authority, the majority rule Beyond this they have no right to go, and one may insist upon their stopping at the limits.[1]

See CORPORATION; PARTNERSHIP; PROXY.

Qualified voters who absent themselves from an election are presumed to assent to the will of the majority of those who vote, unless the law providing for the election declares otherwise.[2]

Good of the majority; majority rule. The majority of the members in communities have always claimed the right to govern the whole society.[3] See POLICE, 2; WELFARE.

MAKE. 1. To prepare, subscribe, verify and file: as, to make answer.

2. To transfer for the benefit of a creditor or creditors: as, to make an assignment.

3. To sign, seal, and deliver; to execute: as, to make a bill, deed, note.

4. To agree to, or to execute: as, to make a contract.

5. To fail to do a thing required in the conduct of legal proceedings: as, to make default.

6. To produce, create: as, to make an issue.

7. To collect or procure under an execution: as, to make the money; money made.

8. To swear or affirm to, in due form: as, to make oath, or affirmation.

9. To transfer: as, to make over.

10. To prepare and read in open court: as, to make a presentment.

11. To certify what was done under the mandate of a writ: as, to make a return.

Compare FACERE; FIERI; MANUFACTURE.

Maker. Specifically, he who executes a promissory note. But "law-maker" means a legislator; and "the law-maker," the individual, or body that enacts a law or laws.

MAL.[4] A prefix denoting ill, evil, unskillful, unlawful.[5]

As, in maladministration, maldistribution, malfeasance, malpractice, maltreatment. See MIS.

MALA. See MALUS.

MALADMINISTRATION. See MAL; ADMINISTER, 4.

MALE. See DESCENT; GENDER; ISSUE, 5; MAN; PRONOUNS.

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[1] 4 Bl. Com. 135

[2] 1 Bl. Com. 429, 430.

[3] Roberts *v.* Cooper, 20 How. 488 (1857). See 3 Cow. 547; 18 How. 507; 54 Ala. 66; 40 Conn. 570; 3 Harr. (Del.) 208; 57 Ga. 263; 11 Mass. 549; 5 Pick. 359; 2 Mo. Ap. 4; 11 Humph 56; 10 Heisk. 341; 2 Story, Eq. §§ 1048-57; 2 Bish. Cr. L. 122.

[4] See Garland *v.* Garland, 50 Miss. 700-716 (1874), cases; Van Arsdalen *v.* Van Arsdalen, 30 N. J. E. 359 (1879).

[5] 1 Story, Ag. § 172; 118 U. S. 587; 1 Gray, 336; 74 Pa. 468.

[6] L. *major*, the greater.

[7] See 8 Op. Att.-Gen. 62.

[8] Commonwealth *v.* Wickersham, 66 Pa. 134 (1870). See 95 U. S. 369.

[9] Commonwealth *v.* Cullen, 13 Pa. 144 (1850).

[1] Leo *v.* Union Pacific R. Co., 18 F. R. 283 (1884).

[2] County of Cass *v.* Johnston, 95 U. S. 369 (1877), cases, Miller and Bradley, JJ., dissenting. See also 22 Alb. Law J. 44-47 (1880), cases; 48 Ill. 263; 69 Ind. 505; 22 Minn. 53; 35 Mo. 103.

[3] See 1 Story, Const. § 330.

[4] F. *mal:* L. *male: malus*, bad.

[5] See Minkler *v.* State, 14 Nev. 183 (1880).

MALEFICIUM. L. Wrong-doing; unlawful action; injury; tort.

Ex maleficio. On account of misconduct. See TRUST, 1, Trustee.

MALFEASANCE. See MAL; FEASANCE.

MALICE.[1] Wicked intention to do an injury.[2]

In law, any improper and sinister motive; not necessarily spite and hatred.[3]

Wantonness; willful disregard of right and duty; doing an act contrary to a man's own convictions of duty.[4]

The state of mind in which one willfully does that which he knows will injure another's person or property.[5]

Not limited to acts done from hatred, revenge, or passion; includes all acts wantonly or willfully done, that is, acts which any man of reason, knowledge, and ability must know to be contrary to his duty.[6]

In homicide, a wicked, malignant, and revengeful act, flowing from a heart regardless of social duty, and fatally bent on mischief.[7]

In trespass, when the injury has been wanton, or gross and outrageous.[8] Not merely the doing of an unlawful or injurious act, but an act conceived in a spirit of mischief, or of criminal indifference to civil obligation.[9]

Thus, in malicious prosecution, the term is quite comprehensive, and includes many phases of wrong motive and conduct. There may be ill-will, malevolence, spite, a spirit of revenge, or a purpose to injure without cause, but it is not necessary there should be. If the prosecution is willful, wanton or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or is bound to know are wrong and against the dictates of public policy, it is malicious.[10]

In a newspaper publication, malice in uttering false statements may consist either in a direct intention to injure another, or in a reckless disregard of his rights, and of the consequences that may result to him.[1] Want of knowledge may aggravate the malignity of the case by showing an indiscriminate malice and indifference to the peace of the innocent.[2]

Actual malice; malice in fact; express malice. Malice existing as a matter of fact.

Express malice in homicide exists when one, with a sedate, deliberate mind and formed design, doth kill another; which design is evidenced by external circumstances discovering that inward intention; as, lying in wait, antecedent menaces, former grudges, and concerted schemes to do bodily harm.[3]

Express malice consists in the deliberate intention of doing any bodily harm to another, unauthorized by law.[4]

Express malice means a deliberate intention and design to commit the offense in question.[5]

Constructive malice; implied malice; legal malice. Malice inferred from acts; malice imputed in law.

Implied malice, or malice in law, is malice inferred from an act, presumed from a deliberate act, though no particular enmity can be proved. As, where a man kills another without provocation — which evidences an abandoned heart; or where a criminal kills a person who is endeavoring to make a lawful arrest; or where a person, intending to commit another felony, kills a man — as, shoots at A and kills B against whom he has no ill-intent; or, a killing by an abortionist. Any such killing is murder, because of the previous felonious intent, which the law transfers to the act. Indeed, all felonious homicide is presumed to be malicious until the contrary appears.[6]

Implied malice is malice which has no existence in fact, but which the law imputes to the guilty party.[7]

Implied malice exists where mischief is intentionally done without just cause or excuse.[8]

Malice aforethought or prepense. In homicide, not so properly spite or malevolence to the deceased in particular, as an evil

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[1] F. *malice:* L. *malitia*, badness. See MALITIA.

[2] Tuttle *v.* Bishop, 80 Conn. 85 (1861).

[3] Mitchell *v.* Wall, 111 Mass. 498 (1873), cases.

[4] United States *v.* Ruggles, 5 Mas. 192 (1828), Story, J.

[5] Territory *v.* Egan, 3 Dak. 130 (1882), Kidder, J.

[6] United States *v.* Coffin, 1 Sumn. 398 (1833), Story, J.; Wiggin *v.* Coffin, 3 Story, 7 (1839); Dexter *v.* Spear, 4 Mas. 117 (1825); United States *v.* Harriman, 1 Hughes, 528 (1876).

[7] United States *v.* Ruggles, *supra*. See also 37 Ind. 114; 89 *id.* 198; 26 Ga. 156, 275; 30 Miss. 673; 31 Mo. 147; 19 Iowa, 447; 35 Mich. 16.

[8] Day *v.* Woodworth, 13 How. 371 (1851).

[9] Philadelphia, &c. R. Co. *v.* Quigley, 21 How. 214 (1858), Campbell, J.; Milwaukee, &c. R. Co. *v.* Arms, 91 U. S. 493 (1875).

[10] Hamilton *v.* Smith, 39 Mich. 229 (1878), Graves, J.; *Re* Murphy, 109 Ill. 33 (1884); Ramsey *v.* Arrott, 64 Tex. 623 (1885).

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[1] Gott *v.* Pulsifer, 122 Mass. 239 (1877), Gray, C. J.; Lothrop *v.* Adams, 133 *id.* 479 (1882); Barr *v.* Moore, 87 Pa. 398 (1878); Negley *v.* Farrow, 60 Md. 177 (1882); Odgers, Lib. & Sl. 264; Townshend, Sl. & Lib. § 87.

[2] Dexter *v.* Spear, 4 Mas. 117 (1825), Story, J.

[3] 4 Bl. Com. 199.

[4] People *v.* Clark, 7 N. Y. 393 (1852).

[5] [Anthony *v.* State, 21 Miss. 264 (1850).

[6] 4 Bl. Com. 199–201.

[7] Darry *v.* People, 10 N. Y. 138 (1854).

[8] Parke *v.* Blackiston, 3 Harr. 378 (Del., 1841).

See, on express and implied malice, 34 Cal. 53; 12 Fla. 125; 3 Ga. 324; 26 *id.* 156; 101 Ill. 391; 1 Ind. 353; 2 La. An. 969; 37 Me. 468; 9 Metc. 104; 15 Pick. 337; 30 Miss. 684; 25 Mo. 151; 48 *id.* 161, 323; 11 S. & R. 40; 32 Tex. 641; 33 *id.* 645; 8 Tex. Ap. 109; 4 B. & C. 255; 9 Cl. & F. 32; 2 Steph. Hist. Cr. Law Eng. 118–21.

design in general; the dictate of a wicked, depraved, and a malignant heart.[1]

Is not confined to homicide committed in cold blood, with settled design and premeditation, but extends to all cases of homicide, however sudden the occasion, when the act is done under such cruel circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit.[2]

Includes not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. Is not confined to ill-will toward one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indication of a heart regardless of social duty, and fatally bent on mischief. Therefore, murder is implied from any deliberate or cruel act against another, however sudden. . . The words do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but they rather denote purpose and design, in contradistinction to accident and mischance.[3]

Whenever a homicide is shown to have been committed without lawful authority and with deliberate intent, it is sufficiently proved to have been with malice aforethought. It is not necessary to prove that any special or express hatred or malice was entertained by the accused toward the deceased. It is sufficient to prove that the act was done with deliberate intent, as distinct from an act done under the sudden impulse of passion, in the heat of blood, and without previous malice.[4] See MURDER.

Particular malice; personal malice. Particular malice is ill-will, grudge, a desire to be revenged on a particular person.[5]

Personal malice is spite against some particular individual. It is one of the two varieties of malice in fact, the other being what Blackstone terms "universal" malice, or malice against the world generally, without reference to individuals: as, where a person discharges a gun into a multitude, or starts out to kill and does kill the first man he meets.[6]

Malicious. Characterizes an act not only when it arises from personal spite, but when it is a wanton and intentional injury, when it is willful.[7]

In a legal sense, describes any unlawful act done willfully and purposely to the prejudice and injury of another.[1]

The intentional doing of a wrongful act with knowledge of its character, and without cause or excuse.[2]

Describes the state of mind in which many acts (crimes and torts) are done: as, malicious — abandonment, arrest, battery, burning, communication, desertion, injury, intention, libel, mischief, prosecution, publication, *qq. v.*

Maliciously. With deliberate intention to injure; willful: as, the malicious burning of a building.[3]

Maliciously suing out an attachment means not only malevolent intention to do injury, but also that careless disregard of the rights of others which, without real ill-will, the law implies as malice.[4]

In a spirit of wicked revenge toward a person, or of wanton cruelty toward an animal.[5]

In misdemeanors and felonies, imports a criminal motive, intent or purpose.[6]

See DELIBERATION, 3; DAMAGES, Exemplary; INTENT; KNOWLEDGE, 1; MOTIVE.

MALITIA. L. Vicious will; evil design; wickedness; malice. Compare DOLUS; MALUS.

Malitia supplet ætatem. Viciousness makes up for age; a wicked design supplies the want of years.

Between seven and fourteen an infant is *prima facie* incapable of criminal intention. Evidence of mischievous discretion will rebut this presumption.[7]

MALO. See MALUS.

MALPRACTICE.[8] Unskillful treatment by a physician or surgeon, in consequence of which the patient is injured more or less seriously, perhaps permanently.

Spoken of as ignorant, negligent, or willful.

Some authorities hold that the offense, however occasioned, is a misdemeanor: it implies a violation of confidence.[9]

The patient may have a civil action for damages.

The majority of the cases arise from amputations,

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[1] 4 Bl. Com. 198.

[2] United States *v.* Cornell, 2 Mas. 91 (1820), Story, J.

[3] Commonwealth *v.* Webster, 5 Cush. 304-6 (1850), Shaw, C. J.

[4] United States *v.* Guiteau, 10 F. R. 162, 165 (1882), Cox, J.; Davison *v.* People, 90 Ill. 229 (1878); Spies *et al.* *v.* People, 122 *id.* 174 (1887).

[5] Brooks *v.* Jones, 11 Ired. L. 261 (1850).

[6] See 4 Bl. Com. 200; Brown's Law Dict. See generally 1 Curtis, 4; 1 Dak. 458; 29 Ga. 594; 29 Kan. 427; 13 Mo. 382; 16 Nev. 307; 49 N. H. 399; 13 Wend. 159; 58 Pa. 9; 14 Tex. Ap. 286, 300, 331; Law Mag. & Rev., Aug. 1882.

[7] Dexter *v.* Spear, 4 Mas. 118 (1825), Story, J.

[1] [Commonwealth *v.* Snelling, 15 Pick. 340 (1834), Shaw, C. J.

[2] Rounds *v.* Delaware, &c. R. Co., 3 Hun, 335 (1874). See also 9 Metc. 106; 29 Tex. 256; 76 Va. 132.

[3] Tuttle *v.* Bishop, 30 Conn. 85 (1861).

[4] Jerman *v.* Stewart, 12 F. R. 268 (1882), Hammond, District Judge.

[5] Commonwealth *v.* Walden, 3 Cush. 559 (1849). See also 7 Ala. 728; 1 Minn. 292; 3 Yerg. 278.

[6] Commonwealth *v.* Brooks, 9 Gray, 303 (1857); Commonwealth *v.* Boynton, 116 Mass. 345 (1874). That a malicious act of itself gives no right of action, see 18 Cent. Law J. 424-28 (1884), cases.

[7] 1 Bl. Com. 465; 4 *id.* 2, 23; 2 Kent, 233.

[8] L. *malpraxis*, bad or faulty practice. See MAL.

[9] See 3 Chitty, Cr. L. 863; 1 Pr. 43; 2 Russ. Cr. 277; 3 Mass. 134; 8 Mo. 561; 3 C. & P. 629; 4 *id.* 423.

fractures, and dislocations. The surgeon must know and apply what is settled in his profession, and bring to the performance of an operation at least ordinary skill; and the patient must not directly contribute, to an extent that cannot be distinguished, to the results of the treatment he afterward complains of.[1] See CARE; MALTREATMENT.

MALTREATMENT. Synonymous with bad treatment.

Does not imply, necessarily, conduct that is either willfully or grossly careless. Results from ignorance, negligence, or willfulness. This, at least, is the meaning, as applied to the treatment of a wound by a surgeon.[2] Compare MALPRACTICE.

Maltreatment of animals. See CRUELTY, 3.

MALUM. See MALUS.

MALUS. L. Bad; evil. Compare MAL.

Mala. Bad; in or with that which is bad, evil, unlawful.

Mala fides. Bad faith; opposed to *bona fides.* See FIDES.

Mala grammatica. Bad grammar, *q. v.*

Mala mens. Bad mind: fraudulent or criminal intention.

Mala praxis. Bad treatment: malpractice, *q. v.*

Malo. With or in bad, evil, unlawful.

Malo animo. With bad intent; maliciously.

Malo sensu. In the bad meaning. See SLANDER.

Malum. Evil, an evil, a wrong. Plural, *mala.*

Malum in se. Evil in itself; an act pernicious in its very nature. *Malum prohibitum.* A forbidden evil; an act made wrong by legislation.

Crimes and misdemeanors, such as murder, theft, and perjury, are *mala in se,* and contract no additional turpitude from being declared unlawful by a human legislature. But it is otherwise as to things in themselves indifferent: these become right or wrong, just or unjust, duties or misdemeanors, as the municipal legislator sees proper for promoting the welfare of society, and more effectually carrying on the purposes of civil life.[3]

Some crimes and misdemeanors are *mala in se:* offenses against divine law, natural or revealed; but by far the greater part are *mala prohibita:* such as derive their guilt merely from prohibition by the laws of the land.[1]

MALVERSATION. Any punishable fault committed in the exercise of an office.

Originally, a term in French law.[2]

MAN. 1. Includes all human beings, or any human being whether male or female: as, in the expressions, offenses against man, manslaughter, material-man, remainderman, warehouseman, and perhaps bondsman. Compare HOMO; PERSON.

2. Restricted to males — adults: as, in alderman, assemblyman, congressman, juryman, talesman.

In a statute, "single man" and "married man" may be taken in a generic sense, and the former include an unmarried woman.[3]

"When any man shall die leaving minor children and no widow," in a statute of descents, "man" will include a woman who dies leaving a minor child, and no husband.[4] See GENDER.

3. In feudal law, a vassal. See FEUD.

Man of straw. See STRAW.

MANAGE.[5] To direct, control, govern, administer, oversee.

It is not easy to establish a rule as to what may be considered "unmanageableness" in a horse, and much depends upon the circumstances of each case.[6]

Management. 1. The management of an engine consists in part of the management of whatever generates the motive force.[7]

2. The body of persons who have charge of the affairs of a corporation. See DIRECTOR.

Manager. 1. An officer of a corporation chosen to superintend its affairs.

An ambiguous word, since it may mean either a person retained generally to represent the principal in his absence, or one who has the superintendence of a particular contract or job, in which latter case he is like a fellow-workman.[8]

General manager. The person who really has the most general control over the affairs of a corporation, and who has knowledge of all its business and property, and who can act in emergencies on his own responsibility.

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[1] See Hibbard *v.* Thompson, 109 Mass. 288 (1872), cases; Potter *v.* Warner, 91 Pa. 366 (1879): 36 Am. Rep. 668, 670, cases; Elwell, Malp. 55; 9 Conn. 209; 13 B. Mon. 219; 27 N. H. 460; 7 N. Y. 397; 25 Ohio St. 86; 22 Pa. 261; 68 *id.* 168; 39 Vt. 447. As to criminal liability for death, see 27 Alb. Law J. 104-5 (1883), cases.

[2] Commonwealth *v.* Hackett, 2 Allen, 142-43 (1861), Bigelow, C. J.

[3] 1 Bl. Com. 54, 57.

[1] 2 Bl. Com. 420; 4 *id.* 5-10; 101 U. S. 821; 108 *id.* 150; 31 F. R. 451.

[2] F.: L. *male,* ill, unlawful; *versatio,* behavior.

[3] Silver *v.* Ladd, 7 Wall. 226 (1868).

[4] Smith *v.* Allen, 31 Ark. 271 (1876).

[5] F. *manege,* control of a horse, handling: L. *manus,* a hand.

[6] Spaulding *v.* Winslow, 74 Me. 536 (1883): 3 Cliff. 61; 100 Mass. 49; 125 *id.* 526; 132 *id.* 49; 73 N. Y. 365; 81 Pa. 50; 2 Thomp. Neg. 1207, cases.

[7] Smith *v.* Old Colony, &c. R. Co., 10 R. I. 28 (1871).

[8] Murphy *v.* Smith, 19 C. B. N. S. 390 (1865), Erle, C. J.

He may be considered as the "principal officer." [1]

Managing agent. An agent having general supervision over the affairs of a corporation.[2]

Distinguishes a person, representing a corporation, who is invested with general power, involving the exercise of judgment and discretion, from an ordinary agent or employee who acts in an inferior capacity, and under the discretion and control of superior authority, both in regard to the extent of the work and the manner of executing it.[3]

Such agent need not have charge of the whole business of the corporation.[4]

In several cases in New York, it has been held that "managing agent" means a person exercising the functions of an officer in the control and management of the business of a company or corporation, and does not include a person having charge of some special work, as, a baggage-master in respect to baggage, or a person employed to purchase horses and feed, or an assistant secretary, or a person who sells tickets, or who has charge of the transfer of the stock and the transmission of assessments. The adjudications have not gone so far as to hold that no agent is a "managing agent" who does not participate in the control of every part of the corporate business, and of every corporate act. Still less has such construction been given where it would defeat justice, and enable a corporation to violate the law with impunity.[5] See PRINCIPAL, 4, Vice.

2. In England and Canada, the chief executive officer of a branch bank.

3. A member of the impeaching branch of a legislature, selected to assist as counsel at a trial.

MANDANT. See MANDATE, 3.

MANDARE. L. To enjoin, command; literally, to put into one's hand.

Mandamus. We command; we command you.

The emphatic word in the Latin form of the writ of that name: a command issuing in the king's name, directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice.[1]

A high prerogative (discretionary) writ of a most extensively remedial nature, where justice is refused or neglected. It issues where a party has a right to have a thing done or has no other specific means of compelling its performance: as, to compel admission or restoration to an office or franchise of a public nature; for the production or inspection of public documents; to compel a judge of an inferior court to do justice according to the powers of his office, as to admit an attorney to practice.[2]

A proceeding to compel officers and others to act in the discharge of the duties and trusts imposed upon them. It is not designed to review their action when discretion may be exercised, or where action depends upon facts to be determined by them.[3]

The courts are disposed to confine the remedy to cases where there is no other adequate specific remedy. . . The writ affords a summary and specific remedy where without it the party will be subjected to serious injustice.[4]

In modern practice, in effect, is nothing more than an ordinary action at law between the parties, and not regarded as a prerogative writ. It came into use by virtue of the prerogative power of the English crown, and was subject to rules and regulations long since disused.[5]

It may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do.[6]

The writ lies where the plaintiff has a clear legal right to the performance of an official or corporate act, by a public officer or corporation, and no other adequate, specific remedy exists.[7]

Regularly the writ lies against a public officer to compel the performance of a public duty; never to restore to a private office or to execute a private right; and, as a rule, never where the applicant has another adequate remedy.[8]

Its office is to compel the performance of a duty resting upon the person to whom the writ is sent. The

[1] Wheeler & Wilson Manuf. Co. *v.* Lawson, 57 Wis. 404 (1883), cases, Orton, J.; 110 U. S. 6.

[2] Upper Mississippi Transportation Co. *v.* Whittaker, 16 Wis. 235 (1862), Paine, J.

[3] [Reddington *v.* Mariposa Land, &c. Co., 19 Hun, 408 (1879), Ingalls, J.

[4] Palmer *v.* Pennsylvania Co., 35 Hun, 371 (1885).

[5] Hat-Sweat Manuf. Co. *v.* Davis Sewing-Machine Co., 31 F. R. 295 (1887), cases, Brown, J.

[1] 3 Bl. Com. 110; 1 Cranch, 169; 5 Pet. *122; 12 *id.* *614.

[2] 3 Bl. Com. 110, 264.

[3] Scripture *v.* Burns, 59 Iowa, 72 (1882), Beck, J. See also 22 N. J. L. 47; 28 N. Y. 114.

[4] Tawas, &c. R. Co. *v.* Judge of Iosco County, 44 Mich. 479, 488 (1880): 24 *id.* 468; Huston, &c. R. Co. *v.* Commissioner of Land Office, 36 Tex. 399 (1872): King *v.* Baker, 3 Bur. 1267 (1762); State *v.* Board of Liquidators, 29 La. An. 267 (1877).

[5] Kentucky *v.* Dennison, 24 How. 97 (1860), Taney, C. J.; Hartman *v.* Greenhow, 102 U. S. 675 (1880); State *v.* Lewis, 76 Mo. 379–81 (1882); High, Extr. Rem. 4.

[6] Virginia *v.* Rives, 100 U. S. 323 (1879), Strong, J.

[7] Smalley *v.* Yates, 36 Kan. 523 (1887), cases, Horton, Chief Justice.

[8] Tobey *v.* Hakes, 54 Conn. 274–75 (1886), cases.

law seeks to enforce a personal obligation, whatever the facts or relations out of which the duty grows. It is a personal action, resting upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. Hence, demand, and refusal, to do the thing, is necessary.[1]

The writ is grounded on a suggestion of right in the petitioner, and a denial of justice; whereupon, in order more fully to satisfy the court that there is probable ground for such interposition, a rule is made (except where probable ground is manifest) directing the party complained of to show cause why a *mandamus* should not issue; and if he shows no sufficient cause, the writ itself is issued, at first in the *alternative;* to do thus or show some reason to the contrary; to which an answer is made at a certain day; and if the respondent shows an insufficient reason, there issues a *peremptory mandamus:* to do the thing absolutely; to which perfect obedience is required.[2] A rule first issues to show cause why a peremptory writ should not issue. After due service, the respondent makes return to the charge contained in the rule — by denying the matters or setting up new matter, or he moves to quash the rule, or demurs to the allegations. A matter charged and denied must be proved by the relator, and new matter in avoidance, if denied by the relator, must be proved by the respondent. Several defenses may be set up.[3]

The appropriate functions of the writ are the enforcement of duties to the public by officers and others, who neglect or refuse to perform them, and for which there is no other specific remedy. The presentation of a *prima facie* case of duty in the respondent and an obligation to perform it precedes the granting of an alternative writ, and this is considered as done when the court has awarded the writ. The respondent is bound to deny the allegations in the writ, or else by a demurrer or by a traverse of the facts, generally or by confession and avoidance, show cause why he should not. In case of traverse, the facts relied upon must be set forth clearly, specifically, and certainly, so that the court may see at once that the facts, if established or admitted, are sufficient as the alternative for obedience to the writ.[4]

The writ does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside of the jurisdiction of the court or officer to which or to whom the writ is addressed. A peculiar and common use is to restrain inferior courts and to keep them within their lawful bounds.[5]

The writ does not abate by expiration of the term of office, where there is a continuing duty irrespective of the incumbent.[6]

There is a preponderance of authority in favor of the doctrine that private persons may move for a *mandamus* to enforce a public duty, not due to the government as such, without the intervention of the government law-officer. The principal reasons urged against the doctrine are that the writ is prerogative — a reason which is of no force in this country, and no longer in England, — and that it exposes the defendant to be harassed with many suits — but the writ, being discretionary with the court, will not be unnecessarily granted.[7]

The writ lies to restore an attorney who has been disbarred unlawfully, and for cases where there is a legal right without any other remedy;[8] to compel satisfaction of a judgment against a municipality, by the levy of a tax, if the authorities have taxing power, and the creditor is unable to obtain payment by execution.[9] But not to compel the officers of a State to perform their political duties, as, to levy a tax for the payment of bonds, the payment being repudiated by the State.[10]

The Supreme Court has power to issue the writ in cases warranted by the principles and usages of law to the Federal courts or officers, where a State, an ambassador or other public minister or consul is a party.[11] Application for the writ to a subordinate court is "warranted by the principles and usages of law" in cases where the subordinate court, having jurisdiction, refuses to hear and decide the controversy, or where such a court, having heard the cause, refuses to render judgment or enter a decree, but not to re-examine a judgment or decree, nor to direct what judgment or decree shall be rendered, nor where remedy by appeal or writ of error lies.[12]

Mandatum. L. A gratuitous bailment. See MANDATE, 3.

Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud. When anything is commanded, commanded also is everything by which it can be effected.

The law authorizes the doing of every thing necessary to accomplish what it commands; as, where effect is to be given to a statute. For this reason, also, a constable may order by-standers to assist him to compel offenders to keep the peace, and the sheriff command citizens to join the *posse.*[13] Compare GRANT, 2, 3; INCIDENT.

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[1] United States *v.* Boutwell, 17 Wall. 607 (1873), Strong, Justice.

[2] 3 Bl. Com. 110, 264; 52 Wis. 426; 40 Tex. 682.

[3] *Exp.* Newman, 14 Wall. 166-67 (1871), cases, Clifford, J.

[4] Commonwealth, *ex rel.* Armstrong *v.* Commissioners of Allegheny County, 37 Pa. 279 (1860): Tapping, Mand. 347; 32 Pa. 218; 34 *id.* 496.

[5] Virginia *v.* Rives, 100 U. S. 328 (1879): *Exp.* Burtis, 108 U. S. 238 (1880), cases; 100 *id.* 186.

[6] Thompson *v.* United States, 103 U. S. 488 (1880), cases.

[7] Union Pacific R. Co. *v.* Hall, 91 U. S. 355-56 (1875), cases.

[8] *Exp.* Bradley, 7 Wall. 376 (1868).

[9] Meriwether *v.* Garrett, 102 U. S. 518-21 (1880).

[10] Louisiana *v.* Jumel, 107 U. S. 711 (1882).

[11] R. S. §§ 688, 716, cases.

[12] *Exp.* Newman, 14 Wall. 165 (1871), cases. As to jurisdiction in the Federal courts, see 19 Am. Law Rev. 505-46 (1885), cases.

[13] 8 Cush. 345; Broom, Max. 485.

MANDATARY. See MANDATE, 3.

MANDATE.[1] 1. A charge, command; a judicial command.[2]

Includes a writ, process or other written direction issued pursuant to law out of a court, or made pursuant to law, by a court, or a judge, or a person acting as a judicial officer, and commanding a court, board or other body, or an officer or other person named or otherwise designated therein, to do or refrain from doing an act therein specified.[3]

The rescript or precept promulgated upon the decision of a cause by the Supreme Court is called a mandate. It embodies what shall be done by the lower court.

Mandatory. Involving a command; opposed to *directory*, q. v.

Many statutory requisitions, intended for the guidance of officers in the conduct of business, do not limit their power or render its exercise in disregard of the requirements ineffectual. Such are regulations designed to secure order, system, and dispatch in proceedings. Provisions of this character are not mandatory unless accompanied by negative words importing that the acts shall not be done in any other manner or time than that designated. But when the requirements, as, in a tax sale, are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must then be followed or the acts done will be invalid. The power of the officer is limited by the manner and conditions prescribed for its exercise.[4] Compare PROHIBITION, 1.

2. In a few of the States, the writ of *mandamus*, q. v.

3. A contract by which a lawful business is committed to the management of another, and by him undertaken to be performed without reward.[5]

Mandant or mandator. The bailor in a contract of mandate. **Mandatary.** The bailee in such contract. See BAILMENT.

MANDATUM. See MANDARE, Mandatum.

MANIA.[6] 1. Mental derangement accompanied with excitement.

2. Madness, irresistible impulse, insanity.

Dipsomania. A madness for drink. *Kleptomania.* An uncontrollable impulse to steal. *Mania a potu.* A frenzy for drinking. *Monomania.* Insanity upon one subject only. See further INSANITY.

MANIFEST.[1] 1. Apparent by examination, without need of evidence to make it more clear; open, palpable, incontrovertible. Synonymous with evident, visible, plain, obvious to the understanding from an examination: as, that there is error in an assessment from inspection of the roll or return.[2]

2. A document showing of what goods a cargo consists, where laden on board, for whom laden, to whom consigned, etc.[3]

MANKIND. See MAN, 1.

MANNER.[4] A word of large signification, but cannot exceed the subject to which it belongs: the incident cannot be extended beyond the principal.[5]

The power to direct the "manner," the mode, the way, in which an act shall be done, and the power to do the act itself, are, obviously, not identical. To prescribe the manner of election or appointment to an office is an ordinary legislative function; to make an appointment is an administrative function.[6]

In like manner. Assessment of damages "in like manner," as prescribed by a former act, may refer merely to the general method.[7]

In the same manner. By similar proceedings, so far as such proceedings are applicable to the subject-matter.[8]

That a mining tax shall be enforced "in the same manner" as a certain annual tax, does not necessarily mean within the same time.[9]

Manner and form. Words used in tendering an issue, general or special. When of the substance of the issue, they put in issue the circumstances to the principal matter denied,— time, place, manner, etc.; otherwise, when not of the substance. When the circumstances are originally and in themselves material, and therefore to be proved as stated, the words "in manner and form" are of the substance. The words put in issue all material circumstances, and no other.[10] See MODE; MODUS.

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[1] *Mandare*, q. v.

[2] See McKelsey *v.* Lewis, 3 Abb. N. Cas. 63 (1877).

[3] N. Y. Code Civ. Proc. § 3343, subd. 2; People *ex rel.* Munsell *v.* Oyer & Terminer, 36 Hun, 281 (1885).

[4] French *v.* Edwards, 13 Wall. 511 (1871), Field, J. See also 20 How. 290; 3 McCrary, 333, 349; 13 F. R. 512, 508, cases.

[5] Story, Bailm. § 137. See also 8 Ga. 178; 5 La. An. 807, 672; 10 Minn. 421; 42 Miss. 543; 35 Mo. 492; 58 N. H. 17.

[6] Gk. *mani'a*, mental excitement, frenzy, rage.

[1] L. *manifestus*, lit., struck by the hand: palpable; apparent, evident.

[2] Matter of Hermance, 71 N. Y. 486 (1877), Allen, J.

[3] See 1 Story, U. S. Laws, 593.

[4] F. *manier*, habitual: *main*, hand.

[5] Wells *v.* Bain, 75 Pa. 54 (1874), Agnew, C. J. See Brown *v.* O'Connell, 36 Conn. 447 (1870); 70 N. Y. 483.

[6] State, *ex rel.* Attorney-General *v.* Kennon, 7 Ohio St. 560 (1857).

[7] Thirty-fourth Street, Philadelphia, 81 Pa. 31 (1876).

[8] Phillips *v.* County Commissioners, 122 Mass. 260 (1877).

[9] State *v.* Eureka Consolidated Mining Co., 8 Nev. 29 (1872). See United States *v.* Morris, 1 Curtis, 26 (1851).

[10] [Gould, Plead 212; Steph. Pl. 213.

MANOR.[1] 1. A tract of land held by a lord or other personage.

Out of this tract the grantee or lord reserved a "demesne" contiguous to his castle. On one part of the rest were settled "military tenants" sufficient in number to perform the services their employer owed to his lord; on another part dwelt the "socage tenants," who farmed the land and paid rents in cattle, grain, etc.; and on a third part were the "villains," who served at base or servile labor at dictation. Roads, commons, and waste ground took up the remainder of the district. "Book" or "charter land" was held by deed under fixed rents and free services. "Folk land" was held by no assurance in writing, but distributed among the common people, and reserved at the pleasure of the lord. The "court-baron" redressed misdemeanors and nuisances within the manor, and settled disputes between tenants as to property, before at least two freeholders as a jury.[2] See DEMESNE; COPYHOLD; FEUD.

2. In the older parts of the United States (the interior of New York and eastern Pennsylvania, for example), land held on a fee-farm rent, and descending to the oldest son of the proprietor — the patroon.[3] See FEUD.

MANSION. See HOUSE, 1; MANOR.

MANSLAUGHTER. The wrongful killing of another person without malice, express or implied.

Voluntary manslaughter. A killing upon a sudden heat; a killing upon a sudden quarrel, in the first transport of passion and before reason has time to resume her empire.[4]

Killing after passion has subsided is murder. Not, then, the same as excusable homicide in self-defense.

Involuntary manslaughter. A killing in the doing of an act unlawful in itself, or a lawful act in an unlawful or careless way.[4]

As, where a workman flings a piece of timber into the street and kills a man; where the owner allows a vicious animal to run at large; where one fires off a pistol, against law, and kills another, or drives a locomotive engine at an unlawful speed; where one corrects a child immoderately. When no more is intended than a civil trespass, a killing is "voluntary" manslaughter; but where a felony is intended, a killing is murder.[4]

Manslaughter is the killing of another without malice. It is "voluntary" when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation, which, in tenderness to the frailty of human nature, the law considers sufficient to palliate the criminality of the offense. It is "involuntary" when the death is caused by some unlawful act, not accompanied with any intention to take life. . . The true nature of manslaughter is, that it is homicide mitigated out of tenderness to the frailty of human nature.[1]

Where there is no evil intent, it is not necessary that the killing should be the result of an unlawful act; it is sufficient if it is the result of reckless or foolhardy presumption, judged by the standard of what would be reckless in a man of ordinary prudence under the same circumstances.[2]

In the courts of the United States, the crime is punishable by imprisonment not exceeding ten years, and by a fine not exceeding one thousand dollars.[3]

See HOMICIDE; MALICE; MURDER.

MANSTEALING. See KIDNAPING.

MANU. See MANUS.

MANUAL. See DELIVERY; LABOR, 1. Compare CORPOREAL.

MANUFACTURE.[4] Making an article by hand; making an article, either by hand or by machinery, into a new form, capable of being used, in ordinary life. In some instances, may refer to the process performed upon what is found in a natural state, in others, to a subsequent process.[5]

To manufacture is to change and modify natural substances so that they become articles of value and use. The publisher of a newspaper is not a "manufacturer."[6]

The meaning has expanded as workmanship and art have advanced; so that now nearly all artificial products of human industry, nearly all such materials as have acquired changed conditions as new and specific combinations, whether from the direct action of the human hand, from chemical processes devised and directed by human skill, or by the use of machinery, are now commonly designated as "manufactured." Making flour from wheat is "manufacturing."[7]

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[1] F. *manoir*, mansion: L. *manere*, to remain, reside.

[2] 2 Bl. Com. 90.

[3] See People *v.* Van Rensselaer, 5 Seld. 291 (1853); The Century Magazine, Dec. 1885: Manor of Gardnier Island.

[4] 4 Bl. Com. 191-93. Approved, 87 Ind. 154; 78 Ky. 177; 23 Ill. 21; 34 La. An. 88; 7 N. J. L. 243; 31 Pa. 201; 8 Gratt. 605.

[1] Commonwealth *v.* Webster, 5 Cush. 304, 307 (1850), Shaw, C. J.; United States *v.* Outerbridge, 5 Saw. 622 (1868), Field, J.

[2] Commonwealth *v.* Pierce, 138 Mass. 174 (1884), cases, Holmes, J. The defendant, who publicly practiced as a physician, caused a patient to be kept in flannels saturated with kerosene, for three days, from which treatment she died. Same case, 24 Am. Law Reg. 117, 124-20, cases. As to deaths from accidents, see 21 Cent. Law J. 267-69 (1885), cases.

[3] Act 13 March, 1875: 1 Sup. R. S. 177. See 1 Whart. Cr. L. § 307; 2 Bish. Cr. L. Ch. XXIII; 4 Crim. Law Mag. 669, 679.

[4] L. *manu*, by the hand; *facere*, to make.

[5] [Lawrence *v.* Allen, 7 How. 794, 793 (1849), Woodbury, J. See also Schrieffer *v.* Wood, 5 Blatch. 216 (1864).

[6] *Re* Capital Publishing Co., 3 MacAr. 412 (1879), MacArthur, J.; *Re* Kenyon, 1 Utah, 47 (1872).

[7] Carlin *v.* Western Assurance Co., 57 Md. 526 (1881),

The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a "manufactured" article, within the meaning of that term as used in the tariff laws. Thus, scouring wool does not make the resulting wool a manufacture of wool; nor does cleaning and ginning cotton make the resulting cotton a manufacture of cotton; nor (case in issue) are shells cleaned by acid, and then ground on an emery wheel, and some afterward etched by acid, and all intended to be sold for ornaments, as shells.[1]

Pressed and baled hay is not a "manufactured article."[2]

Cutting and storing ice is not "manufacturing:" the material is in no way changed or adapted to a new or different use.[3]

Nor is mining coal "manufacturing."[4]

Animal charcoal or bone-black, and bone-dust, are "manufactures of bone."[5]

"Manufactures of metals" mean manufactured articles in which metals form a component part; not articles in which metals have lost their form entirely, and become the chemical ingredients of new forms, as, white lead, nitrate of lead, oxide of zinc.[6]

"Domestic manufactures," in a State statute, refer to manufactures within its jurisdiction.[7]

Manufacturer. One "engaged in the business of making raw materials into wares suitable for use."

The builder or repairer of vessels is not, then, a manufacturer.[8]

Not, necessarily, one who produces a new article out of materials entirely *raw*. He is, who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process.[9]

A cooper who makes barrels from staves was held not to be a manufacturer within an exemption law.[10]

An ice-cream confectioner is not a manufacturer;[10] nor is the publisher of a newspaper, as seen above.[11]

A person who slaughters hogs, adding to their value by certain processes and by combination with other materials, whereby they are converted into bacon, lard, and cured meats, with a view of making gain or profit, is taxable as a manufacturer.[1]

See ART; DESIGN, 2; MECHANIC; PROCESS, 2; TRADE-MARK.

MANUMISSION. Giving liberty to one who has been in servitude, with the power of acting except as restrained by law.[2]

MANURE. See WASTE, 2.

Made upon a farm, from consumption of its products, is part of the realty. Made from hay brought upon the land, has been held to be personalty, especially when gathered into heaps. If abandoned in a highway by the owner of the animals, the first taker has a right to it.[3]

Manure which had accumulated in a public street, the fee of which belonged to the borough, was raked into heaps by the plaintiff during the evening of one day, to be removed the next evening. In this he was prevented by the defendant, who carted the manure away to his own land. In an action of trover by the plaintiff for the value of the manure, it was held: That the manure was personalty; that it belonged originally to the owners of the animals that dropped it, but was to be regarded as abandoned by such owners; that the first occupant had a right to appropriate it; that after the plaintiff had added to its value by the labor of raking it into heaps he was entitled to it; and that he had a reasonable time in which to remove it.[4]

MANUS. L. A hand. F. *main*, q. v.

Manu brevi. With short hand: briefly.

Manu forti. With strong hand: forcibly. See HAND, 2.

Molliter manus imposuit. He laid hands upon him lightly.

A plea justifying an assault or trespass, committed to preserve the peace, to prevent a crime, or to protect one's habitation.[5]

MANUSCRIPT.[6] A writing of any kind, as opposed to printed matter or a picture; a book, paper or document in written characters.

In copyright law, an unpublished literary production, however prepared; not, then, a picture or painting.[7]

At common law, the sole proprietorship in manuscript, before publication, is in the author or his assignee; but an unqualified publication, such as is made by printing and offering copies for sale, dedicates the

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Ritchie, J. See also Holden v. Clancy, 58 Barb. 597 (1871).

[1] Hartranft v. Wiegmann, 121 U. S. 609, 615 (1887), cases, Blatchford, J.

[2] Frazee v. Moffitt, 20 Blatch. 268 (1882).

[3] Hittinger v. Westford, 135 Mass. 262 (1883). *Contra*, Attorney-General v. Belle Island Ice Co., 63 Mich. – (1886).

[4] Byers v. Franklin Coal Co., 106 Mass. 131 (1870).

[5] Schrieffer v. Wood, 5 Blatch. 216 (1864). See also 100 Mass. 183; 9 N. J. E. 289; 4 Lans. 511.

[6] Meyer v. Arthur, 91 U. S. 570 (1875).

[7] Commonwealth v. Giltinan, 64 Pa. 108 (1870).

[8] People v. N. Y. Floating Dry-Dock Co., 63 How. Pr. 458 (1882): Webster's Dict.; s. c., 92 N. Y. 489 (1883).

[9] New Orleans v. Le Blanc, 34 La. An. 597 (1882), Bermudez, C. J.

[10] New Orleans v. Mannessier, 32 La. An. 1075 (1880).

[11] See Norris v. Commonwealth, 27 Pa. 496 (1856).

[1] Engle v. Sohn, 41 Ohio St. 691 (1885).

[2] Fenwick v. Chapman, 9 Pet. *472 (1835), Wayne, J.

[3] 1 Washb. R. P. 6, cases; 11 Conn. 525; 68 Me. 204; 13 Gray, 53; 110 Mass. 94; 2 Ired. L. 326; 44 N. H. 120; 48 *id.* 147; 49 *id.* 62; 28 N. J. L. 581; 15 Wend. 169; 17 Pa. 262; 43 Vt. 93; 2 Chip. (Vt.) 114.

[4] Haslem v. Lockwood, 37 Conn. 500, 505 (1871), cases.

[5] 3 Bl. Com. 121.

[6] L. *manu*, by hand; *scriptum*, written.

[7] Parton v. Prang, 3 Cliff. 537, 544 (1872), cases, Clifford, J.

contents to the public, unless the sole right of printing, publishing, and vending is secured by copyright. In communicating the contents of his manuscript, the author may impose such restrictions as he pleases upon the extent of its use.[1]

At common law, the author has a property in his manuscript, and may obtain redress against one who deprives him of it, or by improperly obtaining a copy endeavors to realize a profit by its publication. The copyright law protects this property which an author has at common law, and which would be protected by a court of chancery.[2]

See further BAGGAGE; COPYRIGHT; LETTER, 3; MAIL, 2; WRITING.

MAP. A transcript of the region which it portrays, narrowed in compass so as to facilitate an understanding of the original.[3]

Maps showing boundaries are receivable in evidence, if it appears that they were made by persons having adequate knowledge.[4]

Where one map appears to have been substantially copied from a copyrighted map, there is clearly an infringement, which a court of equity will enjoin, with an order that an account be taken of the profits made by the infringer.[5] See APPENDAGE; CHART; VERBA, Illata.

MARAUDER.[6] A soldier who commits larceny or robbery near camp, or while wandering from the army.[7]

A rover in quest of plunder; a plunderer.[8]

MARGIN.[9] In a broker's contract for the sale of stocks: security against loss on the part of the agent,— money or other property.[10]

Additional collateral security against loss to the broker, while he is carrying stock for his employer.[11]

See FUTURES; OPTION; WAGERING.

MARINE.[12] 1, *adj.* Pertaining to the high seas, to navigation or commerce upon the sea, to the perils of the sea. Compare MARITIME.

Marine contract. A maritime contract, *q. v.*

Marine court. In the city of New York, a court exercising the jurisdiction of a justice of the peace, with cognisance of actions under city laws for penalties from twenty-five to one hundred dollars, and claims for services rendered upon the high seas where the State courts have jurisdiction, though the amount exceeds one hundred dollars. The court exercises no real admiralty powers.

Marine insurance. See INSURANCE, Mariné.

Marine interest. Extra interest paid for the loan of money upon bottomry or respondentia bonds, *qq. v.*

Marine league. See LEAGUE.

Marine risk. A peril necessarily incident to navigation.

Marine tort. A maritime tort, *q. v.*

2, *n.* Any person employed on a vessel to assist in the main purpose of the voyage.[1]

Mariner. A person employed upon a merchant ship or a ship-of-war.

Includes common sailors, a cook, porter, steward, purser, clerk, engineer, surgeon, captain, admiral — whoever has to do with the equipment and preservation of the vessel, or the welfare of the crew.[2]

MARITAGIUM. L. A daughter's marriage portion.

In feudal law, the right in a lord, of whom land was held by knight-service, to control the marriage of his vassal's daughter. See FEUD; MARITAL; MARRIAGE, 2.

MARITAL.[3] Pertaining or belonging to a husband: as, marital rights, and duties. See JUS, Mariti; SEPARATE, 2.

MARITIME.[4] Pertaining to navigation or commercial intercourse upon the seas, great lakes and rivers.

Maritime. Primarily, bordering on the sea: as, a maritime town, coast, nation; secondarily, belonging to those who border on the sea: as, maritime laws, rights, pursuits.

Marine. Primarily, of or pertaining to the sea: as, marine productions; secondarily, transacted at sea: as, marine service; or, again, doing duty on the sea: as, marine forces.[5]

Maritime cause. An action the subject-matter of which arises out of the business or

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[1] Parton *v.* Prang, *ante.*

[2] Wheaton *v.* Peters, 8 Pet. 656, 661 (1834), M'Lean, J. See also Story, Eq. §§ 943-51; Paige *v.* Banks, 13 Wall. 608 (1871).

[3] Banker *v.* Caldwell, 3 Minn. 108 (1859), Flandrau, J.

[4] 1 Greenl. Ev. § 139, cases; 1 Whart. Ev. §§ 194, 668, 670, cases.

[5] Chapman *v.* Ferry, 18 F. R. 539 (1883).

[6] F. *maraud*, a rogue, vagabond: *marir*, to stray, wander.

[7] [Curry *v.* Collins, 37 Mo. 328 (1866).

[8] Webster's Dict.

[9] L. *margin-*, *margo*, a border, brink.

[10] Markham *v.* Jaudon, 49 Barb. 465 (1867), Leonard, Presiding Justice.

[11] McNeil *v.* Tenth Nat. Bank, 55 Barb. 64 (1869), Potter, J.

[12] L. *marinus: mare*, the sea.

[1] The Ocean Spray, 4 Saw. 105, 111 (1876), Deady, J.

[2] 1 Conk. Adm. 107; 80 N. Y. 71; 7 How. 89; 3 Sumn. 115; 1 Bl. Com. 419.

[3] L. *maritus*, a married man.

[4] MAR'-I-TIME. L. *maritimus: mare*, the sea.

[5] Webster's Dict.; Crabbe's Synonyms.

commercial relations of persons upon the public navigable waters — seas, rivers, lakes. See ADMIRALTY.

Maritime contract. A contract which relates to commerce, or navigation upon the high seas, or navigable lakes or rivers. See ADMIRALTY.

Maritime court. A court exercising the powers of a court of admiralty, *q. v.*

Maritime interest. Marine interest, *q. v.* See also *Maritime Loan.*

Maritime jurisdiction. Such as is exercised in the cognizance of maritime causes; the jurisdiction exercised in admiralty, *q. v.*

Maritime law. The law of the sea. The body of principles and usages which, by the consent of civilized communities or nations, has been adopted to regulate the affairs of men engaged in navigation and marine commerce.

No single nation can change the law of the sea. That law is of universal obligation. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which, when generally accepted, became of universal obligation — as in the cases of the Rhodian law, the Amalphitan table, the ordinances of the Hanseatic League, parts of the ordinances of Louis XIV, the British orders in council of 1863, and our act of Congress of 1864. These have become the law of the sea by reason of their acceptance as such. Of these, courts take judicial notice without proof.[1] See OLERON; RHODIAN.

While the general maritime law is the basis of the maritime law of the United States, as well as of other countries, it is only so far operative as it has been adopted by our laws and usages. It has no inherent force of its own. The general system, familiar to lawyers and statesmen, was meant when it was declared that "The judicial Power shall extend . . to all Cases of admiralty and maritime Jurisdiction."[2] Thus adopted, it became the maritime law of the United States operating uniformly.

The question as to the limits of maritime law and admiralty jurisdiction is judicial, and no law can make it broader or narrower than the judicial power may determine those limits to be. But what the law is within those limits depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.[3]

The French writers on maritime subjects are distinguished for their learning and acumen. The principal text law on which they rely, prior to the Code of Commerce adopted in the present century, is the Ordonnance de la Marine of 1681.[1]

Maritime lien. A lien upon a vessel, for money advanced, labor done, supplies furnished, seamen's wages due, damages from collision, etc., authorized by the maritime law. See further LIEN, Maritime.

Maritime loan. A contract by which the lender, in consideration of the sum, which he will lose, if the thing upon which he has made the loan should perish by inevitable casualty, is authorized to stipulate for an interest or extraordinary profit, in case the thing arrives at the proper port.[2]

Maritime property. See ABANDON, 1; DERELICTION, 2.

Maritime service. A service which is performed upon a public navigable water and has some relation to commerce or navigation — some connection with a vessel employed in trade, with her equipment, her preservation, or the preservation of her cargo or crew.[3]

Maritime tort. A wrong committed upon a navigable water over which a court of admiralty exercises jurisdiction; in no case, a tort committed or consummated upon land.[4]

See generally ADMIRALTY.

MARK. 1, *n.* (1) A sign made on paper, instead of a signature. Consists of two lines traced across each other between the Christian name and the surname, with "His" written above, and "mark" below, the crossed lines.

Marksman. One who signs by means of a mark.

The method of the Saxons was for such as could not write to subscribe their names to a deed, and, whether they could write or not, to affix the sign of the cross; which custom our illiterate vulgar to this day keep up by signing a cross for their mark, when unable to write their names.[5]

Binds an intelligent maker as to parties accepting the document on the faith of the mark. If the maker is able to write, a mark for his name is presumed ac-

[1] The Scotia, 14 Wall. 187-88 (1871), Strong, J.

[2] Constitution, Art. III, sec. 2.

[3] The Lottawanna, 21 Wall. 572-76 (1874), Bradley, J

[1] The City of Norwich, 118 U. S. 496 (1886).

[2] The Draco, 2 Sum. 184 (1835): Valin.

[3] [Cope *v.* Valette Dry-Dock Co., 4 Woods, 267 (1883), Woods, J.

[4] See The Plymouth, 3 Wall. 33 (1865), Nelson, J. Approved, *Exp.* Phenix Fire Ins. Co., 118 U. S. 618 (1886). See also The Arkansas, 17 F. R. 837-88 (1883).

[5] 2 Bl. Com. 305.

cidental, or as an incomplete signature. A mark made by an attesting witness is verified as is the mark of a party.[1] See CANCEL.

(2) A label, token, or impression; a sign, badge, index: as, post-mark, trade-mark,[2] *qq. v.*

Ear-mark. A mark placed upon a thing by which to identify it.

Land-mark. A monument indicating the boundaries of land. See *Mark*, 2 (2).

2, *v.* (1) To point out, settle, define, describe — with or without visible boundaries: as, to mark and lay out the bounds and rules of a prison.[3]

(2) To determine by marks on the ground: as, to mark a boundary line.[4]

(3) To note or enter upon a record: as, to mark for use — indicate upon the record of a suit or judgment for whose benefit the same is maintained or exists.

Marked ballot. A ballot so prepared as to indicate to by-standers the nominee for whom it is to be cast. See BALLOT.

MARKET.[5] 1. A place for public traffic; also, a franchise or liberty to have a place for such resort.[6]

A place where comestibles [eatables], perishable in their nature, are sold for the daily consumption of the people.[7]

A designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed to sale.[8]

The privilege within a town to have a market; as now used, includes the idea of land and buildings or suitable erections for the accommodation of those who attend the market to sell or buy the articles brought there for sale.[9] See ESTABLISH.

2. Buying and selling generally; trade, traffic, irrespective of place — as, in market price or value, *q. v.*

Market overt. Open market; a public market.

In England, a sale of anything vendible therein is good as between the parties, and binding on all who have a property in the thing. But a sale out of market overt of stolen goods does not alter the ownership, and the owner may take them wherever he finds them.[1]

A fair or market held at stated intervals in particular places by virtue of a charter or permission. To this our ordinary markets bear no resemblance.[2]

There is no law recognizing the effect of sales in market overt in any of the United States.[3]

The privilege given by law to a sale in market overt, of binding property against the true owner, was originally intended to encourage markets and commerce. . . The property must still be so openly exposed that the vendor may conclude that no person but the true owner would dare expose it for sale. . . The privilege arose when there was great simplicity of practice between buyers and sellers, in markets and fairs. Shops were few, and persons whose goods were taken feloniously would know where to resort to find them. The privilege was designed to protect buyers: if a man did not pursue his goods to market where they were openly sold he ought not to interfere with the right of the *bona fide* purchaser; but he can require that the goods be exposed, and the whole transaction completed, so as to give him opportunity to pursue the goods. Therefore, a sale by sample is not such a sale as is entitled to the privilege.[4]

Market place. Usually a market-house.[5]

In a rule of charges, either a district of country in which trade in one or several articles is so habitually conducted as to furnish a criterion of the value of the thing or things sold, or, the point to which the trade of a district centers.[6]

Market price or value. A price established by public sales in the way of ordinary business, as, of merchandise.[7]

The price at which the owner or the producer of goods holds them for sale; the price at which they are freely offered in the market; such price as he is willing to receive when the goods are sold in the ordinary course of trade.[8]

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[1] See Barnard *v.* Heydrick, 49 Barb. 66 (1866); 1 Whart. Ev. § 696, cases; 1 Williams, Ex. 63; 1 Jarm. Wills, 69, 119; 2 Curt. 334; 3 *id.* 752; 18 Ga. 396; 16 B. Mon. 102; 19 Mo. 609; 24 Pa. 502.

[2] See Adams *v.* Heisel, 31 F. R. 280 (1887).

[3] Allen *v.* Smith, 12 N. J. L. 165 (1831), Ewing, C. J.

[4] Keller *v.* Young, 78 Pa. 170 (1875).

[5] L. *mercatus*, traffic: *mercari*, to trade: *merx*, merchandise.

[6] See 2 Bl. Com. 37.

[7] New Orleans *v.* Morris, 3 Woods, 102, 107 (1877), cases, Billings, D. J.

[8] Caldwell *v.* City of Alton, 33 Ill. 419 (1864), Breese, Justice.

[9] Ketchum *v.* City of Buffalo, 21 Barb. 296, 298 (1854), Marvin, J.

[1] 2 Bl. Com. 449.

[2] Fawcett *v.* Osborn, 33 Ill. 496 (1863), Breese, J.

[3] See 2 Kent, 324; 1 Johns. 478; 8 Cow. 241; 33 Ill. 411.

[4] Crane *v.* London Dock Co., 117 E. C. L. *820, 818 (1864), Blackburn, J., Cockburn, C. J. See Ventress *v.* Smith, 10 Pet. *176 (1836); The Case of Market Overt, 2 Tud. L. C. *713–35, cases.

[5] Smith *v.* City of Newbern, 70 N. C. 18 (1874).

[6] [Hilliard Flume Co. *v.* Woods, 1 Wyom. 397 (1873), Peck, J.

[7] Murray *v.* Stanton, 99 Mass. 343 (1843), Wells, J.

[8] [Cliquot's Champagne, 3 Wall. 125, 142 (1865),

"Market value," "actual market value," and "fair market value" mean the same. The only other possible meaning of the word "actual" is value in actual market, as contradistinguished from a hypothetical, notional, or ideal value, which may be affixed to an article in a particular case, for a particular reason. What men in the ordinary dealings of society, between man and man, would consider to be the fair actual market value of property, is the actual market value.[1] See further VALUE, Market.

Market stall. The purchase of a stall or stand in a public market confers an easement or exclusive right to occupy the stall, with its appendages, for the purposes of the market, and subject to the regulations thereof.[2]

Marketable. Vendible in market; merchantable; free from plausible or reasonable objection: as, a marketable title to land. Opposed, *unmarketable*.[3] See MERCHANTABLE; TITLE, 1, Marketable.

Municipal market. Consists in a place for the sale of provisions and articles of daily consumption; in convenient fixtures; in a system of police regulations, fixed market hours, provision made for lighting, watching, cleaning, for detecting false weights and unwholesome food, and other arrangements calculated to facilitate the intercourse and insure the honesty of buyer and seller; also, in proper officers to preserve order and enforce obedience to rules.[4]

Every municipal corporation that has power to establish ordinances to promote the general welfare, and preserve the peace, may fix the times or places of holding public markets for the sale of food, and make such other regulations concerning them as may conduce to the public interest. The right to establish a market includes the right to shift it from place to place, as the convenience or necessities of the people demand; but no right is implied to build it upon a public highway.[5]

The court of the clerk of market has been incident to every market, to punish misdemeanors therein, especially the use of false weights and measures.[6]

See ENGROSS, 2; FORESTALLING; INSPECTION, 1; MERCHANDISE; OTHERWISE; REGRATING; STAPLE; TOLL, 2.

Gwayne, J.; Cases of Champagne, 1 Bened. 251 (1867), Blatchford, J.

[1] Sherry Wine Case, 2 Bened. 267-68 (1868), Blatchford, J.

[2] Rose *v.* Mayor of Baltimore, 51 Md. 256, 268 (1878).

[3] 1 Pars. Contr. 584, cases.

[4] [City of Cincinnati *v.* Buckingham, 10 Ohio, 261 (1840), Lane, C. J.

[5] Wartman *v.* City of Philadelphia, 33 Pa. 209 (1859), Black, C. J. See Gall *v.* City of Cincinnati, 18 Ohio St. 563, 567 (1869); Mayor of Savannah *v.* Wilson, 49 Ga 476 (1873).

[6] 4 Bl. Com. 275; 1 *id.* 274.

MARQUE,[1] LETTER OF. Permission granted by one ruler to make reprisals on the country of another ruler, with particular reference to the apprehension of the latter's subjects within the march or limit of the former's country.[2]

Marque and reprisal. Reprisal: taking in return; marque: passing the "frontier" to do so.

Letters of marque and reprisal are grantable by the law of nations whenever the subjects of one state are injured by those of another and justice is denied by the state to which the oppressor belongs. By virtue of such commission the bodies and goods of subjects of the offending state may be seized until satisfaction is made, wherever they happen to be found. The custom is dictated by nature herself; but in society, that the private sufferer should not be left to act as judge in his own cause, the sovereign power is called upon to determine when reprisals may be made.[3]

A private armed vessel or privateer is a vessel owned and officered by private persons, but acting under a commission from the state, usually called letters of marque: originally, letters of license to go across the boundary and make reprisals.[4]

"The Congress shall have Power . . to grant Letters of Marque and Reprisal."[5] "No State shall . . grant Letters of Marque and Reprisal."[6]

MARRIAGE.[7] 1. The private relation which includes the reciprocal duties of husband and wife.[8]

An engagement by which a single man and a single woman of sufficient discretion take each other for husband and wife.[9]

Also, the act or ceremony by which such engagement is solemnized.

As between the immediate parties, under the law, a civil contract; as between them and the State, a status or relation.[10]

"Matrimony" is the state into which the parties enter.

Although marriage is a sacred obligation, it is still a civil contract regulated by law.[11]

Statutes may regulate the mode of entering into

[1] F. *marque*, a boundary, limit, frontier.

[2] [Skeat, Etym. Dict.

[3] 1 Bl. Com. 258.

[4] Woolsey, Int. Law, § 127. See Wheat. Int. L. § 290.

[5] Constitution, Art. I, sec. 8, cl. 11.

[6] *Ibid.* sec. 10. See 2 Story, Const. § 1356.

[7] F. *mariage*; L. *maritare*; *maritus*, a husband. Compare MARITAL.

[8] [1 Bl. Com. 433.

[9] Milford *v.* Worcester, 7 Mass. *52 (1810), Parsons, Chief Justice.

[10] McCabe *v.* Berge, 89 Ind. 229 (1883). See also 44 Ala. 674; 30 Ga. 176; 9 Ind. 50; 19 *id.* 57; 4 Mo. 126; 50 N. Y. 184; 4 R. I. 101; 13 *id.* 96.

[11] Reynolds *v.* United States, 98 U. S. 165 (1878), Waite, Chief Justice.

the contract, but they do not confer the right. A marriage valid at common law is valid under a statute unless the statute contains express words of nullity.[1]

Marriage is an institution founded upon mutual consent. That consent is a contract, but *sui juris*. It supersedes all other contracts between the parties, and, with certain exceptions, it is inconsistent with the power to make new ones. It may be entered into by persons under the age of lawful majority, but it can neither be canceled nor altered at will. An entire failure of the power to fulfill by one party, as in the case of permanent insanity, does not release the other from the pre-existing obligation. Perhaps the only element of a "contract," in the ordinary acceptation, that exists, is that the consent of the parties is necessary to create the relation. Marriage is the most important transaction of life; it is the basis of the entire fabric of all civilized society.[2]

While marriage is often termed by text-writers and in decisions of courts a civil contract — generally to indicate that it must be founded upon agreement of the parties, and does not require any religious ceremony for its solemnization — it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested.[3]

Being a contract, an action is maintainable for damages for "breach of promise" to marry, though the defendant is an infant. Either party may bring it. Anything accepted in satisfaction is a discharge. If the plaintiff is of bad character, the defendant may rescind.[4]

The breach of promise is not a tort, though it may resemble a tort in its consequences.[5]

Contracts in restraint or in procuration of marriage are void, as against sound policy.

Canonical disabilities which at common law made the contract voidable were: pre-contract; consanguinity or affinity within near degrees; corporal infirmities. Civil disabilities which made the contract void *ab initio* were: prior marriage; want of age — under fourteen in a boy, and twelve in a girl, but rendered valid by consent at age; want of consent of parent or guardian, which is statutory; want of reason.[6]

A clergyman, or a magistrate, need not be present. For civil purposes, reputation and cohabitation are sufficient evidence. But in adultery, bigamy, and criminal conversation, strict proof of marriage is necessary.[1] It is not presumed where cohabitation would be unlawful.[2] In Massachusetts, two persons cannot marry themselves, though their intent is good, witnesses are present, and a certificate has been taken taken out.[3]

To a valid marriage, consent is all that is necessary. If made *per verba de præsenti*, by words in the present tense, though not consummated by cohabitation, or *per verba de futuro*, by words of the future tense, and followed by consummation (*q. v.*), it amounts to a valid marriage, in the absence of civil regulations to the contrary. It may be proved by reputation, declarations, conduct and other circumstances usually accompanying the relation;[4] and by what would be proof where the marriage took place.[5]

Where no ceremonies are required, and no record is made to attest the marriage, some public recognition of it is necessary as evidence of its existence. The protection of the parties and their children and considerations of public policy alike require this recognition; and it may be made in any way which can be seen and known, such as living together as man and wife, treating and speaking of each other in the presence of third parties as being in that relation, and declaring the relation in documents executed by them while living together. From such recognition the reputation of being married will obtain among friends and acquaintances, which is of itself evidence of a persuasive character.[6]

In the absence of civil or statutory regulations, the mutual present assent to immediate marriage, by persons capable of assuming that relation, is sufficient without any formal solemnization. Such a contract constitutes a marriage at common law, and its validity will be sustained, unless some statute expressly declares it to be void. Furthermore, marriage, being a natural right, existing before the statutes, is favored by the law, and statutory regulations, if the language will permit, are to be construed as merely directory.

The legislature has power to prescribe reasonable regulations, and a provision punishing those who solemnize marriage contrary to statutory command is within legislative authority. Punishment may be inflicted for disregarding statutory conditions, without rendering the marriage itself void.

Most statutory regulations are wise and salutary. They give publicity to a contract which is of deep concern to the public, discourage deception and seduction, prevent illicit intercourse under the guise of matrimony, relieve from doubt the status of parties who live together as man and wife, and the record required

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[1] Meister *v.* Moore, 96 U. S. 78 (1877), Strong, J. At common law, 12 Va. Law J. 1-13 (1888), cases.

[2] Randall *v.* Kreiger, 23 Wall. 147 (1874), Swayne, J.

[3] Maynard *v.* Hill, 125 U. S. 210-11 (1888), cases, Field, Judge. See Bish. Mar. & D., ed 1864, § 3, cases.

[4] 1 Chitty, Bl. Com. 433; 18 Cent. Law J. 441-46 (1884), cases.

[5] Malone *v.* Ryan, 14 R. I. 617 (1884).

[6] 1 Bl. Com. 434; 2 *id.* 202, 70.

[1] 1 Whart. Ev. §§ 83-87, cases; Commonwealth *v.* Stump, 53 Pa. 132 (1866).

[2] Williams *v.* Williams, 46 Wis. 464 (1879); 49 Tex. 556.

[3] Commonwealth *v.* Munson, 127 Mass. 459 (1879), cases.

[4] Richard *v.* Brehm, 73 Pa. 144 (1873); Jewell *v.* Jewell, 1 How. 231, 233 (1843); 17 F. R. 16; 1 Bl. Com. 43.

[5] Patterson *v.* Gaines, 6 How. 587 (1848).

[6] Maryland *v.* Baldwin, 112 U. S. 495 (1884), Field, J As to presumption of, see 31 Alb. Law J. 106-9, 127-30 (1885), cases.

to be made furnishes evidence of the legitimacy of their offspring.[1]

Marriage is a valuable consideration: no other is so much respected. While of the highest value, it is not reducible to a value which can be expressed in dollars.[2]

Articles of marriage. A memorandum between persons intending marriage as to settlement of property.

Furnishes the data for a formal settlement.

Marriage brokage or brokerage. The act of negotiating a marriage; also, compensation for such service.

Mixed marriage. A union between persons of different races; in particular, between a Caucasian and an African.

A State may forbid whites and blacks to intermarry. The XIVth Amendment does not prohibit such legislation. The relation is a privilege belonging to persons as members of society, and as citizens of the States in which they reside.[3]

The rule that if valid where celebrated, then valid everywhere, does not apply to a marriage involving polygamy or incest, nor to those prohibited from motives of public policy.[4]

Marriage license. An official permit to marry.

In Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, North Carolina, New Hampshire, New York, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Washington Territory, and perhaps in other States and Territories, persons intending to be married must apply for a license, or cause notice of their intention to be entered of record in a designated public office. Substantial compliance with the provisions of such laws is generally all that is required.

Marriage portion. The property which a woman brings to her husband at marriage. See DOWRY.

Marriage settlement. A conveyance whereby, in consideration of marriage, property is secured as a provision for the wife, children, or husband. See SETTLE, 3.

See BIGAMY; COHABIT; DIVORCE; DOWER; GRETNA GREEN; HUSBAND; INCEST; JACTITATION; RELIGION; SOLEMNIZE.

[1] State *v.* Walker, 36 Kan. 303-4, 307 (1887), Johnston, J.: Teter *v.* Teter, 101 Ind. 129 (1884); Beverlin *v.* Beverlin, 29 W. Va. 735 (1887), cases. As to foreign marriages, see 27 Cent. Law J. 189-86 (1888), cases.

[2] Prewit *v.* Wilson, 103 U. S. 24 (1880), cases; 7 Pet. 398; 5 Allen, 458.

[3] *Exp.* Kinney, 3 Hughes, 9, 17-18 (1879); *Ex rel.* Hobbs, 1 Woods, 537 (1871); *Exp.* Francois, 3 *id.* 367 (1879); Green *v.* State, 58 Ala. 192-97 (1877); 59 *id.* 60.

[4] Kinney's Case, 30 Gratt. 865 (1878), cases; Greenbow *v.* James, 80 Va. 636, 639-41 (1885), cases; Story, Confl. L. § 113; 1 Greenl. Ev. § 545.

2. In feudal law, a power which the lord or guardian in chivalry had of disposing of his ward in matrimony.

While the infant was in ward, the guardian could tender her a suitable match, without disparagement or inequality. If the infant declined the match, she forfeited, as the value of the marriage, as much as a jury would assess, or as any one would *bona fide* give for such an alliance.[1]

MARRIED WOMAN. See HUSBAND; WOMAN.

MARSHAL.[2] 1, *n.* (1) In old English law, the title of several officers of different grades and powers, judicial or executive.

The lord-marshal presided in the court of chivalry; the knight-marshal had judicial authority within the king's palace; the marshal of the king's bench was prison-keeper to that court; the marshal of the exchequer had the custody of debtors of the revenue; the marshal to the judge of assize swore in the grand jury. And the marshalsea was the seat or court of the marshal of the king's house, instituted to administer justice between the king's domestic servants.[3]

In Connecticut, the executive officer of the courts is first mentioned (1649) as the "marshal." At the May session of the General Court in 1698, it was enacted that the "marshal of the colony" be called the High Sheriff, and the "county marshal" the County Sheriff. Formerly, and within the memory of persons still living, the sheriff was the marshal at all public processions.[4]

2. An officer of the United States whose chief duty is to execute the processes of its courts.

He and his deputies have in each State the same power in executing the laws of the United States as the sheriffs and their deputies in such States may have in executing the laws thereof.[5]

He is appointed for a term of four years, for each district. He chooses his own deputies, but they are removable by the circuit or district court. He attends these courts, and executes their lawful precepts directed to him under authority of the United States. He may command necessary assistance in executing the laws.[6]

He cannot perform all his duties without the aid of other persons as deputies, general and special. A statute conferring upon him the powers of a sheriff does not take away powers already vested.[7]

When process, issued under a particular law, as, a revenue law, is lawfully issued to him for service, in executing it he acts under the authority of that law.

[1] 2 Bl. Com. 70.

[2] F. *mare-schal*, a horse-servant, a groom; later, a title of honor,— Skeat.

[3] See 3 Bl. Com. 37, 39, 75, 76, 285.

[4] See Appendix to 53 Conn. 609-10.

[5] R. S. § 788.

[6] R. S. §§ 776-83, 943-44.

[7] The Gorgas, 10 Bened. 463, 471 (1879): Act 1861, ch. 25, § 7: R. S. 788; 10 F. R. 80?; 12 *id.* 855.

And so as to all persons who assist him in the performance of his official duty.[1]

The marshal, in preserving arrested property, acts as a bailee, and is responsible to parties interested for its proper care. In the absence of a statute or rule of court, he should be paid his fees when he delivers the property to the person entitled to it.[2]

The clerks employed by the marshal to keep his accounts are not officers of the court, and so are entitled to fees and mileage if used as witnesses for the Government. Unless a deputy marshal, who is an officer, be actually engaged in waiting upon the court, he is entitled to *per diem* and mileage if summoned as a witness for the Government.[3]

See COSTS; EXECUTION, 8; FEE, 2, Docket; JURISDICTION, 2, Concurrent; SHERIFF.

(3) In the western and southwestern States, an officer of the peace, appointed by authority of a city or borough, who holds himself in readiness to answer such calls as fall within the general duties of a constable or sheriff.

"The marshal elected for the county of St. Louis shall have the same power, be subject to the like proceedings, and incur the same liabilities, on all process placed in his hands, as the sheriff of the county has, and is subject to, in similar cases."[4]

Such marshal is elected in the same manner as the sheriff of that county, for a term of two years. He gives bond to the State. He attends on the criminal and the probate courts, and executes all processes issued by them, or by a judge or clerk thereof, or by the county court of St. Louis.

2, *v.* To arrange or rank in order.

Marshaling assets, funds, mortgages, securities. Such arrangement of different funds, under administration, as will enable all the parties having equities thereon to receive their due proportions, notwithstanding the intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of the funds.[5]

The principle is that he who has a right to resort to two funds, in one of which alone another party has a subsidiary lien, shall be compelled to exhaust the one to which the other cannot resort, before coming upon the one in which both have an interest.[6]

The equitable principle that where a creditor has a lien on two funds in the hands of the *same* debtor, and another creditor has a lien only on one of the funds, the former may be compelled to levy his debt out of the fund to which the latter cannot resort; or, what is tantamount thereto, if the former takes his money out of the fund in which alone the latter has a lien, he may, to that extent, be subrogated to the rights of the former as against the other fund. Both funds must be in the hands of the common debtor of both creditors.[1] See *Marshaling Liens*.

Marshaling boundaries. See BOUNDARY.

Marshaling charities. The doctrine that where there are funds of pure and mixed personalty applicable to the payment of debts and charitable legacies, the latter being charged upon the pure personalty and the debts upon the remainder of the fund, and there is a deficiency of assets, the charity legacies will be held to have failed in the proportion of the mixed to the pure personalty.[2]

Marshaling liens. The doctrine that where realty, bound by a judgment or a mortgage, has been alienated in separate parcels to various persons at different times, such parcels may be subjected to the satisfaction of the lien in the inverse order of their alienation.

The first purchaser has a right to suppose that the part he leaves with the mortgagor will be first subjected to the payment of the mortgage; and a second purchaser, who buys all or a part of the residue, should not be placed in a better position than that of his grantor.[3] See *Marshaling Assets*.

Marshaling words. See CONSTRUCTION.

MARSHALSEA. See MARSHAL, 1 (1).

MARTIAL.[4] Belonging to war, or to an army or a navy.

Court-martial. A tribunal which has jurisdiction of offenses against the law military by soldiers in the army, navy, or militia.

In the strictest sense, a court of justice, organized in pursuance of statutory regula-

[1] Davis *v.* South Carolina, 107 U. S. 600 (1882). As to his duties and responsibilities, see Lammon *v.* Feusier, 111 *id.* 17 (1884); Covell *v.* Heyman, *ib.* 176 (1884); 3 Wall. 334; 10 *id.* 308; 109 U. S. 216, 219.

[2] The Georgeanna, 31 F. R. 405 (1887).

[3] *Exp.* Burdell, 32 F. R. 681 (1887); United States *v.* Meigs, 95 U. S. 748 (1877).

[4] Missouri Statutes, sec. 26.

[5] [1 Story, Eq. §§ 558, 633.

[6] Nat. Savings Bank *v.* Creswell, 100 U. S. 641 (1879), Miller, J

[1] *Exp.* Kendall, 17 Ves. *523 (1811), Eldon, Ld. C. See also Aldrich *v.* Cooper, 8 Ves. 308 (1803); 1 Lead. Cas. Eq. *78–111; 2 White & T. *id.* 228–358, cases; 25 Cent. Law J. 228–31 (1887), cases; 11 Biss. 294; 15 F. R. 170; 32 Pa. 108; 77 Va. 248; 1 Story, Eq. §§ 558–64, 633–45; Bisph. Eq. § 341; 1 Pomeroy, Eq. §§ 410, 390; 3 *id.* § 1414.

[2] [2 Story, Eq. § 1180 *a*. See Philanthropic Society *v.* Kemp, 4 Beav. 581 (1841).

[3] Nat. Savings Bank *v.* Creswell, 100 U. S. 640–49 (1879), cases.

[4] L. *mars*, god of war.

tion, and taking cognizance of the duties which the citizen assumes when he enters into the military service of the country.[1]

In cases fitted for its determination, its judgment is final, conclusive, and authoritative.[1]

Courts-martial derive their jurisdiction from and are regulated by an act of Congress, in which the crimes that may be committed, the manner of charging the accused, and of trial, and the punishments, are expressed in terms; or they get jurisdiction by a fair deduction from the definition of the crime that it comprehends, and that Congress meant to subject to punishment, or from the practice of the courts-martial of the nations generally. If such a court has no jurisdiction over the subject-matter of the charge it has been regularly convened to try, or if it inflicts a punishment forbidden by law, the civil courts, at the instance of the aggrieved, may inquire into the want of jurisdiction, and give redress by *habeas corpus*.[2]

Their jurisdiction extends to the trial and punishment of acts of officers which tend to bring disgrace upon the service of which they are members, whether those acts are done in the performance of military duties, in a civil position, in a social relation, or in private business.[3]

Any such court is a court of limited and special jurisdiction. When the object of its creation has been accomplished it is dissolved. To give effect to a sentence, it must appear affirmatively and unequivocally that the court was legally constituted, that it had jurisdiction, that all statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. There are no presumptions in its favor as to these matters. . . The sentence of a general court-martial, in time of peace, to the effect that a commissioned officer be cashiered (dismissed from service), is inoperative until approved by the President in person; and that he approved it must be stated in positive terms, and not be left to be inferred argumentatively.[4]

Courts-martial are spoken of as *general*, *regimental*, and *garrison*. Those for the regulation of the militia are held in the States, and, in the main, resemble the courts provided for the army of the United States.[5] See JUDGE ADVOCATE.

Martial law. The law of military necessity in the actual presence of war, administered by the general of the army.

Of necessity it is arbitrary, but it must be obeyed.[1]

It is the will of the general who commands the army. It supersedes all existing civil laws; and is regulated by a known system or code of laws. The commander is the legislator, judge, and executioner. There may or may not be a hearing upon the charges, at his will. This law is resorted to only in cases of necessity; which is to be shown affirmatively by the commander who assumes to exercise it.[2]

In time of insurrection it cannot be applied to citizens in States in which the courts are open and their process unobstructed.[3]

For any abuse of the authority, the officer ordering and the person committing the act may be liable as trespassers.[4]

Martial law is built upon no settled principles, but is entirely arbitrary in its decisions; in reality it is no law, but something indulged rather than allowed as law. The necessity of order and discipline in the army alone gives it countenance; and therefore it is not permitted in time of peace, when the courts are open for all persons to receive justice according to the laws of the land.[5]

"Martial law" is exercised over all classes of persons indiscriminately, in the actual presence of war. "Military law" governs persons in the military service only, in time of peace as well as in time of war, by regulations previously defined; and is a permanent branch of the law of the land. See MILITARY; WAR.

MASONIC LODGES. See ASSOCIATION, page 85, note 4.

MASSES. Whether gifts to a Roman Catholic church for paying for masses are legal "charities," has been variously decided.

A devise to a church to be devoted to paying for the repose of the testator's soul is not a devise to a "charitable or religious use."[6]

Such a devise or bequest *is* certainly a "religious use." If, therefore, in Pennsylvania, it is made within one month before death, it falls within the prohibition of the act of April 26, 1855.[7]

"Masses are religious ceremonials or observances, . . and come within the religious or pious uses which are upheld as public charities." In the case cited, the language of the will was that the residue of the estate should be disposed of "for charitable purposes, masses," etc.[8]

A bequest of all the residue of a testator's estate to his executors "for the purpose of having prayers offered for the repose of my soul, the souls of my fam-

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[1] Records of Courts-Martial, 11 Op. Att.-Gen. 138-89 (1865); Approval of Court-Martial Sentence, 15 *id.* 297-303 (1877), note.

[2] Dynes *v.* Hoover, 20 How. 82-83 (1857), cases, Wayne, J. See also Barrett *v.* Hopkins, 2 McCrary, 131 (1881); *Re* White, 17 F. R. 723 (1883); Keyes *v.* United States, 109 U. S. 340 (1883), cases.

[3] Smith *v.* Whitney, 116 U. S. 183 (1886), Gray, J.

[4] Runkle *v.* United States, 122 U. S. 555-57 (1887), cases, Waite, C. J.; Articles of War, No. 65, 2 St. 359, 367, c. 29.

[5] See, as to the army, R. S. § 1342, arts. 61-121; as to the navy, § 1624, art. 8; as to the militia, §§ 1649, 1658.

[1] United States *v.* Diekelman, 92 U. S. 526 (1875), Waite, C. J.: s. c. 11 Ct. Cl. 439.

[2] *Re* Egan, 5 Blatch. 321-23 (1866), Nelson, J.

[3] *Exp.* Milligan, 4 Wall. 107, 123, 127 (1866).

[4] See Mitchell *v.* Harmony, 13 How. 128 (1851).

[5] 1 Bl. Com. 413. See 7 How. 59-88; 15 *id.* 115; 16 *id.* 144; 8 Op. Att.-Gen. 365-74; 39 Ala. 658; 44 Ill. 153; 21 Ind. 377; 2 Story, Const. § 1342; North Am. Rev., Oct 1861; 1 Lieber, Civ. Lib. 130.

[6] *Re* Estate of Power, 35 Leg. Int. 68 (Pa., 1878).

[7] Rhymer's Appeal, 93 Pa. 142, 146 (1880).

[8] Schouler, Petitioner, 134 Mass. 427 (1883).

fly, and the souls of all others in purgatory," is invalid, for want of a defined beneficiary.[1] See CHARITY, 2.

MASTER.[2] A person authorized to control another or others in some relation, or charged with the execution of a service as an assistant to a court of equity.

1. He to whom an apprentice is indentured.

"Master and servant" expresses the relation between the parties. See further APPRENTICE.

2. He who hires another to serve him as a domestic or as a common laborer; an employer.[3]

"Master and servant" expresses the relation in private life, founded in convenience, whereby a man calls in the assistance of others when his own skill and labor is not sufficient to answer the cares incumbent upon him.[4] See further SERVANT.

3. Any person having the chief charge or command of the employment and navigation of a vessel.[4] See SHIP, 2.

4. An officer of a court of chancery to whom was referred a bill alleged to contain scandalous or impertinent matter.[5]

An officer whose duty was to make inquiries, when so directed by the court, into matters which, from the constitution of the court, it could not conveniently, without assistance, make for itself, and to report to the court his findings or conclusions.[6]

Clerks, commissioners, and referees now perform many matters formerly entrusted to masters. Their chief duties are to make inquiries, take accounts, sell estates, and adjust other matters, before there can be a final disposition of a cause.[7]

A master is appointed in an equity case to sift the testimony and to collate and report the facts. He is both an examiner and master. Having heard the witnesses and familiarized himself with the case, he is competent to pass upon the credibility of witnesses and to judge of the evidence. By his being fully possessed of the case, the dispute is likely to be confined to the real grounds of the controversy.[8]

The document exhibiting his findings and conclusions is called his "report;" the office of which is to present the case to the court in such a manner that intelligent action may be had; and it is this action that finally determines the rights of the parties.[9]

He must follow the directions contained in the order of his appointment.[1]

The court will review the report only as to matters specified in exceptions filed thereto, and the parts of the evidence particularly referred to.[2] It may set aside the report for manifest error in law or fact, or recommit it, if the means of correction are furnished.[3]

When, by reason of the large amount of equity business, it is impossible for a court to examine every case in detail, its attention may be brought directly to the points of the contest by a preliminary hearing before a master, who can take time to examine the case thoroughly, and report upon it intelligently and accurately. The effect is to eliminate what is undisputed, and to develop the true points of contest. The proceeding before the master develops the rights and liabilities of the parties for the court's consideration; the party dissenting from the master's views bringing the points into review by exceptions. What shall be referred to a master, general or special, is a matter in the discretion of the court. . . Properly speaking, no report is conclusive. That would be to make the judgment of an officer performing an ancillary service superior to the judgment of the court itself. When he reports facts directly proved by the witnesses, the court will give his report great weight, because of his superior opportunities for judging of the credibility of the witnesses and the effect of their testimony. But when the fact is a deduction merely from the facts reported by him, his conclusion is simply a result of reasoning, of which the court is as competent to judge as he. Hence, the report is neither a decision nor an infallible guide, but a serviceable instrumentality to aid the court in performing its own functions.[4] See FINAL.

The compensation of masters, whose functions are judicial, may be measured by the standard of judicial salaries.[5] See COSTS; FEE, 2.

Master of the rolls. One of the judges of the English court of chancery.

He formerly had the custody of the rolls of all patents and grants which passed the great seal, and of the records of chancery. He presided in the Rolls Court, as assistant to the lord chancellor. His jurisdiction is now transferred to the supreme court of judicature.[6]

MATE. See MARINER; SHIP, 2.

MATERIA. L. Substance: matter, subject, subject-matter.

In pari materia. Upon like (equal) matter; in regard to the same matter.

[1] Holland *v.* Alcock, 108 N. Y. 312, 316 (1888), cases. See generally 32 Alb. Law J. 367-70 (1885), cases.

[2] F. *maister:* L. *magister: magnus*, great. Compare MAGISTRATE.

[3] [1 Bl. Com. 423.

[4] R. S. § 2768; 20 Wend. 132; 41 How. Pr. 73.

[5] [3 Bl. Com. 442, 450.

[6] [Holthouse's Law Dict.]

[7] Beebe *v.* Russell, 19 How. 285-86 (1856).

[8] Backus's Appeal, 58 Pa. 192 (1868), Agnew, J.

[9] North Carolina R. Co. *v.* Swasey, 23 Wall. 410 (1874), Waite, C. J. See also Hatch *v.* Indianapolis, &c. R Co., 11 Biss. 138 (1882).

[1] Felch *v.* Hooper, 4 Cliff. 494 (1878).

[2] Harding *v.* Handy, 11 Wheat. 126 (1826).

[3] Steam Stone Cutter Co. *v.* Windsor Manuf. Co., 17 Blatch. 21 (1879); Kisor's Appeal, 62 Pa. 435 (1869).

[4] Phillips's Appeal, 68 Pa. 137 (1871), Agnew, J., Sproull's Appeal, 71 *id.* 137 (1872); Clark's Appeal, 62 *id.* 451 (1869); Tilghman *v.* Proctor, 125 U. S. 149 (1888)

[5] Middleton *v.* Bankers' & Merchants' Tel. Co., 32 F R. 524 (1887).

[6] 1 Spence, Eq. *357-60.

Statutes *in pari materia* are to be construed together. Such statutes relate to the same person or thing or the same classes. They are usually general laws made at different times, in reference to the same subject.[1]

The rule does not apply where the language of an act is free from uncertainty.[2]

The rule applies to a section of a statute construed with reference to prior statutes;[3] to sections of a revised code;[4] and to constitutional provisions having a common purpose.[5]

The legislature is presumed to have had former statutes before it, and to have been acquainted with their judicial construction.[6]

Where divers statutes relate to the same thing, all are to be considered, in construing any one of them.[6]

MATERIAL. 1, *n.* Any article used in building or repairing houses, ships, etc.[7] More often, materials.

Material-man. One who has furnished any merchandise or stuff for the erection or repair of a building, vessel, or other structure. See CASE, Mixed; LABOR, 1; LIEN, Mechanic's.

2, *adj.* Of the substance; essential; important. Opposed, immaterial: formal; not vital; unnecessary: as, a material or immaterial — alteration, amendment, averment or allegation, fact, issue, matter, party, representation, testimony, witness, *qq. v.* See also MATTER.

MATERNAL. See ANCESTOR; CONSANGUINITY; LINE, 3.

MATHEMATICAL. See EVIDENCE.

MATRICIDE. See HOMICIDE.

MATRIMONY. Marriage, as a relation or status.

Matrimonial causes. In England, certain suits, involving rights relating to marriage, which have constituted a branch of ecclesiastical jurisdiction.

As, suits for jactitation of marriage, for restitution of conjugal rights, for judicial separation and dissolution, for alimony.

By the Divorce Act of 1857, these causes passed under the cognizance of a court created by the act, and are included in the probate, divorce, and admiralty division of the high court of justice. See DIVORCE.

MATRONS, JURY OF. See VENTER, 1.

[1] See 7 Conn. 456; 9 Barb. 311; 10 Oreg. 62; 97 U. S. 28; 101 *id.* 281, 771.

[2] Barnes *v.* The Railroads, 17 Wall. 302 (1872).

[3] Roberts *v.* Briscoe, 44 Ohio St. 600 (1886), cases.

[4] Strauder *v.* West Virginia, 100 U. S. 306 (1879).

[5] Steele *v.* Lineberger, 72 Pa. 241 (1872).

[6] United States *v.* Freeman, 3 How. 564 (1845).

[7] See 71 Pa. 298, 36 Wis. 29.

MATTER. 1. Whatever is perceptible by the senses; any material. See MATERIA; MATERIAL; PATENT, 2.

2. The subject of legal action, consideration, complaint or defense.

The fact or facts constituting the whole or a part of a ground of action or defense.[1]

3. Some substantial or essential thing; opposed to *form*,[2] q. v.

Material matter. Anything essential to the understanding or determination of an issue or proceeding. **Immaterial matter.** Anything not of importance to an adjudication.

In a pleading, an "immaterial matter" is anything stated therein which, if established on the trial, would not entitle a party to, or aid him in obtaining, the relief demanded, or in sustaining the defense pleaded.[3]

Matter in controversy. See CONTROVERSY.

Matter in deed. See DEED, 1; ESTOPPEL.

Matter in dispute. See DISPUTE.

Matter in issue. See ISSUE, 3.

Matter in mitigation. See AGGRAVATION.

Matter in pais. See PAIS; DEED, 1.

Matter of aggravation. See AGGRAVATION.

Matter of avoidance. See CONFESSION.

Matter of course. See COURSE, 2.

Matter of fact. See FACT.

Matter of form. See FORM; CONCENSUS, Tollit, etc.

Matter of law. See LAW; FACT.

Matter of record. See RECORD; ESTOPPEL.

Matter of substance. See FORM.

New matter. In pleading, matter not previously alleged or pleaded in avoidance.[4]

"New matter constituting a defense" is not pleaded by averments which simply deny the allegations of the complaint, but only when they constitute a statement of facts the proof of which avoids the legal conclusion otherwise to be drawn from the statement of facts in the complaint. It is in the nature of a plea of confession and avoidance.[5]

Special matter. Facts of a particular nature which a defendant, under a plea of

[1] Nelson *v.* Johnson, 18 Ind. 332 (1862), Perkins, J.

[2] Douglas *v.* Beasley, 40 Ala. 148 (1866).

[3] Johns *v.* Pattee, 55 Iowa, 667 (1881), Seevers, J.

[4] See 3 Bl. Com. 309, 313.

[5] Craig *v.* Cook, 28 Minn. 234 (1881): Pomeroy, Rem. §§ 690-92.

the general issue, may give in evidence in his defense.

The character of the matter is indicated in a notice served upon the plaintiff.

Subject-matter. See SUBJECT, 2 (1).

MATURE; MATURITY.[1] 1. In a will, may import maturity of mind and character, the combined result of age and education.[2]

2. Applied to bonds or similar instruments, and to negotiable instruments generally, refer to the time fixed for payment,—the termination of the period they have to run.[3] Opposed to *immature, immaturity.* See DUE; NEGOTIATE, 2.

"At maturity" includes the whole day, unless expressly limited to a certain hour.[4]

When a promissory note payable on a certain day bears interest "after maturity," interest should be computed from the day fixed for payment, not from the last day of grace.[5]

MAXIM.[6] "A proposition to be of all men confessed and granted without proof, argument, or discourse. . . A conclusion of reason."

So called *quia maxima ejus dignitas et certissima auctoritas, et quod maxime omnibus probetur,*[7] because its value is the highest and its authority the most reliable, and because it is accepted by all persons as the very highest.

The authority of the maxims which are part of the common law rests entirely upon general reception; and the only method of proving that this or that maxim is a rule of the common law is by showing that it has always been the custom to observe it. These maxims are known, and their validity determined, by the judges of the courts.[8]

The principles and axioms of law, which are general propositions flowing from abstracted reason, and not accommodated to times or men, are wisely deposited in the breasts of the judges to be applied to such facts as come properly ascertained before them.[9] See LAW, Common.

When a principle has been so long practiced and so universally acknowledged as to become a maxim, it is obligatory as part of the law.[10] See EQUITY, p. 409.

The Latin maxims in this book will be found translated and explained under the word of most importance in each maxim, with cross-references to and from corresponding English words.

MAY. Though primarily importing permission, is often used, in construing statutes, in the sense of "shall" or "must."

Where public interest or private right requires that a thing should be done, "may" is construed to mean "must."[1]

Equivalent to "must" or "shall" when important rights of an accused person depend upon it, and when the context and general purpose of a statute require it.[2]

Construed "must" in all cases where the legislature meant to impose a positive and absolute duty, and not merely a discretionary power. The ordinary meaning of the language must be presumed intended, unless that would defeat the object of the provision.[3]

But it is only where it is necessary to give effect to the clear policy and intention of the legislature that such liberty can be taken with the plain words of statutes.[4]

When power is given to public officers, and the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory.[5] See REQUIRE.

May be. The expression, in a statute, that "the county court in which any part of the route of the said railroad may be," may subscribe to the stock, is to be construed with reference to the situation of the subject-matter. Used of a railroad already built, "may be" would be equivalent to "exists," "is built," "in operation," or the like. But referring to a road not yet built, not located or surveyed, nor organized, it must have a different meaning.[6]

May have. Possessions that a testator "may have" do not necessarily refer to future time.[7]

"May have" and "may have been" are presumably retrospective.[8]

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[1] L. *maturus*, completed as to period; ripe.

[2] Condict *v.* King, 13 N. J. E. 380 (1861).

[3] United States *v.* Union Pacific R. Co., 91 U. S. 85 (1875), Davis, J.

[4] Leigh *v.* Knickerbocker Life Ins. Co., 26 La. An. 438 (1874).

[5] Wheeless *v.* Williams, 62 Miss. 369 (1884).

[6] L. *maxima* (*sententia*), the greatest sentiment: an opinion of the greatest weight or authority.

[7] Coke, Litt. 67 *a*, 11 *a*.

[8] 1 Bl. Com. 68.

[9] 3 Bl. Com. 379. See 15 West. Jur. 337; Broom, and Wharton, on Maxims.

[10] Hendrickson *v.* Evans, 25 Pa. 444 (1855).

[1] People *v.* Supervisors, 68 N. Y. 119 (1877); People *v.* Supervisors, 51 *id.* 406-7 (1873), cases.

[2] State *v.* Neuner, 49 Conn. 233 (1881), cases; Commonwealth *v.* Smith, 111 Mass. 407 (1873).

[3] Thompson *v.* Lessee of Carroll, 22 How. 434 (1859), Grier, J.

[4] Minor *v.* Mechanics' Bank, 1 Pet. 64 (1828), Story, J.

[5] Supervisors *v.* United States, 4 Wall. 446-47 (1866), cases, Swayne, J.; Jones *v.* Statesville, 97 N. C. 86 (1887). See also Leighton *v.* Maury, 76 Va. 870 (1882); *Exp.* Lester, 77 *id.* 673 (1883); 9 How. 259; 5 Wall. 705; 95 U. S. 170; 17 F. R. 814; 2 Flip. 373; 7 Ct. Cl. 334; 12 Ala. 698; 28 *id.* 28; 45 Cal. 696; 70 Ill. 590; 77 *id.* 273; 7 Ind. 122; 18 *id.* 27; 53 Me. 438; 61 *id.* 566; 107 Mass. 197; 125 *id.* 201; 141 *id.* 104; 11 Minn. 101; 35 *id.* 186; 39 Mo. 521; 48 *id.* 167, 390; 3 Neb. 224; 4 *id.* 150; 11 Nev. 260; 39 N. H. 435; 27 N. J. L. 407; 24 N. Y. 495; 52 *id.* 27; 91 *id.* 537; 81 Pa. 349; 8 Phila. 625; 1 Wash. T. 51; 9 Wis. 309; 36 *id.* 498; 64 *id.* 347; 73 E. C. L. 755.

[6] County of Calloway *v.* Foster, 93 U. S. 573 (1876).

[7] Wilkinson *v.* Adam, 1 Ves. & B. *442 (1812).

[8] Heeney *v.* Brooklyn Benevolent Society, 33 Barb. 363 (1861).

May in anywise. Not always the same as "may by any possibility," or "may under any circumstances."[1]

May or may not give. Where a statute provides that for willful neglect, punitive damages may or may not be given in the discretion of the jury, it is error to instruct a jury that they "should" give punitive damages if they found willful neglect.[2]

But an erroneous instruction that if the defendant was guilty of willful neglect the jury "ought" to award punitive damages, is not cured by another instruction that they "could" find any sum as punitive damages.[3]

May pay. In an agreement for re-insurance, may mean "liable to pay."[4]

May receive. An agreement to credit on a note any amount the payee may receive, may refer to money thereafter received.[5]

May saw. An agreement to sell all the plank one may saw during a winter was held not to bind the defendant to saw any plank at all.[6]

"May summon" the master of a vessel to show cause why process should not issue against the vessel, means shall be at liberty, is permitted, to summon him.[7]

MAYHEM.[8] Violently depriving another of the use of a member proper for his defense in fight.[9]

Violently depriving another of the use of such of his members as may render him the less able, in fighting, either to defend himself or to annoy [disable] his adversary.[10]

A battery, attended with the aggravating circumstances that the party injured is forever disabled from making as good a defense against future external injuries as he otherwise might have done. Among the defensive members are not only arms and legs, but a finger, an eye, a foretooth, and some others; not, however, a jaw-tooth, the ear, or the nose, the loss of which does not weaken. The injury is also a crime, being an atrocious breach of the king's peace, and tending to deprive him of the aid of a subject.[11] See DURESS.

[1] Gregory *v.* Kanouse, 11 N. J. L. 63 (1829).

[2] Louisville & Nashville R. Co. *v.* Brooks, 83 Ky. 138 (1885).

[3] Kentucky Central R. Co. *v.* Gastineau, 83 Ky. 127 (1885).

[4] Fame Ins. Co.'s Appeal, 83 Pa. 405 (1877); 30 Leg. Int. 60.

[5] Greene *v.* Robinson, 41 Conn. 470 (1874).

[6] Wemple *v.* Stewart, 22 Barb. 160 (1856).

[7] The Shelbourne, 30 F. R. 52 (1887).

[8] F. *mehaing*, abatement of strength from hurt. See MAIM.

[9] 3 Bl. Com. 121.

[10] 4 Bl. Com. 205.

[11] 3 Bl. Com. 121; 4 *id.* 205; 1 *id.* 130; 8 Port. (Ala.) 472; 10 Ala. 928; 62 Cal. 542; 5 Ga. 404; 7 Mass. 245; 17 Wend. 392; 3 Binn. 595; 6 S. & R. 224; 4 Wis. 168; 2 Bish. Cr. L. § 1001; Whart. Cr. Pr. § 260, n; R. S. § 1342, art. 58; 8 C. & P. 167.

MAYOR.[1] The chief or executive magistrate of a city.[2]

His principal duty is to enforce the laws of the city. He may also preside over the mayor's *court*, which has jurisdiction, concurrent with the courts of other committing magistrates, over offenses perpetrated within the city limits, and of special matters given by statute. See MAGISTRATE.

McKEAN'S TABLES. See TABLE, 4.

MEADOW. A tract which lies above the shore of a sea or stream, and is overflowed by spring and extraordinary tides only, and yields grasses which are good for hay.[3]

A "sedge-flat" is not a meadow.[4]

The statutes which have long existed in many States, authorizing the majority of the owners of adjacent meadow or swamp lands to have commissioners appointed to drain and improve the whole tract, and to assess the expense upon all the proprietors in proportion to the benefits received, have often been upheld as reasonable regulations.[5] See AQUA, Currit, etc.

MEANDER-LINE.[6] In surveying, a line which follows the course of a stream.

The meander-lines run in surveying fractional portions of the public lands bordering upon navigable rivers are run, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as a means of ascertaining the quantity of land in the fraction.[6]

MEANING. See CONSTRUCTION; INNUENDO; PURPORT.

MEANS. 1. Agency, instrumentality. 2. Property, resources; money.

In patent law, see PROCESS, 2.

Attempt by other means. In a statute punishing setting fire to property, contemplates physical means.[7]

[1] F. *maire:* L. *maiorem: majorem*, greater. "Mayor" is the Spanish spelling,— Skeat. In 1189, Rich. I substituted a mayor for the two bailiffs of London. See 25 Wend. 50; 4 Bl. Com. 413.

[2] Waldo *v.* Wallace, 12 Ind. 577 (1859).

[3] Church *v.* Meeker, 34 Conn. 429 (1867).

[4] Head *v.* Amoskeag Manuf. Co., 113 U. S. 22 (1885), cases; Wurts *v.* Hoagland, 114 *id.* 610 (1885), cases. See Neponset Meadow Co. *v.* Tileston, 133 Mass. 189 (1882).

In Wright *v.* Roseberry, 121 U. S. 488 (1887), the Supreme Court reviewed the legislation of Congress respecting swamp lands, the departmental construction of that legislation, and the decisions of the court and of the highest courts of many of the States concerning such legislation.

[5] From the river Meander, in Asia Minor,— 23 N. Y. 500, *infra*.

[6] St. Paul, &c. R. Co. *v.* Schurmeir, 7 Wall. 272 (1868). See also Jones *v.* Pettibone, 2 Wis. 307 (1853); The Seneca Nation *v.* Knight, 23 N. Y. 500 (1861); Bristol *v.* Carroll County, 95 Ill. 85 (1880).

[7] McDade *v.* People, 29 Mich. 53 (1874).

Means necessary to an end. Any means calculated to produce the end.[1] See NECESSARY.

Means of satisfaction in hand. Referring to a creditor, property or money of the debtor in the creditor's possession, which he may lawfully appropriate to the debt.[2] See AVAILABLE.

Means of support. May embrace all the resources from which the necessaries and comforts of life are or may be supplied, such as lands, goods, salaries, wages, or other sources of income.[3]

MEASURE. See WEIGHT, 1; INSPECTION, 1; MORE OR LESS.

Measure of damages. The rule by which damage is to be estimated.[4] See DAMAGES.

MEAT. See CURED.

MECHANIC. An artisan or artist.[5]

A workman employed in shaping and uniting materials, such as wood or metal, into some kind of structure, machine, or other object, requiring the use of tools.[6]

He is usually, perhaps always, a manufacturer; but a manufacturer is not always a mechanic. A miller is not a mechanic.[6]

Nor is a photographer.[6]

Nor is a dentist; and his tools, therefore, are not the "tools of a mechanic."[7]

A dentist, in one sense, is a professional man; in another sense his calling is mainly mechanical and the tools he employs are used in mechanical operations.[6]

See BUILDER; LIEN; TOOL; TRADE.

MEDIATE. Remotely related; indirectly connected; incident to some other; opposed to immediate: as, mediate — descent, powers, *qq. v.* See IMMEDIATE.

MEDICAL. See MEDICINE.

MEDICINE. The practice of medicine includes the application of medicines and drugs for the purpose of curing, mitigating or alleviating bodily diseases; while the practice of "surgery" is limited to manual operations usually performed by surgical instruments or appliances.[8]

One who undertakes to cure disease by mere manipulation is not engaged in practicing either medicine or surgery.[1]

"Allopathic practice" of medicine means the ordinary method commonly adopted by the great body of learned physicians, taught in their institutions, established by their highest authorities, and accepted by the larger portion of the community. By "eclectic practice" is intended a different system, unusual and eccentric, not countenanced by the class referred to, but characterized by them as spurious and denounced as dangerous.[2]

See DRUGGIST; DRUGS; LIQUOR; PHYSICIAN.

Medicine-chest. All vessels over a given size are required, by acts of Congress, to keep a medicine-chest.[3]

Medical. Pertaining to medicine, or the study or practice of medicine.

Medical adviser. See COMMUNICATION, Privileged, 1.

Medical attendance. Is not restricted to professional medical services rendered; will include nursing, as, within a statute for the relief of paupers.[4]

A medical attendant is one to whom the care of a sick person has been intrusted.[5]

Medical college. Is not a "benevolent, charitable, scientific, or missionary society."[6]

The courts cannot be too scrupulous in examining the asserted rights of colleges to graduate matriculants with the degree of doctor of medicine.[7]

The power of the legislature to prescribe reasonable conditions calculated to exclude from the profession persons unfitted to discharge its duties cannot be questioned. Statutes for the accomplishment of this purpose, which have been common, generally require that the practitioner shall be a graduate of an institution for medical instruction, or shall have a certificate of qualification from some recognized body of men learned in the science, and shall be of good moral character.[8] See EMERGENCY.

Medical evidence. Testimony furnished by physicians or surgeons, or standard treatises prepared by them. See EXPERT; SCIENCE.

Medical examination. See INSPECTION, 2, Of person.

Medical jurisprudence. Treats of matters

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[1] M'Culloch *v.* Maryland, 4 Wheat. 414 (1819); 35 N. J. L. 546.

[2] Perrine *v.* Fireman's Ins. Co., 29 Ala. 576 (1858); Knighton *v.* Cuery, 62 *id.* 408 (1878).

[3] Schneider *v.* Hosier, 21 Ohio St. 112 (1871), McIlvaine, J.; Meidel *v.* Anthis, 71 Ill. 246 (1874), Breese, C. J. And see Sharpley *v.* Brown, 43 Hun, 375 (1887).

[4] See Sedgwick, Damages, 29.

[5] Berks County *v.* Bertolet, 13 Pa. 525 (1850), Rogers, Judge.

[6] Story *v.* Walker, 11 Lea, 517 (1883), Cooper, J.

[7] Whitcomb *v.* Reid, 31 Miss. 569 (1856).

[8] Maxon *v.* Perrott, 17 Mich. 337 (1868), Cooley, C. J.

[9] Smith *v.* Lane, 24 Hun, 633-35 (1881).

[1] Smith *v.* Lane, *ante*.

[2] Bradbury *v.* Bardin, 34 Conn. 453 (1867), McCurdy, J.; Same *v.* Same, 35 *id.* 581 (1869). Bardin had falsely represented that his practice, made the subject of a sale, was regular allopathic.

[3] 1 Story, Laws, 106; 2 *id.* 971; R. S. §§ 4569-70.

[4] Scott *v.* Winneshiek County, 52 Iowa, 580 (1879).

[5] Edington *v.* Mutual Life Ins. Co., 5 Hun, 6 (1875).

[6] People *v.* Cothran, 27 Hun, 345 (1882).

[7] People *v.* Gunn, 30 Hun, 325 (1883).

[8] State *v.* State Medical Examining Board, 32 Minn. 327 (1884), cases.

requiring medical knowledge and skill, as well as knowledge of law; forensic medicine.

Medical lectures. See LECTURES.

Medical services. May include the professional services of a medical clairvoyant.[1]

Medical or *medicinal uses.* See LIQUOR.

Medico-legal. Pertaining to matters of both law and medicine.

MEDIETAS LINGUÆ. L. Half of a tongue: a jury composed one-half each of aliens and denizens or natives; or, a jury one-half of whom are of the nationality of one of the parties to a suit.[2]

Medietatis linguæ, or *de medietate linguæ.* Of half a (mixed) tongue: half of each language or nationality.

At common law, when an accused person spoke only a foreign language, and the fact was made known to the court, a petit jury was immediately awarded, without the ordinary precept, one-half of the jurors speaking English, and one-half the language of the alien.[3] The principle never had application to this country.[4]

MEDIUM, SPIRITUAL. See INFLUENCE; PRETENSES, False.

MEDLEY. A melee; confused fight; affray.

Chance-medley. A casual affray. A killing in self-defense upon a sudden encounter.

Chaud-medley.[5] An affray in the heat of blood or passion.

Both terms are about obsolete.

MEET AND PASS. See ROAD, 1, Law of.

Does not apply to travelers who come together in different directions from roads which intersect.[6]

MEETING. "General meetings" of the members of a corporation occur at stated times fixed by the constitution or by-laws; "special meetings" are called for special purposes. The former are also called "stated meetings."[7] See MINUTES, 2.

MELIOR. See DELICTUM, In pari, etc.

MELIORATION. See BETTERMENT, 1; IMPROVEMENT.

MEMBER. 1. Of the person, see MAYHEM, 2. A person, see AMOTION; BAR, 1; CHURCH; CORPORATION.

MEMORANDUM. L. Be it remembered; let it be remembered. Latin plural, *memoranda*; English plural, memorandums. The word is now Anglicised.

Writings for which no technical forms were prescribed began with this word. At present it denotes any informal document preserving evidence of a fact or agreement. See REFRESH.

Memorandum check. A check given by a borrower of money, to be held by the lender for redemption at a time specified. See CHECK.

Memorandum clause. Words in a policy of insurance limiting the liability of the insurer to the articles and risks specified.

Memorandum of agreement. Articles of agreement, *q. v.* Under the Statute of Frauds (*q. v.*), a note or writing signed by the party to be charged or by his agent thereunto duly authorized.

A memorandum is a note to help the memory, a memorial, a record. A list of articles purchased, or a note of things to be done by a friend or agent, specifying persons, places, modes of doing the business, etc., is a memorandum, although in form a letter. It is well settled that a letter may be a sufficient memorandum under the Statute of Frauds.[1]

Memoritur. It is remembered: from memory.

"*Memoritur* proof" of a lost document will be received of a witness acquainted with the original.

MEMORIZATION. See DRAMA; LECTURES.

MEMORY. 1. The mental faculty by which passed impressions are reproduced. See REFRESH.

2. Mental capacity; understanding: as, sane memory, sound and disposing mind and memory. See MIND.

Legal memory; memory of man; time of memory. Originally, indefinite, but by statute in 1276, made to begin with the reign of Richard I, 1189. At another time the period was practically sixty years. In 1832, it was changed to twenty years.[2]

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[1] Bibber *v.* Simpson, 59 Me. 182 (1871).

[2] See 3 Bl. Com. 360; 4 *id.* 352.

[3] United States *v.* Antz, 4 Woods, 180 (1882): s. c. 16 F. R. 124.

[4] State *v.* Sloan, 97 N. C. 501 (1887).

[5] F. *chaud*, heat,—4 Bl. Com. 184; 1 Russ. Cr. 660. F. *chaude mêlée*, an affray in hot blood,—Trench, Eng. Past & Pres., 335.

[6] Lovejoy *v.* Dolan, 10 Cush. 497 (1852).

[7] See Warner *v.* Mower, 11 Vt. 391 (1839)

[1] Bissell *v.* Beckwith, 32 Conn. 517 (1865), McCurdy, J

[2] See 2 Bl. Com. 31.

Immemorial. Beginning or occurring time out of mind: as, an immemorial custom, *q. v.*

MEN. See MAN.

MENACE. See ASSAULT; DEFENSE, 1; DURESS.

MENAGERIE. See ANIMAL.

MENIAL. See SERVANT.

MENS. L. The intellect; judgment, intention, mind. See AGGREGATIO; COMPOS.

Mala mens. Bad mind; fraudulent intention.

Mens legis. The intent of the law.

Mens rea. Criminal intent.

MENSA. See DIVORCE.

MENTAL. See LABOR, 1; MIND.

MERCANTILE. Pertaining to merchandise; having to do with the business or relations of merchants. See MERCHANT; MERCHANDISE.

Mercantile agency. See COMMUNICATION, Privileged, 2.

Mercantile law. The law-merchant.

Mercantile paper. See MERCHANT, Law.

Mercantile partnership. A partnership which habitually buys and sells,— buys for the purpose of afterward selling.

A coal and oil association is not such a partnership.[1]

MERCHANDISE.[2] Defined in the early dictionaries as "commodities or goods to trade with."[3]

"Objects of commerce, wares, goods, commodities; whatever is usually bought or sold in trade." Provisions daily sold in market, horses, cattle, and fuel are not usually included, and realty never. The word conveys the idea of personalty used by merchants in the course of trade, and is usually, if not universally, applied to property which has not yet reached the hands of the consumer. The baggage (*q. v.*) of a passenger is not merchandise.[4]

Has no fixed legal signification; comprehends whatever is usually bought and sold, what merchants commonly trade in.[5]

Is limited to things that are ordinarily bought and sold,— the subjects of commerce and traffic; things that have an intrinsic value, in bulk, weight, or measure, and which are bought and sold.[1]

Does not apply to mere evidence of value, as, a note, a policy of insurance, a bill of lading, and the like, although some of these are sometimes bought and sold.[1]

May include shares in a joint-stock company.[2]

And may even embrace animate property; as, in a common count for goods sold and delivered.[3]

In duty-laws, includes goods, wares, and chattels of every description capable of being imported.[4]

See BAGGAGE; COMMERCE; GOODS; INSPECTION, 1 INVOICE; MAIL, 2; MERCANTILE; MERCHANT; TRADE MARK; WARES.

MERCHANT.[5] Originally, one who traded with foreign countries; at present, one whose business is to buy and sell merchandise.[6]

One who buys to sell again, and who does both, not occasionally or incidentally, but habitually and as a business.[7]

One who buys and sells an article; not, then, a manufacturer who sells his own productions.[8]

A banker is a merchant, according to both the commercial and the civil law.[9]

A commercial traveler is not a merchant: he does not sell his own goods.[10]

Nor is a brewer;[8] nor an apothecary, selling liquor for medical uses;[11] but a hotel-keeper is, if he sells liquors, tobacco, etc., in his hotel;[12] so may be the keeper of a boarding-stable;[13] but not a stock-speculator.[14]

Commission merchant. A factor, *q. v.*

Forwarding merchant. See FORWARDER.

Law-merchant; law of merchants. A system of law consisting of certain principles of equity and usages of trade which general convenience and a common sense of justice

[1] Commonwealth *v.* Natural Gas Co., 32 Pitts. L. J. 310 (1883).

[2] L. *mercari*, to trade: *merx*, traffic.

[3] Passaic Manuf. Co. *v.* Hoffman, 3 Daly, 512 (1871).

[4] The Marine City, 6 F. R. 413, 415-16 (1881), Brown, District Judge.

[5] Kent *v.* Liverpool, &c. Ins. Co., 26 Ind. 297-98 (1866), Elliott, J.

[1] Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story, 53-54 (1841), cases, Story, J.

[2] Pray *v.* Mitchell, 60 Me. 435 (1872); Fine *v.* Hornsby, 2 Mo. Ap. 64 (1876).

[3] Weston *v.* McDowell, 20 Mich. 357 (1870); United States *v.* One Sorrel Horse, 22 Vt. 656 (1847).

[4] [R. S. § 2766. See also 6 Pet. 163; 11 Biss. 55; 40 Ind. 593; 55 Iowa, 520; 20 Pick. 13; 5 Mich. 112; 44 N. Y. 305; 43 Pa. 350; 47 Wis. 615.

[5] L. *mercator: merx*, traffic, merchandise.

[6] See Thomson *v.* Hopper, 1 W. & S. 469 (1841).

[7] Commonwealth *v.* Natural Gas Co., 32 Pitts. L. J. 310 (1883).

[8] Josselyn *v.* Parson, 50 L. R., 7 Ex. 129 (1872).

[9] Brown *v.* Pike, 34 La. An. 578 (1882).

[10] *Exp.* Taylor, 58 Miss. 481 (1880).

[11] Anderson *v.* Commonwealth, 9 Bush, 571 (1873).

[12] Campbell *v.* Finck, 2 Duv. 107 (1865).

[13] *Re* Odell, 17 Bankr. Reg. 73 (1877).

[14] *Re* Woodward, 8 Bened. 565 (1876).

have established to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world.[1]

On mercantile questions, such as relate to bills of exchange and the like, in marine causes relating to freight, average, demurrage, insurance, bottomry, and others of a similar nature, the law-merchant, which is a branch of the law of nations, is followed.[2]

The law-merchant was not made: it grew. Customs have sprung from the necessity and convenience of business and prevailed in duration and extent until they acquired the force of law. This mass of our jurisprudence has thus grown, and will continue to grow, by successive accretions. It is the outcome of time and experience, wiser law-makers, if slower, than legislative bodies.[3]

The rules applicable to commercial paper were transplanted into the common law from the law-merchant. They had their origin in the customs and course of business of merchants and bankers, and are now recognized by the courts because they are demanded by the wants and convenience of the mercantile world.[4] See PAPER, 4.

Merchants' accounts. Within the meaning of the exception in statutes of limitations, accounts between merchants for merchandise, consisting of debts and credits, unsettled and mutual.[5] See ACCOUNT, 1.

Merchant appraiser. See APPRAISER.

Merchant vessel. See VESSEL.

Merchantable. Vendible in market. Merchandise is vendible because of its fitness to serve its proper purpose. As applied to forage, merchantable means edible.[6]

The terms used in defining the word are "ordinary quality," "marketable quality," "bringing the average price," "at least of medium quality or goodness," "good, lawful merchandise of suitable quality," "good and sufficient in its kind," "free from any remarkable defect."[7]

See CUSTOM; MARKET; MERCHANDISE; STATUTE-MERCHANT.

MERCY.[8] Compassion; leniency; clemency.

1. At common law, the conclusion of a judgment for the plaintiff was that the defendant "be in mercy" (*misericordia*), that is, be fined for his delay of justice; and when the judgment was for the defendant, the conclusion was that the plaintiff be in mercy for his false claim.[1] See AMERCE.

2. Justice is to be administered with mercy: it is reserved for the sovereign or his deputy to extend mercy wherever he thinks it deserved, holding a court of equity in his own breast to soften the rigor of the law in such criminal cases as merit an exemption from punishment.[2] See PARDON.

3. Deeds of mercy in Sunday laws, see SUNDAY.

MERE. See MOTION, 1; RIGHT.

MERETRICIOUS.[3] Pertaining to unlawful sexual relation.

If persons under legal incapacities wed, the union is meretricious.[4]

MERGER.[5] A sinking: absorption, coalescence, union, extinguishment — of a lesser estate, obligation, right, or wrong, by a larger one; the smaller ceasing to exist, and the greater not increasing.

1. **Merger of estates.** Whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in law phrase, is "merged," that is, sunk or drowned in the greater.[6]

As, where the reversion of a fee-simple descends to or is purchased by the tenant for years or life.

Consists in a thorough coalescence, indissoluble union of merging estates; each retaining its rights and advantages, while imparting to the other the whole of its peculiar attributes.[7]

The extinguishment, by act of law, of one estate in another by the union of the two estates.[8]

The whole title, legal as well as equitable, must unite in the same person.[9]

While a merger at law follows inevitably upon the union of a greater and lesser estate in the same ownership, it does not so follow in equity. There the doctrine is not favored, and the estates will be kept separate where such is the intention of the parties, and justice requires it.[10]

Merger is a matter of intention, declared or pre-

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[1] 3 Kent, 2.

[2] 4 Bl. Com. 67; 1 *id.* 75, 273.

[3] Merchants' Bank *v.* State Bank, 10 Wall. 651 (1870), Swayne, J.

[4] Woodbury *v.* Roberts, 59 Iowa, 349 (1882), Beck, J.

[5] Fox *v.* Fisk, 7 Miss. 346 (1842).

[6] Wood *v.* United States, 11 Ct. Cl. 685 (1875), Loring, Judge.

[7] Warner *v.* Arctic Ice Co., 74 Me. 478 (1883), cases, Symonds, J. See 9 Oreg. 411; 34 Barb. 206.

[8] F. *merci*, pardon: L. *merces*, fine, pains.

[1] See 3 Bl. Com. 376; 4 *id.* 379.

[2] 4 Bl. Com. 397; 1 Kent, 265; 3 Story, Const. § 1488.

[3] L. *meretrix*, a courtesan: *mereri*, to earn money.

[4] 1 Bl. Com. 436.

[5] L. *mergere*, to sink under water.

[6] 2 Bl. Com. 177; Mangum *v.* Piester, 16 S. C. 330 (1881); Little *v.* Bowen, 76 Va. 727 (1882).

[7] [Den *v.* Vanness, 10 N. J. L. 106 (1828), Ewing, C. J.; Duncan *v.* Smith, 31 *id.* 327 (1865), Beasley, C. J.

[8] State *v.* Koch, 47 Mo. 584 (1871), Wagner, J.

[9] Jordan *v.* Cheney, 74 Me. 362 (1883).

[10] Smith *v.* Roberts, 91 N. Y. 475 (1883), cases; Hill *v.* Pixley, 63 Barb. 208 (1873); Cook *v.* Brightly, 46 Pa. 444 (1864).

sumed. The person in whom the estates meet may prevent it. Thus, the owner of the fee in land may acquire and hold a mortgage interest therein.[1]

2. Merger of agreements, contracts, obligations. When an engagement by simple contract is afterward confirmed or continued by a sealed instrument, or when the demand or right of one party as against the other under their sealed or unsealed engagement is transformed into a judgment.

The simple contract becomes lost, sunk, as it were, and swallowed up in that under seal, and becomes totally extinguished.[2]

A judgment on a note, or a contract, merges the note, or the contract, and no other suit can be maintained on the same instrument.[3]

A judgment against one of several joint-contractors on a bond merges the contract into the higher security. The instrument, in either case, is thereafter *functus officio*.[4] See GREATER; JOINT.

Extinguishment by merger takes place between debts of different degrees, the lower being lost in the higher, and, being by act of law, it is dependent upon no particular intention. It takes place only where the debt is one, and the parties to the securities are identical. Hence, there is no merger where a stranger gives a bond for a simple contract debt, or confesses judgment for a debt. . . . The debt remains the same, though the old evidence of it melts into the new one, and the creditor merely gains a higher security. . . . In merger there is a change only of the security; in satisfaction by "substitution" there is a change of the debt.[5] See SECURITY, Collateral.

All verbal agreements between the parties to a written contract, made before or at the time of the execution of the contract, are considered as merged into the written instrument, and are inadmissible to vary its terms or to affect its construction. But oral agreements subsequently made, on a new and valid consideration, and before the breach of the contract, in cases falling within the rules of common law, and not within the Statute of Frauds, stand upon a different footing. They may have the effect to enlarge the time of performance specified in the contract, or may vary any other of its terms, or they may waive or discharge it altogether.[6] See PAROL, Evidence.

3. Merger of wrongs. When a private wrong and a public offense [a felony] is committed by one and the same act.[7]

At common law, under an indictment for a felony, conviction cannot be had of a lesser offense included within it, if such lesser offense is a misdemeanor. This rule has been changed by statute.[1]

Formerly, the civil action for damages suffered by the individual was suspended until he had performed his duty to society by an endeavor to bring the offender to justice in a court of criminal law.[2] See WAIVER.

MERIT. Sufficiency in law; legal validity.

A person is the "meritorious" cause of action, when the cause or the consideration on which the action is founded originated with or was occasioned by him.

Thus, in an action by a husband and wife upon an agreement entered into with her before marriage, she is the meritorious cause of action.[3]

Merits. Embraces more than the questions of law and of fact involved; all that a party may of right claim in reference to his case.[4]

The real or substantial grounds of action or of defense, in contradistinction to some technical or collateral matter raised in the course of the suit.[5]

An "affidavit of merits" represents that upon the substantial facts of the case justice is with the affiant.[6]

In ordinary acceptation, the abstract justice of a case, without regard to technical or arbitrary rules of law. In legal signification, the combined questions of law and of fact presented by the pleadings in the case. But in a given case, may mean the strict legal rights of the parties, as distinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court.[6]

"Pleading to the merits" distinguishes pleas which answer the cause of action, and on which a trial may be had, from those of a different character.[7]

MESNE.[8] Middle, intermediate, intervening: as, mesne or a mesne — assignment, incumbrance, lord, process, profits, *qq. v.*

MESSAGE.[9] 1. A communication from the President to Congress.

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[1] Winona, &c. R. Co. v. County of Deuel, 3 Dak. 21 (1882), cases.

[2] [Smith, Contr. 23.

[3] Eldred v. Michigan Ins. Bank, 17 Wall. 545 (1873); Beazley v. Sim, 81 Va. 648 (1886).

[4] United States v. Ames, 99 U. S. 45 (1878); Candee v. Smith, 98 N. Y. 351 (1885); 6 Wall. 231; 95 U. S. 347.

[5] Jones v. Johnson, 3 W. & S. 277 (1842), Gibson, C. J.

[6] Emerson v. Slater, 22 How. 41 (1859), cases, Clifford, J.; Hawkins v. United States, 96 U. S. 689 (1877), cases.

[7] 4 Bl. Com. 6.

[1] State v. Durham, 72 N. C. 449 (1875); Commonwealth v. Dean, 109 Mass. 351 (1872); 1 Bish. Cr. L. §§ 786, 804.

[2] 4 Bl. Com. 6.

[3] See 1 Chitty, Contr. *181.

[4] Blakely v. Frazier, 11 S. C. 134 (1877), Willard, C. J.; Dill v. Moon, 14 *id.* 339 (1880).

[5] [Holthouse's Law Dict. See 18 Pa. 354; 65 *id.* 476.

[6] St. John v. West, 4 How. Pr. *331-32 (1850), Selden, J.

[7] Rahn v. Gunnison, 12 Wis. *532 (1860), Paine, J.; Oatman v. Bond, 15 *id.* *25 (1862).

[8] F. *mesne:* L. *medius*, middle.

[9] F. *message:* L. *mittere*, to send.

"He shall from time to time give to the Congress information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." [1]

An "annual message" is delivered at the commencement of each session; a "special message," when particular information is to be communicated; a "veto message," where a bill is returned unsigned. Prior to Jefferson's administration, messages were delivered orally.[2]

The sovereign of England communicates with the houses of Parliament by message, at the hands of a minister of the crown or a member of the royal household.[3]

2. In the sense of a communication by telegraph, see TELEGRAPH.

MESSENGER. 1. "One who bears a message or errand; the bearer of a verbal or written communication, notice, or invitation from one person to another or to a public body; an office servant."

Does not apply to public officer acting in an original capacity in the discharge of duties imposed by law, but presupposes a superior whose servant the messenger is and whose mandate he executes, not as a deputy, with power to discriminate and judge, or to bind his superior, but as a mere bearer and communicator of the will of his superior. In this sense a county treasurer is not a "public messenger." [4]

2. An officer who is given charge of a bankrupt's estate until an assignee has been qualified.

See BANK, 2; EXPRESS, Company.

MESSUAGE.[5] The best writers represent this word as synonymous with house, and as embracing an orchard, garden, curtilage, adjoining buildings, and other appendages of a dwelling-house.[6]

A grant of a messuage, or of a messuage with the appurtenances, will carry the dwelling-house and adjoining buildings, and its orchard, garden, and curtilage.[7] See CURTILAGE; GRANT, 3; LAND; MILL, 1.

METALS. See ASSAYER; COIN; MANUFACTURE; MINERAL; ORE.

METEOR. See ACCRETION.

METES. See BOUNDARY.

METHOD. Placing several things and performing several operations in the most convenient order; also, a contrivance or device.[1] See PROCESS, 2.

METRE, or METER. The ten-millionth part of a quadrant of a terrestrial meridian — from the equator to the north pole. Practically, the length of a platinum bar intended to be equal to one ten-millionth of the meridian which passes through Paris, and equivalent to 39.368 American inches.

Metric system. A system for measuring length, capacity, surface, and weight, founded upon the *metre* as a unit.

The act of July 28, 1866, re-enacted in Rev. St. §§ 3569-70 (where tables of equivalents are given), authorized the use of the system, and directed that standards be furnished to each of the States.

MEXICAN TITLES. See PUEBLO.

MICHAELMAS. See TERM, 4.

MICHIGAN, LAKE. See LAKES.

MIDDLE. See NAME, 1; THREAD.

MIGHT. See SHELLEY'S CASE.

MIGRATION. "Migration" and "importation," as used in sec. 9, art. I, of the Constitution, refer to the different conditions of persons of the African race as regards freedom and slavery. When the free black man came here, he migrated; when the slave came, he was imported — as property.[2]

MILE. Has no technical meaning, except in the expression "mile circular" or "circular mile:" one of the whole number of miles traveled in going to and returning from a place.

In admiralty, while "knot" denotes the rate of speed, "mile" commonly expresses distance covered by speed — the result of speed. In English statutes, "marine league" indicates the three-mile belt from shore, but not always so; in United States statutes, the distance from shore in which admiralty jurisdiction shall be limited, "mile" being used in other cases. In the business of our navy department, "mile" means "marine mile" or "admiralty knot." The "land mile" is the more common to landmen; the "sea mile" to seamen. While the former is 5280 feet, the latter is 6086.7.[3]

Mileage. A payment of so much a mile to one who travels on public business: as, the charge allowed a sheriff or marshal for executing a writ.

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[1] Constitution, Art. II, sec. 3.

[2] See 2 Story, Const., 4 ed. p. 368, note.

[3] May, Parlm. Pr. Ch. 17.

[4] Pfister *v.* Central Pacific R. Co., 70 Cal. 177 (1886), Searls, C.; Act 4 April, 1864. Quotes Webster's Dict.

[5] Mess'-wĭge. F. *mesuage*, manor-house: L. L. *masa*, *mansa*, farm, dwelling.

[6] Grimes *v.* Wilson, 4 Blackf. 333 (1837), Dewey, J. See also 2 Bing. 617; 29 E. C. L. 433; 5 T. R. 48; Williams, R. P. 13.

[7] Sheets *v.* Selden, 2 Wall. 187 (1864): Shep. Touch. 94.

[1] Hornblower *v.* Boulton, 8 F. R. 106 (1799); 2 B. & Ald. 350.

[2] People *v.* Compagnie Générale Transatlantique, 107 U. S. 62 (1882), Miller, J.

[3] Rockland, &c. Steamboat Co. *v.* Tessenden, 79 Me. 146-48 (1887), Peters, C. J.

Within the meaning of Rev. St. § 829, mileage is to be computed from the place where the process is returnable to the place of service.[1] See DIRECT, 1; DISTANCE; NEAR; RADIUS.

MILITARY. See MARTIAL; MILITIA; WAR.

. Pertaining to soldiers in war, or to war; relating to the army.

Military bounty-lands. See BOUNTY.

Military cause. A cause arising out of the military law.

Military court or tribunal. A court for the administration of the military law; a court-martial.

A military tribunal exists under the Constitution in time of war. Should Congress fail to create such tribunals, they must be constituted and proceed according to the laws and usages of civilized warfare. In time of peace they may exist only under the power in Congress "To make Rules for the Government and Regulation of the land and naval Forces."[2] See JUDGE-ADVOCATE.

Civil courts have no authority to review, or in any manner interfere with, the action of military tribunals regularly engaged in the exercise of their appropriate jurisdiction. Thus, the civil courts cannot discharge a minor, who enlisted in the army in violation of Rev. St. § 1117, who is in custody, awaiting trial before a court-martial, upon a charge of desertion.[3]

Military government or jurisdiction. There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war outside the boundaries of the United States, or in time of rebellion and civil war within the States or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise.

The first, which may be called jurisdiction under "military law," is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second, which may be distinguished as "military government," supersedes, as far as may be deemed expedient, the local law, and is exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third, which may be denominated "martial law" proper, is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts where ordinary law no longer adequately secures public safety and private rights.[1]

Military law. Regulations for the government of persons employed in the army; the law applicable to military service and affairs.

The body of the military law of the United States is contained in the "Act establishing rules and articles for the government of the armies of the United States," approved April 30, 1806, with supplements thereto. The first section of the act contains one hundred and one articles (whence called "the articles of war"); it describes the various offenses, the punishments to be inflicted, and the manner of summoning, as well as the organization of courts-martial.[2]

There are also various usages which constitute an unwritten law, for application to cases in which there are no express provisions.[3] See MARTIAL, LAW.

Military offenses. The common-law distinction between felonies and misdemeanors does not apply to military offenses.

A homicide committed by a military guard, without malice, while performing his supposed duty, is excusable, unless manifestly beyond the scope of his authority, or such that a man of ordinary sense would know was illegal. The circuit courts have jurisdiction of a homicide committed within a military reservation.[4]

Military post or station. See STATION.

Military service. Employment in the army or in matters connected with war.[5]

Military tenures. See FEUD.

Military testament. The will of a soldier in service. See WILL, 2 Nuncupative.

MILITIA. Soldiers enrolled for discipline, and not for other military service except in times of insurrection, invasion, and perhaps of riot.

"The Congress shall have power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[6]

[1] *Re* Crittenden, 2 Flip. 213 (1878).

[2] Military Commissions, 11 Op. Att.-Gen. 296 (1865), Speed, A. G.

[3] *Re* Zimmerman, 30 F. R. 176 (1887), Sawyer, J.

[1] *Ex parte* Milligan, 4 Wall. 141-42, 123 (1866), Chase, C. J., and Wayne, Swayne, and Miller, JJ., dissenting.

[2] See R. S. Tit. XIV, XV, XVI.

[3] Martin *v.* Mott, 12 Wheat. 28 (1827).

[4] United States *v.* Clark, 31 F. R. 710 (1887), Brown, J.; s. c. 26 Am. Law Reg. 703-9 (1887), cases.

[5] See 18 Wall. 84; 18 Iowa, 513.

[6] Constitution, Art. I, sec. 8, cl. 15, 16.

This provision authorizes Congress to delegate to the President the power to call out the militia for the purposes named, and to make his decision conclusive as to the necessity for the call.[1]

The militia are "a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in times of peace." That is the case as to the *active militia* of the State. The men comprising it come from the body of the militia, and when not engaged at stated periods in drilling and other exercises, return to their usual vocations, as is usual with militia, and are subject to call when the public exigencies demand it. . . The word "troops" conveys the idea of an armed body of soldiers whose sole occupation is war or service, answering to the regular army. The organization of the active militia bears no likeness to such a body of men. It is simply a domestic force as distinguished from the regular troops, and is only liable to be called into service when the exigencies of the State make it necessary.[2]

The act of Congress of May 2, 1792, is the first legislation relating to the militia. Under it, and its supplements, the militia can be used to suppress rebellion against the national government. The President, who, as seen, is to judge of the exigency, may address his request either to the governor of the State or to an officer of the militia. In actual service, the militia are subject to the same rules as the regular troops The President specifies the term of service, which may not exceed nine months.[3]

The right voluntary to associate together as a military company or organization, and to drill or to parade with arms, without, and independent of, an act of Congress or a law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of each country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal governments, acting in due regard to their respective prerogatives and powers.[4] See MOB.

MILK. See ADULTERATE;[5] OLEOMARGARINE; PEDDLER.

MILL. 1. Mill, mill-dam, mill-privilege, mill-site, and like expressions, are construed to include land, buildings, and machinery or other fixtures necessary or useful to attain the object proposed in the erection.[1] See GRANT, 8; TOLL, 2.

A statute of a State which authorizes any person to erect and maintain on his land a water mill and mill-dam upon and across any stream not navigable, paying to the owners of lands flowed damages assessed in a judicial proceeding, does not deprive such owners of their property without due process of law. The right to the use of running water is *publici juris*, and common to all the proprietors of the bed and banks of a stream. Each has a right to a reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him. One reasonable use is the use of the power, inherent in the fall of the stream and the force of the current, to drive mills. That power cannot be used without damming up the water, and thereby causing it to flow back. If the water thus dammed up by one riparian proprietor spread over the land of others, they could at common law bring successive actions against him for the injury done them, or even have the dam abated. Before the Mill Acts, therefore, it was often impossible for a riparian proprietor to use the water-power at all, without the consent of those above him. The purpose of these statutes is to enable any riparian proprietor to erect a mill and use the water-power of the stream, provided he does not interfere with an earlier exercise by another of a like right or with any right of the public; and to substitute for the common-law remedies a new form of remedy by which any one whose land is flowed can have assessed, once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury. . . General mill acts exist in some twenty or more States.[2] See AQUA, Currit, etc.; NUISANCE; WATER.

Miller. See MECHANIC.

2. The tenth of a cent. See COIN; M, 2.

MIND. The rational faculty, or the understanding; the state of the mental faculties; inclination, desire, purpose, intent; also, memory, recollection.[3]

Disposing mind. Testamentary capacity, *q. v.*

Mind and memory. At common law, and in statutes of wills, are convertible terms.[4]

Sound mind. Mind can only be known by its outward manifestations — language and conduct. As these conform to the practice of the majority of mankind, or contrast harshly with it, judgment is formed as to a man's soundness of mind.[5]

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[1] Martin *v.* Mott, 12 Wheat. 28 (1827); Luther *v.* Borden, 7 How. 34 (1849); 8 Mass. 547.

[2] Dunne *v.* People, 94 Ill. 120, 123 (1879), cases, Scott, Justice.

[3] See R. S. Tit. XVI.

[4] Presser *v.* Illinois, 116 U. S. 267 (1886), Woods, J. See generally 2 Story, Const. §§ 1199–1215, cases; 2 Bancroft, Const. 147–49; 1 Kent, 262–66, cases; Houston *v.* Moore, 5 Wheat. 12 (1820); 1 Kan. Law J. 261–66 (1885).

[5] On punishing adulteration of, see especially 22 Am. Law Rev. 104 (1888), cases.

[1] See 35 Conn. 158; 41 Ga. 162; 3 Mas. 280; 6 Me. 436; 16 *id.* 63; 32 *id* 993; 39 Mich. 777; 20 Barb. 635; 76 N. Y. 23; 35 Wis. 41; 37 Vt. 622.

[2] Head *v.* Amoskeag Manuf. Co., 113 U. S. 9, 16–19, 28 (1885), Gray, J.

[3] See 15 Wall. 589; 8 Del. 119.

[4] *Re* Forman's Will, 54 Barb. 286 (1869).

[5] United States *v.* Guiteau, 10 F. R. 167 (1882), Cox, J.; *ib.* 202–3, cases; 2 Harr., Del., 879.

Unsound mind. Includes every species of insanity or mental unsoundness.[1]

Weak mind. When a person, from infirmity and mental weakness, is likely to be easily influenced by others, a transaction entered into by him without independent advice will be set aside, if there is any unfairness in it.[2]

See CAPACITY, 1; DOUBT; FAITH; INFANT; INFLUENCE; INTENT; INSANITY; KNOWLEDGE, 1; MALICE; MURDER; REASON; WILL, 1. Compare MENS.

MINE.[3] 1, *v.* To draw or lead — a way or passage underground, a subterraneous duct, course or passage, whether in search of metals or to destroy fortifications.[4]

2, *n.* An opening or excavation in the earth for the purpose of extracting minerals.

Applied to coal, is generally equivalent to a worked vein.[5]

The right to mines, as a branch of the royal revenue, had its original in the king's prerogative of coinage, in order to supply him with materials; and therefore mines which are properly "royal" are only those of gold and silver. By 1 and 8 W. & M. (1689, 1696), no mines are to be royal, but the king may have the precious metals for a price named in the statutes.[6] See ROYALTY.

Statutes in various States declare that a patent passes the entire interest of the State.[7]

Mining claim. A parcel of land containing precious metal in its soil or rock; also, one's right of property in such land.

Mineral locations, made prior to the passage of any mineral law by Congress, have always been governed by the local rules and customs in force at the time of the location.[8]

The location of a mining claim is the act of appropriating such parcel according to certain established rules. It usually consists in placing on the ground, in a conspicuous position, a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel, according to the local customs or, since the statute of 1872, according to the provisions of that act. The location, which is the act of taking the parcel of mineral land, in time becomes, among the miners, synonymous with the mining claim originally appropriated. One claim may include several or many locations.[9]

The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. A relocation on lands actually covered at the time by another valid and subsisting claim is void. A location is made by taking possession and working on the ground, recording and doing whatever else is required by the acts of Congress and local regulations. A claim perfected under the law is property in the highest sense, which may be bought, sold, and conveyed, and which will pass by descent. Actual possession is not necessary, but the locator must do the requisite amount of work within the prescribed time. The paramount title remains in the United States; the locator acquires the exclusive right of possession. A relocation may be made only when the rights of the former locator have ended.[1]

Known mine. Within the meaning of the mining laws, no lands are "known mines" unless at the time that the rights of a purchaser accrued there was upon the ground an actual and opened mine, which had been worked, or which was capable of being worked.[2]

If a lode or vein of gold or silver is "known to exist" within a placer claim when the patent is applied for, the patentee cannot recover its possession, even as against an intruder. Having no title to such lode or vein by reason of its exception from his patent under Rev. St. § 2333, he cannot enforce any legal right to it, being bound to rely upon the strength of his own title, not upon the weakness of his adversary's. The statute speaks of acquiring a patent with knowledge of the existence of a vein or lode within the boundaries of the claim; not of the effect of the *intent* of the party to acquire a lode which may or may not exist, of which he has no knowledge. Nor does it render belief, after examination, in the existence of a lode, knowledge of the fact. There may be difficulty in determining whether such knowledge in a given case was had; but between mere belief and knowledge there is a wide difference. Questions as to what kind of evidence is sufficient to prove the required knowledge should be settled as they arise.[3]

Mining partnership. A distinct association, with different rights and liabilities attaching to its members, from an ordinary trading partnership.

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[1] McCammon *v.* Cunningham, 108 Ind. 547 (1886).

[2] Allore *v.* Jewell, 94 U. S. 511-12 (1876), Field, J.

[3] L. L. *minare*, to lead; hence, to follow a vein, to excavate. Whence mineral.

[4] Bell *v.* Wilson. L. R., 1 Ch. Ap. *309 (1866), Turner, L. J., quoting Ency. Metrop.

[5] Westmoreland Coal Co.'s Appeal, 85 Pa. 346 (1877).

[6] 1 Bl. Com. 294.

[7] 3 Kent, 378, n; 17 Cal. 199. As to the United States, see 107 U. S. 526; 108 *id.* 510; 2 Black, 17; 3 Wall. 304.

[8] Glacier Mining Co. *v.* Willis, 127 U. S. 482 (1888).

[9] Smelting Company *v.* Kemp, 104 U. S. 649 (1881), Field, J.; R. S. § 2324.

[1] Belk *v.* Meagher, 104 U. S. 284, 281-88 (1881), Waite, C. J.; Forbes *v.* Gracey, 94 *id.* 762 (1876); R. S. § 2319; Erhardt *v.* Boaro, 113 U. S. 535 (1885). See generally Steel *v.* Smelting Co., 106 *id.* 449, 457 (1882); Jackson *v.* Roby, 109 *id.* 441 (1883); Chambers *v.* Harrington, 111 *id.* 350 (1884).

[2] Colorado Coal & Iron Co. *v.* United States, 123 U. S. 325 (1887), cases, Matthews, J.

[3] Iron Silver Mining Co. *v.* Reynolds, 124 U. S. 383 (1888), Field, J.; Noyes *v.* Mantle, 127 *id.* 353 (1888). As to mining on public lands, see 26 Cent. Law J. 354-61 (1888), cases.

A member may convey his interest without dissolving the partnership; and the death or insolvency of a member will not work a dissolution. But a member may not pledge the credit of the association.[1]

Such partnership exists where the owners of a mine co-operate in working it.[2]

See ADIT; MINERAL; AQUA, Currit, etc.; LAND, Public; ORE; VEIN: WASTE.

MINERAL. That which is mined.

Though frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines.[3]

A fossil, or what is dug out of the earth. In its enlarged sense, comprises all the substances which form, or have formed, part of the solid body of the earth, both external and internal, and which are now destitute of, and incapable of supporting, animal or vegetable life.[4]

Petroleum is a mineral, and as much a part of the realty as timber or coal.[5]

A right to experiment for oil, and to sever and remove it upon giving a portion to the lessor, is a license to work land for minerals; and so coupled with an interest as not to be revocable at the pleasure of the licensor.[6]

Where the grantor in a deed conveying realty reserved certain timber and "all minerals," and the grantee claimed the mineral oil, the court said: "It is true that petroleum is a mineral; but so are salt and other waters, impregnated or combined with mineral substances; so are rocks, clays, and sand: anything dug from mines or quarries; in fine, all inorganic substances are classed under the general name of 'minerals.' If the reservation embraced all these things, it is as extensive as the grant. That something may be retained for the vendor, 'minerals' must then be limited in its meaning. The parties doubtless thought and wrote, not as scientists, but as business men using the language of every-day life; and in popular estimation petroleum is not regarded as a mineral substance any more than is animal or vegetable oil, and it can, indeed, be so classified only in the most general or scientific sense."[7]

Minerals beneath the surface may be conveyed by a deed, distinct from the right to the surface. They constitute a corporeal hereditament, and pass by apt words, with delivery of the deed and registration.[8]

The law recognizes horizontal divisions of land. A severance of the surface from the underlying strata may be created, either by reservation or express grant; after severance, a mineral right is an independent interest. Thus, one person may own the iron-ore, another the coal, another the limestone, another the petroleum, and another the surface.[1]

But each proprietor must so use his own property as not to injure another proprietor.[2]

A tenant for life cannot open and operate a *new* mine: it would injure the inheritance; but his right to operate previously opened mines, and work them, even to exhaustion, cannot be questioned.[3]

What is termed a mineral lease is frequently found to be an actual sale of a portion of the land. It differs from an ordinary lease in this, that, although both convey an interest in land, the latter merely conveys the right to its temporary use and occupation, while the former conveys absolutely a portion of the land itself. . . If the entire interest of the lessor is conveyed, in the whole or a portion of his land, the conveyance cannot properly be regarded as a "demise," but as an "assignment."[4]

See MINE; AQUA, Currit, etc.; LAND, Public; QUARRY; VEIN; WASTE, 1.

MINISTER.[5] 1. An officer of a court charged with the execution of processes.

Ministerial. Done or executed, or serving, under the authority of, or in obedience to, another person as superior: as, a ministerial — act, duty, office, officer, trust, writ. Opposed to *judicial:* involving the exercise of discretion.

A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to, or the exercise of, his own judgment upon the propriety of the act to be done.[6]

As, the act of bringing a party into court;[6] selecting jurors;[7] delivering a patent to land after the right thereto is complete.[8]

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department of government, by judicial process, is one in re-

[1] Kahn *v.* Smeltiug Co., 102 U. S. 645 (1880); Bissell *v.* Foss, 114 *id.* 260 (1885), cases; 42 Cal. 370; 79 Va. 160; 50 E. C. L. 685.

[2] Higgins *v.* Armstrong, 9 Col. 46 (1885); 5 *id.* 111.

[3] Rosse *v.* Wainman, 14 M. & W. 872 (1845), Parke, B.

[4] [Bainbridge, Mines, &c., 1, cases.

[5] Appeal of Stoughton, 88 Pa. 198 (1878).

[6] Furst *v.* Halderman, 53 Pa. 229 (1866).

[7] Dunham *v.* Kirkpatrick, 101 Pa. 43-44 (1882), Gordon, J. See also Hartwell *v.* Camman, 10 N. J. E. 128, 132-36 (1854).

[8] Caldwell *v.* Fulton, 31 Pa. 475 (1858).

[1] Caldwell *v.* Copeland, 37 Pa. 430-31 (1860); Sanderson *v.* City of Scranton, 105 *id.* 472 (1884); 31 *id.* 476, 482; 1 Maule & S. 84; 2 Barn. & Ald. 554; 2 Strange, 1142; 11 M. & W. 33; L. R., 4 Eq., 19; 2 Exch. 800; 6 *id.* 644; 5 E. L. & E. 526; 2 Dr. & S. 395.

[2] Erickson *v.* Michigan Land & Iron Co., 50 Mich. 604, 609-10 (1883), cases.

[3] Eley's Appeal, 103 Pa. 307 (1883), cases.

[4] Sanderson *v.* City of Scranton, 105 Pa. 472-73 (1884), Clark, J. On opinions as to the value of a silver or gold mine, see Southern Development Co. *v.* Silva, 125 U. S. 247, 252 (1888).

[5] L. *minister*, a servant.

[6] Flournoy *v.* Jeffersonville, 17 Ind. 173-74 (1861), Perkins, J.; 54 *id.* 377; 15 F. R. 16; Roins *v.* Simpson, 50 Tex. 501 (1878).

[7] *Exp.* Virginia, 100 U. S. 348 (1879).

[8] Simmons *v.* Wagner, 101 U. S. 261 (1879).

spect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.[1]

See EXECUTION, 3, Writ of; JUDGE; OFFICER; SHERIFF.

2. A person ordained to preach the gospel.[2] See ORDAIN, 2.

3. In laws respecting foreign relations, a person invested with and exercising the principal diplomatic functions.[3]

"The President . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls. . ."[4]

Foreign minister. In the diplomatic sense, a minister who comes from another jurisdiction or government.[5]

The modern law of nations recognizes a class of public officers, who, while bearing various designations, chiefly significant in the relation of rank, precedence, or dignity, possess in substance the same functions, rights, and privileges,— being agents of their respective governments for the transaction of diplomatic business abroad, possessing also such powers as their respective governments may please to confer, and enjoying, as a class, established legal rights and immunities of person and property in the governments to which they are accredited as the representatives of sovereign powers.

Disregarding questions of dignity, these diplomatic agents might all be denominated *ambassadors*, because they are immediate officers of the sovereign; or *envoys*, because they are persons sent; or *ministers*, because engaged in public service or duty; or *procurators*, because they are the proctors of their respective governments; or *legates*, because officially employed as the substitute of the superior; or *nuncios*, or *internuncios*, because they are messengers to or between governments; or *deputies*, because they are deputed; or *commissioners*, because they hold and discharge commissions; or *chargés d'affaires*, because they are charged with business; or *agents*, because they act for their governments. All these, and other designations of public ministers, are found in the history of modern negotiations, the name having no fixed relation to the functions or powers, or true nature of the office.

In the simple indication of duties these public ministers would be divisible into three subdivisions of differences: ministers, representatives, and agents: *ordinary*, and *extraordinary*, that is, special; *resident*, and *non-resident* or transient; and *plenipotentiary*, and *not plenipotentiary* or with limited powers.

But, in process of time, sometimes to flatter the pride of the sovereign represented, or that of the representative, or that of the government addressed; at other times to indicate shades of differences in functions, or in the place or manner of exercising them, and for other causes, arbitrary and artificial distinctions have grown up, in the use of titles, or names, which for the most part are independent of, or absolutely contrary to, the truth and substance of the things they pretend to designate. Thus it is that "ambassador," in origin the most equivocal of all the titles — for "ambascia" is "officium vel ministerium quodcunque, nobile et ignobile," and "ambisciata" at this day is any message, though borne by a household servant — has come, notwithstanding its humble origin, to designate a diplomatic agent of the highest rank in the class, because taken to be the most direct representative of the sovereign; in this, reviving its original use of the personal client or agent of the chief or prince. Thus it is that the Papal See appoints peculiar ministers assumed to belong to the highest rank, under the name of "legate" or "nuncio," both in nature as ordinary, and the latter as humble, as any in the whole category. Thus it is that the ordinary "envoy," or agent of regular and ordinary functions, is by mere titular exaggeration turned into "envoy extraordinary," while another agent, who is no more a resident minister than he, and just as much an "extraordinary" envoy, is denominated merely a "minister resident." Thus it is, also, that in one of the varieties of agents, to "envoy extraordinary," which is false, is added "minister plenipotentiary," which is inexact in fact and by specialty of application: for it is not usual to give any diplomatic agent general "plenipotentiary" powers, but limited ones; and such powers, whatever they may be, as are given to envoys ordinary and extraordinary are frequently given to commissioners, ministers resident, or even chargés d'affaires. And thus it is that "chargés d'affaires," in itself quite as general as any title, and often borne by persons exercising as high functions as any other, has settled into the designation of a mere provisional officer, in dignity of the lowest rank. Thus, also, while "commissioner," which in fact is more comprehensive than the others, like "deputy," when held by a person having foreign diplomatic functions, as distinguished from functions [illegible] or administrative, has come to have something of a specific meaning by reason of its vagueness, as implying

[1] Mississippi *v.* Johnson, 4 Wall. 498 (1866), Chase, C. J. See also Kendall *v.* Stokes, 3 How. 87, 98 (1845); South *v.* Maryland, 18 How. 396, 402 (1855); Conner *v.* Long, 104 U. S. 234-44 (1881), cases; 7 Ct. Cl. 293; 49 Ala. 311; 39 Ark. 85; 12 Conn. 464; 12 Ohio St. 132; 40 Wis. 175.

[2] See 1 Mass. 32; 5 *id.* 524; 6 *id.* 401; 7 *id.* 60, 230; 14 *id.* 333; 2 Pick. 403; 1 Me. 102; 11 *id.* 487.

[3] R. S. § 4130: Act 1 Feb. 1876; 19 St. L. 2.

[4] Constitution, Art. II, sec. 2, cl. 2.

[5] Cherokee Nation *v.* Georgia, 5 Pet. *56 (1831), Thompson, J.

a diplomatic agent whose functions are undefined as respects the nature of his powers or the place of exercising them,— the term has more commonly been held to denote a minister the range of whose duties and powers is not confined to a particular court and does not depend on his presentation there.

The Constitution, specifying "ambassadors" as examples of a class, empowers the President to appoint these and other "public ministers," that is, any such officers as by the law of nations are recognized as "public ministers," without making the appointment of them subject, like "other (non-enumerated) officers," to the exigency of an act of Congress. In a word, the power to appoint diplomatic agents, and to select any one out of the varieties of the class, according to his judgment as to the needs of the public service, is a constitutional function of the President, not derived from nor limitable by Congress, but requiring only the ultimate concurrence of the Senate; and so it was understood in the early practice of the government.[1]

The United States has never sent an "ambassador."[2]

The power to appoint a representative includes the power to remove him.[3]

"In all Cases affecting Ambassadors, other public Ministers and Consuls . . the supreme Court shall have original Jurisdiction."[4]

The purpose was to keep open the highest court of the nation for the determination, in the first instance, of suits involving a diplomatic or commercial representative of a foreign government. This was due to the rank and dignity of such representatives. . . . They may sue in any court they choose that is open to them. As to consuls, the commercial representatives of foreign governments, the jurisdiction of the Supreme Court was made concurrent with the district courts. Congress may confer jurisdiction, in cases of consuls, upon the subordinate courts of the Union.[5]

See ALIEN, 1; ARREST, 2 (2, 3); ASYLUM; CONSUL; EXEQUATUR, 2.

MINOR.[6] A person not twenty-one years old; an infant, *q. v.*

Minority. 1. The civil condition of a minor; infancy.

2. The smaller number of votes or voters. See MAJORITY.

3. The smaller number of citizens. See CONSTITUTION.

MINSTRELS. See THEATER.

MINT. The United States mint was established by act of April 2, 1792, and located at Philadelphia. There are branch mints at San Francisco, New Orleans, Carson, and Denver.[1] See COIN.

MINUS. See MAJOR; MINOR; DIMINUTION.

MINUTES.[2] 1. Official memoranda of what takes place in a court; made by the clerk, and preserved in his "minute-book."

From these memoranda the record is afterward made, the minutes themselves not being considered part of the record.

The courts are to take notice how the records of their own and of other courts are in fact made and kept. The clerk must of necessity take down the doings of the court in brief notes. This he usually does in a minute-book called the "docket," from which a full, extended, and intelligible record is afterward to be made up. Until they can be so made, these short notes must stand as the record.[3]

But it is not the office of the clerk's minutes to indicate the legal questions raised upon the trial of a case.[4]

2. The record of the proceedings had before the board of directors of a corporation; usually made by the secretary.

Failure to make minutes will not invalidate a corporate act, even where the charter directs that they be made or kept. If not kept, or if lost, destroyed, or for other reason not produced after request duly made, secondary evidence of the proceeding will be admitted.[5]

MIS.[6] A prefix denoting error, fault, defect, wrong; also, ill or bad. Compare MAL.

MISADVENTURE. An accident, usually resulting in the death of a person, where a lawful act is being done.

Homicide by misadventure is where a man, doing a lawful act without any intention of hurt, unfortunately kills another.[7]

MISAPPLY. See APPLICATION, 2.

MISAPPROPRIATE. See APPROPRIATE, 1 (1).

MISBEHAVIOR. See BEHAVIOR.

MISCARRIAGE. 1. Erroneous doing; faulty behavior; a wrongful act incurring liability in damages.[8] See FRAUDS, Statute of.

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[1] Ambassadors and Public Ministers, 7 Op. Att.-Gen. 190-93 (1855), Caleb Cushing.

[2] 1 Kent, 39, n. See 1 Bl. Com. 253.

[3] *Exp.* Hennen, 13 Pet. 259 (1839).

[4] Constitution, Art. III, sec. 2, cl. 2.

[5] Ames *v.* Kansas, 111 U. S. 464 (1884); Börs *v.* Preston, *ib.* 252, 255 (1884), cases.

[6] L. *minor*, less, younger.

[1] See R. S. § 3495; 1 Story, Laws, 227.

[2] L. *minuta* (*scriptura*), small hand or writing: copies for parties were in larger hand,— 8 Toullier, n. 413.

[3] Pruden *v.* Alden, 23 Pick. 187 (1839), Shaw, C. J.

[4] Scott *v.* Morgan, 94 N. Y. 514 (1884); Johnson *v.* Commonwealth, 80 Ky. 377 (1882); 34 La. An. 369.

[5] See Angell & Am. Corp. 291 *a*; Green's Brice's Ultra Vires, 522; 12 Wheat. 75; 96 U. S. 271; 111 Mass. 315; 32 Vt. 633.

[6] A. S. *missian*, to fail to hit, reach, attain, find. F. *mes-*; L. *minus*, less, bad.

[7] 4 Bl. Com. 182.

[8] See Kirkham *v.* Marter, 2 B. & A. *616 (1819).

2. Destroying a foetus before birth is termed "procuring a miscarriage."[1] See ABORTION.

3. A "miscarriage of justice" imports a failure or defect in the administration of justice.

MISCEGENATION.[2] The intermarriage of persons of different races. See MARRIAGE, Mixed.

MISCHARGE. See CHARGE, 2 (2, c).

MISCHIEF. Injury, damage, detriment, harm.

Malicious mischief. Injury to private property amounting to a crime. Such damage as is done, not *animo furandi*, with an intention of gaining by another's loss, but either out of a spirit of wanton cruelty or black and diabolical revenge.[3]

The injury must have been done out of a spirit of wanton cruelty or wicked revenge.[4]

It is difficult to state with precision what acts constitute malicious mischief at common law. The subject has been so much legislated upon, and at such an early day, that its common-law limits are indistinct. Blackstone classes it with larceny and forgery, and, after defining it as above, adds that "any damage arising from this mischievous disposition, though only trespass at common law, is now, by a multitude of statutes, made penal in the highest degree"—several statutes having elevated the offense to a felony.

Some judges, giving "trespass," as there used, its modern meaning, have denied, against the weight of authority, that the offense of malicious mischief exists under the common law of this country. But Blackstone meant by that word what we mean by "misdemeanor."

The offense includes malicious physical injuries to the rights of another which impair utility or materially diminish value.

Thus, it has been considered an offense at common law maliciously—to destroy another's horse, cow, or other beast; to cast a carcass into a well in use; to poison chickens; to tear up a promissory note; to break a window; to set fire to barrels of tar; to destroy a corn crib; to injure trees or plants; to break up a boat; to deface tombs; to strip a building of pipes or sheeting; to injure a telephone wire.[5]

MISCONDUCT. "Misconduct in office" was held to apply to a wrongful performance of an authorized act.[1] See ARBITRATOR; ATTORNEY; MISDEMEANOR, 1; VERDICT.

MISDATE. See DATE.

MISDELIVERY. See DELIVERY.

MISDEMEANOR. 1. Misconduct; misbehavior, not amounting to a crime, in discharging the duties of a public office.

As, in a statute enacting that whenever a sheriff shall have been guilty of any default or misdemeanor in office, the party aggrieved may apply to a court for leave to prosecute his official bond.[2] Compare MISCONDUCT.

2. Any indictable offense under the grade of felony.[3]

Where a municipal ordinance prohibits an act not punishable at common law or by statute, and provides, as a penalty, a fine, and, in default of payment thereof, imprisonment in the county jail, the violation of such ordinance is not a misdemeanor under a statute defining a misdemeanor to be "an act or omission punishable by fine and imprisonment or by fine or imprisonment."[4]

The provision in the Constitution that "the trial of all crimes, except in cases of impeachment, shall be by jury," construed in the light of the principles of the common law, embraces not only felonies punishable by confinement in the penitentiary, but also some classes of misdemeanors the punishment of which may involve deprivation of liberty. The word "crime," in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character.[5]

Misdemeanant. A person convicted of a misdemeanor. (Rare.)

See further CRIME; FELONY.

MISDESCRIPTION. See DESCRIPTION.

MISDIRECTION. See CHARGE, 2 (2, c).

MISERICORDIA. See MERCY, 1.

MISFEASANCE. See FEASANCE.

MISFORTUNE. See ACCIDENT; HOMICIDE; MISADVENTURE.

MISINSTRUCTION. See CHARGE, 2 (2, c); INSTRUCT, 2.

MISINTERPRETATION. See INTERPRETATION.

MISJOINDER. See JOINDER.

MISLAID. See FIND, 1.

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[1] See Smith *v.* State, 33 Me. 60 (1851); Commonwealth *v.* Railing, 113 Pa. 37 (1886).

[2] L. *miscere*, to mix; *genere*, to beget.

[3] [4 Bl. Com. 243.

[4] [Commonwealth *v.* Walden, 3 Cush. 561 (1849). See also 101 Ill. 394; 110 Mass. 402; 49 Miss. 337; 27 N. J. L. 128; 3 D. & B. (N. C.) 131; 2 Whart. Cr. L. §§ 1065-82, cases.

[5] State *v.* Watts, 48 Ark. 57-59 (1886), Battle, J.; 2 Whart. Cr. L. §§ 1067, 1076, cases; 1 Bish. Cr. L. §§ 568-69, cases.

[1] State *v.* Leach, 60 Me. 66 (1872). See also 37 How Pr. 20; 1 Den. 267.

[2] State *ex rel.* Blinebury *v.* Mann, 21 Wis. 687 (1867).

[3] See 4 Bl. Com. 5; 6 Ark. 190; 65 Ill. 60; 9 Wend 222; 12 *id.* 314; 26 Hun, 60; 9 Humph. 50; 1 Bish. Cr. L. § 624.

[4] City of Oshkosh *v.* Schwartz, 55 Wis. 483 (1882).

[5] Callan *v.* Wilson, 127 U. S. 549 (1888), Harlan, J.

MISLEAD. See CHARGE, 2 (2, c); INSTRUCT, 2.

MISNOMER. Misnaming: giving a wrong name to a person, in an instrument or document of any nature.[1] See ALIAS, 1; NAME, 1.

MISPLEADING. See PLEADING.

MISPRISION.[2] 1. Formerly, any dereliction or offense which had no distinctive name.[3]

Any such high offense as is under the degree of capital, but nearly bordering thereon; is contained in every act of treason and in every felony.[4]

Negative misprision. The concealment of something which ought to be revealed. **Positive misprision.** The commission of something which ought not to be done.

The concealment of treason, of a felony, or of treasure-trove, were examples of negative misprisions. Positive misprisions included all contempts and high misdemeanors: as, the maladministration of officers in public employment, embezzling public money; contempts of the executive department: as, refusing to advise in public councils, refusing to help defend the realm, neglecting to join the *posse comitatus*, disobeying any lawful command; contempts against the king's person and government: as, speaking against them, wishing them ill, acts lessening them in esteem; contempts against the king's title not amounting to treason or *præmunire:* as, denying his right to the crown in common discourse; also, contempts against the courts of justice.[4]

2. Misapprehension of duty; a clerical error, by an inferior judicial officer.

"The omission of the clerk to enter on the record the judgment upon the demurrer, or to state its waiver, if it was abandoned, would be merely a clerical mistake; and it is well settled at common law that a misprision by a clerk, if the case be clearly that alone, though it consists of the omission of an important expression, is not ground to reverse a judgment, where substance enough appears to show that all that was required was properly done."[5]

"Inasmuch as the statute provides what judgment shall be rendered on joint debts where only one party is served, this [the entry of 'defendant' for 'defendants'] is a mere clerical misprision."[6] See RECORD, Judicial.

MISREADING. See READING.

MISRECITAL. See RECITAL.

[1] See 3 Bl. Com. 302; 4 *id.* 334; 77 Mo. 370.

[2] Mis-prizh'-un. F. *mépris*, neglect, contempt: *mé*, amiss; *prendre*, to take.

[3] See 3 Coke, Inst. 36.

[4] 4 Bl. Com. 119; 1 Hawk. P. C. 60; R. S. §§ 5390, 5333.

[5] Townsend *v.* Jemison, 7 How. 720 (1849).

[6] Holcomb *v.* Tift, 54 Mich. 648 (1884).

MISREPRESENTATION. See REPRESENTATION, 1.

MISTAKE. Some intentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence.[1]

When a person, under some erroneous conviction of law or fact, does, or omits to do, an act which but for the erroneous conviction he would not have done or omitted.[2]

That result of ignorance of law or of fact which has misled a person to commit that which if he had not been in error he would not have done.[3]

An erroneous mental conception that influences the will and leads to action.[4]

The doing of an act under an erroneous conviction, which act, but for such conviction, would not have been done.[5]

Mistake of fact. Takes place either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist. **Mistake of law.** When a person, having full knowledge of facts, comes to an erroneous conclusion as to their legal effect.[6]

Mistake of judgment. See DIRECTORS; DISCRETION; SEWER.

Mutual mistake. A mistake reciprocal and common to both parties; as, the parties to a contract when each alike labors under the same misconception with respect to its terms.[7]

The rule is that a mistake of law affords no ground for relief, and that a mistake of fact may furnish such ground. In the latter case the fact must be *material* to the act or contract, that is, must be essential to its character, and an efficient cause of its concoction, and must also be such fact as the complainant could not by reasonable diligence get knowledge of, when put upon inquiry. When the fact is known to one party, and unknown to the other, the ground of relief is, not the mistake or ignorance of material facts alone, but the unconscientious advantage taken by the conceal-

[1] 1 Story, Eq. § 110; Chicago, &c. R. Co. *v.* Hay, 119 Ill. 504 (1887).

[2] Bispham, Eq. § 185.

[3] Bruse *v.* Nelson, 35 Iowa, 160 (1872): Jeremy.

[4] West Portland Homestead Association *v.* Lowndale, 17 F. R. 616 (1883), Deady, J., citing 2 Pom. Eq. § 839.

[5] Cummins *v.* Bulgin, 37 N. J. E. 477 (1883), Van Fleet, Vice-Chancellor.

[6] Hurd *v.* Hall, 12 Wis. 124 (1860), Dixon, C. J.

[7] [Botsford *v.* McLean, 45 Barb. 481 (1866), E. D. Smith, J.; Massie *v.* Heiskell, 80 Va. 801 (1885).

ment. If the parties act fairly, one not being bound to communicate the facts to the other, a court of equity will not interfere.[1]

To entitle a plaintiff to relief in equity the mistake must be clearly established.[2]

"We think that no case can be found where a court of equity has relieved a party on account of a mistake which was made through the mere carelessness and negligence of the party asking relief, where there rested a duty upon him toward the other party to use due care and diligence not to make a mistake."[3]

Relief for a mistake of law cannot be granted in a Federal court.[4]

See further CONSENSUS, Tollit, etc.; IGNORANCE; KNOWLEDGE, 1; MISPRISION, 2; PAYMENT, Voluntary; RECEIPT; RECORD, 2; REFORM; RESCISSION; WILL, 2.

MISTRIAL. See TRIAL.

MISUNDERSTANDING. See ASSENT; MISTAKE.

MISUSER. See USE, 1.

MITIGATION.[5] Lessening the degree of; diminution as to the severity of; reduction of the amount of: as, of damages, punishment or penalty.

The criteria by which the sufficiency of a pleading is ordinarily determined, that is, materiality and relevancy, may not be strictly applied to allegations in an answer of facts by way of mitigation. Such allegations should not be stricken out on motion, unless it is clear that under no possible circumstances could the matter pleaded have the bearing claimed for it.[6] See AGGRAVATION.

MITIORI. See SENSUS.

MITTIMUS. L. We send: a warrant of commitment, *q. v.*

MIXED. Partaking of two or more natures or characteristics; of two or more species, characters, races, etc.

Mixed action. An action in its nature both real and personal. See ACTION, 2; EJECTMENT.

Mixed case. A case involving principles of law and equity or admiralty. See ADMIRALTY.

Mixed jury. A jury of white and black persons. See JURY.

Mixed larceny. Larceny characterized by circumstances of aggravation; compound larceny, *q. v.*

Mixed marriage. A marriage contracted between persons of different races. See MARRIAGE.

Mixed property. Property of the nature of both realty and personalty. See PROPERTY.

Mixed question. A question involving matters of law and of fact.

Mixed schools. Schools for the education of different races; specifically, of the white and black races. See SCHOOL.

MIXTION. See CONFUSION.

MOB. A "rebellious mob" commits high treason; a "common mob" commits a riot: the latter wants a universality of purpose to make it rebellious.[1]

The Pennsylvania act of May 31, 1841, which makes the county of Philadelphia liable for property destroyed by a mob, and which was extended to Allegheny county by the act of March 20, 1849, is not repealed by the constitution of 1874. The act is both remedial and penal, and must be liberally construed. The fact that county authorities are unable to quell a riot does not limit the liability of the county for damages done thereby. The act embraces every kind of riotous disturbance.[2]

See ASSEMBLY, Unlawful; INSURRECTION; RIOT.

MOBILIA. L. Movable things; movables, *q. v.*

Mobilia non habet situm. Movables have no situs.[3]

Mobilia personam sequuntur, immobilia situm. Movables follow the person, immovables the locality. The use and transfer of personalty is regulated by the law of the domicil of the owner; the use and disposition of realty, by the law of the place where situated.[4] See PLACE, 1; PROPERTY; SITUS.

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[1] 1 Story, Eq. §§ 140–47; Grymes *v.* Sanders, 93 U. S. 60–63 (1876), cases; 8 Wheat. 211; 1 Pet. 1; 13 *id.* 26; 2 McCrary, 440; 10 Bened. 408; 13 F. R. 256–60, cases; 14 *id.* 498; 15 *id.* 368; 7 Ga. 64; 94 N. Y. 247; 9 Cow. 685–87, 674; 3 Lead. Cas. Eq. 411.

[2] Baltzer *v.* Raleigh, &c. R. Co., 115 U. S. 645 (1885), cases; Cummins *v.* Bulgin, 37 N. J. E. 477 (1883); Benson *v.* Markoe, Sup. Ct. Minn. (1887), cases; 18 Cent. Law J. 7–10 (1884), cases; 1 Law Q. Rev. 298–313 (1885), cases; 2 *id.* 78–82 (1886), cases; 1 Story, Eq. § 157.

[3] Brown *v.* Bosworth, 58 Wis. 339 (1883), Taylor, J.; Hurd *v.* Hall, 12 *id.* *124–28 (1860), cases, Dixon, C. J.

[4] Allen *v.* Galloway, 30 F. R. 467 (1887), cases.

[5] L. *mitis*, soft, mild.

[6] Bradner *v.* Faulkner, 93 N. Y. 515, 518 (1883).

[1] [Angell, Ins. § 136; Harris *v.* York Mut. Ins. Co., 50 Pa. 341 (1855).

[2] County of Allegheny *v.* Gibson's Son & Co., 90 Pa. 397, 404 (1879): Pittsburgh Riot of July 20–24, 1877. See also Solomon *v.* Kingston, 24 Hun, 562 (1881); Hart *v.* Bridgeport, 13 Blatch. 289 (1876); Wing Chung *v.* Los Angeles, 47 Cal. 351 (1874); Atchison *v.* Twine, 9 Kan. 356 (1872); Dale County *v.* Gunter, 46 Ala. 118 (1871); Baltimore *v.* Poultney, 25 Md. 107 (1866); Darlington *v.* New York City, 31 N. Y. 187–89 (1865); 16 Alb. Law J 109 (1877), cases and statutes; Wis. Act 1886.

[3] 4 Johns. Ch. 472.

[4] 4 Kent, 513; 2 *id.* 67; 2 Greenl. Ev. § 668; Story Confl. L. §§ 376, 424.

MODE. The manner in which a thing is done: as, the mode of proceeding, the mode of process.[1] See MODUS.

Mode of operation. In specifications for letters patent, where the invention falls within the category of machines, a claim for the mechanism and also for the mode of operation generally, is void.[2]

MODEL. A copy or imitation of the thing intended to be represented.[3]

A model of an invention need not be furnished, unless required by the commissioner of patents; and, when required, it is not to exceed one foot in any of its dimensions, except as to working models of complicated machines.[4] See INVENTION.

MODERATE.[5] 1. L. *adv.* Moderately; reasonably.

Moderate castigavit. He punished with moderation.

A plea justifying a battery by one who has a right to correct another. See BATTERY.

2. Eng. *adj.* Reasonable; proper.

What is a "moderate speed" for a vessel depends not upon the speed of the vessel herself, but upon the position she is in, whether in a crowded channel or on the open sea.[6]

MODIFICATION. See CONTRACT.

MODUS. L. Manner; way.

Modo et forma. In manner and form. See MANNER.

Modus et conventio vincunt legem. Manner and agreement overrule the law. The terms and effect given to an agreement, not contrary to law, may control a rule of law.[7] See CONVENTIO.

Modus legem dat donationi. The manner gives law to a gift. A donor may attach to his gift such condition as he pleases.[8]

MOIETY.[9] A half; an undivided half.

Joint tenants are said to hold by moieties. See PARTITION; ENTIRETY.

Moieties, being half of the penalty or forfeiture, were formerly paid to informers under the laws forbidding smuggling. The act of June 22, 1874, abolished the practice, directed that all fines should be paid into the Treasury, and that whatever compensation might be due to informers should be reported to Congress for action.[10]

[1] See 10 Wheat. 29; 9 Pet. 856; 14 *id.* 316; 16 *id.* 313; 1 How. 306.

[2] Hatch *v.* Moffitt, 15 F. R. 252 (1883).

[3] State *v.* Fox, 25 N. J. L. 602 (1856).

[4] See R. S. § 4930.

[5] L. mŏd-e-rā'(or rä')-tŭs. Eng. mod'-ĕr-āte.

[6] The Elysia, 46 L. T. 840 (1882).

[7] 13 Pick. 491; 22 N. Y. 252; 59 Pa. 389.

[8] Broom, Max. 459; Whart. Max. 259.

[9] F. *moitié;* L. *medietatem*, a half.

[10] 1 Sup. R. S. p. 77; United States *v.* Auffmordt, 19 F. R. 898, 898 (1884).

MOLLITUR. See MANUS.

MONASTERY. See DEATH, Civil.

MONEY. An universal medium, or common standard, by comparison with which the value of all merchandise may be ascertained; a sign which represents the respective values of all commodities.[1]

In its strict technical sense, coined metal, usually gold or silver, upon which the government stamp has been imposed to indicate its value; in its more popular sense, any currency, tokens, bank-notes, or other circulating medium, in general use as the representative of value.[2]

A generic term; includes, but is not confined to, coin; whatever is lawfully and actually current in buying and selling, of the value and as the equivalent of coin. By universal consent, bank-notes, lawfully issued, actually current at par in lieu of coin, are money. "Paper money" is as accurate an expression as "coined money."[3]

The lawful currency of a country; that which may be tendered and must be received in discharge of a subsisting debt.[4]

A simple bequest of "money" will not carry securities. When it can be gathered from the will that the testator used the word in the sense of personal estate, that intention will be given effect.[5]

Power to coin and regulate the value of money is one of the ordinary prerogatives of sovereignty. The power is vested in the national government in order to produce uniformity of value and to prevent the embarrassment of a perpetually fluctuating medium.[6]

Lawful money. "Lawful money of the United States" is lawful money of any State or Territory.[7]

[1] 1 Bl. Com. 276, 329; 2 *id.* 446; 3 *id.* 231; 2 Story, Const. § 1118.

[2] Kennedy *v.* Briere, 45 Tex. 309 (1876), Moore, A. J.; Block *v.* State, 44 *id.* 622 (1876).

[3] Klauber *v.* Biggerstaff, 47 Wis. 557 (1879), Ryan, Chief Justice.

[4] Morris *v.* Edwards, 1 Ohio, 204 (1823). See also 2 Cranch, C. C. 43; 3 T. B. Mon. 166; 15 Pick. 173; 34 Mich. 490; 6 N. J. L. 226; 5 Humph. 140; 71 Ala. 554.

[5] Glendenning *v.* Glendenning, 9 Beav. 324 (1846); Rogers *v.* Thomas, 2 Keen, *3 (1837); Dowson *v.* Gaskoin, *ib.* *14 (1837); Smith *v.* Davis, 1 Grant, 158 (1858); Paul *v.* Ball, 31 Tex. 10 (1868); Blood *v.* Fairbanks, 48 Cal. 171 (1874); Smith *v.* Burch, 92 N. Y. 231–34 (1883), cases; 2 Redf. Wills, 111, 437; Jarm. Wills, Ch. 24; 2 Williams, Ex. 1025.

[6] 2 Story, Const. § 1122; Legal Tender Cases, 12 Wall. 602 (1870); 1 Bl. Com. 276.

[7] Cocke *v.* Kendall, Hempst. 236 (1834); 1 Dall. *125, 175; 7 Wall. 247.

Nothing is "lawful money of the United States" but gold or silver coin, United States treasury notes, or fractional currency. National bank notes are not such money.[1] See further TENDER, 2, Legal.

The notes issued by the Confederate States had no real value; they were made current as dollars by irresistible force. They were the only measure of value the people had, and their use was a matter of almost absolute necessity. This use gave them a sort of value, insignificant and precarious enough it is true, but always having a sufficiently definite relation to gold and silver, the uniform measure of value, that it was always easy to ascertain how much gold and silver was the equivalent of a sum expressed in this currency. The notes were considered as if issued by a foreign government temporarily occupying our territory. Contracts for payments in this currency were not regarded for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They had no necessary relation to the hostile government. They were transactions in the ordinary course of civil society, and, though they might indirectly and remotely have promoted the ends of the unlawful government, were without blame, except when proved to have been entered into with an actual intent to further invasion or insurrection. Such contracts should be enforced after the restoration of peace.[2]

Deferred payments under a contract for the sale of land, made in 1856, came due during the war and were paid to the representative of the vendor in Confederate money. *Held*, that, as against the heirs of the vendor who did not ratify it, the payment did not extinguish the indebtedness: that lawful money of the United States was contemplated.[3]

Money bills. In the constitution of Massachusetts, bills before the legislature that transfer money or property from the people to the State; not bills that appropriate from the treasury of the State. Bills for revenue.[4]

Money counts. Claims in an action of *assumpsit* (q. v.) for money expended in behalf of the defendant or received by him for the plaintiff.[5] See COUNT, 4 (1), Common.

Money judgment. A judgment for a sum of money, rather than for other property. Opposed to *personal* judgment.

Money made. See MAKE, 7.

Money-order. The act of June 8, 1872, c. 355, provided for the establishment of the money-order system of the United States.[1]

Moneyed capital. As used in Rev. St., § 5219, forbidding a State to tax shares of stock in national banks at a greater rate than is assessed upon other "moneyed capital" in the hands of individual citizens of the State, embraces capital employed in national banks, and capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money.

It does not include moneyed capital in the hands of a corporation, even if its business be such as to make its shares moneyed capital when in the hands of individuals, or if it invests its capital in securities payable in money.[2]

Moneyed corporation. See CORPORATION.

Moneys. Is not more extensive than "money."[3]

Public money. In the statutes of the United States, ordinarily, the money of the government, received from the public revenues or intrusted to its officers charged with the duty of receiving, keeping, or disbursing the same.[4] See REVENUE.

See APPROPRIATE, 1 (3); ATTACH, 2; AVAILABLE; BAGGAGE; BANK, 2; CAPITAL, 2; CHATTEL; CHECK; CIRCULATION; CONDEMNATION; COIN; CONVERSION, 2; CORRUPTION; CREDIT, Bill of; CURRENCY, 2; DEPOSIT, 2; DOLLAR; DUE; GOODS; GREENBACK; IDENTITY, 2; INCOME; INTEREST, 3; INVEST, 2; PAYMENT; POUND, 1; PRICE; PURCHASE-MONEY; SPECIE; SUM; TAX, 2; TREASURE-TROVE; USURY. Compare ASS.

MONITION.[5] A process, in the nature of a summons, issued by courts proceeding according to the civil law; in particular, by admiralty courts.[6]

[1] Hamilton v. State, 60 Ind. 194 (1877).

[2] Thornington v. Smith, 8 Wall. 11-13 (1868), Chase, C. J.; Effinger v. Kenney, 115 U. S. 566, 569-76 (1885); Wilmington, &c. R. Co. v. King, 91 *id.* 3 (1875); Stewart v. Salamon, 94 *id.* 434 (1876); Cook v. Lillo, 103 *id.* 792 (1880); Rives v. Duke, 105 *id.* 140 (1881).

[3] Opie v. Castleman, 32 F. R. 511 (1887), Jackson, J.

[4] Opinion of the Justices, 126 Mass. 601, 593 (1878).

[5] See Brand v. Williams, 29 Minn. 239 (1882).

[1] See R. S. §§ 4027-48; 1 Sup. R. S. p. 155. Compare 3 & 4 Vict. c. 96; 11 & 12 Vict. c. 88.

[2] Mercantile Bank v. New York, 121 U. S. 138, 155-57 (1887), Matthews, J. See on same subject, Bank of Redemption v. Boston, 125 *id.* 60 (1888); Hepburn v. School Directors, 23 Wall. 480, 483 (1874); First Nat. Bank of Utica v. Waters, 19 Blatch. 242 (1881); Evansville Nat. Bank v. Britton, 105 U. S. 322 (1881); Boyer v. Boyer, 113 *id.* 689 (1885); McMahon v. Palmer, 102 N. Y. 176, 188 (1886); Wasson v. First Nat. Bank of Indianapolis, 107 Ind. 206 (1886); Richards v. Town of Rock Rapids, 31 F. R. 508 (1887); Tennessee v. Whitworth, under TAX, 2.

[3] Mann v. Mann, 14 Johns. *12 (1816); 1 Johns. Ch. 231; 9 Barb. 35; 4 Jones, Eq. 244.

[4] Branch v. United States, 13 Ct. Cl. 289 (1876).

[5] L. *monere*, to make to think, advise.

[6] See St. Louis v. Richeson, 76 Mo. 484 (1883).

General monition. A citation or summons to all persons interested to appear and show cause why the libel should not be sustained and the prayer for relief granted. **Special monition.** A similar warrant giving special notice to persons named, of the pendency of the suit, the grounds of it, and the time and place of trial. **Mixed monition.** Contains directions to all persons interested and a special summons to particular persons.[1]

Acts of Congress and the rules and practice of the courts prescribe the time and manner of notice and service of the several writs. A writ may issue upon libel or information against a promissory note to attach, seize, or arrest it.[2] See RES, 2.

MONK. See DEATH, Civil.

MONOGRAPH.[3] A discourse or treatise, frequently in pamphlet form, upon a special subject, usually a branch to a more general division; as, on the removal of causes from a State court to the United States circuit court. Whence monographic, monographical.

MONOMANIA. See MANIA.

MONOPOLY.[4] A license or privilege allowed by the sovereign for the sole buying and selling, making, working, or using of anything whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before.[5]

An exclusive right granted to a few, of something which was before of common right. Lord Coke's definition is "an institution by the king, by his grant, commission, or otherwise, to any persons or corporations, of or for the sole buying, selling, making, working or using of every thing, whereby any persons or corporations are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade."[6]

A grant which gives to one person, or to one association of persons, an exclusive right to buy, sell, make, or use a given thing or commodity, or to pursue a designated employment.[1]

The prerogative of granting such rights having been abused, the courts adjudged them illegal,[2] and Parliament, by statute of 21 James I (1624), c. 3, abrogated the practice, except with respect to patents for fourteen years. A patent resembles a contract more nearly than it resembles a monopoly, in the common-law sense of the latter term.[3]

All such grants relating to any known trade or manufacture have been held by all the judges of England to be void at common law as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it in the power of the grantees to enhance the price of commodities.[4]

A legislative grant of an exclusive right to supply water or gas to a municipality and its inhabitants is a grant of a franchise vested in the State, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the Constitution from impairment. Such franchise is violated by a grant to an individual of the right to supply his premises with water (or gas) by the same means, namely, by pipes laid through the public streets. In making such grants, a State legislature does not part with the police power and duty of protecting the public health, the public morals, and the public safety, as one or the other may be involved in the exercise of that franchise by the grantee.[5]

Though the use of a street for water mains may not be of common right, yet when the use would assist in the maintenance of a claim of exclusive right to sell water, the courts, in view of the constitutional declaration that monopolies "shall never be allowed," will give no sanction to a contract entered into by the city resulting in a monopoly. The exercise of such a franchise, involving, as it does, a use of the public streets, is subject to control.[6]

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[1] [Dunlap, Adm. Pr. 132.

[2] Pelham *v.* Rose, 9 Wall. 103 (1869).

[3] Gk. *mŏnŏs*, single, one; *graphein*, to write.

[4] Gk. *mŏnŏs*, sole, exclusive; *pōlein*, to sell.

[5] 4 Bl. Com. 159.

[6] Charles River Bridge *v.* Warren Bridge, 11 Pet. 607 (1837), Story, J.; 3 Coke, Inst. 181. See also Slaughter-House Cases, 16 Wall. 102 (1872).

[1] City of Benham *v.* Benham Water Co., 67 Tex. 561 (1887), Stayton, A. J.

[2] Case of Monopolies (Darcy *v.* Allein), 6 Coke, 84 (1601). See Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 761 (1884); Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 36 (1856); Slaughter-House Cases, *infra*.

[3] Pennock *v.* Dialogue, 2 Pet. 18 (1829); Gayler *v.* Wilder, 10 How. 494 (1850); Turrill *v.* Michigan, &c. R. Co., 1 Wall. 491 (1863); 111 U. S. 763.

[4] Slaughter-House Cases, 16 Wall. 102 (1872), Field, J. dissenting: 18 *id.* 138 (1873). See also 19 Pick. 54; 13 Allen, 372; 1 Wash. T. 284.

[5] New Orleans Water-Works Co. *v.* Rivers, 115 U. S. 674 (1885), Harlan, J.; Louisville Gas Co. *v.* Citizens' Gas Co., *ib.* 683, 691 (1885); New Orleans Gas Co. *v.* Louisiana Light Co., *ib.* 650 (1885); New Orleans Water-Works Co. *v.* Louisiana Sugar Refining Co., 125 *id.* 18 (1888). See also Memphis *v.* Water Co., 5 Heisk. 495 (1871). See generally Pullman Palace Car Co. *v.* Texas, &c. R. Co., 11 F. R. 625 (1882); *ib.* 632–34, note.

[6] [City of Benham *v.* Benham Water Co., 67 Tex. 561 (1887). Compare Norwich Gas Co. *v.* Norwich City Gas Co., 25 Conn. 19 (1856); State *v.* Cincinnati Gas Co., 18

Plaintiff by its charter was given the exclusive horse-railway franchise of Omaha for fifty years. Defendant, under a city ordinance, consented to by the people, undertook to lay a cable tramway on streets occupied by the plaintiff. The court refused to enjoin the defendant, holding that the grant of the monopoly was of forms of transportation then known, and not of such as might subsequently be devised.[1]

"The fuel company has placed itself in the position of seeking to obtain from the railroad company, not merely favorable rates, but a discrimination against other parties. The result will be the building up of a monopoly in the coal business. A party who voluntarily enters into such a contract is in no position to ask the courts that anything be strained in his behalf. If the fuel company could make similar contracts with other transportation companies, running to other fields, it would soon be master of the coal business of the northwestern country. It would have the monopoly of that business, and could dictate prices to the consumer and starvation wages to the producers; and, when the first contracts had expired, it could dictate transportation rates to the railroad companies. . . It is impossible to disintegrate the contract, and say that one part is good and the other bad. The parties entered into it as a whole, and the courts should not try to divide it in order to uphold parts. If one part is void and the rest valid, the contract must be read as an entirety, and the whole declared void. Any other doctrine would result in building up monopolies. Persons who enter into such contracts need never expect, no matter what the conduct of the other party, recognition in courts of justice."[2]

See COMBINATION, 2; HAPPINESS; POLICE, 2; PRIVILEGE, 1, Special; RAILROAD; TRADE-MARK; TRUST, 2.

MONSTRANS DE DROIT. F. Manifestation or plea of right; showing title.

A method, at common law, of obtaining possession or restitution from the crown of either real or personal property. When the right of the party, as well as the right of the crown, appears upon record, that party shall have *monstrans de droit*, which is putting in a claim of right grounded upon facts already acknowledged and established and praying the judgment of the court, whether the king or his subject has the right. The remedy was extended by statutes to almost all cases where a subject based his claim against the crown upon an inquisition of office. When the evidence of the subject's right was not of record, he formerly presented a "petition *de droit*" in which he set out the facts constituting his claim, whereupon a commission issued to inquire of the truth of the suggestion. Either proceeding could be prosecuted in the chancery or exchequer courts. The judgment, if against the crown, was that of *ouster le main* or *amoveas manus*.[1]

MONTH. At common law, twenty-eight days, unless otherwise expressed: a uniform period, falling into a quarterly division of weeks.[2]

Astronomical month. One-twelfth of the period during which the sun passes through the zodiac.

Calendar month. A month known as January, February, March, etc. See CALENDAR, 1.

Civil month. The same as solar month.

Lunar month. Twenty-eight days, the period of one revolution by the moon.

Solar month. One of the months in the Gregorian calendar, of twenty-eight to thirty-one days.

Monthly. Once each calendar month; as, a monthly trip.[3]

The common law construed "month" as a lunar month; the general commercial law, as a calendar month. The common-law courts in time adopted the latter rule in construing commercial instruments, while they adhered to the former rule in construing common-law papers.[4]

The term "month" is not technical. When parties have not given it a definition, and there is no legislative provision on the subject, it will be construed in its ordinary sense of calendar month.[5]

When parties contract for the performance of an act during the first *half* of a month of thirty-one days, the act is to be done by noon of the sixteenth day.[6]

A letting by parol for a sum certain per month, without anything said about a year, constitutes a lease from month to month. If the tenant holds over for more than a year he remains a tenant from month to month; and one month's notice to him to quit is sufficient.[7]

Ohio St. 262 (1868); Memphis *v.* Memphis Water Co., 5 Heisk. 495 (1871); Crescent City Gas Co. *v.* New Orleans Gas Co., 27 La. An. 138 (1875).

[1] Omaha Horse-Railway Co. *v.* Cable Tramway Co., 30 F. R. 324 (1887), Brewer, Cir. J. Compare Bridge Proprietors *v.* Hoboken Company, 1 Wall. 116 (1863).

[2] Burlington, Cedar Rapids & Northern R. Co. *v.* Northwestern Fuel Co., 31 F. R. 657, 659 (1887), Brewer, J. On limitation on grants, see 26 Am. Law Reg. 65-71 (1887), cases.

[1] 3 Bl. Com. 256-57; 3 Steph. Com. 656-57; Brown *v.* Commonwealth, 5 Leigh, *516 (1834); Flott *v.* Commonwealth, 12 Gratt. 576 (1855).

[2] 2 Bl. Com. 141.

[3] Pacific Mail S. Co. *v.* United States, 18 Ct. Cl. 88 (1883).

[4] See Redmond *v.* Glover, Dudley, 107 (Ga., 1832); 2 Whart. Contr. § 896, cases; Bish. Contr. § 1339, cases.

[5] Sheets *v.* Selden, 2 Wall. 190 (1864). See also 2 Dall. 302; 4 *id.* 143; 3 Cranch, C. C. 218; 21 Ala. 42; 31 Cal. 173; 5 Conn. 357; 2 Harr., Del., 548; 16 Ind. 275; 8 Me. 163; 17 Md. 260; 2 Mass. 170; 4 *id.* 460; 19 Pick. 522; 37 Miss. 567; 72 N. C. 146; 29 N. H. 385; 4 Wend. 512; 10 *id.* 393; 8 Cow. 260; 1 Johns. Cas. 99; 3 Johns. Ch. 74; 15 Johns. 119, 358; 28 N. Y. 444; 6 W. & S. 179; 6 S. & R. 539; 2 Vt. 138; 1 Wash. T. 518.

[6] Grosvenor *v.* Magill, 37 Ill. 240 (1865).

[7] Hollis *v.* Burns, 100 Pa. 206 (1882); Taylor, Land. & T. § 57.

MONUMENT.[1] 1. A memorial; a permanent landmark.

Artificial monument. A mark made by man; as, a post, or a clearing.

Mural monument. A memorial made in a wall.

Natural monument. Some natural object, like a spring, a stream, or a tree.

In the determination of monuments, boundaries control courses and distances, because less liable to mistakes. But the rule ceases with the reason for it. If they are inconsistent with the calls for other monuments, and it is apparent that they were inadvertently inserted, they will be rejected as false and repugnant.[2] See further BOUNDARY; HEARSAY, 3.

2. Something designed to perpetuate the memory of a person or event.[3]

MOOT.[4] To debate, make the subject of contention.

For exercise in arguing; for the purpose of pleading or trying mock causes or issues: as, a moot court.

Moot; mooted. Debated, undecided: as, a mooted question.

The courts will not give an opinion upon a moot or fictitious case.[5] See FICTITIOUS.

MORAL.[6] 1. Conformed to rules of right: as, a moral character, *q. v.*

2. Condemned on ethical considerations; perpetrated or existing in fact: as, moral fraud, *q. v.*

3. Not of legal sanction; not imposed or enforced by positive law; opposed to *legal, immoral:* as, a moral — consideration, duty, obligation, *qq. v.* See also RIGHT, 1.

4. Inhering in the affections, inclinations, and temper: as, moral insanity, *q. v.*

5. Sufficient in degree to authorize action; established by proof, beyond a reasonable doubt: as, moral — certainty, evidence, proof, *qq. v.*

Morals. Manners, conduct, deportment.

Offenses against good morals include indecency, obscenity, lascivious carriage, exposures of the person, public drunkenness, gambling, and the like.[7]

A contract opposed to good morals, that is, sound morality, will not be enforced by the courts; as, an obligation resting upon any immoral consideration, a contract which is an incentive to crime, offensive to decency, or pernicious in its consequences. See LEGAL, Illegal.

As the end of human law is to regulate the behavior of men as members of society, they have no concern with other than social or relative duties. The man who keeps his wickedness to himself, and does not offend against the rules of public decency, is out of the reach of such laws. But if he makes his vices public, though they be such as seem principally to affect himself, they then become, by their example, of pernicious effects to society; and, therefore, it is then the business of human laws to correct them. Public sobriety is a relative duty, enjoined by the laws.[1]

See OBSCENE; POLICE, 2; RELIGION; SUNDAY.

MORE OR LESS. The addition of these or like qualifying words provides against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight.[2]

They qualify a statement of an absolute and definite amount, so that neither party to a contract can avoid it by reason of a deficiency or surplus occasioned by no fraud or want of good faith, if there is a reasonable approximation to the quantity named. They create "an absolute contract for a specific quantity within a reasonable limit."[3]

Where land is sold at a fixed price per acre, and the vendor misrepresents the number of acres, the vendee is entitled to an abatement on the purchase price, though the deed contains the phrase "more or less."[4]

Where a person purchased at a judicial sale, held to pay the debts of a decedent, one hundred and twenty-eight acres of land in a tract supposed to contain forty acres, his heirs may recover the excess or enforce payment therefor.[5] See ABOUT; DESCRIPTION, 1; ESTIMATE; LEX, De minimis, etc.

MOREOVER. See ALSO.

MOREY LETTER. See page 621, n. 2.

MORMONISM. See POLYGAMY.

MORTAL. See WOUND.

MORTALITY, BILL OF. 1. An official record of deaths.

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[1] L. *moneo*, to remind, advise.

[2] White *v.* Luning, 93 U. S. 524–25 (1876); Land Co. *v.* Saunders, 106 *id.* 316 (1880); Morse *v.* Rogers, 118 Mass. 578 (1875), cases.

[3] See Mead *v.* Case, 33 Barb. 204 (1860); Cooke *v.* Millard, 65 N. Y. 363 (1875).

[4] A. S. *mot*, a meeting.

[5] Bartemeyer *v.* Iowa, 18 Wall. 135 (1873).

[6] L. *mos, mor-*, manner, custom.

[7] See 2 Bl. Com. 42; 36 N. Y. 226.

[1] 1 Bl. Com. 124; 4 *id.* 41–42; 2 Steph. Hist. Cr. L. Eng. 76.

[2] Brawley *v.* United States, 96 U. S. 172, 171 (1877), Bradley, J.; Norrington *v.* Wright, 115 *id.* 204 (1885).

[3] Cabot *v.* Winsor, 1 Allen, 550 (1861), Bigelow, C. J. See also 1 Pet. C. C. 49; 4 Mas. 418–22, cases; 99 Mass. 232–35, cases; 108 *id.* 344; 9 Ct. Cl. 244; 11 *id.* 522; 17 Ves. 394; 2 B. & Ad. 106; 19 Ark. 102; 69 Ga. 511; 3 Marsh. J. J. 421; 5 *id.* 181; 5 Bush, 663; 29 Md. 305; 3 Md. Ch. 24; 4 *id.* 95; 24 Miss. 597; 24 Mo. 574; 40 *id.* 79; 62 *id.* 405; 4 N. J. E. 212; 14 N. Y. 143; 83 *id.* 116; 9 S. & R. 80; 13 *id.* 143; 24 Tex. 345; 59 *id.* 604; 21 W. Va. 333, 647; 81 Va 183; 12 Rep. 565.

[4] Tyler *v.* Anderson, 106 Ind. 189–91 (1886), cases: 24 Am. Law Reg. 570 (1885); *ib.* 574–80, cases.

[5] Miller *v.* Craig, 83 Ky. 623 (1886).

2. The district included in such record; as, that a person resides within the bill of mortality.[1]

MORTGAGE.[2] A transfer of property as security for a debt.[3]

In most of the States, not now regarded as a conveyance, but as a mere lien or incumbrance upon the property for the payment of a debt or the performance of some other pecuniary obligation.[4]

In effect, a sale with a power of defeasance, which may ultimately end in an absolute transfer of the title.[5]

The conveyance of an estate by way of pledge for the security of debt, and to become void on payment of it.[6]

The legal ownership is vested in the creditor; but, in equity, the mortgagor remains the actual owner, until he is debarred by his own default or by judicial decree.[8]

In equity, a mortgage is a security — an incident to the debt it secures. In law, as between the parties, it is a transfer of the legal title, leaving in the mortgagor a right to redeem.[7]

Mortgages are not sales, transfers or conveyances, in the usual acceptation of those terms, but securities for the payment of money.[8]

A mortgage is but a mere security for the debt, and collateral to it. The debt has an independent existence, and remains notwithstanding a release of the mortgage. The debt is the principal, the mortgage an incident, though not an indispensable incident. An assignment of the debt will, in equity, carry the mortgaged property with it.[9]

A mortgage is an estate held in dead pledge: where a man borrows a sum of money and grants the lender an estate in fee, on condition that if he repays the money on a day mentioned in the deed he may reenter on the estate; or (the more usual way) the lender will reconvey the estate to him. In case of non-payment, the land is forever dead and gone from the borrower and the lender's estate is no longer conditional but absolute. In effect, a mortgage is an estate defeasible upon a condition subsequent.[1]

An agreement to pay "a mortgage" refers to the mortgage debt.[2]

Mortgagor. He who makes a mortgage.[3]

Mortgagee. He to whom a mortgage is given.

The estate transferred is a trust, a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is, therefore, only in a loose and general sense that it is called a "lien;" and then only by way of contrast to an estate absolute, and indefeasible.[4] As between the mortgagor and strangers, the mortgage is a lien, a security, not an estate; as between the parties, or their privies, it is a grant which operates to transfer the legal title to the mortgagee, and leaves the mortgagor only the right to redeem. The legal title is in the mortgagee until redemption, and bills to redeem are entertained upon the principle that the mortgagee holds for the mortgagor when the debt has been paid or tendered.[6]

Under the old theory the mortgage was the conveyance of a conditional estate, which became absolute upon breach of condition. But the courts of equity, viewing the transaction as one of security and not of purchase, interfered and gave the mortgagor the right to redeem after a breach and forfeiture, upon discharge of the obligation within reasonable time. The mortgagee, after the close of the reasonable period unused, could sue to foreclose this equity of redemption. To this proceeding the holder of the equity was an essential party — his equity being regarded as the real and beneficial estate, subject to transfer and to seizure and sale. Hence, the owner of the property must be heard as to the existence of the obligation alleged, before a sale can be made.[6]

The obligation and the mortgage are inseparable, the latter being an incident. An assignment of the obligation carries the mortgage with it, while an assignment of the mortgage alone is a nullity. The mortgage can have no separate existence. When the obligation is discharged, the mortgage expires. This dependent relation is the controlling consideration, and takes a case out of the rule applied to choses in action.[7]

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[1] See 3 Bl. Com. 369; 1 Greenl. Ev. § 310.

[2] F. *mort*, dead; *gage*, pledge, *q. v.*

[3] Conard *v.* Atlantic Insurance Co., 1 Pet. 441 (1828), Story, J. May also be used in verbal senses, Brown *v.* National Bank, 44 Ohio St. 274 (1886).

[4] Terrell *v.* Allison, 21 Wall. 293 (1874), Field, J.; Neslin *v.* Wells, 104 U. S. 440 (1881).

[5] Willamette Manuf. Co. *v.* Bank of British Columbia, 119 U. S. 198 (1886), Miller, J.

[6] 4 Kent, 136; Cowles *v.* Dickinson, 140 Mass. 376 (1886); 49 Conn. 318-19; 2 Dak. 263; 34 La. An. 800; 10 S. C. 368-75.

[7] Marks *v.* Robinson, 82 Ala. 77 (1886), Stone, C. J.

[8] Judge *v.* Connecticut Ins. Co., 132 Mass. 523 (1882), Devens, J.; Friezen *v.* Allemania Fire Ins. Co., 30 F. R. 358 (1887).

[9] Hatch *v.* White, 2 Gall. 154 (1814), Story, J.

[1] [2 Bl. Com. 157; 1 Washb. R. P. 477. See also 2 Sumn. 533; 17 F. R. 778; 18 *id.* 391; 9 Cal. 407, 426; 10 Conn. 294; 6 Del. 326; 4 Fla. 347; 17 Ill. 261; 27 Ind. 472; 44 Me. 299; 55 *id.* 355; 6 Gray, 153; 83 Ky. 395; 7 Mich. 527; 6 Neb 389; 11 N. H. 574; 34 N. J. L. 502; 9 N. Y. 213; 23 Wend. 668; 38 Tex. 442; 9 Wis. 508; 12 *id.* 420. As to essential formalities, see 23 Cent. Law J. 221 (1886).

[2] Tuttle *v.* Armstead, 53 Conn. 181 (1885).

[3] Pronounced as if spelled mortgage-or, *i. e.*, gej-or. Mortgage*or* and *-er* are rare, in law publications. Compare PLEDGOR.

[4] Conard *v.* Atlantic Ins. Co., 1 Pet. 441 (1828), Story, Justice.

[6] Brobst *v.* Brock, 10 Wall. 529 (1870), Strong, J.; Hutchins *v.* King, 1 *id.* 58 (1863); 107 U. S. 392.

[6] Terrell *v.* Allison, 21 Wall. 292 (1874), Field, J.

[7] Carpenter *v.* Longan, 16 Wall. 274 (1872), Swayne, J.; Myer *v.* Western Car Co., 102 U. S. 10 (1880).

A bond being the principal thing containing the obligation, and a mortgage a security to insure the performance of that obligation, the terms of the bond control.[1]

The mortgagor may sell fixtures, timber, or minerals; otherwise, the means of paying the lien would be taken from him, and a purchaser of the products of the realty would have to get the assent of lien creditors, to be safe from constructive fraud.[2]

It is the land that is pledged, not the rents and profits; they belong to the tenant in possession, unless otherwise agreed. As long as the mortgagor is allowed to remain in possession, he is entitled to the income of the estate. If the mortgagee wishes to receive the rents he must take means to obtain the possession. The mortgagor contracts to pay interest, not rent.[3]

The mortgagee may sue on the obligation, bring ejectment, or file a bill for foreclosure and sale;[4] or, he may, perhaps, enter upon the land.[5]

Under a decree of foreclosure, the title of the purchaser takes effect by relation to the date of the mortgage and defeats any subsequent lien.[6]

In a "pledge," the possession passes out of the pledgor; in a mortgage it need not pass. Again, the general property passes by a mortgage; by a pledge, only a special property passes.[7] See PLEDGE.

A "conditional sale" is a purchase with an agreement to resell; in a mortgage a debt still subsists.[8] See SALE, Conditional.

An instrument "once a mortgage is always a mortgage."[9]

The interest of the mortgagee is not subject, at common law, to levy and sale.[10]

A court of equity will not undertake to determine the validity of a title prior to the mortgage, and adverse to both mortgagor and mortgagee.[11]

Chattel mortgage. A mortgage of personal property.[12]

A bill of sale with a defeasance incorporated in it.

A seal is not necessary. If the transaction rests on good consideration and is *bona fide*, the mortgagor may retain possession,—in obedience to the wants of trade.[1]

The nature of the agreement must be such that by the mere non-performance of the condition by the mortgagor the title will be transferred to the mortgagee. In a "pledge," possession only is transferred.[2]

Common mortgage. A mortgage that, under common-law rules, cannot be foreclosed before the lapse of a year and a day after breach of the condition. **Sharp or tight mortgage.** Allows no days of grace, or a limited number (as, thirty, sixty, or ninety days), after a default in paying interest, principal, premiums of insurance, taxes, etc., before foreclosure proceedings may be begun.

These distinctions may obtain in localities only, and be merely colloquial.

Equitable mortgage. 1. A mortgage of an equitable interest. 2. The lien of a vendor of realty for unpaid purchase-money, *q. v.* 3. A lien upon realty, recognized in a court of equity, as security for money loaned or due; as, in the case of a deposit of title-deeds with a creditor. **Legal mortgage.** A conveyance expressly intended to be a mortgage.

It may be laid down as a rule, subject to few exceptions, that wherever a conveyance, an assignment, or other instrument transferring an estate, is originally intended between the parties as a security for money, or for any other incumbrance, whether this intention appears from the same instrument or from any other, it is always considered in equity as a mortgage, and, consequently, is redeemable upon the performance of the conditions or stipulations thereof.[3]

A court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. The court looks beyond the terms of the instrument to the real transaction, and any evidence, oral or written, tending to show this is admissible. While the written language used cannot be qualified or varied from its natural import, inquiry into the object of the parties in executing the instru-

[1] Indiana, &c. R. Co. *v.* Sprague, 103 U. S. 761 (1880).

[2] Angier *v.* Agnew, 98 Pa. 589 (1881), cases.

[3] Kountz *v.* Omaha Hotel Co., 107 U. S. 392 (1882), Bradley, J.; Teal *v.* Walker, 111 *id.* 250 (1884); Freedman's Saving Co. *v.* Shepherd, 127 *id.* 502 (1888), cases. As to lien of mortgagee on insurance money, see 88 Alb. Law J. 188-191 (1888), cases.

[4] Gilman *v.* Illinois, &c. R. Co., 91 U. S. 617 (1875), cases.

[5] Brobst *v.* Brock, 10 Wall. 530 (1870).

[6] Osterberg *v.* Union Trust Co., 93 U. S. 428 (1876).

[7] Huntington *v.* Mather, 2 Barb. 543 (1848); Chamberlain *v.* Martin, 43 *id.* 610 (1865).

[8] Slowey *v.* McMurray, 27 Mo. 116 (1858); Flagg *v.* Mann, 2 Sumn. 527 (1837). Mortgages as choses in actions, 37 Alb. Law J. 44-46 (1888), cases.

[9] Dean *v.* Nelson, 10 Wall. 171 (1869).

[10] Morris *v.* Barker, 82 Ala. 274-75 (1886), cases.

[11] Hefner *v.* Northwestern Mut. Life Ins. Co., 123 U. S. 75 (1887), cases, Gray, J. On the assumption of mortgages, see 18 Cent. Law J. 23-27 (1884), cases.

[12] 2 Kent, 516.

[1] Gibson *v.* Warden, 14 Wall. 247 (1871), Swayne, J.; Robinson *v.* Elliott, 22 *id.* 523 (1874); 8 W. Va. 40.

[2] Parshall *v.* Eggart, 52 Barb. 371 (1868); Wright *v.* Ross, 36 Cal. 428, 441 (1868); Evans *v.* Darlington, 5 Blackf. 322 (1840); 4 Kent, 138. As to description of property, see 24 Cent. Law J. 339 (1887), cases.

See also 18 Ark. 112; 36 Cal. 428; 8 Ill. 463; 16 Ind. 390; 97 Mass. 452, 489; 7 Mich. 47; 6 Ired. L. 319; 9 N. Y. 217; 54 *id.* 23; 8 Johns. 98; 23 Wend. 668; Penn. Act 26 April, 1887: P. L. 32.

[3] 2 Story, Eq. § 1018; 2 Washb. R. P. 479, cases; 4 Kent, 142; 3 Pars. Contr. 280.

ment is always permissible. This serves to prevent fraud or oppression, and to promote justice.[1]

First mortgage. Implies a lien prior to all other liens. **Second mortgage.** Is without intervening liens between it and the first mortgage.[2]

Mortgage-bonds. As individual holders of mortgage-bonds issued by a railroad corporation, and secured by the same mortgage, have mutual contract interests and relations, there is nothing inequitable, when the power exists, in subjecting a small minority to the will of a decided majority, in re-organizing the mortgage indebtedness when the corporation is embarrassed.[3] See *Railroad-Mortgage.*

Purchase-money mortgage. A mortgage upon realty given to secure a balance due upon a conveyance thereof.

Favored over mortgages for loans. See PURCHASE-MONEY.

Railroad-mortgage. Railroad-mortgages constitute a peculiar class of securities. A trustee is appointed who represents the mortgagees. In the execution of his trust he may exercise his discretion within the scope of his powers. He is to follow the voice of the majority of the bondholders: they acting in good faith, and their request being consistent with the nature of the trust. He represents them in legal proceedings, and whatever binds him binds them.[4]

The trustees of a railroad-mortgage having obtained a decree for possession of the road are also entitled, there being no debts for current expenses, to receive profits earned since the suit was begun, the effect of the decree being to establish their right of possession when suit was entered.[5]

See ADVANCES, Future; CONDITION; DEFEASANCE; EMBLEMENTS; FIXTURE; FORECLOSURE, 1; LIEN, Equitable; MARSHAL, 2, Liens; PLEDGE; RECEIVER, 2; RECORD; REDEEM; RES, In rem; TABULA; TACKING; TERRE-TENANT; UNDER AND SUBJECT.

MORTMAIN.[1] Originally, a purchase of land by any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence of which the lands became perpetually inherent in one "dead hand," occasioned the appellation to be applied to such alienations alone.[2]

The members of ecclesiastical bodies were at that time reckoned as "dead" in law.

The statutes in England which prohibit corporations from taking lands by devise, even for charities, except in special cases, are called the Statutes of Mortmain, *mortua manu*, for the reason of which Sir Edward Coke offers many conjectures.[3]

The word now designates all prohibitory laws which limit, restrain, or annul gifts, grants, or devises of lands or other corporeal hereditaments to charitable uses.[3]

Amortize, or admortize. To alien lands in mortmain. Whence amortization, amortizement.

By allowing lands to become vested in objects endowed with perpetuity of duration, in former times, the lords were deprived of escheats and other feudal profits, and the general policy of the common law, which favored the free circulation of property, was frustrated, although the power of purchasing lands was incident to corporations. Numerous statutes restraining alienation in mortmain were passed, the effect of which was to deprive corporations of the power of acquiring realty without a general or particular license from the crown. These restraints were subsequently relaxed in particulars, including gifts for purposes of charity. The statute of 9 Geo. II (1736), c. 36, is known as the Mortmain Act, by pre-eminence.[4]

The English statutes have not been re-enacted in this country, except in Pennsylvania, where they have extended to prohibiting the dedication of property to superstitious uses, and to grants to corporations without a statutory license.[5] See CHARITY, 2.

MORTUARY. A customary gift due to the minister in many parishes, on the death of a parishioner.[6]

MORTUUS. L. Dead. See CAPUT, Mortuum.

[1] Peugh *v.* Davis, 96 U. S. 336 (1877), cases, Field, J.; Teal *v.* Walker, 111 *id.* 246 (1884), cases; Horbach *v.* Hill, 112 *id.* 144 (1884); Coyle *v.* Davis, 116 *id.* 108 (1885); Jackson *v.* Lawrence, 117 *id.* 681 (1886), cases; Cadman *v.* Peter, 118 *id.* 80 (1886), cases; Husheon *v.* Husheon, 71 Cal. 411–412 (1886), cases; Kemper *v.* Campbell, 44 Ohio St. 210 (1886); 1 Cranch, 218; 1 How. 118; 38 Ala. 643; 36 Me. 115; 21 Mo. 325; 38 N. H. 22; 18 N. J. L. 244; 2 N. M. 318; 7 Johns. Ch. 40; 20 Ohio, 464; 64 Pa. 319; 100 *id.* 18, 113; 6 Humph. 99; 59 Tex. 208, 425; 76 Va. 668; White & Tud. L. C., Am. ed., 241, cases.

[2] Green's Appeal, 97 Pa. 347–48 (1881); 79 *id.* 168; Minnesota, &c. R. Co. *v.* Sibley, 2 Minn. 24 (1858); Clark *v.* Edgar, 12 Mo. Ap. 353 (1882).

[3] Canada Southern R. Co. *v.* Gebhard, 109 U. S. 535 (1883).

[4] Shaw *v.* Little Rock, &c. R. Co., 100 U. S. 611–12 (1879), Waite, C. J.: 121 *id.* 86. See also Fosdick *v.* Schall, 99 *id.* 252 (1878); Burnham *v.* Bowen, 111 *id.* 776 (1884); Woodworth *v.* Blair, 112 *id.* 8 (1884).

[5] Dow *v.* Memphis, &c. R. Co. 124 U. S. 654 (1888), Waite, C. J.; Sage *v.* Memphis, &c. R. Co., 125 *id.* 361, 377 (1888). As to claims for labor and materials, over the lien of railroad-mortgages, see 21 Cent. Law J. 125–29 (1885), cases; as to foreclosure of, 20 Am. Law Rev. 867–88 (1886), cases.

[1] F. *mort main*, dead hand.

[2] 2 Bl. Com. 268; 1 *id.* 479.

[3] 2 Story, Eq. § 1137, note; Yates *v.* Yates, 9 Barb. 333 (1850); Plowd. 193.

[4] Perin *v.* Carey, 24 How. 495 (1860); Downing *v.* Marshall, 23 How. Pr. 84 (1861); 2 Bl. Com. 269; Williams, R. P. 67; 8 H. L. C. 712.

[5] Leazure *v.* Hillegas, 7 S. & R. *320 (1821); Goundie *v.* Water Co., 7 Pa. 239 (1847). See Christian Union *v.* Yount, 101 U. S. 353 (1879).

[6] [3 Bl. Com. 425.

Mortuum vadium. Dead pledge, *q. v.*

Mortuus est. He is dead,—a return to process.

MOTHER. See ANCESTOR; BASTARD; CONSANGUINITY; PARENT; PARTUS.

MOTION.[1] 1. Desire, will; instance.

A person does a thing of his "own motion," when he acts voluntarily, without being required to do it. And "mere motion" refers a court's objecting to a proceeding for irregularity, *sua sponte*,—*ex mero motu*, or *ex propria motu*.

2. An application to the court, by a party or his counsel, to obtain some rule or order which may become necessary in the progress of a cause.[2]

An application for a rule or order, made *viva voce* to a court or judge.[3]

It is distinguished from the more formal applications for relief by petition or complaint. The grounds of the motion are often required to be stated in writing and filed.[3]

Making such application is termed "moving" the court; and the motion itself is spoken of as granted or allowed, refused, denied, withdrawn, etc.

A motion is "of course" when it is a matter of mere routine; and "special," when granted after hearing had. It is "*ex parte*" when applied for by one party with no notice to his adversary; and "on notice" or "with notice" when opportunity to resist is afforded the adversary.

"Motion-day" is the time when motions are ordinarily entertained.

Movent. He who makes a motion before a court: as, the movent for a new trial. (Rare.)

Motions and rules may be defined in a general way as instruments or means of facilitating the progress of a cause or the transaction of the business of litigation, by correcting clerical steps, or amending errors not fatal; by accommodating the case to changes of circumstances since its commencement; by meeting exigencies unforeseen or unprovided for; by removing difficulties in the development of the case which stop progress; or by advancing the case in any way toward its final and proper disposition.[4]

MOTIVE. Inducement; incentive to action.

In cases of proof by circumstantial evidence, the motive for doing an alleged act often becomes not only material but controlling, and in such cases the facts from which the motive may be inferred must be proved.[1]

Litigation would be endless if the motives of those who are simply enforcing a legal claim were legitimate subjects of inquiry.[2]

See INTENT; MALICE; PREDOMINANT; PREMEDITATE; PROSECUTION, Malicious.

MOURNING. See ANNUS, Luctus.

MOVE. A consideration issuing from or furnished by a party is said to "move" from him.[3] See also MOTION.

Movable. That which can be changed in place, or carried from place to place. **Movables.** Such things in themselves considered. Opposed to *immovable, immovables.*

The law attaches no technical meaning to "movable property," used in a will. "Movable," applied to property, ordinarily signifies capable of being put out of one place into another; that the property is susceptible of locomotion or change of place. But this is predicable of that only which is corporeal or tangible. Obviously, a judgment is not of this character.[4]

"Movables," standing alone, comprehends personal property generally.[5]

See FIXTURE; MOBILIA; PERSONALTY.

MR.; MRS. See NAME, 1.

MULATTO. A person begotten between a white and a black; not, therefore, the issue of a white and a mulatto.[6] See COLOR; WHITE.

MULCT.[7] A fine imposed for an offense; a penalty.

Defendants in actions of tort, against whom damages are awarded, are sometimes said to be "mulcted in damages;" and parties who will be required to pay the costs of an issue or issues determined against them, as "mulcted in the costs."

MULE. See title CATTLE; HORSE.

MULIER PUISNE. See EIGN.

MULTIFARIOUSNESS.[8] Blending in one bill in equity matters which in their nature are distinct and independent.

Improperly joining in one bill distinct and independent matters, and thereby confounding them.[9]

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[1] L. *movere*, to move.

[2] [3 Bl. Com. 304.

[3] People *v.* Ah Sam, 41 Cal. 650 (1871); Funk *v.* Israel, 5 Iowa, 441 (1857).

[4] Mitchell, Motions & Rules, 10.

[1] People *v.* Bennett, 49 N. Y. 143-49 (1872), Church, Chief Justice.

[2] Chesley *v.* King, 74 Me. 175 (1882): 8 Gray, 409; 72 N. Y. 39; 24 Pa. 308; 27 Vt. 505; 32 *id.* 737.

[3] See 22 Wall. 507; 121 Mass. 529.

[4] Strong *v.* White, 19 Conn. 245 (1848), Storrs, J.; 96 Ill. 448.

[5] Penniman *v.* French, 17 Pick. 405 (1835).

[6] Inhabitants of Medway *v.* Inhabitants of Natick, 7 Mass. *89 (1810); Thurman *v.* State, 18 Ala. 278 (1850).

[7] L. *mulcta*, a fine.

[8] L. *multus*, many; *fari*, to speak: claiming various things.

[9] Story, Eq. Pl. §§ 271, 530; 104 U. S. 251; 98 *id.* 604.

Embracing in the same bill distinct matters, which do not affect all the defendants alike.[1]

A bill is subject to this defect, if one of two complainants has no standing in court, if they set up antagonistic causes of action, or the relief for which they respectively pray involves totally distinct questions, requiring different evidence and leading to different decrees.[2]

But charging different *sources* of right does not introduce the vice.[3]

It is impracticable to lay down any rule as to what constitutes multifariousness, as an abstract proposition. Each case must depend upon its own circumstances, and be left, necessarily, to the sound discretion of the court. It cannot be objected to, as of right, except by demurrer, plea, or answer; and not at all, at so late a period as the hearing, or in the appellate court. But it may be taken by the court *sua sponte*, when necessary to the administration of justice.[4]

As a rule, the court will not subject parties to the expense, vexation, and delay of several suits, where the transactions constituting the subject of the litigation, or out of which the litigation arises, are so connected by their circumstances as to render it proper and convenient that they should be examined in the same suit, and full relief given by one comprehensive decree.[5]

A different rule would often prove oppressive and mischievous, and result in no benefit to a litigant whose object was not simply to harass his adversary, but to ascertain his legal rights.[6]

MULTIPLICITY.[7] Instituting two or more actions having the same issue.

Obviated, in a court of equity, by a bill of peace; in a court of law, by a rule to consolidate the actions.

To prevent a multiplicity of suits at law, a court of equity will take cognizance of a matter in cases of account, agency, apportionment, general average, contribution, suretyship, confusion of boundaries, rents and profits, waste, and partnership.[8] See INTEREST, 1, Rei, etc.

MULTITUDE. Some authorities say that ten persons, or more, make a multitude; others, that the law has not designated the number.[1]

But two persons (riotous) are insufficient.[2]

MUNICIPAL.[3] 1. Pertaining to a city, or a community within a state, possessing rights of self-government: as, a municipal or municipal — aid, bond, corporation, court, lien, market, officer, ordinance, *qq. v.*

2. Pertaining to a free state: as, in municipal law, which at first referred to the customs of a free town, and then to the rule by which particular districts, communities, or nations were or are governed.[4] See LAW, Municipal; ORDINANCE, 1.

Municipality. 1. A division of a state for governmental purposes; a city, a municipal corporation,[5] *qq. v.*

2. The officers of a city, considered collectively.

MUNIMENT.[6] Means of supporting or defending; proofs: as, the muniments of evidence.[7]

Any written evidence by which the owner of land may defend his estate or title. Whence muniments of title, muniment room or office.

MURAL. See MONUMENT, 1.

MURDER.[8] The unlawful killing of another with malice.[9]

When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied.[10]

The killing of any person in the peace of the commonwealth, with malice aforethought, either express or implied by law.[11]

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[1] [Payne *v.* Hook, 7 Wall. 433 (1868), Davis, J.

[2] Walker *v.* Powers, 104 U. S. 245, 250 (1881), cases, Miller, J.; Daniell, Ch. Pr. 335.

[3] Welford, Eq. Pl. 98; Cumberland Valley R. Co.'s Appeal, 62 Pa. 227-28 (1869).

[4] Oliver *v.* Piatt, 3 How. 412, 411 (1845), cases, Story, J.; Story, Eq. Pl. § 747; Barney *v.* Latham, 103 U. S. 205 (1880); Hill *v.* Hill, 79 Va. 592 (1884).

[5] Sheldon *v.* Keokuk Packet Co., 10 Biss. 473 (1881), Harlan, J.: 8 F. R. 770; United States *v.* Union Pacific R. Co., 98 U. S. 604 (1878); De Wolfe *v.* Sprague Manuf. Co., 49 Conn. 292-98, 302 (1881); Mining Debris Case, 8 Saw. 628, 636 (1883): 16 F. R. 32; 8 *id.* 378, 703; 18 Blatch. 420; 19 *id.* 531; 30 Conn. 323; 68 Ga. 60; 14 Ill. 25; 2 Gray, 467; 9 Mich. 71; 32 N. H. 25; 58 *id.* 421; 66 Barb. 12; 13 R. I. 413.

[6] Potts *v.* Hahn, 32 F. R. 662 (1887).

[7] L. *multus*, many; *plex*, *plic-*, fold.

[8] Story, Eq., Index; Eq. Pl., 284; 1 Pomeroy, Eq., § 242, *et seq.*

[1] Coke, Litt. 257.

[2] Pike *v.* Witt, 104 Mass. 597 (1870).

[3] L. *municipium*, a free town,— 1 Bl. Com. 44.

[4] [1 Bl. Com. 44. See generally Horton *v.* School Commissioners, 43 Ala. 607 (1869); Winspear *v.* District Township, 37 Iowa, 544 (1873).

[5] [Kilgore *v.* Magee, 8 Pa. 411 (1877).

[6] L. *munire*, to fortify.

[7] 95 U. S. 161.

[8] Teut. *moerda*, secret killing,—4 Bl. Com. 195. *Morth*, secret,—3 Steph. Hist. Cr. L. Eng. 25-26. A. S. *morthor*, *morth*; Mid. Eng. *morthre*, *mordre*: L. *mort-*, death,—Skeat. Ary. *mar*, dust: die, kill,—2 Müller, Science Lang. 336.

[9] United States *v.* Magill, 1 Wash. 465 (1806).

[10] Coke, 3 Inst. 47; 4 Bl. Com. 195; Harrison *v.* Commonwealth, 79 Va. 377 (1884).

[11] Commonwealth *v.* Webster, 5 Cush. 304 (1850), Shaw, C. J.

The unlawful killing of a human being in the peace of the people, with malice aforethought, either express or implied.[1]

There are three degrees of murder in Minnesota and Wisconsin; and two in Alabama, Arkansas, California, Connecticut, Delaware, Florida, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Tennessee, Texas, and Virginia.

In Pennsylvania, which was the first State to establish degrees, "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree."[2]

Similar statutes have been passed in many other States. Their common object is to class the more deliberate and atrocious forms of homicide as murder in the first degree, punishable with death; while forms which exhibit an instantaneous intent, or which are marked by circumstances extenuating guilt, are classed as murder in the second degree, punishable with fine and long imprisonment.[3]

A premeditated intention to destroy life is indispensable to murder in the first degree. An unlawful killing may be presumed to be murder, but not in the first degree. The burden of proof lies on the State.[4]

In California, a killing, in the first degree, must be premeditated, except when done in the perpetration of certain felonies. There must be manifested express malice, proved by circumstances independent of the killing,— a deliberate intention "to take away the life of a fellow-creature." Where such intention is proved by the circumstances preceding or connected with the homicide, there is no question of "implied" malice; and, unless the express malice is affirmatively proved, a defendant cannot be convicted of murder in the first degree, even though his commission of the homicide is proved, and there is no evidence that it is manslaughter or that the killing was justifiable or excusable; but in such case the verdict should be murder in the second degree.[5]

Malice is always presumed where one person deliberately injures another. It is the deliberation with which the act is performed that gives it character. It is the opposite of an act performed under uncontrollable passion, which prevents cool reflection in forming a purpose.[1]

Malice aforethought, or a wicked intention to kill, previously and deliberately formed, is an essential ingredient, and must be plainly charged in the information or indictment. It is not necessary, however, that these identical words, or any particular form of words, be used. Any words clearly expressing this element are sufficient.[2]

See ABORTION; ACCESSARY; ANARCHIST CASE; BLOOD, 2; CORPUS, Delicti; DEFENSE, 2; DEATH, Penalty; DELIBERATION, 3; DRUNKENNESS; DUEL; HOMICIDE; INDICTMENT; INSANITY, 2 (6); INTENT; JEOPARDY, 2; MALICE; MANSLAUGHTER; PLACE, 1; PREMEDITATE; PUNISHMENT, Capital; SUICIDE; WILL, 1; WOUND; YEAR AND DAY.

MUSEUM. Not only collections of curiosities for the entertainment of the sight, but also such as interest, amuse, and instruct the mind.[3]

MUSIC; MUSICAL. See BAGGAGE; BOOK, 1; COMPOSITION, 1; COPYRIGHT; IMPLEMENT; OPERA; TOOL.

MUST. See MAY; SHALL.

MUSTER. Applies to a parade of soldiers already enrolled, armed, and trained; but "mustering in" implies that the persons are not already in the service.[4]

MUTE.[5] See WITNESS.

A prisoner is said to "stand mute" when, being arraigned for treason or felony, he either makes no answer at all, or answers foreign to the purpose, or with such matter as is not allowable, and will not answer otherwise; or, upon having pleaded not guilty, refuses to put himself upon the country.[6]

Standing mute means, then, simply refusing to plead or answer to an indictment. The plea of "not guilty" is entered, and the trial proceeds.[7]

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[1] Illinois Crim. Code, sec. 140.

[2] Act 31 March, 1860, § 74: 1 Purd. Dig. 498, pl. 141. See Hogan *v.* State, 36 Wis. 238 (1874), Ryan, C. J.; State *v.* Baldwin, 36 Kan. 19 (1886).

[3] See United States *v.* Guiteau, 10 F. R. 163, 165 (1882); 52 Ala. 348; 29 Ark. 243; 39 Cal. 694; 44 *id.* 96; 48 *id.* 65; 49 *id.* 167; 59 *id.* 430; 40 Conn. 136; 1 Dak. 458; 14 Fla. 499; 18 *id.* 496; 33 Ga. 303; 49 *id.* 482; 55 *id.* 31; 5 Ind. 400; 23 *id.* 231; 54 *id.* 128; 88 *id.* 26; 33 Iowa, 270; 101 Mass. 1; 30 Mich. 16; 35 *id.* 16; 16 Minn. 75; 54 Mo. 153; 51 *id.* 549; 64 *id.* 191, 319, 391; 6 Neb. 138; 49 N. H. 399; 16 N. Y. 68; 53 *id.* 164; Wright (O.), 20; 5 Oreg. 216; 31 Pa. 56; 44 *id.* 56; 58 *id.* 9; 8 Phila. 401; 33 Tex. 638; 36 *id.* 523; 77 Va. 283–84; 36 Wis. 238.

[4] Johnson *v.* Commonwealth, 24 Pa. 389 (1855), Lewis, Chief Justice.

[5] People *v.* Knapp, 71 Cal. 6 (1886), cases, McKinstry, Judge.

[1] Davison *v.* People, 90 Ill. 229 (1878), Walker, J.; Spies *et al. v.* People (Anarchists' Case), 122 *id.* 174 (1887).

[2] State *v.* McGaffin, 36 Kan. 318 (1887), Johnston, J. As to *corpus delicti*, see People *v.* Palmer, Ct. Ap. N. Y. (1888), cases. On blood corpuscles, see 19 Am. Law Reg. 529, 598 (1880); 26 *id.* 21 (1887).

[3] Bostwick *v.* Purdy, 5 Stew. & Port. 109 (Ala., 1833).

[4] Tyler *v.* Pomeroy, 8 Allen, 498 (1864), Gray, J.; R. S. § 1342.

[5] L. *mutus*, dumb.

[6] 4 Bl. Com. 324; United States *v.* Gibert, 2 Sumn. 66–67 (1834).

[7] See R. S. § 1082; United States *v.* Borger, 19 Blatch. 251–52 (1881), cases; *Re* Smith, 13 F. R. 25–27 (1882), cases; State *v.* Ward, 48 Ark. 39 (1886).

MUTILATE.[1] 1. To lacerate, wound, maim. See MAIM; CRUELTY, 3.

2. To commit mayhem, *q. v.* See also WOUND.

3. To render imperfect — which is something less than to "destroy:" as, to mutilate a will.

The courts speak of "records mutilated by erasures" and "by corrupt interlineations." Purposely taking from a will the signature of the testator deprives it of an essential part, and makes it so imperfect that it loses its legal force. The manner in which that is effected is not of controlling importance.[2] See SPOLIATION.

MUTINY.[3] Insurrection against authority; revolt against discipline; resistance of officers, by sailors, soldiers, or marines.

Mutinous. Tending toward mutiny: as, mutinous conduct or words.[4] See REVOLT.

MUTUAL.[5] Interchangeable; reciprocal; imposing like duties and obligations; affecting two or more persons in a common transaction or relation.

As, mutual — accounts, assent, covenant, credits, debts, insurance, mistake, obligations, promises, *qq. v.* See also COMPROMISE; CONTRIBUTION; BARGAIN.

Mutuality. Of contract: an obligation on each party to do or permit to be done something in consideration of the act or promise of the other.[6]

Mutuality of obligation is generally necessary to the validity of a contract; to be binding, the contract must be enforceable by either party.[7] See ASSENT; CONTRACT.

MUTUUM. L. A loan of chattels to be consumed by the borrower and returned to the lender in kind and quantity.[8] See DEPOSIT, 2.

Mutuant; mutuary. The lender, and the borrower, respectively, in such a contract.

MYSTERY.[9] A trade, art, or occupation.[10]

MYSTIC. In Louisiana, a "mystic testament" is a will under seal.[11]

[1] L. *mutilare*, to maim: *mutilus*, maimed.

[2] Woodfill *v.* Patton, 76 Ind. 568 (1881), Elliott, C. J.

[3] F. *meute*, sedition.

[4] See R. S. §§ 1624, 4596; Sim. Ct. Mar. § 170; Hick. Nav. Ct. Mar., Ch. 21; 1 Bl. Com. 415.

[5] L. *mutuus*, reciprocal: *mutare*, to change.

[6] Spear *v.* Orendorf, 26 Md. 43 (1866), Bowie, C. J.; Grove *v.* Hodges, 55 Pa. 516 (1867).

[7] Smith *v.* Cansler, 83 Ky. 371 (1885).

[8] [Story, Bailm §§ 228, 47.

[9] F. *mestier*, a trade: L. *minister*-, employ.

[10] 2 Coke, Inst. 668; 2 Hawk. P. C., 23, § 111; 15 Me. 124.

[11] See La. Civ. Code, a. 1567; 10 La. 328; 15 *id.* 88.

N.

N. As an abbreviation, ordinarily stands for new, *non*, northern, note:

N. A. *Non allocatur*, it is not allowed. See ALLOCATUR.

N. B. *Nulla bona*, no property. See BONA, 2, Nulla.

N. D. Northern district. See D, 3.

N. E. I. *Non est inventus*, he has not been found. See FIND, 3.

N. P. Neither party; *nisi prius;* notary public, *qq. v.*

N. R. New reports: non-resident; not reported.

N. S. New series.

NAKED. 1. Nude; uncovered.

Publishing photographs of girls bare to the waist will not support an indictment for publishing obscene pictures of "naked" girls.[1]

2. Incomplete, wanting in the quality that would invest with full power.

Naked authority. The authority of an agent who acts wholly for the benefit of his principal. See AUTHORITY, 1.

Naked confession. A confession of guilt not induced by promise of a reward or fear of a threat. See CONFESSION, 2.

Naked contract. An agreement without consideration. See OBLIGATION, 1; PACT.

Naked deposit. A bailment without reward. See DEPOSIT, 2.

Naked trust. A passive or dry trust, *q. v.*

NAM. L. For; because.

Sometimes used to introduce maxims.

NAME. 1. A designation by which a person, natural or artificial, is known.

It is merely a custom for males to take the name of their parents, and not obligatory.[2]

When two names have the same original, or one is an abbreviation or corruption of the other, but both in common usage are the same, the use of one name for the other is not a material misnomer.[3]

When a person is known equally well by two names he may be sued or indicted by either name, or by both.[4]

When a nickname is used, evidence will be received as to the true name. Such a name is but an *alias* for the true name.[5]

[1] Commonwealth *v.* Dejardin, 126 Mass. 47 (1878).

[2] Petition of Snook, 2 Hilt. 568 (1859).

[3] Gordon *v.* Holiday, 1 Wash. 289 (1805); 13 Mo. 92.

[4] Eagleston *v.* Son, 5 Robt. 640 (1866); Kennedy *v.* People, 39 N. Y. 250 (1868).

[5] Knapp *v.* Fuller, 55 Vt. 313 (1883); President, &c. *v.* Norwood, 1 Busb. Eq. 67 (1852)

The rule that the middle name is really no part of one's name has not been extended to the Christian name; on the contrary, the law presumes that every person has a Christian name. Where there is a mistake in the name used in the writ, and the writ is yet served on the right person, he is thereby informed that he is the person meant, and he should plead the misnomer in abatement. A non-resident, to whom a wrong name is given in an order of publication, receives no legal notice.[1]

The law recognizes only one Christian name. There are cases countenancing, if not establishing, that the omission of a middle letter is not a misnomer or variance; if so, the middle letter is immaterial, and a wrong letter may be disregarded.[2]

Signing by initials satisfies the statute of frauds.[3] And a legatee may be designated by initials.[4] The effect of designating a candidate for election by his initials has been variously decided.[5]

"Jr." or "Sr." is not part of a name.[6] Nor is "Mrs." a part.[7] When father and son have the same name, the use of the name presumptively designates the father.[8]

Identity of name is *prima facie* evidence of identity of person.[9]

As to names having the same sound, see IDEM, SONANS.

At common law, a man may lawfully change his name. He is bound by any contract into which he may enter in his adopted or reputed name, and by his recognized name he may sue and be sued.[10]

As to the use of a name as part of a trade-mark, see that title.

2. A man's name, as the synonym of his power and personality, is often put for the man himself. Thus, an agent is said to buy "in the name" of his principal when he buys for him, declaring his agency. A man invests "in his own name" (as executor) when he invests openly for himself, though he only receives evidence (bonds) of the investment.[1]

See ADDITION, 2; ALIAS, 1; FORGERY; MISNOMER; SIGNATURE. Compare NOMEN.

Namely. See WIT.

NARCOTICS. See under ALCOHOL.

NARRATIO. A statement of the facts constituting the ground of action in a cause; a declaration, *q. v.* Abbreviated *narr.*, *nar.*

Narrator. One who files a declaration.

NASCITURUS. See NATUS.

NATION. Implies a body of men united together to procure their mutual safety and advantage by means of their union. . . "State" and "nation" frequently import the same thing.[2] See STATE, 3.

But "nation" is more nearly synonymous with "people." While a "state" may embrace different nations or peoples, a nation is sometimes so divided politically as to constitute several states.[3]

National. Belonging to, affecting, or pertaining to, a particular nation: as, national domicil, the national government. Often opposed to *State*, and nearly synonymous with *Federal*, q. v.: as, in national bank (*q. v.*), or national banking association.

The word national was excluded from the Constitution because it might seem to present the idea of the union of the people without bringing into view that the one republic was formed out of many states. Toward foreign powers the country presented itself as one nation.[4]

No bank or banker other than a national banking association, and except a savings bank authorized by Congress, may use the word "national" as a portion of its title.[5]

International. Concerning, or existing between, distinct nations or independent sovereignties: as, international — comity, commerce, copyright, extradition, *qq. v.*

Law of nations; international law. That law which regulates the conduct and mutual intercourse of independent states

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[1] Skelton *v.* Sackett, 91 Mo. 379–80 (1886); 37 *id.* 301.

[2] Keene *v.* Meade, 3 Pet. *7 (1830), cases; Games *v.* Stiles, 14 *id.* 327 (1840); Commonwealth *v.* O'Hearn, 132 Mass. 553 (1882); State *v.* Black, 12 Mo. Ap. 534 (1882), cases; State *v.* Feeny, 13 R. I. 628 (1882). See also 32 Cent. Law J. 487 (1886), cases; 17 Ala. 179; 89 Ill. 457; 52 Ind. 347; 20 Iowa, 98; 10 Miss. 391; 26 N. H. 561; 14 Barb. 261; 5 Johns. 84; 19 Ohio, 423; 4 Watts, 339; 7 W. & S. 406; 14 Tex. 402; 28 *id.* 772; 26 Vt. 599.

[3] Addison, Contr. 46, n; 1 Denio, 471.

[4] Abbot *v.* Massie, 3 Ves. *148 (1796). See also Minor *v.* State, 68 Ga. 321 (1879).

[5] Cooley, Const. Lim. 766; 38 Me. 559; 16 Mich. 283; 8 Cow. 102; 4 Wis. 429.

[6] Commonwealth *v.* Perkins, 1 Pick. 388 (1823); 8 Conn. 280; 22 Me. 171; 9 N. H. 519.

[7] Elberson *v.* Richards, 42 N. J. L. 70 (1880).

[8] Brown *v.* Benight, 3 Blackf. 39 (1833).

[9] Stebbins *v.* Duncan, 108 U. S. 47 (1882), cases; State *v.* Kelsoe, 76 Mo. 507 (1882); 25 Pa. 133; 68 *id.* 200; 53 *id.* 427.

[10] Linton *v.* First Nat. Bank of Kittanning, 10 F. R. 897 (1882), cases; Commonwealth *v.* Trainor, 123 Mass. 414 (1877). See generally 32 Cent. Law J. 230, 244 (1886), cases.

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[1] Carpenter *v.* Carpenter, 12 R. I. 548 (1880), Durfee, Chief Justice.

[2] Cherokee Nation *v.* Georgia, 5 Pet. 52 (1831), Thompson, J.; Vattel, Law of Nations, § 1; Texas *v.* White, 7 Wall. 720 (1868).

[3] Cooley, Princ. Const. Law, 20, Const. Lim. 1; 1 Story, Const. § 207; Langford *v.* Monteith, 1 Idaho, 617 (1876).

[4] 2 Bancroft, Const. 208; *ib.* abr. ed. 356 (1884).

[5] R. S. § 5243: Act 3 March, 1873.

with each other, by reason and natural justice.[1]

A system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world, in order to decide disputes, regulate ceremonies and civilities, and insure the observance of justice and good faith in their mutual intercourse. This general law is founded upon the principle that different nations ought in time of peace to do one another all the good they can, and in time of war as little harm as possible, without prejudice to their own real interests. And, as none of these states will allow a superiority in the other, no one can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice in which all the learned of every nation agree; or they depend upon mutual compacts or treaties, in the construction of which there is no judge to resort to but the law of nature and reason,—the only law in which all the parties are equally conversant and to which they are equally subject.[2]

International law is part of the universal law of reason, justice, and conscience.[3] The principal offenses against the law of nations are: violations of safe-conducts or passports; infringement of the rights of ambassadors; piracy;[4] injuring a state at peace with the United States by exercising a commission to serve a hostile state, arming a vessel to cruise for such hostile state, assisting its armed vessel or setting afloat a military expedition for it.[4]

The nation injured by the subject of another first demands satisfaction and that justice be done on the offender by the state to which he belongs; and if that be refused, the sovereign then avows himself an abettor of his subject's crime.[5]

Public international law comprises the rights and duties of sovereign states toward each other. *Private international law* comprises the rights and duties of the subjects of different states toward each other—refers to the power of the state to act upon the persons and property within the limits of its own territory.[6]

The rules of private international law are: 1. Every nation possesses an exclusive sovereignty and jurisdiction within its own territory—as to all property, persons, and contracts. 2. No state can, by its laws, directly affect or bind property out of its territory, or persons not resident therein. 3. Whatever force and obligation the laws of one country have in another depends solely upon the laws of the latter, that is, upon the comity exercised by it.[6]

See COMITY; DISCOVERY, 1, Right of; INDIAN; MERCHANT, LAW; PUBLICIST; TREATY; WAR.

[1] 1 Bl. Com. xxiv, 43.

[2] 4 Bl. Com. 67–68.

[3] Wilson *v.* McNamee, 102 U. S. 574 (1880). See Hogsheads of Sugar *v.* Boyle, 9 Cranch, 198 (1815); 1 Op. Att.-Gen. 27; 7 *id.* 18, 229; 37 Miss. 230.

[4] Wharton, Cr. Law, 130.

[5] See Story, Confl. Laws, §§ 18–23; Hoyt *v.* Sprague, 103 U. S. 630 (1880).

NATIVE. See CITIZEN.

NATURA. L. Disposition; nature. See ANIMAL.

NATURAL; NATURE. Are employed with little or no deviation from the vernacular meaning: as, in natural—affection or love, allegiance, birth, boundary, child, day, death, duty or obligation, equity, fruits, guardian, law, life, liberty, monument, obligation, person, presumption, right, *qq. v.* With some of these terms, opposed to *artificial*, with others to *civil*, and *political*. See also ACT, Of God; ALLUVION; CAUSE, 1.

Naturally. In the usual course of things; as, in the rule, that the damages recoverable for breach of a contract are such as naturally arise.[1]

Nature of the transaction. "Without knowledge of the nature of the transaction" may be a very misleading expression.[2]

NATURALIZE. To make an alien a citizen or as if native-born.

Naturalization. The act or proceeding by which an alien becomes a citizen.[3]

"The Congress shall have Power . . To establish an uniform Rule of Naturalization."[4]

Before the adoption of the Constitution, each State exercised this right. The provision quoted vests the power exclusively in the Federal government. A State may make a person its own citizen.[5]

The original status of an alien is presumed to continue until the contrary is shown. Naturalization is strictly a judicial act. The action of the court must be recorded as its judgment; if valid, it is final. In the absence of proof of its loss or destruction, the record can be proved only by itself, or by an extract. Naturalization cannot be proved by parol.[6]

The provisions of the Revised Statutes, Title XXX, respecting naturalization, are as follows:

"Sec. 2165. An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:

"*First.* He shall declare on oath, before a circuit or district court of the United States, or a district or supreme court of the Territories, or a court of record of any of the States having common-law jurisdiction, and a seal and a clerk, two years, at least, prior to his admission, that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever

[1] Mitchell *v.* Clarke, 71 Cal. 164 (1886).

[2] King *v.* Ward, 74 Me. 351 (1883).

[3] [1 Bl. Com. 374; 9 Wheat. 827; 9 Op. Att.-Gen. 359.

[4] Constitution, Art. I, sec. 8, cl. 4.

[5] See R. S. §§ 2165–74, 5395, 5424–29; 2 Wheat. 259; 7 How. 556; 19 *id.* 393, 419; 4 Dill. 425; 5 Cal. 300; 36 *id.* 658; 56 How. Pr. 5.

[6] Charles Green's Son *v.* Salas, 31 F. R. 106 (1887), Speer, J. On citizenship by naturalization, see 18 Am. Law Reg. 593–612, 665–76 (1879), cases.

all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject," [1]

"*Second.* He shall, at the time of his application to be admitted, declare, on oath, before some one of the courts above specified, that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty; and, particularly, by name, to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court." [2]

"*Third.* It shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least, and within the State or Territory where such court is at the time held, one year at least; and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; but the oath of the applicant shall in no case be allowed to prove his residence." [3]

"*Fourth.* In case the alien applying to be admitted to citizenship has borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court." [3]

Fifth. Any alien residing within the United States before January 29, 1795, may be admitted as a citizen on due proof made to any court specified that he has resided two years within the United States, and one year, immediately preceding his application, within the State or Territory where such court is held, and on his declaring on oath that he will support the Constitution, and that he renounces allegiance, etc., as particularized in the sections preceding.[3]

Sixth. Any alien who was residing within the United States between June 18, 1798, and June 18, 1812, and who has continued so to reside, may be admitted as a citizen without previous declaration of intention to become such; but whenever any person, without a certificate of such declaration, makes application to be admitted, the court must be satisfied that he was a resident before June 18, 1812, and has continued so to reside; and his residence for five years immediately preceding his application must be proved by the oath of citizens; and such residence shall be set forth, with the names of such citizens, in the record of the court admitting the applicant.[3]

The declaration of intention, required by section 2165, may be made before the clerk of any of the courts therein named; and all declarations as heretofore made are as valid as if made before one of said courts.[1]

"Sec. 2166. Any alien, of the age of twenty-one years and upward, who has enlisted, or may enlist, in the armies of the United States, either the regular or volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proofs of residence and good moral character as are now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States." [2]

"Sec. 2167. Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding his arriving at age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States without having made the declaration required in the first condition of section 2165; but such alien shall make the declaration required therein at the time of his admission; and shall further declare, on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his *bona fide* intention to become a citizen of the United States; and he shall in all other respects comply with the laws in regard to naturalization." [3]

"Sec. 2168. When any alien, who has complied with the first condition specified in section 2165, dies before he is actually naturalized, the widow and children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law." [4]

"Sec. 2169. The provisions of this title shall apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent." [5]

"Sec. 2170. No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States." [6]

"Sec. 2171. No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States; but persons resident within the United States" June 18, 1812, "who had before that day made a declaration, according to law, of their intention to become a citizen or who were on that day entitled to become citizens without making

[1] Acts 14 April, 1802, 26 May, 1824, 1 Feb. 1876.
[2] Act 14 April, 1802.
[3] Acts 22 March, 1816, 24 May, 1828.

[1] Act 1 Feb. 1876.
[2] Act 17 July, 1862.
[3] Act 26 May, 1824.
[4] Act 26 March, 1804.
[5] Acts 14 July, 1870, 16 Feb. 1875.
[6] Act 3 March, 1813.

such declaration, may be admitted to become citizens thereof, notwithstanding they were alien enemies at the time and in the manner prescribed by the laws heretofore passed on that subject. . . "[1]

"Sec. 2172. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof."[2]

"Sec. 2174. Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any competent court, and shall have served three years on board of a merchant-vessel of the United States subsequent to the date of such declaration, may, on his application to any competent court, and the production of his certificate of discharge and good conduct during that time, together with the certificate of his declaration of intention to become a citizen, be admitted a citizen of the United States; and every seaman, being a foreigner, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served such three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant-vessel of the United States, anything to the contrary in any act of Congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen."[3]

See ALIEN, 1; CHINESE; CITIZEN; INDIAN.

NATUS. L. Born; already born; alive. **Agnati.** Persons related through a male as their father — *ad eum nati.* **Cognati.** Persons related through a woman as their mother. Anglicised "agnates" and "cognates."

In Roman law, the agnate family consisted of such cognates (blood-relations) as could trace their lineage through males alone (father, grandfather, etc.) up to a common male ancestor, whose family-name they all bore, and to whose *patria potestas* they would have been subject had he lived to their time. But persons brought into a family by adoption became agnates; and those who passed out of it either by adoption or emancipation ceased to be agnates (though still cognates).[4]

Ante natus. Born before; a child born before another person, or prior to a particular event. **Post natus.** Born after; afterborn.

[1] Acts 14 April, 1802, 30 July, 1813.

[2] Act 14 April, 1802.

[3] Act 7 June, 1872.

[4] Hadley, Roman Law, Lect. VI, p. 129; 2 Bl. Com. 235.

Nasciturus. Yet to be born; unborn.

NAUTICAL. See ASSESSOR, 1.

NAVAL. See GRADUATE; NAVY.

NAVIGABLE.[1] Refers to waters which afford a channel for commerce or intercourse. Opposed, *non-navigable, unnavigable.*

Capable of being used for purposes of navigation, of trade and travel, in the ordinary modes, without reference to the extent or manner of use; sufficiently wide, deep, and free from obstructions to be useful for purposes of trade and transportation.[2]

"Navigable waters" has three distinct meanings: 1, as synonymous with "tide-waters," being waters, salt or fresh, wherever the ebb and flow of the tide from the sea is felt; 2, as limited to tide-waters capable of being navigated for some useful purpose; 3, as including all waters, whether within or beyond the ebb and flow of the tide, which can be used for navigation.[3]

A river, navigable in its general character, does not change its legal characteristics by a disturbance which, at a point, breaks the continuity of actual navigation.[4]

Congress has power "to regulate commerce," and "commerce" includes navigation. But the power does not extend to such small creeks and coves as are not navigable for any general purpose useful to commercial business.[5] See further COMMERCE.

The admiralty and maritime jurisdiction granted to the Federal government by the Constitution extends to all navigable lakes and rivers, where commerce is carried on between States or with a foreign nation.[6] See LAKES.

With us the ebb and flow of the tide is no test, as at common law and in England. There, no waters are navigable to any considerable extent which are not subject to the tide; from which circumstance tide-water and navigable water there signify substantially the same thing. Some of our rivers are navigable hundreds of miles above tide-limits. The test with us is navigable capacity. Those are public navigable rivers in law which are navigable in fact; when they are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinc-

[1] L. *navigabilis: navis*, a ship; *-igare*, to drive.

[2] Sullivan *v.* Spotswood, 82 Ala. 166-68 (1886), cases.

[3] Reservation at Niagara, 16 Abb. N. Cas. 159 (1884).

[4] Commonwealth *v.* Vincent, 108 Mass. 447 (1871), Gray, J.

[5] Groton *v.* Hurlburt, 22 Conn. 183-86 (1852); Gibbons *v.* Ogden, 9 Wheat. 186 (1824).

[6] The Genesee Chief, 12 How. 443 (1851); The Hine *v.* Trevor, 4 Wall. 561 (1866).

tion to the navigable waters of the States, when they form, in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water [1]

The capacity of use by the public for purposes of transportation and commerce affords the true criterion. If the river be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes in law a public river or highway. The essential point is whether the river is such that it affords a channel for useful commerce.[2]

The navigable waters of the United States include such as are navigable in fact, and which, by themselves or their connections, form a continuous channel for commerce with foreign countries or among the States.[3]

In the absence of legislation by Congress, a State may authorize a navigable stream within its limits to be obstructed by a bridge or highway.[4]

If, in the opinion of a State, its commerce will be benefited by improving a navigable stream within its borders, it may authorize the improvement, although increased inconvenience and expense may thereby attend the business of individuals.[5]

That the navigable streams shall be highways without any tax, impost, or duty, has reference to navigation in its natural state. The constitutional provision did not contemplate that such navigation might not be improved by artificial means, and that for the expense a State should not exact reasonable tolls.[6]

There is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law; but no precedent exists for the enforcement of such law. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by courts of law and equity, obstructions in navigable streams within the States. Such obstructions are, or may be, offenses against the laws of the State, but not against Federal laws which do not exist. On the ground that the litigant parties are citizens of different States, the circuit courts may take jurisdiction.[1] See BRIDGE.

Navigation. The science or business of conducting vessels or materials over navigable waters.[2]

Moving an unfinished vessel about in the course of her construction is not "navigation."[3]

Inland navigation. Navigation carried on within a country, on its rivers or other bodies of water, without reference to their magnitude, if such bodies are not so connected with the ocean, in the commerce of the world, as to be considered a part of the ocean or highway of nations.[4]

Rules of navigation. Regulations designed to prevent collisions between vessels.

A leading system is that promulgated by the corporation of the Trinity House, October 30, 1840; but each commercial country has its own rules, made up of principles of the general maritime law, and of special enactments. Important legislation by Congress went into effect September 1, 1864 [5]

Sailing rules and regulations prescribed by law furnish the paramount rule of decision, when they are applicable; but where a disputed question arises, with regard to which neither they nor the rules of the Supreme Court regulating the practice in admiralty have made provision, evidence of experts as to the general usage is admissible.[6]

See ADMIRALTY; PURPRESTURE; REGULAR; RHODIAN; SEA; SPAN.

NAVY. See GRADUATE; JUDGE-ADVOCATE; MARTIAL; WAR; WARRANT, 2.

"The Congress shall have Power . . To provide and maintain a Navy; To make Rules for the Government and regulation of the . . naval Forces." [7]

This power authorizes the United States to buy or build vessels of war, to establish a naval academy, to punish desertion and other crimes, and to make other needful rules for the government of persons enlisted in the naval force, and the regulation of all affairs connected with naval warfare.[8]

NAYS. See YEAS.

NE. L., and F. Not; lest.

Ne exeat. L. That he does not depart the jurisdiction. See further EXIRE, Ne exeat.

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[1] The Daniel Ball, 10 Wall. 563 (1870), Field, J.; Escanaba Co. *v.* Chicago, 107 U. S. 689 (1882).

[2] The Montello, 20 Wall. 441–43 (1874), cases, Davis, J. See also Little Rock, &c. R. Co. *v.* Brooks, 39 Ark. 409 (1882).

[3] Miller *v.* Mayor of New York, 109 U. S. 385, 395 (1883), Field, J.

[4] Cardwell *v.* American Bridge Co., 113 U. S. 205, 206–12 (1885), cases. See generally Shaw *v.* Oswego Iron Co., 10 Oreg. 375 (1882); Smith *v.* City of Rochester, 92 N. Y. 479 (1883); 93 *id.* 155–56; 18 Blatch. 212; 7 Saw. 127, 141; 16 Op. Att.-Gen. 338; 33 Ala. 593; 6 Cal. 443; 20 Conn. 217; 5 Ind. 8; 28 *id.* 270; 3 Iowa, 1; 50 Me. 479; 21 Pick. 344; 8 Mich. 320; 10 N. J. E. 211; 35 N. Y. 459; 23 Ohio St. 523; 43 Pa. 219.

[5] Huse *v.* Glover, 119 U. S. 543 (1886).

[6] Sands *v.* Manistee River Imp. Co., 123 U. S. 296 (1887); Huse *v.* Glover, 119 *id.* 548 (1886).

[1] Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 8 (1888), cases, Bradley, J.

[2] See Gerrish *v.* Brown, 51 Me. 262 (1863); Harrigan *v.* Connecticut River Lumber Co., 129 Mass. 584 (1880).

[3] The Joshua Levinese, 9 Bened. 339 (1878).

[4] [American Transportation Co. *v.* Moore, 5 Mich. 400 (1858), Manning, J.: 24 How. 37 (1860); 26 F. R. 772–73.

[5] 13 St. L. 58; The Scotia, 14 Wall. 185–86 (1871); 1 W. Rob. Adm. 488.

[6] The City of Washington, 92 U. S. 39 (1875).

[7] Constitution, Art. I, sec. 8, cl. 13–14.

[8] See Dynes *v.* Hoover, 20 How. 78–79 (1857).

Ne unques accouple. F. Never joined — in lawful matrimony. Denies, in an action for dower, the validity of the marriage.

Ne unques executor. F. Never executor. A plea denying that a plaintiff is a lawful executor.

Ne varietur. L. Let it not be changed. Words written upon a bill or note for identification.[1]

NEAR. As applied to space, has no precise meaning; is a relative term, depending for its signification on the subject-matter, and the circumstances under which it is to be applied to surrounding objects.[2, 3]

A statute which authorizes commissioners to build bridges over streams "near county or town lines," empowers those officials to determine the location of a particular bridge, as, within a mile or other reasonable distance from a town line, regard being had to expense, accessibility, etc.[3]

The location of a railroad twenty-five hundred feet from another road may be "near" the latter road.[3]

A statute which forbids liquor-selling "near" an election ground prohibits a sale within a mile and a quarter of such ground.[4]

Between the shoulder blades is "near" the shoulders.[5]

An allegation of a failure to keep a road in repair "near the house of K.," whereby the plaintiff was injured, does not describe the spot with sufficient certainty.[6] Compare ADJACENT; ON; VICINITY.

As near as. An affidavit that the defendant is indebted to the plaintiff in an amount specified "as near as" the plaintiff can determine, is insufficient.[7]

Nearest. The "three nearest towns" not interested in taking land, may refer to the situation of the towns to each other, not to the tract to be viewed.[8]

Provision that a cause shall be removed to some adjoining county, the court-house of which is "nearest the court-house of the county in which the suit is pending," does not necessarily mean the nearest by geometrical measurement, but the most convenient of access and nearest to the usually traveled route.[9] See PRACTICABLE.

NEAT. "Beeves" may include neat stock, but all "neat stock" are not beeves.[1]

NECESSARIES.[2] Refers to things essential or proper for the support of a wife, infant, or ward, and to the maintenance of a vessel.

1. In the rule as to supplying a *wife* or an *infant*, and recovering from the husband, parent, or guardian, "necessaries" is not used in its strictest sense, nor limited to that which is required to sustain life. Things proper and suitable to each individual, according to his circumstances and condition in life, are necessaries, if not supplied from some other source.[3]

It is not desirable to attempt to prescribe a universal rule for the specific determination of what are and what are not necessaries. In a general way, it may be said that whatever naturally and reasonably tends to relieve distress, or materially and in some essential particular to promote comfort, either of body or mind, may be deemed to be a necessary, for which a *wife*, under proper circumstances, may pledge her husband's credit. Each case is to be determined by its own circumstances.[4] See HUSBAND.

The necessaries for which a *minor* may bind himself are for suitable food, shelter, clothing, washing, medicine, medical attendance, and education. But what is proper in quantity and quality depends upon what the court or jury may think, in each case, regard being had to the condition and station in life.[5] Cf. WANT.

2. To bring an article within the description of necessaries for a *vessel* it need not appear that the voyage could not by any possibility be made without the article. It is sufficient if the article forms a part of the natural and reasonable outfit of the vessel, or of the business in which she is engaged.[6]

Those things which pertain to the navigation of the vessel, and which are directly incidental to and connected with her navi-

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[1] See Brabston *v.* Gibson, 9 How. 278 (1850); Fleckner *v.* United States Bank, 8 Wheat. 349 (1823).

[2] [Fall River Iron Works *v.* Old Colony, &c. R. Co., 5 Allen, 227 (1862), Bigelow, C. J.; Barrett *v.* County Court, 44 Mo. 202 (1869); Kirkbride *v.* Lafayette County, 108 U. S. 211 (1883); 1 Gray, 367; 39 N. J. E. 435.

[3] Insley *v.* Shepard, 31 F. R. 872 (1887), Blodgett, J.; Ill. Act. 28 March, 1883, § 106.

[4] Manis *v.* State, 3 Heisk. 315 (1871).

[5] Fassett *v.* Roxbury, 55 Vt. 554 (1883).

[6] Kellogg *v.* Inhabitants of Northampton, 4 Gray, 67 (1855).

[7] Hawes *v.* Clement, 64 Wis. 152 (1885).

[8] Reed *v.* Hanover Branch R. Co., 105 Mass. 304 (1870).

[9] Shaw *v.* Cade, 54 Tex. 307 (1881).

[1] Castello *v.* State, 36 Tex. 334 (1871); Hubotter *v.* State, 32 *id.* 484 (1870).

[2] L. *necessarius*, needful.

[3] Davis *v.* Caldwell, 12 Cush. 513 (1853), Shaw, C. J.

[4] Conant *v.* Burnham, 133 Mass. 504 (1882), C. Allen, J.; Hamilton *v.* Lane, 138 *id.* 360 (1885); Skelton *v.* Pendleton, 18 Conn. 423 (1847), cases; Harris *v.* Dale, 5 Bush, 63 (1868).

[5] Munson *v.* Washband, 31 Conn. 306-8 (1863), cases, Hinman, C. J.; Breed *v.* Judd, 1 Gray, 458 (1854); Trainer *v.* Trumbull, 141 Mass. 530 (1886), cases: 25 Am. Law Reg. 698-99 (1886), cases; Ayers *v.* Burns, 97 Ind. 243 (1883), cases; 36 Alb. Law J. 283; 35 W. R. 806.

See generally *Re* Steele, 2 Flip. 328 (1879), cases.

[6] The Plymouth Rock, 7 Bened. 449 (1874), Benedict, Judge.

gation; that is, those things which directly aid in keeping her in motion for the purpose of receiving, carrying, and delivering cargoes.[1]

This is the meaning in the twelfth Admiralty Rule, which provides that in suits by material-men for supplies, repairs, or other necessaries furnished to a foreign ship or a ship in a foreign port, the libelant may proceed against the ship and freight *in rem*, or against the master or owner *in personam*, and that in cases of domestic ships the proceeding shall be *in personam* only. Under the foregoing definition, a claim for storing sails would not be a subject of admiralty jurisdiction.[1]

See NECESSARY; PROVISIONS.

NECESSARY. Frequently imports no more than convenient, essential, or useful to some end in view. The term admits of degrees: a thing may be necessary, very necessary, or absolutely necessary.[2]

To employ "means necessary to an end" is generally understood as meaning to employ means calculated to produce the end, not as being confined to some single means without which the end would be unattainable.[2]

It is in the looser sense that the word is used in Art. I, sec. 8, cl. 8, of the Constitution, empowering Congress to pass laws "necessary and proper" for carrying its express provisions into effect. When the framers intended an indispensable necessity, as in Art. X, sec. 1, they coupled the word "absolutely" with it.[3] See CONSTITUTION.

What is "necessary to the beneficial enjoyment of an estate" cannot reasonably be held to be limited to absolute physical necessity, but to what is reasonably necessary.[3]

"Necessary help" for the warden of a prison includes the services of a physician.[4]

A statute exempting from execution "necessary household furniture" includes more articles than such as are absolutely indispensable,— articles which, to the common understanding, are required for comfort and convenience. But "necessary" is not to have the liberal sense given it in the rule as to "necessaries," [4] *q. v.*

"Necessary implication," in construing a will, means so strong a probability of intention that an intention contrary to that imputed cannot be supposed.[5]

Referring to taking private property for public uses, "necessary" means expedient.[1]

In a statute requiring a railroad to construct a farm-crossing when "necessary" for the use of the proprietors of adjoining lands, held equivalent to "reasonably convenient."[2]

"Necessary repairs" to a vessel means such as are reasonably proper under the circumstances; not merely such as are indispensable for the safety of the ship or the accomplishment of the voyage.[3]

See BAGGAGE; NECESSITY; SUNDAY.

NECESSITAS. L. Necessity.

Necessitas publica major est quam privata. Public necessity is greater than private.

A private right or necessity must yield to the public good; as in the exercise of the powers of eminent domain and taxation.[4]

Necessitas vincit legem. Necessity overcomes law,— is paramount to any rule of law.[5] See NECESSITY.

Trinoda necessitas. A threefold necessity or burden.

In England, anciently, when lands were granted free of services, they were still subject by implication, under a certain *trinoda necessitas*, to the expense of repairing bridges and forts, and of repelling invasions.[6]

NECESSITY. Constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will, if left to itself, would reject.[7]

An inevitable or unavoidable necessity is regarded as a defect of will, and excuses an act otherwise criminal in nature.[7]

Moral necessity; physical necessity. Moral necessity arises where there is a duty incumbent upon a rational being which he ought at the time to perform. It presupposes a power of volition and action, under circumstances in which he ought to act, but in which he is not absolutely compelled to act by overwhelming superior force. It means a sense of duty, when it becomes imperative by its urgency upon his conscience and judgment. That is not a physical necessity where

[1] Hubbard *v.* Roach, 9 Biss. 376-77 (1880), Dyer, J.

[2] M'Culloch *v.* Maryland, 4 Wheat. 413 (1819), Marshall, C. J.; Legal Tender Case, 110 U. S. 440 (1884); 23 Ind. 143-45; 47 N. J. L. 328-29.

[3] Pettingill *v.* Porter, 8 Allen, 6 (1864).

[4] State *v.* Hobart, 13 Nev. 420 (1878).

[5] Hitchcock *v.* Holmes, 43 Conn. 529 (1876).

[6] [Wilkinson *v.* Adam, 1 Ves. & B. *466 (1812). See also 6 M. & W. 403; 4 De G., M. & G. 85; 15 N. Y. 558; 9 Yerg. 164.

[1] Stuyvesant *v.* Mayor of New York, 7 Cow. 606 (1827); 7 Johns. Ch. 315; 5 R. I. 325.

[2] Chalcraft *v.* Louisville, &c. R. Co., 113 Ill. 88 (1885).

[3] The Fortitude, 3 Sumn. 237 (1838), Story, J. See generally 50 Cal. 302; 50 Conn. 155, 253; 27 Ind. 191; 5 Iowa, 432; 13 Mass. 278; 112 *id.* 3-4; 3 Pa. 331.

[4] Bacon, Maxims.

[5] Cooley, Const. Lim. 747.

[6] West River Bridge Co. *v.* Dix, 6 How. 542, 545 (1848); 2 Bl. Com. 102.

[7] 4 Bl. Com. 27.

the agent is called upon to exercise judgment and discretion, to act or not to act.[1]

A master may sell his vessel, in case of wreck or irreparable disaster — the necessity being extraordinary, paramount, actual and not merely apprehended: a question which the court passes upon.[2] See HYPOTHECATION.

At common law, to prevent the spreading of fire, in a case of actual necessity, any one might destroy realty or personalty with no responsibility in him and no remedy in the owner.[3] See FIRE.

Work of necessity. In the exception to the prohibition of labor, business, or work on the Lord's day, the reference is not to a physical or absolute necessity. Any labor, business, or work which is morally fit and proper to be done on that day, under the circumstances of the case, is a work of necessity.[4]

Not limited to labor for the preservation of life, health, or property from impending danger. The necessity may grow out of, or be incident to, the general course of trade or business, or even be an exigency of a particular trade or business. For example, a danger of navigation being closed may make it lawful to load a vessel on Sunday, if there is no other time to do so. So, as to keeping a blast furnace open. If absolute necessity were intended, it would be unlawful to prepare a meal.[5] See SUNDAY.

NEED. See WANT.

Needful. Rules "needful" for the government, good order, and efficiency of a school refer to such rules as will best advance the pupils in their studies, tend to their education and mental improvement, and promote their interest and welfare.[6]

Needless. Characterizes an act done without any useful motive, in a spirit of wanton cruelty, or for the mere pleasure of destruction. In an act authorizing indictment for "needlessly killing" an animal, cannot reasonably be construed as characterizing an act which might by care be avoided.[7] See CRUELTY.

Needlessly. The requirement that compensation must be made or secured before private property can be "needlessly disturbed," indicates that some disturbances might be "needful," such as running a survey, locating a line of railroad, and such others as the legislature may specify.[8]

Needy. A devise to a trustee of an estate to be distributed among the testator's "next of kin who may be needy, in such proportions and at such times as in his opinion may be best," was held valid as to the class designated "the next of kin," but invalid, for uncertainty, as to the individuals to be selected as (the most) "needy."[1]

NEGATIVE. Is used in an untechnical sense, in opposition to *affirmative* or *positive;* as, negative or a negative — allegation, averment, condition, covenant, easement, evidence, statute, *qq. v.*

Whoever asserts a right dependent for its existence upon a negative must establish the truth of the negative, except where the matter is peculiarly within the knowledge of the adverse party — as, that the latter has no license for selling liquor.[2]

It is not a maxim of law that a negative is incapable of proof. When the negative ceases to be a simple one, — when it is qualified by time, place, or circumstance, — much of the objection is removed; and proof of a negative may reasonably be required when the qualifying circumstances are the direct matter in issue, or the affirmative is either probable in itself, or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative. . . When a presumption is in favor of a party who asserts the negative, it affords an additional reason for casting the burden of proof on his adversary; it is when a presumption is in favor of the party who asserts the affirmative that its effect becomes visible, as the opposite side is then bound to prove his negative. One class of exceptions to the rule, that the burden of proof rests on the party holding the affirmative, includes the cases in which the plaintiff grounds his right of action upon a negative allegation which is an essential element in his case. . . So, where the negative allegation involves a charge of criminal neglect of duty, or fraud, or the wrongful violation of actual lawful possession of property, the party making the allegation must prove it; for in those cases the presumption of law is in favor of the party charged.[3] See AFFIRM, 1.

Negative pregnant. The statement of a negative proposition in such a form as may imply or carry with it the admission of an affirmative.

A fault, within the rule that a pleading must not be ambiguous in meaning.[4]

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[1] [The Fortitude, 3 Sumn. 248 (1838), Story, J.

[2] The Henry, 1 Blatch. & H. 469-71 (1834).

[3] Bowditch *v.* Boston, 101 U. S. 18-19 (1879), cases; The Tornado, 108 *id.* 342 (1883).

[4] Flagg *v.* Millbury, 4 Cush. 244 (1849), Wilde, J.

[5] McGatrick *v.* Wason, 4 Ohio St. 572-74 (1855), Thurman, C. J.; Burns *v.* Moore, 76 Ala. 342 (1884), cases. See also 55 Ga. 126; 31 Ill. 473; 76 Ind. 310; 56 Md. 415; 97 Mass. 407, 411.

[6] State, *ex rel.* Bowe *v.* Board of Fond du Lac, 63 Wis. 237 (1885).

[7] Grise *v.* State, 37 Ark. 456 (1881).

[8] McClain *v.* People, 9 Col. 194 (1886).

[1] Fontaine *v.* Thompson, 80 Va. 229, 232, 234 (1885), cases.

[2] Goodwin *v.* Smith, 72 Ind. 113 (1880); 67 *id.* 375, 68 *id.* 254; 78 N. Y. 480; 37 Am. R. 141, cases; Gould, Pl. 98, 344.

[3] Best, Ev. (Am. ed., 1883), §§ 270, 273, 276, cases; 1 Greenl. Ev. §§ 78, 80. Approved, Colorado Coal & Iron Co. *v.* United States, 123 U. S. 317 (1887), Matthews, J. See 1 Whart. Ev. § 356, cases.

[4] Steph. Pl. 408-9; Gould, Pl. 298; 16 M. & W. 708; 13 Wall. 307; 107 U. S. 275.

NEGLECT. Omission or forbearance to do a thing that can be done or that is required to be done.[1]

Does not generally imply carelessness or imprudence; simply, an omission to do or perform some work, duty, or act.[2]

Willful neglect. An intentional failure to perform a manifest duty in which the public has an interest, or which is important to the person injured, in either preventing or avoiding injury.[3] See FAULT; NEGLIGENCE.

NEGLIGENCE.[4] Failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person would not have done.[5]

The essence of the fault lies in omission or commission. The duty is dictated and measured by the exigencies of the occasion.[6]

The measure of care against accident which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his interests were to be affected, and the whole risk were his own.[6]

The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.[7]

Failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury.[8]

The want of care and diligence, and the degree of one is in inverse proportion to the degree of the other.[9]

The absence of care according to the circumstances.[10]

Where the duty is defined, a failure to perform it is of course negligence, and may be so declared by the court.[10]

A failure to perform some act required by law, or doing the act in an improper manner.

The law determines the duty; the evidence shows whether the duty was performed.[1]

Willful negligence, against which a carrier may not exact exemption, means gross omission of duty, involving intentional or willful misconduct.[2]

When a person inadvertently omits or fails to do some act required in the discharge of a legal duty to another, whether such duty arises from contract or from the nature of his employment, and as an ordinary or natural consequence damage ensues to that other person, such omission constitutes actionable negligence.[3]

What facts will constitute that diligence which the law requires must depend upon the circumstances of each case. The omission must be considered in relation to the business in which the person, who is to exercise the care, is engaged, and with reference to the persons, whether adults or children, who may be injured by the want of care.[3]

Negligence is only actionable when it involves a breach of duty toward the person injured.[4]

In its degrees, negligence ranges between pure accident and actual fraud. "Fraud" commences where negligence ends. Negligence is evidence of fraud, not fraud in itself.[5]

The difference between negligence and "willfulness," in a civil action for damages, is in the degree only, not in the essence of the wrong-doing.[6]

Comparative negligence. The doctrine obtains in several of the States that a plaintiff, though guilty of negligence contributing to the injury complained of, may still recover damages, if his negligence is slight, and that

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[1] [Malone v. United States, 5 Ct. Cl. 489 (1869).

[2] Rosenplaenter v. Roessle, 54 N. Y. 268 (1873). See also 6 Gray, 294; 2 Grant, 60; 13 Conn. 52; 53 How. Pr. 122.

[3] Kentucky Central R. Co. v. Gastineau, 83 Ky. 128 (1885), Holt, J.

[4] L. *negligentia: negligere*, to neglect.

[5] [Baltimore, &c. R. Co. v. Jones, 95 U. S. 441 (1877), Swayne, J.; The Lizzie Frank, 31 F. R. 478 (1887).

[6] Nitro-Glycerine Case, 15 Wall. 538 (1872), cases, Field, J.

[7] Blyth v. Birmingham Water Works Co., 11 Ex. 784 (1856), Alderson, B.; 26 E. L. & E. 508.

[8] Cooley, Torts, 630.

[9] Hodgson v. Dexter, 1 Cranch, C. C. 111 (1802).

[10] Philadelphia, &c. R. Co. v. Stinger, 78 Pa. 295 (1875).

[1] Nolan v. New York, &c. R. Co., 53 Conn. 471 (1885), Carpenter, J.

[2] Missouri Pacific R. Co. v. Harris, 67 Tex. 169 (1886), Stayton, A. J.

[3] Galveston City R. Co. v. Hewitt, 67 Tex. 478 (1887), Stayton, A. J.

[4] Sisk v. Crump, 112 Ind. 504 (1887), — for the value of a horse injured by a barbed-wire fence along a highway. See other definitions, Whart. Neg. § 3; 10 F. R. 711; 13 *id.* 69; 17 *id.* 68; 19 *id.* 637; 3 McCrary, 352; 29 Ala. 302; 16 Ark. 308; 34 Cal. 75; 55 *id.* 596; 39 Conn. 210; 89 Ill. 353; 94 *id.* 352; 29 Iowa, 99; 5 Kan. 178; 80 Ky. 84; 10 Bush, 677; 34 La. An. 144, 181; 29 Minn. 3; 30 *id.* 433; 70 N. C. 390; 25 N. H. 549; 33 N. J. L. 440; 38 *id.* 11; 41 N. Y. 529; 91 *id.* 305; 20 Hun, 600; 62 Barb. 150; 40 Pa. 402; 67 *id.* 361; 78 *id.* 219; 89 *id.* 312; 2 R. I. 409; 19 S. C. 24, 29, 497; 46 Tex. 356; 59 *id.* 376; 55 Vt. 487; 9 W. Va. 252; 17 *id.* 196; 53 Wis. 633; 2 Steph. Hist. Cr. L. Eng. 129.

[5] Gardner v. Heartt, 3 Denio, 237 (1846); 20 Ill. 235; 48 N. H. 41.

[6] Field v. Chicago, &c. R. Co., 14 F. R. 336 (1882).

of the defendant gross in comparison therewith. But there must at least be no want of ordinary care on the part of the plaintiff.[1]

Contributory negligence. The absence of reasonable care and caution in a given case, on the part of a complainant.[2]

If the complainant's fault, whether of omission or commission, has been the proximate cause of his injury, he is without remedy against one also in the wrong.[3]

Any want of ordinary care, even in a slight decree, which directly contributes to the injury.[4]

Where the plaintiff alone is negligent he can have no relief. Where the defendant also is negligent in the same connection, the question is whether the damage was occasioned entirely by the improper conduct of the defendant; or, whether the plaintiff himself so far contributed to the misfortune by his own improper conduct, that but for such conduct the misfortune would not have happened. In the former case the plaintiff may recover, in the latter case not.[5]

The negligence of the plaintiff must have been the proximate cause of the injury.[6]

Where a passenger is injured by the negligence of a carrier, an act done by the passenger to avoid impending danger does not constitute contributory negligence, although it helped produce his injuries.[7]

Contributory negligence is to be proved by the defendant by a preponderance of evidence.[8]

Criminal negligence. In some of the States acts of gross negligence by common carriers of passengers or their employees have been made punishable as criminal offenses.[9]

Culpable negligence. The omission to do something which a reasonable and prudent man would do, or the doing of something which such a man would not do, under the circumstances.[1]

Involves a breach of duty toward the person complaining.[2]

Gross, ordinary, and slight negligence. "Gross negligence" is the omission of that care which even inattentive and thoughtless men never fail to take of their own property or interests.[3]

"Gross negligence" is a relative term. It implies a greater want of care than is implied by "ordinary negligence," — or, simply, the absence of the care that was necessary under the circumstances.[4]

The expressions "gross negligence" and "ordinary negligence," strictly speaking, are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due, and he fails to bestow that little, it is called "gross negligence." If very great care is due, and he fails to come up to the mark required, it is called "slight negligence." And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called "ordinary negligence." In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more accurate, perhaps, to call it simply "negligence." This is the tendency of modern authorities.[5]

The Supreme Court has disapproved of attempts to fix the degrees of negligence by legal definitions. "The law furnishes no definitions which can be applied in practice, but leaves it to the jury to determine in each case what the duty was, and what omissions amount to a breach of it."[6]

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[1] Wabash, &c. R. Co. *v.* Moran, 13 Bradw. 76 (1883). cases, Bailey, P. J.; Chicago, &c. R. Co. *v.* O'Connor, *ib.* 65-66 (1883), cases; Union Ry. & Transit Co. *v.* Kallaber, 12 *id.* 404 (1883). See Kansas Pacific R. Co. *v.* Peavey, 29 Kan. 180 (1883); 124 Mass. 50.

[2] [Washington, &c. R. Co. *v.* Gladmon, 15 Wall. 401 (1872).

[3] Little *v.* Hackett, 116 U. S. 371 (1886), Field, J.

[4] Neanow *v.* Uttech, 46 Wis. 590 (1879).

[5] Baltimore & Potomac R. Co. *v.* Jones, 95 U. S. 442 (1877), cases, Swayne, J.

[6] Cornwall *v.* Charlott, &c. R. Co., 97 N. C. 11 (1887).

[7] Ladd *v.* Foster, 31 F. R. 881 (1887), cases; 23 Cent. Law J. 559 (1886) — Irish Law Times. See generally Wells *v.* Coe, 9 Col. 160-62 (1886), cases; Farley *v.* Richmond, &c. R. Co., 81 Va. 784-85 (1886); 36 Alb. Law J. 324-25 (1887), cases. By passengers on street cars, 24 Am. Law Reg. 739-42 (1885), cases.

[8] Indianapolis, &c. R. Co. *v.* Horst, 93 U. S. 298 (1876); Washington, &c. R. Co. *v.* Gladmon, 15 Wall. 406-8 (1872), cases; 16 F. R. 76, 160; 62 Cal. 334; 59 Iowa, 186; 84 La. An. 1086; 101 Mass. 464-65; 92 Pa. 432, 479-81.

[9] See Cook *v.* Western, &c. R. Co., 72 Ga. 48 (1883).

[1] Woodman *v.* Nottingham, 49 N. H. 392 (1870).

[2] Rush *v.* Missouri Pacific R. Co., 36 Kan. 135 (1887).

[3] [Goodman *v.* Simonds, 20 How. 367 (1857), Clifford, J.

[4] Milwaukee, &c. R. Co. *v.* Arms, 91 U. S. 495 (1875), cases, Davis, J.

[5] New York Central R. Co. *v.* Lockwood, 17 Wall. 382-83 (1873), cases, Bradley, J.; Steamboat New World *v.* King, 16 How. 474 (1853); Griswold *v.* New York, &c. R. Co., 53 Conn. 390 (1885).

[6] Milwaukee, &c. R. Co. *v.* Arms, 91 U. S. 494 (1875), Davis, J. See also as to *gross* negligence, 3 Mas. 132, Story, J.; 14 F. R. 710; 30 Ala. 496; 23 Conn. 443; 73 Ill. 357; 45 Mo. 22; 22 Barb. 151; 38 Ohio St. 639; Story, Bailm. § 17; as to *ordinary*, 5 Kan. 180; 10 *id.* 288; 7 B.

Where neither fraud nor collusion, nor privity of contract exists, a party will not be held liable for his act of negligence, unless the act is one immediately dangerous to the lives of others.[1]

The limit of the doctrine relating to actionable negligence is, that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction upon the right to sue for a want of care in the exercise of an employment or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies, if the ill effects of negligence could be followed down the chain of results to the final effect.[2]

An *adult* must give that care and attention to his own protection that is ordinarily exercised by persons of intelligence and discretion. From an *infant* of tender years less discretion is required and the degree depends upon his age and knowledge. The caution required is according to the maturity and capacity of the child,—a matter to be determined in each case by circumstances.[3]

One is bound to exercise reasonable care to anticipate and prevent injury to a child of such tender years as to have little discretion, although a trespasser.[4]

The rule is that a *master* is exempt from liability to a servant for injuries caused by the negligence of a fellow-servant. It is implied in the contract that the servant risks the dangers which ordinarily attend the business — among which is the carelessness of those in the same employment, with whose habits, conduct, and capacity he has an opportunity to become acquainted, and against whose neglect he may guard himself. It is implied, also, that in the selection of the physical means the master will not be wanting in proper care. His negligence in that regard is not a hazard usually attendant upon the business; nor is it one the servant is presumed to risk, for he has, ordinarily, no connection with their purchase, preservation, or maintenance. Although the master's liability is not that of a guarantor of the absolute safety or perfection of apparatus provided for use, yet he is bound to exercise the care which the exigency reasonably requires, in furnishing such as is adequate and suitable. It is for the jury to say whether in relying upon a promise given to repair, and using machinery after he knew its defective condition, the servant was in the exercise of due care. In such case the burden of proving contributory negligence is upon the master.[1]

Where the master has expressly promised to remedy a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept.[2]

Usually, where some instrument or appliance has become unsafe and the danger from its use is not imminent or obvious, the servant may use it for a short time with the expectation that the master will remedy the defect. Where the master has been informed of a defect, and agrees to remedy it, the servant may continue for a reasonable time in the employment, so as to give the master an opportunity to fulfill his promise. Where the danger is one to which the servant is not exposed in the ordinary course of his employment, but is one which he is required to immediately encounter by special command of a superior, without time for reflection, he may obey without being guilty of contributory negligence or forfeiting his right to recovery in case injury results. When the danger is not always obvious or imminent, and both employer and employee, with full knowledge, enter upon or continue the contract of employment, neither is guilty of culpable negligence; while if the danger is obvious and imminent, and it is encountered by the servant, then both are equally guilty — that of the employee being culpable contributory negligence.[3]

When one enters the employment of another he assumes all the ordinary risks attendant upon it; and where a number of persons enter a common employment for another, all being upon a common footing, and one receives an injury by the neglect of another, they are the agents of each other, and no recovery can be had against the employer. The English rule has been that it did not matter if the injured servant was subordinate to the neglectful one and under his control; or if they were engaged in different grades of the service. To hold the master responsible he must have had personal connection with the injury, provided he was not neglectful in selecting and retaining his servants. This rule seems to prevail in many courts in

Mon. 668; 61 Ill. 160; 71 Me. 41; 6 Met. 26; 25 Mich. 297; 24 N. Y. 181; 40 *id.* 29; as to *slight*, 35 N. Y. 27; 3 Oreg. 145; 64 Tex. 151; 43 Wis. 509.

[1] Savings Bank *v.* Ward, 100 U. S. 204 (1879), cases.

[2] Kahl *v.* Love, 37 N. J. L. 8 (1874), Beasley, C. J.; Gordon *v.* Livingston, 12 Mo. Ap. 267, 272 (1882).

[3] Washington, &c. R. Co. *v.* Gladmon, 15 Wall. 408 (1872), cases, Hunt, J.; Union Pacific R. Co. *v.* Fort, 17 *id.* 553 (1873); Sioux City, &c. R. Co. *v.* Stout, *ib.* 660 (1873); Collins *v.* South Boston R. Co., 142 Mass. 313 (1886), cases; 124 *id.* 57; 91 N. Y. 420; 43 Pa. 220–23; 88 *id.* 520; 100 *id.* 149.

[4] Kentucky Central R. Co. *v.* Gastineau, 83 Ky. 125–27 (1885), cases. See generally as to young and inexperienced persons, Hickey *v.* Taaffe, 105 N. Y. 26 (1887), cases: 26 Am. Law Reg. 734–43 (1887), cases; 25 *id.* 891–94 (1886), cases; 23 Cent. Law J. 33, 459 (1886), cases.

[1] Hough *v.* Texas & Pacific R. Co., 100 U. S. 213–26 (1879), cases, Harlan, J.; Union Pacific R. Co. *v.* Fort, 17 Wall. 557 (1873); Packet Company *v.* McCue, *ib.* 508 (1873); Tuttle *v.* Detroit, &c. R. Co., 122 U. S. 195 (1887); North Chicago Rolling Mill Co. *v.* Johnson, 114 Ill. 64 (1885).

[2] Hough *v.* Texas, &c. R. Co., 100 U. S. 225 (1879), cases.

[3] Rush, Adm'x *v.* Missouri Pacific R. Co., 36 Kan. 136–38 (1887), Valentine, J. See as to the effect of a promise to remedy a defect, Indianapolis, &c. R. Co. *v.* Watson, 114 Ind. 20 (1887), cases: 37 Alb. Law J. 169, 171, cases; 25 Am. Law Reg. 617–32 (1886), cases; 92 Am. Dec. 213–21, cases. Presumption, where the appliance is within control of the defendant, Sheeler *v.* Chesapeake, &c. R. Co., 81 Va. 199 (1885); 20 Am. R. D. 245–47, 261, cases. Want of knowledge, as a defense, 20 Cent. Law J. 163–66 (1885), cases.

this country, except that if the injured party be in a different grade of the service, the employer may be responsible; the establishment of the rule being largely due to the opinion of Chief Justice Shaw in the case of *Farwell* v. *Boston, &c. R. Co.*, 4 Metc. 57 (1842). The courts of Ohio and Kentucky have extended the rule; and the leaning in New York is in the same direction: they holding not only that the master is liable for an injury to one servant by another in a different grade of employment, but, also, when engaged in the same common employment, provided the neglectful one is superior to or in control of the injured one.[1]

Carriers of passengers must exercise ordinary care. According to the best considered adjudications, and upon the clearest grounds of necessity and good faith, "ordinary care," in the selection and retention of servants and agents, implies that degree of diligence and precaution which the exigencies of the particular service reasonably require. It is such care, as, in view of the consequences that may result from negligence on the part of employees, is fairly commensurate with the perils or dangers likely to be encountered. Ordinary care implies the exercise of reasonable diligence, and reasonable diligence implies, as between employer and employee, such watchfulness, caution, and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise. A degree of care "ordinarily exercised in such matters" may not be due, or reasonable, or proper care, and therefore not ordinary care.[2]

The *occupant* of land or a structure, who "invites" another to come upon it for a lawful purpose, is liable to such person, not chargeable with contributory negligence, for an injury occasioned by the unsafe condition of the land and its approaches, if such condition was known to the occupant and he suffered it to exist without giving notice to those likely to act upon the invitation. An invitation will be inferred where there is a common interest or mutual advantage; while a "license" will be inferred where the object is the mere pleasure or benefit of the person using it. Each case rests largely upon its own circumstances.[1]

A passive acquiescence in a certain use of land by others involves no liability; but if the owner or occupier directly or by implication induces persons to enter or pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use.[3]

While a railroad company is not bound to the same degree of care in regard to a mere stranger who is even unlawfully upon its premises that it owes to passengers, it is not exempt from responsibility to such stranger for an injury arising from its negligence or tortious act.[3]

What is negligence and what is ordinary care must be submitted to the jury, if there be any dispute or reasonable doubt as to the facts claimed to establish the alleged negligence, or as to the just inferences to be drawn therefrom. If, however, the facts be admitted or ascertained, it is the province of the court to declare the law thereon.[4]

See further BAILMENT; CARE; CARRIER; CASE, 8; CAUSE, 1; CHECK; COLLISION; CONSEQUENCES; DAMAGES; DILIGENCE; FAULT; FIRE; FRAUD; INJURY; JURY; LACHES; LIVERY-KEEPER; PRUDENCE; SERVANT, 8; TELEGRAPH; TORT, 2.

NEGOTIATE.[5] 1. To conduct business: to discuss the terms of a bargain; to endeavor to effect an agreement; to conclude a contract.[6]

2. To transfer by indorsement or delivery.

A bill of exchange is "negotiated" when it has passed into the hands of the payee,

[1] Louisville, &c. R. Co. *v.* Moore, 83 Ky. 683-84 (1886), cases, Holt, J. See further, as to master and servant, and fellow-servants, Herbert *v.* Northern Pacific R. Co., 3 Dak. 50-58 (1882), cases; Rogers *v.* Overton, 87 Ind. 412 (1882), cases; Baltimore & Ohio R. Co. *v.* McKenzie, 81 Va. 73-75, 84-85 (1885), cases; Little Rock, &c. R. Co. *v.* Leverett, 48 Ark. 347 (1886), cases; Sanborn *v.* Modera Flume, &c. Co., 70 Cal. 265-68 (1886), cases; Rogers *v.* Ludlow Manuf. Co., 144 Mass. 200 (1887); Rice *v.* King Philip Mills, *ib.* 235 (1887); Porter *v.* West. N. Car. R. Co., 97 N. C. 75 (1887); 24 Am. Law Reg. 462-67 (1885), cases; 25 *id.* 481-93 (1886), cases; 26 *id.* 635-41 (1887), cases; 23 Cent. Law J. 316-23, 555-59 (1886), cases. As to contracts limiting the liability of the employer, see Lake Shore, &c. R. Co. *v.* Spangler, 44 Ohio St. 476 (1886), cases: 26 Am. Law Reg. 45-47 (1887), cases; 26 Alb. Law J. 64-67 (1882), cases.

[2] Wabash R. Co. *v.* McDaniels, 107 U. S. 459-61 (1882), cases, Harlan, J.; Randall *v.* Baltimore & Ohio R. Co., 109 *id.* 483 (1883); Armour *v.* Hahn, 111 *id.* 318 (1884), cases; Chicago, &c. R. Co. *v.* Ross, 112 *id.* 382-83 (1884), cases: 20 Cent. Law J. 87 (1885), cases; Northern Pacific R. Co. *v.* Herbert, 116 *id.* 647 (1886); Atchison, &c. R. Co. *v.* Moore, 29 Kan. 644 (1883); Peschel *v.* Chicago, &c. R. Co., 62 Wis 340 (1885); 2 McCrary, 235, 243; 3 *id.* 430-36; 11 Biss. 362; 14 F. R. 833-46; 39 Ark. 1, 26; 3 Cal. 499; 50 Conn. 433, 457; 88 Ill. 270; 125 Mass. 485; 130 *id.* 102; 22 Minn. 185; 86 Pa. 429-40; 100 *id.* 301, 306.

[1] Bennett *v.* Louisville, &c. R. Co., 102 U. S. 580 (1880), cases, Harlan, J. See also Nickerson *v.* Tirrell, 127 Mass. 239 (1879), cases; Converse *v.* Walker, 30 Hun, 601 (1883); Parker *v.* Portland Publishing Co., 69 Me. 173, 176 (1879), cases; McKee *v.* Bidwell, 74 Pa. 218, 223 (1873); American Steamship Co. *v.* Landreth, 108 *id.* 264 (1885); 111 *id.* 423; Marshall *v.* Heard, 59 Tex. 226 (1883), cases.

[2] Crogan *v.* Schiele, 53 Conn. 205-7 (1885), cases.

[3] Sioux City, &c. R. Co. *v.* Stout, 17 Wall. 661 (1873), Hunt, J.

[4] Baker *v.* Fehr, 97 Pa. 70 (1881), cases; Abbott *v.* Chicago, &c. R. Co., 30 Minn. 483 (1883); Mares *v.* Northern Pacific R. Co., 3 Dak. T. 343-44 (1884), cases. That the Government is not liable for the negligence of its employees, see Robertson *v.* Sichel, 127 U. S. 515 (1888), cases.

[5] L. *negotiare*, to do business: *negotium*.

[6] See Inhabitants of Palmer *v.* Ferry, 6 Gray, 422 (1856); Yerkes *v.* National Bank, 69 N. Y. 386 (1877); Coles *v.* Shepard, 30 Minn. 448 (1883).

or indorsee, or other holder for value, who thereby acquires a title to it.[1]

Negotiable. Capable of being transferred by assignment; also, a thing which may be transferred by a sale and indorsement or delivery:[2] as, a negotiable or a *non-negotiable* instrument, negotiables and non-negotiables.

A note, to be negotiable, must not be encumbered by a collateral agreement to be determined by a jury.[3]

The tendency is to enlarge the rule as to the negotiability of paper. Stipulations which do not render uncertain the amount to be paid, or the time of payment, but which tend to increase the value of the instrument, do not impair its negotiability.[4]

At common law, no contract was assignable with a right in the assignee to sue in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, were made exceptions by the law-merchant. They may be transferred by indorsement and delivery, and such a transfer is called "negotiation." It is a mercantile business transaction, and the capability of being thus transferred, so as to give the indorsee a right to sue on the contract in his own name, is what constitutes negotiation. The term expresses, at least primarily, this mode and effect of transfer.[5]

As to bills and notes, other consequences follow: *e. g.*, liability of an indorser after notice of non-payment; non-availability, as to a *bona fide* indorser for value, before maturity, in the regular course of business, of an equity good as against the original payee, or the fact that the paper was lost or stolen. But "negotiability" may exist without these consequences. Thus, a past-due note or bill payable to order or bearer is negotiable, but defects then existing,—all prior equities, and the defense that the paper was lost or stolen,—attach to it.[6]

Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the use of a city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts due public creditors, are not negotiable. To make such instruments negotiable, in the broad sense, rendering them in the hands of *bona fide* holders absolute obligations to pay, would be an abuse of their character, convert municipal corporations into trading companies, and put it in the power of corrupt officials to bankrupt a community.[7]

Nor does the term apply to securities to pay for extensive public works, the expense of which is beyond the immediate resources of reasonable taxation, and capable of being spread over a long period.[8]

County warrants are not negotiable, in the sense of the law-merchant, so that when held by a *bona fide* purchaser, evidence of their invalidity, or defenses available against the original payee, would be excluded. The transferee takes them subject to all defenses which existed as against the instrument in the hands of such payee.[1]

Bills of exchange and promissory notes are distinctively negotiable instruments. They are the representatives of money, and circulate as money. They are held sacred in the hands of a *bona fide* holder, for value, without notice. Without this they could not perform their peculiar functions. On account of their negotiable quality and convenience in mercantile affairs, they are favored by the courts. Possession is *prima facie* evidence of title. Nothing short of fraud, not even gross negligence, will invalidate title from mere possession.[2]

If, in a suit brought by the indorsee or transferee of a negotiable instrument, the maker or acceptor, or a party who is primarily bound by the original consideration, proves that there was fraud or illegality in the inception of the instrument, the burden of proof is thrown on the plaintiff to show that he is a holder for value.[3]

As between the payee of a promissory note, payable to order, and not indorsed, and a stranger having possession, the payee is *prima facie* the legal owner; so that mere possession cannot avail the holder in an action by the payee.[4]

If any previous holder was a *bona fide* owner for value, the plaintiff, by showing that he paid value, can avail himself of the position of such holder. In cases to the contrary, there was no *bona fide* previous holder; yet in such case the plaintiff has recovered advances made before he learned that prior parties were not *bona fide* holders.[5]

See further ASSIGN, 2; BANK, 2 (2); BEARER; CERTAINTY; CIRCULATION; COLLECTION; COUPON, Bond;

[1] Baring *v.* Lyman, 1 Story, 416 (1841), Story, J.

[2] Walker *v.* Ocean Bank, 19 Ind. 250 (1862), Hanna, J.

[3] Woods *v.* North, 84 Pa. 409 (1877); Garretson *v.* Purdy, 3 Dak. 182–88 (1882), cases.

[4] Schlesinger *v.* Arline, 31 F. R. 649–52 (1887), cases.

[5] Shaw *v.* North Pennsylvania R. Co., 101 U. S. 562–64 (1879), cases, Strong, J. See also Paine *v.* Central Vt. R. Co., 118 *id.* 160 (1886), cases.

[6] Mayor of Nashville *v.* Ray, 19 Wall. 477–78 (1873), Bradley, J.

[1] Wall *v.* County of Monroe, 108 U. S. 77–78 (1880), Field, J.; County of Ouachita *v.* Wolcott, *ib.* 559 (1880), Miller, J.

[2] Shaw *v.* North Penn. R. Co., 101 U. S. 564 (1879), cases; Perley *v.* Perley, 144 Mass. 107 (1887), cases. See also, as to the effect of negligence, Credit Co. *v.* Howe Machine Co., 54 Conn. 383–84 (1886), cases; 23 Cent. Law J. 149–54 (1886), cases. Why negotiable paper is favored, Merchants' Bank *v.* McClelland, 9 Col. 611 (1886), cases.

[3] Pana *v.* Bowler, 107 U. S. 542 (1883), cases, Woods, J. See also Goodman *v.* Simonds, 20 How. 364–65 (1857), cases; Smith *v.* Sac County, 11 Wall. 154 (1870), cases; Hotchkiss *v.* National Banks, 21 *id.* 359 (1874), cases; Collins *v.* Gilbert, 94 U. S. 754 (1876), cases; 2 McCrary, 568; 11 Biss. 66; 4 Hughes, 524; 18 Ct. Cl. 399; 133 Mass. 151; 38 Mich. 299; 52 Miss. 919; 15 Mo. 342; 73 N. Y. 273; 29 Wis. 191.

[4] Durein *v.* Moeser, 36 Kan. 443 (1887), cases.

[5] Butterfield *v.* Town of Ontario, 32 F. R. 802 (1887), cases. As to diligence required in collecting from indorsers, guarantors, and sureties, see 21 Cent. Law J. 6–9 (1885), cases; 36 Am. Law Reg. 129–47, 201–18 (1887), cases.

DISCOUNT, 2; DISHONOR; DRUNKENNESS; EXCHANGE, 8, Bill of; FACE, 1; FAITH; FORGERY; HOLDER; INDORSEMENT; LADING, Bill of; LOST, 2; MATURE, 2; MERCHANT, Law; NOTE, 2; ORDER, 1; PAPER, 4; PAROL, Evidence; PLACE, 1, Of payment; PRESENT, 2 (1); PROTEST, 2; RENEW; RETIRE, 2; SECURITY; SIGHT; SUSPICION; TURPITUDE; VALUE, Received. WARRANT, 2 (2).

NEGRO. See CITIZEN; COLOR, 1; MULATTO; PARTUS; RIGHTS, Civil; SLAVERY; WAR; WHITE.

NEIGHBOR. See POLICE, 2, Public; UTERE, Sic utere, etc.

Neighborhood. See COUNTRY; VICINITY.

NEMO. L. No man; no one.

Nemo allegans, See TURPITUDE.

Nemo dat. See DARE.

Nemo bis vexari. See VEXARI.

Nemo debet judex. See JUDEX.

Nemo debet testis. See TESTIS.

Nemo exuere patriam. See EXPATRIATION.

Nemo hæres viventis. See HÆRES.

Nemo plus juris. See TRANSFERRE.

Nemo tenetur accusare. See ACCUSARE.

NEPHEW; NIECE. The immediate descendants, male and female, respectively, of brothers and sisters.

May be shown, by circumstances, to include grand-nephews and grand-nieces, even a great-grand niece,[1] or a nephew or niece by marriage.[2] See CONSANGUINITY.

NET; NETT.[3] The quantity, amount, or value of an article or commodity, after all tare and charges are deducted.[4]

That which remains after deducting all charges or outlay; as, net — earnings,[5] balance, income, proceeds, profits, value, weight, *qq. v.*

NEUTRALITY. Siding with neither party in a war; sustaining a relation of amity to belligerents.

Neutrality is "strict," and "imperfect;" and imperfect neutrality is either "impartial" or "qualified."[6]

NEVER INDEBTED. See DEBT, 2.

NEW. 1. Applied to the same subject or object, stands opposed to *old*, as in "new patent:" more or less efficacious, or possessing new properties by a combination with other ingredients, not from a mere change of form produced by mechanical division.[1] See NOVELTY.

2. In technical phrases, varies only slightly, if at all, from the popular signification: as, in new — acknowledgment, assets, assignment, buildings, evidence or proofs, matter, parties, promise, trial, *qq. v.* Cf. RENEW.

New for old. In adjusting losses in marine insurance, the rule has been to apply the old materials toward paying for new, on a valuation of one-third for the old.[2] See BUILDING; RESTITUTIO, 2.

Newly discovered evidence. See DISCOVERY, 8.

NEW MEXICO. See PUEBLO; TERRITORY, 2.

NEW YEAR'S. See HOLIDAY.

NEWGATE. An underground prison in Connecticut, in use for more than fifty years after the close of the Revolution.

The place, for its horrors, has been compared to the Black Hole of Calcutta.[3]

NEWSPAPER. A publication containing a narrative of recent events and occurrences, published regularly at short intervals from time to time.[4]

In the usage of the commercial world, "a publication in numbers, consisting commonly of single sheets, and published at short intervals, conveying intelligence of passing events."[5]

As ordinarily understood, a publication which contains, among other things, what is called the general news, the current news, or the news of the day; not, a publication which does not usually contain such news, and is not intended for general circulation.[6]

Such a newspaper is adapted to the general reader. Where the object of the publication of a summons is considered, the reasonableness of such a construction of the word as requires the publication to be made

[1] Cromer *v.* Pinckney, 3 Barb. Ch. 475 (1848), cases.

[2] Green's Appeal, 42 Pa. 80 (1862); Merrill *v.* Morton, 43 L. T. 750 (1881).

[3] F. *net*, pure: clean, clear.

[4] Andrews *v.* Boyd, 5 Me. *202-3 (1828).

[5] St. John *v.* Erie R. Co., 22 Wall. 148 (1874); 10 Blatch. 271; 99 U. S. 420; 50 Ga. 350; 71 Pa. 74.

[6] See Woolsey, Int. Law, Ch. 11; 1 Kent, 116; R. S. § 5286: United States *v.* Rand, 17 F. R. 142 (1883); United States *v.* Quincy, 6 Pet. 445 (1832); 3 Whart. Cr.-L. §§ 2778-2802.

[1] See Lessee of Pollard's Heirs *v.* Kibbe, 14 Pet. 364 (1840); Glue Co. *v.* Upton, 97 U. S. 6 (1877).

[2] Eager *v.* Atlas Ins. Co., 14 Pick. 143-45 (1833), cases; 2 Pars. Mar. Ins. 129, 385.

[3] See 1 McMaster, Hist. Peop. U. S. 98.

[4] Attorney-General *v.* Bradbury, 7 Exch. 103 (1851), Martin, B. Postal Law,— "The Household Narrative of Current Events."

[5] 4 Op. Att.-Gen. 11 (1842). Postal Law,— "The Shipping and Commercial List and New York Price Current."

[6] [Beecher *v.* Stephens, 25 Minn. 147 (1878), Berry, J

where it will be likely to meet the eye of the general reader, is apparent. The "Northwestern Reporter," while a *legal* newspaper, is not a newspaper in the ordinary sense.[1]

In another case a paper devoted to disseminating legal news among lawyers and business men was held to be a newspaper.[2]

A newspaper is of itself a public print, and imports publicity. The word "public" need not therefore be used in describing the paper.[3]

A "daily newspaper" is published every day of the week except one, whether Sunday or any other day, as, Monday.[4]

A statute providing that laws of a general character shall be published "in a daily and weekly newspaper," contemplates publication in the daily and weekly editions as a single insertion, and not as a separate insertion in each edition.[5]

A paper which is composed and issued in a place is "published" at that place, although the press-work is done elsewhere.[6]

A paper made up partly of a "patent inside," printed in another State, is printed "in the county where it is issued," within the meaning of a statute regulating publication of notice in actions against non-residents.[7]

Since, in nearly all counties, newspapers are published but once a week, a legislature, in prescribing publication a certain number of weeks, will be presumed to have intended publication once a week.[8]

A newspaper may be admissible in evidence to impute knowledge of a fact, as, the dissolution of a partnership; when verified, to prove prices-current, but not, generally, for other purposes. Knowledge derived from a newspaper is provable inferentially, as, from familiarity with the paper.[9]

When the publication of news is made in good faith, in the ordinary course of business, without intent to defame, and without negligence, a person injured may be restricted in his recovery to actual damages.[10]

Fair reports of what takes place before legislative bodies and their committees, and in the courts, are privileged — the report being confined to the proceedings, and without defamatory headings or comments.[11]

The law favors publicity of legal proceedings, as far as attainable without injustice being done to any person immediately concerned. The public being permitted to attend, may be served with reports of, judicial inquiries, provided these reports are so full and impartial as not to convey a false impression. . . A report must be strictly confined to the actual proceedings, and contain no defamatory comments. . . It has been held that the publication of *ex parte* proceedings, or merely preliminary examinations, is not privileged. Reports of these tend "to prejudge those whom the law presumes innocent; to cause the judgment of conviction to be pronounced before trial; to poison the sources of justice — the mass of the people from whom jurors are drawn."[1]

But it is not lawful to publish even a correct account of the proceedings in a case in court, if the account contains matter of a blasphemous or indecent nature.[2]

See CONTEMPT, 1; COMMUNICATION, Privileged, 2; DISTRIBUTION, 3; EDITOR; MAIL, 2; OPINION, 2; PACKET; PROCLAMATION, 3; REVIEW, 3; SCIENCE; SUNDAY; WEEK.

NEXT. Nearest.

A return of process to the "next term" means to the next term to which the law directs return.[3]

A writ of attachment was issued in September, 1880, returnable to the "next March term, 1880." *Held*, that the writ being returnable to an impossible day, all proceedings were void.[4]

NICKEL. See COIN.

NICKNAME. See NAME, 1.

NIECE. See NEPHEW.

NIGHT. In the law of burglary, there must not be day-light enough to discern a face.[5]

It will not avail the prisoner that there was light enough from the moon, street-lamps, and buildings, aided by snow, to discern the features of another person.[6]

Within the meaning of a statute forbidding the keeping open of tippling-houses on the Sabbath day and night, "night" includes the time between midnight on Saturday and the dawn of Sabbath morning.[7]

See DAY.

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[1] [Beecher *v.* Stephens, *ante*.

[2] Kerr *v.* Hitt, 75 Ill. 51 (1874), — "Chicago Legal News." See also Kellogg *v.* Carrico, 47 Mo. 159 (1870), — "Legal Record and Advertiser."

[3] Bailey *v.* Myrick, 50 Me. 181 (1860).

[4] Richardson *v.* Tobin, 45 Cal. 30 (1872), — "San Francisco Chronicle."

[5] Montgomery Advertiser Co. *v.* Burke, 93 Ala. 333 (1886).

[6] Bayer *v.* Hoboken, 44 N. J. L. 131 (1882), — "Hoboken Advertiser."

[7] Palmer *v.* McCormick, 30 F. R. 82 (1887).

[8] Greenwood *v.* Murray, 28 Minn. 123 (1881), — "St. Paul Daily Evening Dispatch."

[9] 1 Whart. Ev. §§ 671-75, cases.

[10] Detroit Daily Post Co. *v.* McArthur, 16 Mich. 447 (1868); Perrott *v.* New Orleans Times, 25 La. An. 170 (1873).

[11] See Pittock *v.* O'Niel, 63 Pa. 253 (1869); Storey *v.* Wallace, 60 Ill. 51 (1871); Scripps *v.* Reilly, 38 Mich. 10 (1878); Bathrick *v.* Detroit Post and Tribune Co., 50 *id.* 630, 644 (1883).

[1] See Cooley, Const. Lim. 448-51; Rex *v.* Fisher, 2 Campb. *570-71 (1811), Ellenborough, C. J.; Stanley *v.* Webb, 4 Sandf. 21, 30 (1850), Campbell, J.; 16 Alb. Law J. 327 (1877), cases; 18 *id.* 142 (1878), cases; Rex *v.* Lee, 5 Esp. 123 (1804); Stiles *v.* Nokes, 7 East, 493 (1806); Lewis *v.* Clement, 3 B. & Ald. 702 (1820).

[2] King *v.* Carlile, 3 B. & Ald. 167 (1819); *ib.* 161. See generally Odgers, Lib. & Sl. 243-59, cases; Starkie, Sl. & Lib. 173, 186, cases; Townshend, Sl. & Lib. §§ 217-22, cases; as to privileged communications, 21 Cent. Law J. 86-90, 450-55 (1885), cases.

[3] Rivers *v.* Hood, 72 Ga. 194 (1883).

[4] Holzman *v.* Martinez, 2 N. M. 272 (1880). See also 7 Ga. 107; 1 Mass. 411; 4 Johns. Ch. 96; 64 Ill. 356.

[5] 4 Bl. Com. 224.

[6] State *v.* Morris, 47 Conn. 179 (1879).

[7] Kroer *v.* People, 78 Ill. 295 (1875).

Night-walkers. Those who are abroad during the night and sleep by day, and are of suspicious appearance and demeanor.[1]

"Those who eave-drop men's houses, cast men's gates, carts, and the like into ponds, or commit other outrages or misdemeanors in the night, or shall be suspected to be pilfering, or otherwise like to disturb the peace, or that be persons of evil fame or report generally, or that shall keep company with any such, or with other suspicious persons in the night."[1]

Watchmen and constables may arrest night-walkers and commit them to custody till morning.[2]

NIHIL; NIL. L. Nothing.

Nil is the contracted form.

Various returns to process are termed returns of *nihil*.

Nihil or nil debet, or indebitatus. He owes nothing. See DEBET, 2.

Nihil or nil dicit. He says nothing. A judgment in default of a plea or an answer. See RETRAXIT.

Nihil est. There is nothing.

A fuller answer to the command of a summons than is *non est inventus*. It means that the defendant has nothing in the bailiwick,— no dwelling-house, no family, no residence, no personal presence.[3]

Nihil habet. He has nothing. The return when the officer has been unable to find the defendant.

Nihil alone is often used. It is used as the return to a *scire facias* that the defendant, or his bail, has nothing by which the officer can "make known" to them,— two such returns being sometimes considered equal to a service. Thus, two "nihils" in a suit on a mortgage may equal a personal service. The name is also given to the return that nothing is subject to garnishment. Compare BONA, 2, Nulla.

NIHILIST. 1. One who denies that anything can be known or shown to exist.[4] See NIHIL; OATH.

2. In Russia, a member of a secret society whose aim is the overthrow of authority as at present constituted, the ulterior view of the more advanced members being the establishment of a socialistic or communistic republic.[4] See ANARCHY; COMMUNISM; GOVERNMENT.

NISI. L. Unless; conditionally.

A rule or order which is to become absolute (*q. v.*) "unless" cause to the contrary be shown is termed a rule *nisi*.

The continuance of a case *nisi* is to a time certain unless something shall occur to cause action to be taken upon the case before that time.[1]

Nisi prius. Unless before.

Formerly, was applied to a court holding jury trials. The two words were the most emphatic in the *venire* for summoning the jurors.

This use of the word originated in a fiction. An issue of fact was to be tried at Westminster by a jury from the county wherein the cause arose, "unless before" the day set the judges, upon their circuit, came to that county.[2]

It being found a burden to compel the parties, witnesses, and jurors to go — say from Westmoreland, to try actions of trifling value at Westminster, the practice obtained to continue such actions in the court at Westminster until the itinerant justices, of whom two were of the Westminster bench, came to the county where the cause arose, whereupon the cause was remanded from Westminster for trial. For a period, the proceedings were returned to Westminster for judgment. Holding trials in this manner became the principal civil employment of the justices.[3]

An advocate is said to be a good *nisi prius* lawyer when he possesses the qualifications required to attain success in the management of trials at *nisi prius*.

NO. See AWARD; BILL; DEFENSE, 2; FUNDS; GOODS. Compare NUL; NULLUS. See also NUMBER.

NO MAN'S LAND. See INDIAN, Country.

NOBILITY. See TITLE, 4.

NOISE. See AIR; DISORDER; NUISANCE; POLICE, 2.

If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of the effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured with reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those on the other who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them. That this must be the rule in regard to public nuisances is obvious. It is the rule as well, and for reasons nearly if not quite as satisfactory, in relation to private nuisances. Upon a question whether one can lawfully ring his factory bell, or run his noisy

[1] State *v.* Dowers, 45 N. H. 544 (1864), Bellows, J.; Thomas *v.* State, 55 Ala. 260 (1876); State *v.* Russell, 14 R. I. 506 (1884).

[2] 4 Bl. Com. 292.

[3] Sherer *v.* Easton Bank, 33 Pa. 138 (1859).

[4] [Worcester's Dict.

[1] Commonwealth *v.* Maloney, 145 Mass. 208 (1887).

[2] 3 Bl. Com. 59.

[3] 3 Bl. Com. 352.

machinery, or whether the noise will be a private nuisance to the occupant of a house near by, it is necessary to ascertain the natural and probable effect of the sound upon ordinary persons in that house — not how it will affect a particular person who happens to be there to-day, or who may chance to come to-morrow.[1]

Where a noisy nuisance is complained of, it is a question of degree and locality. If the noise is very slight, and the inconvenience merely fanciful, or such as would be complained of by people of elegant and dainty modes of living, and inflicts no serious or substantial discomfort, a court of equity will not take cognizance of it. But if unusual and disturbing noises are made, and particularly if they are regularly and persistently made, and if they are of a character to affect the comfort of a man's household, or the peace and health of his family, and to destroy the comfortable enjoyment of his home, a court of equity will prevent continuance of such injuries.[2]

NOLLE. L. To not wish or desire: *non velle.* Compare VOLO.

Nolle prosequi. To not care to proceed. A record entry that the prosecutor does not care to proceed further in the particular case.

An agreement not to proceed further in that suit, as to the particular person or cause of action to which it is applied.[3]

Said of a judgment in a criminal case by which the attorney-general, or other representative of the state, voluntarily declares that he will not further prosecute a suit or indictment, or a particular count, or as to a particular defendant.[4]

Sometimes spoken of as allowing a *nolle.*

Not a bar to another prosecution for the same offense,[1] but such termination as will allow an action for malicious prosecution.[2] See PROSEQUI.

Nolo contendere. I do not care to dispute it.

A plea in effect the same as a plea of "guilty," so far at least as regards proceedings on the particular indictment.[3]

NOM. See NOMEN, Nomine.

Nom de plume. See COPYRIGHT.

NOMEN. L. A name.

Nomen collectivum. A class name.

Thus, "heir" may include all the heirs of a person, and "misdemeanor" includes many different species of offenses.

Nomen generalissimum. A very general name: a comprehensive term.

Such are the terms crime, demand, draft, estate, goods, grant, heir, house, instrument, interest, land, merchandise, obligation, offense.

Nomine. By name; under the name of.

NOMINAL. Existing in name only; apparent, formal, not real or substantial: as, nominal — damages, date, partner, party, *qq. v.*

NOMINEE. See CANDIDATE: OFFICER; RESIGNATION.

NON. L. Not; no.

A particle of negation, whether occurring as a single word or as a prefix to a word of affirmative signification.

Used with words of Latin origin. *Un* is used with words of Anglo-Saxon origin.

1. Pure Latin phrases:

Non accrevit. See ACCRESCERE.

Non assumpsit. See ASSUMPSIT.

Non cepit. See CAPERE.

Non compos. See MENS.

Non constat. See CONSTAT, 1.

Non cul; non culpabilis. See CULPA.

Non damnificatus. See DAMNUM.

Non demisit. See DEMITTERE.

Non detinet. See DETINERE.

Non est factum. See FACERE.

Non est inventus. See FIND, 3.

Non juridicus. See DIES.

Non obstante. See p. 1140.

Non prosequitur. See PROSEQUI.

[1] Rogers *v.* Elliott, 146 Mass. 351 (March 2, 1888), cases, holding that a person who by reason of a sunstroke was peculiarly susceptible to the noise caused by the ringing of a church bell, situated directly opposite his house in a thickly populated district, cannot, in the absence of evidence of express malice, or that the bell was objectionable to persons of ordinary health and strength, maintain an action against the custodian of the church for sufferings caused by the ringing of the bell.

[2] Appeal of Ladies' Decorative Art Club, 22 W. N. 75 (April 23, 1888). Affirmed the lower court in enjoining the hammering of brass by the pupils of an art school located in a thickly populated square in the city of Philadelphia, to which the plaintiff, with his family, had moved five years after the school had been opened, and into an adjoining house. Ball *v.* Ray, 8 Ch. Ap. 467 (1872), and Broder *v.* Saillard, 2 Ch. Div. 692 (1876), followed. See also Yocum *v.* Hotel St. George Co., 18 Abb. N. Cas. 340 (1886), cases,— in which the noise and vibration caused by an electric engine and dynamos was enjoined; 23 Cent. Law J. 510 (1886) — Solicitors' Jour. (London).

[3] Minor *v.* Mechanics' Bank, 1 Pet. 74 (1828), Story, J.

[4] Commonwealth *v.* Casey, 12 Allen, 318 (1866), cases.

[1] State *v.* Primm, 61 Mo. 166, 173 (1875), cases.

[2] Woodworth *v.* Mills, 61 Wis. 44, 50-53 (1884), cases; Graves *v.* Dawson, 113 Mass. 419 (1882), cases. See generally 5 Crim. Law Mag. 1-16 (1884), cases.

[3] Commonwealth *v.* Horton, 9 Pick. 206 (1829); Commonwealth *v.* Tilton, 8 Metc. 232 (1844); United States *v.* Hartwell, 3 Cliff. 232 (1869), cases.

Non sui juris. See JUS.
Non sum informatus. See INFORMATUS.
Non usurpavit. See USURP.
2. Illustrative English compounds:
Non-acceptance. See ACCEPT, 2.
Non-access. See ACCESS.
Non-age. See AGE.
Non-apparent. See EASEMENT.
Non-appearance. See APPEARANCE, 3.
Non-assessable. See ASSESS, 1.
Non-claim. See CLAIM.
Non-combatants. See WAR.
Non-commissioned. See OFFICER.
Non-contestable. See CONTEST.
Non-continuous. See CONTINUOUS.
Non-court. See DAY, Judicial.
Non-delivery. See DELIVERY.
Non-discovery. See DISCOVERY.
Non-intercourse. See ACCESS.
Non-feasance. See FEASANCE.
Non-fulfillment. See PERFORMANCE.
Non-joinder. See JOINDER.
Non-jurisdiction. See JURISDICTION.
Non-payment. See PAYMENT.
Non-negotiable. See NEGOTIATE, 2.
Non-performance. See PERFORMANCE.
Non-resident. See RESIDENT; TAX, 2.
Non-sane. See INSANITY.
Non-service. See SERVICE, 6.
Non-taxable. See TAX.
Non-use; non-user. See USE, 1.

NONSUIT. Not following: failure in a plaintiff to make advance in his cause: a giving up or renunciation of his suit.

If the plaintiff is guilty of a delay or default against a rule of law, as, by not filing a pleading within the allotted time, he is adjudged "not to follow" or pursue his remedy as he ought to do, and thereupon a "nonsuit" or *non prosequitur* is entered, and he is said to be "nonpros'd."[1]

"The plaintiff thereupon became nonsuit, and commenced this action" in the circuit court.[2]

After a nonsuit, and payment of costs, the plaintiff may begin suit again. After a *retraxit* — an open and voluntary renunciation of a suit — he forever loses his right of action.[3]

Compulsory or involuntary, and voluntary, nonsuit. When the plaintiff perceives that he has not given evidence sufficient to maintain the issue it is usual for him to be "voluntarily nonsuited," or to withdraw himself.[4]

For if he was not present when the jury came in to deliver their verdict, no verdict could be received.[5]

An "involuntary" or "compulsory" nonsuit is for neglect, in the plaintiff, either to appear, or, having appeared, for failure to present evidence sufficient in law to support a verdict in his favor.[6]

In either case, the court, at the request of the defendant or his counsel, may enter a judgment of nonsuit against the plaintiff.

Judgments of involuntary nonsuit are not allowed in the Federal courts.[7]

Before the evidence in a case is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which the jury can find a verdict for the party producing it. If there is not sufficient evidence, the judge may instruct the jury to find against the failing party. This has superseded the practice of demurrer to evidence: by which a party admits the truth of the testimony and the conclusions of fact the jury may fairly draw, but contests the legal sufficiency of the testimony.

If the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury.[8]

It would be an idle proceeding to submit evidence to a jury when they could justly find one way only.[9]

See DEFENSE, Affidavit of; INSTRUCT, 2; SCINTILLA.

NORMAN. See FEUD; FRENCH; LATIN; SEAL, 1.

NORTH. Not synonymous with "northerly" or "northwardly." And "northly" and "northwardly" may mean due north.[10]

Northern passage. See ART, 3.

NORTHAMPTON TABLES. See TABLE, 4.

NOSCITUR. L. It is known.

Noscitur a sociis. It is known from its associates or associations. A word or a par-

[1] 3 Bl. Com. 295-96, 316; 7 Q. B. D. 332; 12 Vt. 490.
[2] Bucher v. Chesire R. Co., 125 U. S. 557 (1888).
[3] 3 Bl. Com. 376.

[1] 3 Bl. Com. 376.
[2] See Pratt v. Hull, 13 Johns. 334 (1816); Runyon v Central R. Co., 25 N. J. L. 556 (1856).
[3] Oscanyan v. Arms Company, 103 U. S. 264 (1880).
[4] Pleasants v. Fant, 22 Wall. 121 (1874), cases, Miller, J.; Randall v. Baltimore, &c. R. Co., 109 U. S. 482 (1883), cases; Suydam v. Williamson, 20 How. 435 (1857), cases; Phœnix Ins. Co. v. Doster, 106 U. S. 32 (1882), cases; Carter v. Goff, 141 Mass. 125 (1886), cases; 69 Ga 619; 15 Kan. 244; 58 Me. 384; 106 Mass. 271; 40 Mo. 151; 89 N. C. 464; 49 N. J. L. 671; 91 N. Y. 141; 64 Pa. 201; 13 S. C. 23, 32.
[5] North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago, 123 U. S. 733 (1887).
[6] See Garvin v. Dean, 115 Mass. 378 (1874); Howard v College of the Holy Cross, 116 id. 120 (1874); 1 Johns 156; 21 Barb. 404; 1 Bibb, 58.

agraph is to be read in the light of its context or surroundings.

A word is best understood by the meaning of associated words.[1]

Where "printed matter" was named in a list with engravings, maps, charts, and illustrated papers, it was held that printed pictures (lithographs) were naturally associated with those articles.[2]

When several particulars are enumerated, followed by a general provision, the latter will be limited to things of like kind.[3]

In a penal act, "things," in the expression "obscene books, pamphlets, ballads, printed paper or other things," means other things of like kind.[4]

The principle extends to the interpretation of every species of writing, as, letters, libels, contracts, wills, as well as statutes.[5] It is analogous to the principle of circumstantial evidence.[6]

NOSE. See MAYHEM.

NOT. In its untechnical sense begins several phrases. Compare NE; NON.

Not a true bill. See IGNORE.

Not found. See IGNORE.

Not guilty. See GUILTY.

Not proven. See PROOF.

NOTARY.[7] Anciently, a scribe who took notes or minutes, and made short drafts of writings and instruments, both public and private.[8]

Notary public. An officer who publicly attests deeds or writings to make them authentic in another country, principally in business relating to merchants.[9]

An officer who confirms and attests the truth of writings, to render them available as evidence.

Notarial. Pertaining to, originating with, a notary: as, a notarial act, a notarial seal.

Some of his chief duties are connected with mercantile transactions, as in noting (*q. v.*) paper presented for payment and dishonored.

At common law, a minor could be a notary.[10]

"N. P.," for notary public, is in common use. The courts take judicial notice of the meaning of the abbreviation.[1]

In the absence of positive law prescribing otherwise, it is enough that the impress of a die seal used by him be readily identified upon inspection. The courts take judicial notice of the seals of notaries public, foreign as well as domestic, for they are officers recognized by the commercial law of the world.[2]

The use of the seal of another person was held not to invalidate the certificate of acknowledgment to a chattel mortgage.[3]

See PROTEST, 3; SEAL, 1.

NOTE. 1. A brief statement in writing; a memorandum,[4] *q. v.* See also REFRESH.

Bought note; sold note. Where a broker is employed to buy and sell goods he gives the buyer a note of the sale called a "sold note," and the seller a like note called a "bought note," in his own name, as the agent of each, and thereby they are respectively bound, if he has not exceeded his authority.[5] "What he delivers to the seller is called the sold note: to the buyer the bought note."[6]

Judge's notes. Memoranda taken by the judge who tries a cause, of the testimony of witnesses, of documents admitted in evidence, of offers of evidence, etc.

They are no part of the record, and he is not required to take them.[7]

2. A written promise to pay money; a "promissory note."

Judgment note. A promissory note with a power of attorney authorizing entry of judgment by confession, in default of payment.

Not generally negotiable, but transferable by formal assignment under seal. See further ATTORNEY, Warrant of.

Promissory note. A plain and direct engagement, in writing, to pay a sum specified at the time therein limited to a person therein named, or, sometimes, to his order, or often to the bearer at large.[8]

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[1] Neal *v.* Clark, 95 U. S. 708 (1877); Pickering *v.* McCullough, 104 *id.* 317 (1881); Adams *v.* Bancroft, 3 Sumn. 386 (1838).

[2] Arthur *v.* Moller, 97 U. S. 368 (1878).

[3] Harwood *v.* City of Lowell, 4 Cush. 313 (1849).

[4] Commonwealth *v.* Dejardin, 126 Mass. 47 (1878); 105 *id.* 488.

[5] 1 Bl. Com. 60.

[6] 1 Greenl. Ev. § 11. See also 31 F. R. 187; 54 Conn. 467; 3 Dak. 102; 35 Ohio St. 563; 61 Wis. 582; 69 *id.* 38.

[7] L. *notarius*, one who makes notes, a scrivener: *nota*, a note.

[8] Byles, Bills, 262.

[9] Kirksey *v.* Bates, 7 Port. 531 (Ala., 1838), Collier, Chief Justice

[10] United States *v.* Bixby, 10 Biss. 528 (1881).

[1] Rowley *v.* Berrian, 12 Ill. 200 (1850).

[2] Pierce *v.* Indseth, 106 U. S. 548-49 (1882), cases, Field, J.; The Gallego, 30 F. R. 274 (1887); Story, Bills, § 277; 1 Greenl. Ev. § 5.

[3] Muncie Nat. Bank *v.* Brown, Ind. Sup. Ct. (1887): 27 Alb. Law J. 68.

[4] See Clason *v.* Bailey, 14 Johns. 492 (1817).

[5] [Story, Agency, § 28, 9 ed., text and note.

[6] 1 Benj. Sales, § 275; *ib.* §§ 294-302, cases. See also Butler *v.* Thomson, 92 U. S. 416-17 (1875), cases; 1 Whart. Ev. § 75, cases.

[7] 1 Greenl. Ev. § 166.

[8] 2 Bl. Com. 467.

A written engagement by one person to pay, absolutely and unconditionally, to another person therein named, or to his order or to the bearer, a certain sum of money at a specified time or on demand, or at sight.[1]

No precise words of contract are necessary, provided they amount, in legal effect, to a promise to pay.[2]

Held to be valid notes were the following: "Due A. $225, payable on demand;" "I acknowledge myself indebted to A. $109, to be paid on demand for value received;" "I. O. U. $85 to be paid May 5th."[3]

A bank-bill is a promissory note, in an indictment for stealing or forging a promissory note.[4]

Giving a new note for an old one which had become due, the amount and makers of the two notes being the same, will not be treated as payment or extinguishment of the old note or of the pre-existing debt, unless the parties so expressly agree; but will be regarded merely as an extension of credit upon the debt; and the surrender of the old note will not of itself raise a presumption of such agreement to extinguish the old note by the new one, it being considered as a conditional surrender and that its obligation is received, if the new note is not paid. And the new note will not be regarded as a payment of the old even when it is so expressly agreed, if such agreement was obtained by the concealment of any material fact affecting the security of the debt; nor does the presumption of payment apply where the creditor abandons some security which he held when he takes the new note.[5]

Taking a note, bill or check in payment of another note is generally conditioned upon the payment of the latter — except, perhaps, in Indiana, Louisiana, Maine, Massachusetts, and Vermont.[6]

Raised note. A negotiable promissory note increased in the amount called for on the face, by fraudulent alteration.

If the maker is not chargeable with negligence in putting in circulation an instrument susceptible of alteration so as to deceive a person of ordinary caution, he is not liable upon his raised note.[7]

See further ALTERATION, 2; BEARER; CERTAINTY; CHECK; COLLECTION; DUE, 1; EXCHANGE, 2; FORGERY; GENUINE; GRACE; I O U; LOST, 2; NEGOTIABLE; PATENT, 2; PAYMENT; POST-NOTE.

[1] Hall *v.* Farmer, 5 Denio, 486 (1848), cases, Beardsley, C. J. See also 13 Bradw. 101; 24 Ill. 170; 95 *id.* 144; 21 La. An. 122; 49 Me. 518; 60 Md. 585; 10 Neb. 287; 6 Cow. 108; 6 Humph. 304; 47 Wis. 555; 53 *id.* 606.

[2] Cowan *v.* Halleck, 9 Col. 578 (1886), cases.

[3] 1 Daniel, Neg. Inst. § 39, cases.

[4] Commonwealth *v.* Butts, 124 Mass. 452-53 (1878), cases; 126 *id.* 56, 252.

[5] Merchants' Nat. Bank *v.* Good, 21 W. Va. 466, 464-67 (1883), cases, Snyder, J.; Green *v.* Russell, 132 Mass. 536 (1882).

[6] Henry *v.* Conley, 48 Ark. 271-72 (1886), cases; 2 Dan. Neg. Inst § 1260.

[7] Knoxville Nat. Bank *v.* Clark, 51 Iowa, 264 (1879), cases.

NOTICE.[1] In its untechnical sense, is equivalent to information, intelligence, knowledge.[2]

1. In its legal sense, embraces a knowledge of circumstances that ought to induce suspicion or belief, as well as direct information.[3]

Actual notice. Notice directly and personally given to the party to be notified.

Constructive notice. When the party, by circumstances, is put upon inquiry, and must be presumed to have had notice, or, by judgment of law, is held to have had notice.[4]

Whatever fairly puts a party upon inquiry, where the means of knowledge are at hand, is constructive notice of all the facts a proper inquiry might have ascertained.[5]

Express is used by some writers for *actual* notice, and *implied* for *constructive*.

A subsequent purchaser has actual notice of record when he has actual knowledge of such facts as would put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict with that which he is about to purchase.[6]

Constructive notice is a legal inference from established facts;[7] no more than evidence of notice, the assumption of which is so violent that the court will not allow of its being controverted.[8]

Thus, if a mortgagee has a deed put into his hands which recites another deed showing a title in a third person, the court will conclusively presume that he has notice of that fact.[9]

Constructive notice is resorted to from the necessity of finding a ground of preference between equities otherwise equal, but the doctrine cannot be applied in support of a charge of direct personal fraud.[9]

The doctrine of constructive notice depends upon two considerations: first, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge, that the law holds the knowledge to exist because it is highly improbable that it should not

[1] L. *notitia*, a being known.

[2] Wile *v.* Town of Southbury, 43 Conn. 54 (1875), Pardee, J.; United States *v.* Foote, 13 Blatch. 420 (1876).

[3] Pringle *v.* Phillips, 5 Sandf. 165 (N. Y., 1851), Duer, J.

[4] Jordan *v.* Pollock, 14 Ga. 156 (1853); Johnson *v.* Dooly, 72 *id.* 299 (1884).

[5] Angle *v.* Northwestern Mut. Life Ins. Co., 92 U. S. 342 (1875), cases, Clifford, J. As to proving actual notice, see Knapp *v.* Bailey, 79 Me. 202 (1887).

[6] Brinkman *v.* Jones, 44 Wis. 498, 521-23 (1878), cases *pro* and *con;* 1 Harv. Law Rev. 1-16 (1887), cases.

[7] Birdsall *v.* Russell, 29 N. Y. 249 (1864).

[8] Plumb *v.* Fluitt, 2 Anstr. 438 (1791), Eyre, C. B. Approved, Townsend *v.* Little, 109 U. S. 511 (1883), cases.

[9] Wilde *v.* Gibson, 1 H. L. Cas. 623 (1848), Cottenham, Lord Chancellor.

exist; second, that policy and the safety of the public forbid that a person should deny knowledge while he is so acting as to keep himself ignorant, or so that he may keep himself ignorant, and all the while his agent know, and he himself, perhaps, profit by that knowledge.[1]

Constructive notice is knowledge imputed by the court on the presumption, too strong to be rebutted, that the knowledge must have been communicated.[2]

To confine actual *notice* within the narrow limits of actual *knowledge*, as a definition, is to render the former next to impossible of application. To insist that it must be imparted in words, verbal or written, is too exclusive on its face to render the definition of utility. "Constructive notice" (so-called) is dependent upon actual facts, and "actual notice" upon conclusions of law. The only necessity for drawing the distinction nicely is where actual notice is imperatively demanded.[3]

The doctrine of constructive notice from possession is applied as a shield to protect him who has equitable rights.[4]

A party to a suit is constructively present in court during the entire term at which his cause is set for hearing, and, as the doings of the court are matters of record, he is chargeable with notice of all that is done during the term affecting the suit.[5]

There must be notice of some kind, actual or constructive, to a valid judgment affecting one's rights; and, until given, the court has no jurisdiction over the subject-matter or the person. This affords opportunity to be heard upon the claim or charges made, and is a summons to him to appear and speak, if he has anything to say, why the judgment should not be rendered.[6]

A person not notified of an action nor made a party thereto, and who had no opportunity or right to control the defense, introduce or cross-examine witnesses, or to prosecute a writ of error, is not bound by the judgment that may be rendered.[7] But, unless so directed or intended by statute, the notice need not be "personal."[8] See CITE, 2; INDICTMENT; KNOWLEDGE, 1; PROCESS, 1, Due; RECORD; SERVICE, 3.

[1] Kennedy *v.* Green, 3 Mylne & K. 719 (1834), Brougham, L. C.

[2] 1 Story, Eq. § 399, cases.

[3] 19 Am. Law Rev. 74, 89 (1885), W. P. Wade; Wade, Notice, Ch. I, II, cases.

[4] Gill *v.* Hardin, 48 Ark. 412 (1886); Groton Savings Bank *v.* Batty, 30 N. J. E. 151 (1878). See generally 23 Alb. Law J. 126-27 (1881), cases; 24 Cent. Law J. 290 (1887), cases; 10 *id.* 313-14 (1880), cases.

[5] Railroad Co. *v.* Blair, 100 U. S. 662 (1879).

[6] Windsor *v.* McVeigh, 93 U. S. 277 (1876), Field, J.; Pennoyer *v.* Neff, 95 *id.* 727 (1877); St. Clair *v.* Cox, 106 *id.* 353 (1882); Freeman *v.* Alderson, 119 *id.* 188 (1886); Sabariego *v.* Maverick, 124 *id.* 292 (1888), cases; Eliot *v.* McCormick, 144 Mass. 11 (1887); 18 Blatch. 28; 12 F. R. 398, 401; 9 Oreg. 210.

[7] Hale *v.* Finch, 104 U. S. 265 (1881): Brooklyn City, &c. R. Co. *v.* National Bank, 102 *id.* 21 (1880).

[8] Betancourt *v.* Eberlin, 71 Ala. 468 (1882), cases.

Judicial notice. The knowledge which a judge will officially take of a fact without proof.

A court will notice, judicially, a thing in the common knowledge and use of the people throughout the country: as,— the general customs and usages of merchants; the seals of notaries; things which must happen according to the laws of nature; the coincidence of the days of the week with those of the month, the meaning of words in the vernacular language; the customary abbreviations of Christian names; the accession of the Chief Magistrate to office, his leaving it, and the appointment of members of his Cabinet; the election and resignation of Senators; the appointment of marshals and sheriffs, but not of their deputies; of the ports and waters where the tide ebbs and flows; of the boundaries of the States, and of judicial and collection districts.[1] So, of law, statutory, constitutional, and military, the law-merchant, maritime law, and the ecclesiastical laws of Christendom as part of the common law.[2] See LAW, Foreign. Executive and judicial documents are judicially noticed. The public seal of the state and the seals of courts are self-proving. The existence of foreign sovereignties is also noticed; likewise, judicial officers and judicial practice.[3] So is the course of the seasons; the limitation of life as to age; the demonstrable conclusions of science and of political economy; the familiar principles of psychological and physical laws; leading political appointments; leading public events; leading domestic geographical features. In fine, whatever is known to all intelligent persons in the community, is received as true beyond dispute; for notoriety needs no proof.[4] Yet the power is to be exercised with caution. The requisite notoriety must exist. Every reasonable doubt is to be resolved in the negative.[5]

The courts of the United States take judicial notice of the public statutes of the several States.[6]

Record notice. The contents of a record, or of that which is legally recorded in a public record, is supposed to be known to all the world.

Not demandable by the parties to an instrument, or by such other persons as have actual notice.[6] See RECORD; REGISTRY.

Without notice. A brief expression for "without notice of fraud or other fact invalidating title."

Most frequently applied to an innocent holder of commercial paper. See NEGOTIABLE.

2. A letter or memorandum containing in-

[1] Brown *v.* Piper, 91 U. S. 42-43 (1875), cases, Swayne, Justice; 104 *id.* 42.

[2] 1 Whart. Ev. §§ 276-86, cases: 24 Kan. 715.

[3] 1 Whart. Ev. §§ 317-26, cases.

[4] 1 Whart. Ev. §§ 327-40, cases. See generally 24 Am. Law Reg. 553-73 (1885), cases.

[5] Knower *v.* Haines, 31 F. R. 513 (1887); Fourth Nat. Bank *v.* Francklyn, 120 U. S. 751 (1887); Hanley *v.* Donoghue, 116 *id.* 6 (1885), cases.

[6] Moore *v.* Simonds, 100 U. S. 145 (1875).

formation by advertisement, posting, or personal service. See PLACE, 1, Public; PROCLAMATION; PUBLICATION.

A notice required by common law need not be in writing; otherwise as to a notice which a statute directs to be given.[1] See *Notify*.

"Legal notices" was held not to include proceedings of a common council, within the meaning of a law providing for advertising certain notices.[2]

Notices, known by various names and in great number, are in daily use: as, notice — of acceptance of a bill of exchange; of an action about to be brought against a justice of the peace; to admit the genuineness of a document; of appearance; of dishonor, nonpayment, protest; of *lis pendens;* of a motion for an order or rule; to plead to a declaration or to a bill; to produce (*q. v.*) papers at a trial; to quit possession of leased premises.

The duty of an insured to pay his premium on the day specified is the same whether notice be given or not of the day. And banks are not obliged to give notice of the approaching maturity of a promise to pay a note or bill.[3]

Notify. In legal proceedings, and in respect to public matters, imports notice given by some person whose duty it is to give it, in some manner prescribed, and to some person entitled to receive it.[4]

The word does not require a written notice, unless expressly so stated.[5]

Notification. In the law requiring that the holder of dishonored paper shall give notice of that fact to antecedent parties, "notice" does not mean mere knowledge, but actual notification.[6]

NOTING. The minute made on a bill of exchange by the officer at the time of refusal of acceptance or payment.

Consists of his initials, the month, day, year, and his charges for minuting, and is considered as preparatory to protest.[7]

NOTORIOUS.[8] 1. Manifest to all persons; generally known; open: as, a notorious act of ownership,[9] a notorious mistake in a record,[1] a custom (*q. v.*) which has become notorious.

Referring to adverse possession (*q. v.*), denotes that the possession must be more than secret, and unknown to the disseised owner.[2]

In Maryland, whether intestacy be so "notorious" as not to require proof, so that letters may issue forthwith, is a matter within the knowledge and judgment of the probate judge.[3]

See also ENTRY, I, 1; NOTICE, Judicial; OPEN, 2 (13).

2. Known to discredit or disadvantage; of bad or questionable repute. See FAME, Ill-fame.

NOVATION.[4] The substitution of one debtor for another, or of a new for an old obligation, which is thereby extinguished.[5]

The doctrine is of civil-law origin. The common-law equivalent is "assignment" or "merger."

The requisites are: a previous valid obligation; agreement of all parties to the new contract; extinguishment of the old contract; and a valid new contract.[6]

In the civil law, the substitution may be in the debt, the debtor, or the creditor.[7]

The new creditor may maintain an action in his own name, founded upon the assignment and the express promise of the debtor to pay him. Without this promise, the assignee must sue in the name of the assignor.[8]

See ASSIGNMENT, 8; DELEGATION, 2.

NOVEL. See ASSIGNMENT, 1.

NOVELTY.[9] The quality in an invention of being "new:" this pertaining to the general relations of the invention to the existing state of the art. See NEW, 1.

Want of novelty will defeat an application for a patent, invalidate a patent already issued, and defeat an action for an infringement.

When a machine is new and its product or manufacture old, the machine is patentable. When the machine is substantially old and the product new, the product is patentable. When both are new, both are patentable. And so of processes and their results. Patentability may exist as to either, neither, or both, according to the fact of novelty or the opposite.[10]

It is not sufficient that the thing is new and useful; and the author must find it out by mental labor and

[1] Jones *v.* Van Zandt, 5 How. 225 (1847); Lane *v.* Cary, 19 Barb. 538–39 (1855), cases; People *v.* Croton Aqueduct Board, 26 *id.* 248 (1857); Pearson *v.* Lovejoy, 53 *id.* 411 (1866), cases; Vinton *v.* Builders', &c. Association, 109 Ind. 353 (1886).

[2] MacArthur *v.* City of Troy, 24 Hun, 55 (1881).

[3] Thompson *v.* Knickerbocker Life Ins. Co., 104 U. S. 258 (1881), Bradley, J.

[4] Potwine's Appeal, 31 Conn. 384 (1863), Butler, J. See also Minard *v.* Douglas County, 9 Oreg. 210 (1881); 50 Mich. 277.

[5] Vinton *v.* Builders', &c. Association, 109 Ind. 353 (1886).

[6] Byles, Bills, § 271, cases.

[7] [Byles, Bills, § 263; 4 Term, 175.

[8] L. *notorius*, manifest: *notus*, known.

[9] 3 Bl. Com. 174.

[1] 4 Bl. Com. 391.

[2] Sheaffer *v.* Eakman, 56 Pa. 153 (1867), Strong, J.

[3] Eslin *v.* District of Columbia, 22 Ct. Cl. 162 (1887).

[4] L. *novatio: novus*, new.

[5] [Guichard *v.* Brande, 57 Wis. 536 (1883), Cole, C. J.

[6] Clark *v.* Billings, 59 Ind. 509 (1877), Biddle, C. J.; 64 *id.* 413.

[7] Adams *v.* Power, 48 Miss. 454 (1873).

[8] Mowry *v.* Todd, 12 Mass. 284 (1815), Parker, C. J.; Derby *v.* Sanford, 9 Cush. 264 (1852); 8 Paige, Ch. 238; 9 Baxt. 10.

[9] L. *novellitas*, newness: *novus*, new.

[10] Rubber Company *v.* Goodyear, 9 Wall. 796 (1869), Swayne, J.

intellectual creation. If the result of accident, it must be what would not occur to all persons skilled in the art, who wished to produce the same result. There must be some addition to the common stock of knowledge, not merely the first use of what was known before.[1]

A new combination, if it produces new and useful results, is patentable, though all the constituents were well known and in common use before the combination was made. But the results must be a product of the combination, not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result by a new and improved manner. Merely bringing old devices into juxtaposition, and allowing each to work out its own effect, without the production of something novel, is not invention.[2]

The combination must produce a different force or effect, or result in the combined forces or processes, from that given by the separate parts. There must be a new result produced by their union: if not so, it is only an aggregation of separate elements. Thus, sulphur, mixed with India-rubber, produces vulcanized rubber — a new article. The action of a stem-winding watch is another instance. In each case the result comes from the combined effect of the several parts, not from the separate action of each part. The required result does not follow from attaching a piece of rubber to a lead-pencil.[3]

The combination must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate combinations. Otherwise, it is a mechanical juxtaposition, not a vital union.[4]

The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts, not to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges would tend to obstruct rather than stimulate invention.[5]

The application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated.[6]

See further COMBINATION, 1; PATENT, 2.

[1] Earle *v.* Sawyer, 4 Mas. 5 (1825), Story, J.

[2] Halles *v.* Van Wormer, 20 Wall. 368 (1873), Strong, J.

[3] Reckendorfer *v.* Faber, 92 U. S. 357-58 (1875), Hunt, Justice.

[4] Pickering *v.* McCullough, 104 U. S. 318 (1881), Matthews, J.

[5] Atlantic Works *v.* Brady, 107 U. S. 201 (1882), Bradley, J.; Phillips *v.* Detroit, 111 *id.* 608 (1884); 17 F. R. 850.

[6] Pennsylvania R. Co. *v.* Locomotive Truck Co., 110 U. S. 494 (1884), cases, Gray, J.

NOVUS. See NOVATION; NOVELTY; VENIRE, De novo.

NOW. See IMMEDIATELY; NUNC.

NOXIOUS. See ANIMAL; CRUELTY, 8; NUISANCE.

To constitute the offense of administering a "noxious thing," within the meaning of the statute of 24 and 25 Vict. (1861), c. 100, s. 58, the thing must be noxious in itself, not merely so when taken in excess, and although it may have been administered with intent to injure or annoy.[1] See ADMINISTER, 1.

NUDE. See INDECENCY; NAKED, 1; OBSCENE; OBLIGATION, 1; PACT.

NUDUM. See PACTUM.

NUGATORY.[2] Of no force; ineffectual; null, *q. v.*

"Laws without competent authority to secure their administration from disobedience and contempt would be vain and nugatory."[3]

A direction in a will may be "nugatory and void."[4] See FELO DE SE, 2.

NUISANCE.[5] Whatever unlawfully annoys or does damage to another. As an injury to realty: anything that worketh hurt, inconvenience, or damage.[6]

That which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him.[7]

An actionable nuisance is anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights.[8]

Something which produces real discomfort or annoyance through the medium of the senses; not from delicacy of taste or a refined fancy. The injury must be physical, not purely imaginative.[9]

A person who is injured by a "continuing nuisance" may maintain an action against the original tort feasor who creates it, or against any grantee who continues it after a request to abate it.[10]

[1] Regina *v.* Hennah, 19 Moak, 570 (1877); The Queen *v.* Cramp, 29 *id.* 314 (1880).

[2] L. *nugatorius*, worthless, useless, futile: *nugax*, trifling.

[3] 4 Bl. Com. 296.

[4] Newcomb *v.* Williams, 9 Metc. 533 (1845).

[5] F. *nuisance*, a hurt: *nuire:* L. *nocere*, to hurt.

[6] 3 Bl. Com. 6, 216; 49 Conn. 117; 39 Ga. 218; 32 Tex. 210.

[7] Baltimore & Potomac R. Co. *v.* Fifth Baptist Church, 108 U. S. 329 (1883), Field, J.

[8] Railroad Co. *v.* Carr, 38 Ohio St. 453 (1882): Cooley Torts, 655.

[9] Westcott *v.* Middleton, 43 N. J. E. 496 (1887).

[10] Prentiss *v.* Wood, 132 Mass. 486 (1882), cases. See Sloggy *v.* Dilworth, Sup. Ct. Minn. (1888), cases: 36 Cent. Law J. 442-43 (1888), cases.

Cases of nuisance which rest for their sanction upon the intent of the law under which they are created, the paramount power of the legislature, the principle of the "greatest good of the greatest number," and the importance of the public benefit and convenience involved in their continuance, are termed "legalized nuisances."[1]

Private nuisance. Anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. **Public or common nuisance.** Doing a thing to the annoyance of the public, or neglecting to do a thing which the common good requires.[2]

Examples: a house so close to another as to cause rain-water to fall upon its roof; animals kept so near a dwelling-house that the stench taints the air; any offensive trade, as, a tanner's, a tallow-chandler's, lead-works the fumes of which poison the herbage; diverting water that naturally runs to another's land; corrupting or poisoning running water by maintaining a dye-house or a lime-kiln; obstructing a right of way; a ferry or bridge unlawfully near another; disorderly houses; and all lotteries.[3]

A business which is lawful, carried on reasonably, and does not necessarily affect health, comfort, or the ordinary uses and enjoyment of property in the neighborhood, is not a nuisance in fact or in anticipation.[4]

As the atmosphere cannot rightfully be infected with noxious smells or exhalations, so it should not be caused to vibrate by ringing bells, in a way to wound the sense of hearing.[5]

Noise (as, the ringing of a factory bell), which constitutes an annoyance to a person of ordinary sensibility to sound, such as materially to interfere with the ordinary comfort of life, and impair the reasonable enjoyment of his habitation, is a nuisance to him, the continuance of which may be restrained by injunction.[6] See NOISE.

If a party may acquire a prescriptive right to continue a nuisance, it can only be by continuous use for twenty years. No acquiescence short of that period will bar one from complaining of the nuisance, unless by some act or omission he has induced the party causing the nuisance to incur large expenditures, or to take some action upon which an estoppel may be based.[7]

Relief is had by abatement,[1] injunction, action for damages, or criminal prosecution.

A public nuisance can only be redressed by public prosecution, unless the complainant suffers damage differing in kind from that sustained by the public at large.[2]

In regard to public nuisances, the jurisdiction of courts of equity seems to be of a very ancient date. The jurisdiction is applicable not only to public nuisances, strictly so called, but to purprestures upon public rights and property. An indictment lies to abate public nuisances, properly so called, and to punish the offender; and an information lies in equity to redress the grievance by injunction.[3]

The ground of this jurisdiction is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts the subject of new proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists.[4]

Courts of law afford redress by giving damages against the wrong-doer, and, when the cause of the annoyance is continuous, courts of equity will restrain the nuisance. . . Grants of privileges or powers to corporate bodies confer no license to use them in disregard of the private rights of others, and with immunity for their invasion.[5]

The measure of damages is not simply the depreciation of the property; the jury may take into consideration personal discomfort, and any causes which produce a constant apprehension of danger.[6]

See ABATEMENT, 3; AIR; BLACKSMITH SHOP; DAMAGES; HEALTH; INJUNCTION; PARDON; POLICE, 2; PURPRESTURE; UNDERTAKER.

NUL. No, no one, none. Law-French, from Latin *nullus*, q. v.

Nul agard. No award, *q. v.*

[1] Fertilizing Company *v.* Hyde Park, 97 U. S. 670 (1878), Swayne, J.

[2] 3 Bl. Com. 216; 4 *id.* 166; 40 Ark. 87; 49 Conn. 117; 7 Ga. 311; 80 Ky. 138, 146; 30 Me. 174; 74 *id.* 271; 34 Mich. 473; 80 N. Y. 582; 37 Ohio St. 516; 17 Tex. 502; 1 McLean, 381.

[3] 3 Bl. Com. 216-20; 4 *id.* 167-69.

[4] Rhodes *v.* Dunbar, 57 Pa. 290 (1868); Strawbridge *v.* Philadelphia, 13 Rep. 216 (1882).

[5] Harrison *v.* St. Mark's Church, 3 W. N. C. 384 (1877); 15 Alb. Law J. 248, 345.

[6] Davis *v.* Sawyer, 133 Mass. 290 (1882), cases. See further, as to a planing-mill, Hurlburt *v.* McKone, 55 Conn. 31 (1887), cases.

[7] Campbell *v.* Seaman, 63 N. Y. 568, 584 (1876), cases.

[1] See Bowden *v.* Lewis, 13 R. I. 191 (1881); 19 Cent. Law J. 42-45 (1884), cases.

[2] School District *v.* Neil, 36 Kan. 619-20 (1887), cases; Hogan *v.* Central R. Co., 71 Cal. 86 (1886).

[3] 2 Story, Eq. §§ 921-22.

[4] Mugler *v.* Kansas, 123 U. S. 672-73 (1887), cases, Harlan J. That an injunction will not be granted where there is a remedy at law, see Sellers *v.* Parvis Co., 30 F. R. 164 (1887).

[5] Baltimore & Potomac R. Co. *v.* Fifth Baptist Church, 108 U. S. 331 (1883); Georgetown *v.* Alexandria Canal Co., 12 Pet. 91 (1838); Pennsylvania *v.* Wheeling Bridge Co., 13 How. 518 (1851); Mississippi, &c. R. Co. *v.* Ward, 2 Black, 485 (1862); Parker *v.* Winnipiseogee Co., *ib.* 545 (1862); 49 Md. 277; 50 *id.* 516; 10 Oreg. 170, 172; 2 Bish. Cr. L. § 856; Whart. Cr. L. § 1410.

[6] Baltimore & Potomac R. Co. *v.* Fifth Baptist Church, 108 U. S. 335 (1883).

Nul disseisin. No disseisin: the general issue in a real action.

Nul tiel corporation. No such corporation: a plea denying the existence of a corporation.

Nul tiel record. No such record: a plea denying the existence of the alleged record upon which an action has been brought. See RECORD, Nul, etc.

Nul tort. No wrong: a plea denying wrong alleged, in a real action. See TORT, 1.

Nul waste. No waste: a plea denying alleged waste, *q. v.*

NULL. As nothing; as if not existing, made, or done; without force or effect; invalid. See NUGATORY; NULLUS.

Nullity. An act which has no more effect than if it had not been done; a proceeding of no legal effect or efficacy.

Such a defect as renders the proceeding in which it occurs totally void, of no avail or effect whatever, and incapable of being made so.[1] See VOID.

NULLUS. L. No person; nothing; no.

Nulla bona. No goods. See BONA, 2.

Nullius filius. See FILIUS.

Nullum arbitrium. No award, *q. v.*

Nullum commodum. See COMMODUM.

Nullum simile. See SIMILIS.

Nullum tempus. See TEMPUS.

NUMBER.[2] See ANY; DESCRIPTION; DIVERS; INDICTMENT; TRADE-MARK; UNUSUAL.

"A number of days" and "some days" may mean two or more days, but neither expression necessarily includes more than two days.[3]

The plural number includes the singular. Thus, in construing a penal statute, "houses" will apply to a house, "notes" to a note, etc.[4]

NUMERALS. See FIGURES; NUMBER.

NUNC PRO TUNC. L. Now for then.

Said of a thing done in the present time which is to have the same effect as if it had been done at a time gone by, when it should have been done.[5]

Thus, when a party has omitted to take some step which he ought to have taken, as, to file the service of a notice or a pleading, the court will sometimes permit him to do it after the proper time has passed, and accord to it the effect it would have had if regularly done in due season.

A decree *nunc pro tunc* is admissible where a decree, which was ordered or intended to be entered, was omitted by inadvertence of the court.[1]

Courts always have power over their own records to make them conform to what was actually done at the time, *nunc pro tunc*.[2]

Every court has a right to judge its own records and minutes; and if it appear that an order made at a former term was not entered of record, it may at any time direct it to be entered as of the term when made, whether the proceeding be criminal or civil.[3]

Whether an order for entry of judgment *nunc pro tunc* shall be made is a matter of discretion with the court, to be exercised as justice may require, in view of the circumstances of the case.[4]

See ACTUS, Curiæ; LACHES; TERM, 4.

NUNCIO. See MINISTER, 3.

NUNCUPATIVE.[5] Originally, to pronounce or declare publicly in solemn words. In the civil law, to pronounce orally or in words without writing; to dictate.[6] Whence nuncupatory, nuncupation.

A nuncupative will depends upon oral evidence, being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing.[7]

"Last sickness," referring to the making of a nuncupative will, means *in extremis;* that is, the law contemplates sudden and severe illness immediately preceding physical dissolution, when there is neither time nor opportunity to make a written will, in which case, of necessity, a will must be verbal.[8] See further WILL, 2.

NUNQUAM. See ASSUMPSIT.

NUPTIAL. "Ante-nuptial" and "post-nuptial" refer, respectively, to a contract entered into or other act done by a woman before marriage, and after marriage. See HUSBAND; SETTLE, 4.

NURSERY TREES. See EMBLEMENTS.

NURSING. See MEDICAL, Attendance.

NURTURE. See GUARDIAN.

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[1] [Salter *v.* Hilgen, 40 Wis. 365 (1876); Jenness *v.* Lapeer Circuit Judge, 42 *id.* 471 (1880); MacNamara, Nullities, &c., 4; 35 Tex. 530.

[2] L. *numerus.* The Eng. "No." is from *numero*, in number.

[3] Chase *v.* Cleveland, 44 Ohio St. 513 (1886).

[4] See R. S. § 1; 1 Bl. Com. 88; State *v.* Main, 31 Conn. 574 75 (1863), cases; State *v.* Nichols, 83 Ind. 228 (1882), cases; 87 *id.* 54; 71 Ala. 157; 29 Kan. 734; 54 Mich. 243, 247; 77 Mo. 245 11 Biss. 111.

[5] See Secou *v.* Leroux, 1 N. Mex. 390 (1866).

[1] Gray *v.* Brignardello, 1 Wall. 627 (1863); Mitchell *v.* Overman, 103 U. S. 65 (1880).

[2] Ætna Fire Ins. Co. *v.* Boon, 95 U. S. 125 (1877).

[3] Benedict *v.* State, 44 Ohio St. 684-85 (1887), cases.

[4] Borer *v.* Chapman, 119 U. S. 596 (1887), cases.

[5] Nun-cu'-pa-tive, or -nun-'. L. *nuncupare: nomine*, by name; *capere*, to take, call.

[6] [Succession of Morales, 16 La. An. 269 (1861).

[7] 2 Bl. Com. 500; 4 Kent, 576; 1 Jarm. Wills, 130, 136.

[8] Carroll *v.* Bonham, 42 N. J. E. 627 (1886), note. See generally 2 Law Q. Rev. 444-52 (1886); 26 Am. Law Reg. 570-73 (1887), cases.

O.

O. Is sometimes used as an abbreviation:

O. C. Old code; orphans' court.

O. S. Old series.

OATH. 1. Calling God to witness the truth of what is said.[1]

A solemn adjuration to God to punish the affiant, if he swears falsely.[2]

A religious asseveration by which a person renounces the mercy and imprecates the vengeance of Heaven, if he does not speak the truth.[3]

Assurance of the truth of an assertion by an appeal to an object which is regarded as high and holy.[4]

Belief in a future state of rewards and punishments, entertaining just ideas of the moral attributes of the Supreme Being, and a firm persuasion that he superintends and will finally compensate every action in human life,— these are the foundation of all judicial oaths; which call God to witness the truth of those facts which, perhaps, may be known only to Him and the party attesting.[5]

The sanction of an oath is a belief that the Supreme Being will punish falsehood; and, whether that punishment is administered by remorse of conscience or in any other mode in this world, or is reserved for the future state of being, cannot affect the question, as the sum of the matter is a belief that God is the avenger of falsehood.[6]

"Oaths were instituted long before the beginning of the Christian era, and were always held in the highest veneration. The substance of an oath has nothing to do with Christianity. The forms have always been different in different countries. But still the substance is the same, which is that God in all of them is called upon to witness to the truth of what we say. . . Such infidels who believe a God and that he will punish them if they swear falsely," may be admitted as witnesses. And "such infidels (if any such there be) who either do not believe a God, or, if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses in any case nor under any circumstances, . . because an oath cannot possibly be any tie or obligation upon them."[7] See ATHEIST; INFIDEL.

Assertory oath. See *Official Oath.*

Corporal oath. An oath taken by kissing or laying the hand upon a copy of the Gospels.

Synonymous with "solemn oath" or an oath taken with the uplifted hand. "So called from the ancient usage of touching the *corporale* or cloth that covered the consecrated elements."[1]

Applies to any bodily assent to the oath.[2]

Judicial oath. An oath administered in some judicial proceeding, under direction of law. **Extra-judicial oath.** An oath taken without direction or authority of law.

In the Revised Statutes or any act or resolution of Congress, passed subsequently to February 25, 1871, a requirement of an "oath" shall be deemed complied with by making affirmation, in judicial form.[3] See AFFIRM, 4.

An extra-judicial oath, when false, does not expose the person to punishment for perjury. A common form for the judicial oath, which is usually administered by the clerk of the court to the witness, who either kisses a copy of the Gospels or raises his right hand toward Heaven, is, in substance: "You do swear that, in this issue joined between A and B, you will tell the truth, the whole truth, and nothing but the truth. So help you God," — or "as you shall answer at the Great Day." But the form deemed most obligatory by the witness will always be used.[4]

The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court, where they may be subjected to cross-examination, affords the greatest security of truth.[5]

A child under seven may testify if the court be first satisfied, by examination, that he appreciates the obligation of an oath.[6]

In English practice, it is usual for the judge to examine the child as to his competency to testify, and if found incompetent to defer trial till such a time as he may, by instruction, be qualified to take an oath. Some American authorities favor this practice.[7]

Perjury (*q. v.*) consists in taking a false judicial oath.[8]

The time and form of administering oaths, as well

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[1] Parkes *v.* Parkes, 25 E. L. & E. 619 (1852).

[2] Blocker *v.* Burness, 2 Ala. 355 (1841).

[3] King *v.* White, 2 Leach, Cr. Cas. 482 (1786).

[4] [Savigny, Röm. Recht. VIII, 48.

[5] 4 Bl. Com. 43.

[6] Blocker *v.* Burness, *supra.* See also Chappell *v.* State, 71 Ala. 324 (1882); Bush *v.* Commonwealth, 80 Ky. 248, 250 (1882); 7 Conn. 79; 10 Ohio, 123; 13 Vt. 366.

[7] Ormichund *v.* Barker, Willes, 545, 547, 549 (1744), Willes, C. J.; 1 Sm. L. C. 194. See also Wakefield *v.* Ross, 5 Mas. 19 (1827); United States *v.* Kennedy, 3 McLean, 175 (1843); Bush *v.* Commonwealth, 80 Ky. 248-49 (1882); 1 Whart. Ev. §§ 395-96, cases; 1 Greenl. Ev. § 328; 15 Mass. 184.

[1] Jackson *v.* State, 1 Ind. 185 (1848): Webster's Dict.

[2] State *v.* Norris, 9 N. H. 101 (1837).

[3] R. S. §§ 1, 5013.

[4] 1 Whart. Ev. §§ 386-88. "All witnesses shall give or deliver in their testimony, by solemnly promising to speak the truth, the whole truth, and nothing but the truth, to the matter or thing in question." — Great Law of Penn. (1682), Ch. XXXVI: Linn, 116.

[5] Chaffee *v.* United States, 18 Wall. 541 (1873).

[6] Hughes *v.* Detroit, &c. R. Co., Sup. Ct. Mich. (1887), cases.

[7] Commonwealth *v.* Lynes, 142 Mass. 579-80 (1886), cases.

[8] United States *v.* Grottkau, 30 F. R. 672 (1887).

as the persons empowered to administer them, are regulated by statute.[1]

Oath decisory; decisive oath. In civil law, where a party to a suit was not able to prove his charge and offered to refer the decision of the cause to the oath of his adversary.[2]

This the adversary was bound to accept, or tender the same proposal back again; otherwise the matter was taken as confessed. The *sacramentum decisionis.*[3]

Oath in litem. In civil law, an oath taken by the complainant as to the value of the thing in dispute, on failure of other proof, and to prevent a defeat of justice.[3]

Oath of office; official oath. An oath taken by an officer that he will faithfully discharge the duties of his office.

An *assertory oath* is an oath required by law upon induction to office. A *promissory oath* is an official oath that the person will discharge the duties required of him. The breach of these oaths may not involve perjury.[4]

The form of official oaths is prescribed by statute or the constitution. Thus, "Before he [the President] enter on the Execution of his Office, he shall take the following Oath or Affirmation:— I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[5]

"The Senators and Representatives . . and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution. . ."[6]

"No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability."[7]

The political disabilities imposed by that amendment were removed by act of May 22, 1872, except as to Members of the thirty-sixth and thirty-seventh Congresses, officers in judicial, military, and naval service, heads of departments, and foreign ministers.[1]

Act of May 13, 1884, repeals Rev. St. § 1756, and provides that office-holders in the civil, military, and naval service, except the President, shall take the oath prescribed in § 1757; the repeal not to affect the oaths prescribed for the performance of duties in special or particular subordinate employments.[2]

Rev. St. § 1757, directs that the following oath shall be taken and subscribed to: "I, A B, do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought, nor accepted, nor attempted to exercise the functions of any office whatever, under any authority, or pretended authority, in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God."[3] See AMNESTY; OFFICER.

Suppletory oath. The oath of a party, administered in order that he may furnish the measure of proof required of a fact: as, his oath to the correctness of his books of account and of the justness of the claim he makes.

Its original is found in the civil law, which requires the testimony of two persons to a fact: *plena probatio*, full proof; the testimony of one person being *semi-plena probatio*, half-full proof. To make up the complement, when there is one witness only, the party may be examined in his own behalf, and the oath administered is called the "suppletory oath."[4]

Test oath. See TEST, Oath.

2. As to profane oaths, see BLASPHEMY; PROFANITY.

OBIT. L. A corruption of *obiit* or *obivit*, he died or has died.

Post obit, or post obitum. After he died, or after death.

[1] See Oaks *v.* Rodgers, 48 Cal. 197 (1874); Arnold *v.* Middletown, 41 Conn. 206 (1874).

[2] 3 Bl. Com. 342. See Dunlap, Adm. Pr. 290.

[3] See 1 Greenl. Ev. § 348; 1 Pet. 591, 596; 16 *id.* 203; 9 Wheat. 486; 16 Johns. 193.

[4] See State *v.* Dayton, 23 N. J. L. 49, 54 (1850).

[5] Constitution, Art. II, sec. 1, cl. 8.

[6] Constitution, Art. VI, cl. 3.

[7] Constitution, Amd. Art. XIV, sec. 3. Ratified July 28, 1868.

[1] See 17 St. L., ch. 193, p. 142. Proceedings to remove disqualified office-holders were discontinued by proclamation of President Grant, June 1, 1872. *Ib.* Ap. No. 11, p. 956.

[2] See 23 St. L. 21-22, ch. 50, sec. 2.

[3] Act 2 July, 1862, ch. 128: 12 St. L. 502. By Act 24 Jan. 1865: 13 St. L. 424, made to embrace attorneys of the courts of the United States. See *Exp.* Garland, 4 Wall. 374 (1866).

[4] [3 Bl. Com. 370.

Post-obit bond. An agreement, for money, to pay a larger sum, exceeding legal interest, upon the death of a person from whom the obligor has expectations, if he survive him.[1]

Being a fraud upon the expectations of the ancestor, such obligations are annullable in equity.[2]

OBITER. L. On the way, by the way; in passing. Applied to an opinion given by a judge incidentally or as an illustration, and not as part of the decision of the court. See further DICTUM.

OBJECT. 1. The thing aimed at, the end sought to be accomplished.[3]

Whatever is presented to the mind or to the senses; whatever, also, is acted or operated upon affirmatively, or intentionally influenced by any thing done, moved or applied thereto.[4]

"Objects charged with internal tax" is equivalent to "subjects of taxation."[4]

2. A person who is to be benefited by a distribution of the property or income of a trust is spoken of as "the object" of the power or of the donor's or testator's bounty. See TRUST, 1.

OBJECTION. See EXCEPTION, 4; PROTEST, 1.

OBLIGATE; OBLIGE.[5] Oblige: To place, or become held, under a bond or legal duty.

As, in the saying that one "obliges himself" by a written instrument;[6] that the civil and canon laws "oblige," as far as adopted.[7]

"Every act that causes damage to another 'obliges' him to repair it." That is, the wrong done creates an obligation — brings into existence the relation of debtor and creditor between the parties.[8]

Obligate: To promise, perhaps more or less formally, to do or to refrain from doing some act; to covenant in writing; to execute an instrument under seal.

Has about superseded "oblige" in legal expression.

Obligatory.[9] A "writing obligatory" means, simply, a written contract under seal.[10]

[1] [Boynton *v.* Hubbard, 7 Mass. *119 (1810), Parsons, C. J.; Chesterfield *v.* Janssen, 2 Ves. Sr. *125, 157 (1750).

[2] 1 Story, Eq. §§ 342–44.

[3] Paxton *v.* Baum, 57 Miss. 536 (1882).

[4] Wells *v.* Shook, 8 Blatch. 257 (1871), Woodruff, J.

[5] F. *obliger:* L. *ob-ligare*, to bind together, to constrain. *Obligatio*, a tying up, a binding.

[6] 2 Bl. Com. 340.

[7] 1 Bl. Com. 18.

[8] La. Civ. Code, Art. 2315; United States *v.* New Orleans, 17 F. R. 497 (1883).

[9] Ob'-ligatory.

[10] Watson *v.* Hoge, 7 Yerg. 350 (1835).

Obligation. A ligament or tie; something which binds one to do or not to do an act.[1]

1. In its most extensive sense, synonymous with "duty."[2]

Natural or *moral obligation.* An obligation which cannot be enforced by action, but which is nevertheless binding in conscience and according to natural justice.[3] Opposed, *civil* or *legal obligation.*

When an action upon a civil obligation is barred by an act of limitations, or by a discharge under a bankrupt law, or as having been entered into during infancy or coverture, the natural obligation still subsists; it is a sufficient consideration for a new contract; and money paid upon account of it cannot be recovered.[4] See CONSIDERATION, Moral.

Perfect obligation. An obligation which gives to the opposite party the right of compulsion. *Imperfect obligation.* An obligation which is not binding, as between man and man; a duty not enforceable by human law.[5] See ASSENT; DUTY, 1; EQUITY; JOINT AND SEVERAL; RIGHT, 2.

In Roman law, a contract was a pact (*q. v.*), a convention plus an obligation. So long as the pact remained unclothed with the obligation, it was "nude" or "naked." An obligation was "*juris vinculum, quo necessitate, adstringimur alicujus solvendæ rei*" (Justinian, Inst. III, 13, 1). The obligation is the "bond" or "chain," with which the law joins persons together in consequence of their voluntary acts. *Obligatio* may signify a right as well as a duty. The picture is that of a "legal chain," and the two ends were equally regarded.[6]

The obligation was a personal relation between two parties, a debtor bound to render some service, a creditor to receive it. The debt was a binding (*obligatio*), the payment a releasing (*solutio*), of the person. The creditor's hold was on the person (later, on the property) of the debtor. The imperfect *obligatio* (*naturalis*) could not, like the perfect (*civilis*), be enforced by a direct action, but might have force in indirect ways. Natural obligations arose from transactions which would have created civil ones, but for some defect in form or in legal capacity. Civil obligations were those *stricti juris*, subject to a literal and rigorous construction, and those *bonæ fidei*, in which the aims

[1] [Blair *v.* Williams, 4 Litt. *36, 66 (Ky., 1823).

[2] Crandall *v.* Bryan, 15 How. Pr. 55–56 (1857); Sibilrud *v.* Minneapolis, &c. R. Co., 29 Minn. 60 (1882).

[3] [Goulding *v.* Davidson, 25 How. Pr. 484 (1863); Tebbetts *v.* Dowd, 23 Wend. *332 (1840).

[4] See 2 Bl. Com. 445; Hemphill *v.* McClimans, 24 Pa. 371 (1855); Chitty, Contr. 10; Langd. Contr. § 71; Leak, Contr. 66.

[5] [Aycock *v.* Martin, 37 Ga. 128 (1867); Vattel, Law of Nations, *lxii, § 17.

[6] Maine, Ancient Law, 312–14. See also Goodsell *v.* Benson, 13 R. I. 289 (1881), note; Hare, Contr. 64.

of the parties and the demands of reason and equity were considered.[1]

2. A legal duty; a legal liability.[2]

A valid, subsisting obligation consists of a legal debt or duty, and the remedy to enforce it.[3]

3. An undertaking under seal; also, the instrument or writing by which it is evidenced.[4]

A bond, or other writing in the nature of a bond. In a popular sense, any act by which a person becomes bound to or for another, or to perform something.[5] See BOND.

Obligee. He to whom an obligation or bond is given.

Obligor. He who enters into a bond or obligation.[6]

A "co-obligor" is a person who is jointly bound, by the same instrument, with another person.

Obligation is a generic word, including every kind of contract by which parties bind themselves. Used without limitation, will include a coupon bond payable to bearer.[7]

An obligation is "a deed in writing, whereby one man doth bind himself to another to pay a sum of money or do some other thing." No precise form of words is necessary. Any memorandum under seal, whereby a debt is acknowledged to be owing, will obligate the party to pay. The terms must at least create a *debitum in præsenti*, though the *solvendum* may be *in futuro*, even after the death of the obligor.[8]

Obligation of a contract. The law which binds a party to a contract to perform his undertaking.[9]

The power and efficacy of the law which applies to and enforces performance of the contract, or the payment of an equivalent for non-performance.[10]

"No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[1]

The constitutions of the several States contain a similar restriction upon the exercise of legislative power.[2]

The reference is to the means provided by law by which a contract can be enforced,— by which the parties can be obliged to perform it.[3]

The "obligation" is found in the terms of the agreement, sanctioned by moral and legal principles.[4]

It includes everything within the obligatory scope of the contract.[5]

Implies a duty, that may be enforced by law, to perform the contract according to its terms.[6]

Consists in the remedy given by law to enforce the contract. While this remedy may be changed by an enactment, it cannot be taken away or lessened, at least not without leaving the parties "a substantial remedy," according to the course of justice as it existed when the contract was made.[7] See further IMPAIR.

4. An instrument for the payment of money.

"Obligation or other security of the United States," in the Crimes Acts, means, all bonds, certificates of indebtedness, national currency, coupons, United States notes, Treasury notes, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps, and other representatives of value issued by any act of Congress.

Any person who, with intent to defraud, falsely makes, forges, or counterfeits, or alters any such obligation or security, shall be punished by a fine of not more than five thousand dollars, and imprisoned not more than fifteen years.[8]

See MERGER, 2.

OBLITERATION. Is not confined to effacing letters or words so that they cannot be read. A line drawn through a writing (testamentary) obliterates it, though left as

[1] Hadley, Rom. Law, 235, 245, 252, 255.

[2] Crandall *v.* Bryan, 15 How. Pr. 55-56 (1857).

[3] Cocke *v.* Hoffman, 5 Lea, 112 (1880); 6 Barb. 583.

[4] Smith *v.* Ellington, 14 Ga. 333 (1853); Hargroves *v.* Cooke, 15 *id.* 330 (1854).

[5] Strong *v.* Wheaton, 38 Barb. 624 (1861). See also 2 Bl. Com. 340; 1 Ark. 112; 6 Minn. 353; 38 L. T. R. 378.

[6] 2 Bl. Com. 340. Obli-jee'; obli-gor'.

[7] [Sinton *v.* County of Carter, 23 F. R. 535, 538 (1885).

[8] Cover *v.* Stem, 67 Md. 451 (1887), Alvey, C. J., quoting Shep. Touch. 367, and holding that the words "At my death, my estate or my executor may pay Ann Cover $3,000 — David Engel," created neither an obligation to pay money, nor, under the Maryland act of 1864, a will.

[9] [Sturges *v.* Crowninshield, 4 Wheat. 197 (1819), Marshall, C. J.

[10] Ogden *v.* Saunders, 12 Wheat. 318 (1827), Trimble, J. See also Wachter *v.* Famachon, 62 Wis. 121-22 (1885).

[1] Constitution, Art. I, sec. 10, cl. 1.

[2] Consult Story, Const. § 1373; Cooley, Const. Lim. 273-94.

[3] Louisiana *v.* New Orleans, 102 U. S. 206 (1880), Field, J.; Seibert *v.* Lewis, 122 *id.* 295 (1887).

[4] Charles River Bridge *v.* Warren Bridge, 11 Pet. *572 (1837), M'Lean, J.

[5] Edwards *v.* Kearzey, 96 U. S. 600 (1877).

[6] [Wachter *v.* Famachon, 62 Wis. 121 (1885), Orton, J.

[7] Bank of Louisville *v.* Trustees of Public Schools, 83 Ky. 227 (1885); McCracken County *v.* Mercantile Trust Co., 84 *id.* 348-52 (1886), cases. See also 1 How. 311; 15 *id.* 301; 8 Wheat. 1; 16 Wall. 317; 70 Ala. 151-62; 9 Cal. 83; 31 Conn. 265; 38 Ga. 369; 15 Iowa, 130; 4 Litt. *36; 29 Minn. 527-32, 546; 41 Pa. 446; 11 R. I. 354; 27 Vt. 602; 18 Gratt. 270.

[8] R. S. § 5413: Act 30 June, 1864.

legible as before.[1] See ALTERATION, 2; CANCEL.

OBLOQUY.[2] Censure; reproach.

To expose one to obloquy is to expose him to censure and reproach, these words being synonymous with "obloquy."[3]

OBSCENE.[4] Includes what is foul or indecent, and what is immodest or calculated to excite impure desires.[5]

Is applied to language spoken, written, or printed, and to pictorial productions.

Obscene, lewd, or lascivious publications of an indecent character, are neither mailable[6] nor importable.[7]

He who deposits such publications in the mails, and he who receives the same for circulation, shall be guilty of a misdemeanor, punishable by a fine of one hundred to five thousand dollars, with imprisonment for one to ten years, or both.[8]

The test is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of the sort may fall. A book need not have words which are in themselves obscene, in order to be obscene. Regard is had to the idea conveyed by the words used, in any substantial part of the publication. "Obscenity" is that form of indecency which is calculated to promote general corruption of morals. "Lewdness" has a tendency to excite lustful thoughts. . . The indictment need not specify in what respect a picture is unlawful. . . One may have what views on religion he pleases, and publish the same, but not in connection with obscene matters sent through the mails.[9]

The prohibition applies to an obscene writing or letter inclosed in a sealed envelope.[10]

The purpose is to exclude from the mails only such articles as are impure and immodest and tend to corrupt the morals.[11]

The fact that the publications were sent in the real or supposed interest of science, philosophy, or morality is immaterial.

The indictment should allege a *scienter*. An allegation that the accused "knowingly deposited" the objectionable matter cannot be extended to embrace an averment of *scienter*.[1]

The fact that post-office inspectors used test or decoy letters to bring to justice a person suspected of mailing obscene literature does not discredit their testimony.[1]

Any offense, which, in its nature and by its example, tends to the corruption of morals, as, the exhibition of an obscene picture, is indictable at common law.[2]

Whether matter published is obscene or not, is a question of law for the court. If the matter is too gross to be spread upon the records that fact may be averred as an excuse for not setting the matter out. But this rule is not general.[3] See VERBUM, In hæc.

See also BOOK, 1; DECOY; INDECENT; NAKED, 1; POLICE, 2; PUBLICATION, 2.

OBSOLETE. Worn out: old and not enforced. *Obsolescent.* Falling into disuse.

"It must be a strong case to justify the court in deciding that an unrepealed act is obsolete and invalid. I will not say that such case may not exist: where there has been a non-user for a great number of years; where, from a change of times and manners, an ancient sleeping statute would do great mischief, if suddenly brought into action; where a long practice, inconsistent with it, has prevailed, and, especially, where from other and later statutes it might fairly be inferred that, in the apprehension of the legislature, the old one was not in force."[4] See REPEAL.

OBSTA PRINCIPIIS. L. Resist beginnings, first encroachments, a wrong at inception.

Courts are watchful against stealthy encroachments upon constitutional rights.[5]

OBSTRUCT. To pile up or against: to render passage difficult or impossible; to impede or retard action, hinder or prevent from performing a duty or service.

1. To obstruct travel is to stop up and wholly prevent travel upon a road, or render the road unfit for travel.[6]

A fence along a highway is an obstruction thereof, if it prevents public travel from being perfectly safe,

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[1] Evans's Appeal, 58 Pa. 244 (1868), Strong, J. See also 123 Mass. 102; 22 N. J. E. 463; 25 Am. R. 35; 19 Alb. L. J. 328; 1 Williams, Ex. 144.

[2] L. *ob-loqui*, to speak against: contradict.

[3] Bettner *v.* Holt, 70 Cal. 275 (1886), Foote, J.

[4] L. *obscenus*, repulsive, foul.

[5] [United States *v.* Loftis, 12 F. R. 673 (1882), Deady, D. J.: Worcester's Dict.; s. c., 8 Saw. 194.

[6] Act 12 July, 1876; R. S. §§ 3893–94; 1 Sup. R. S. p. 229, Act 3 March, 1879: 1 Sup. R. S. p. 456.

[7] R. S. § 2191; 22 St. L. 489.

[8] R. S. § 3894. See ADDENDA.

[9] United States *v.* Bennett, 16 Blatch. 336, 360–62, 366–69 (1879), cases, Blatchford, J. Definitions approved, United States *v.* Slenker, *post*.

[10] United States *v.* Gaylord, 11 Biss. 438 (1883), Treat, J.; Same *v.* Same, 17 F. R. 438 (1883), Drummond, J.; United States *v.* Hanover, *ib.* 444 (1883), cases; United States *v.* Fero, 18 *id.* 900 (1884), cases; Thomas *v.* State, 103 Ind. 421 (1885).

[11] *Exp.* Doran, 32 F. R. 76 (1887).

[1] United States *v.* Slenker, 32 F. R. 694 (1887), cases, Paul, J.; United States *v.* Wightman, 29 *id.* 636 (1886), cases, and note.

[2] Commonwealth *v.* Sharpless, 2 S. & R. *91, 101 (1815), Tilghman, C. J.

[3] McNair *v.* People, 89 Ill. 441 (1878); 92 *id.* 182. See generally 2 Whart. Cr. L. § 1432; Bradlaugh *v.* The Queen, L. R., 3 Q. B. D. 607 (1878).

[4] Wright *v.* Crane, 13 S. & R. *452 (1825), Tilghman, C. J. See also Snowden *v.* Snowden, 1 Bland, Ch. 556 (1829); Hill *v.* Smith, 1 Morris, *79 (Iowa, 1840).

[5] Boyd *v.* United States, 116 U. S. 635 (1886).

[6] [Newburyport Turnpike Corporation *v.* Eastern R. Co., 23 Pick. 329 (1839); 21 N. J. E. 27; 78 Pa. 23.

although it does not extend across the road.[1] See OPEN, 1 (7).

The primary purpose of streets is use by the public for travel and transportation, and the rule is that any obstruction or encroachment which interferes with such use is a public nuisance. But there are exceptions to the rule, born of necessity and justified by public convenience. An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods to or from his adjoining store. A coach or omnibus may stop to take up or set down passengers, and use for public travel may be temporarily interfered with in a variety of other ways without the creation of a nuisance; but all such interruptions and obstructions must be justified by necessity. It is not sufficient that the obstructions are necessary with reference to the business of him who creates and maintains them. They must also be reasonable with reference to the rights of the public, who have interests which may not be sacrificed or disregarded. Whether an obstruction is necessary and reasonable must generally be a question of fact to be determined upon the evidence relating thereto.[2]

One who wrongfully pulls a signal rope and stops a train does not "obstruct" the train.[3]

2. "Any person who shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same, shall, for every such offense, be punishable by a fine of not more than one hundred dollars."[4]

When acts which create an obstruction of the mails are in themselves unlawful the intention to obstruct will be imputed to their author, although to attain another end may have been his primary object. The prohibition has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows.[5]

The offense is complete when one or more persons unlawfully prevent the moving of a railroad train carrying the mails.[6]

3. Obstructing an officer executing lawful process is an offense against public justice.[7]

The offense is committed when he is prevented by actual violence, or by threats of violence which it is in the power of the offender to enforce, from executing the writ.[8] See RESIST.

[1] Mosher v. Vincent, 39 Iowa, 609 (1874); State v. Leaver, 62 Wis. 392 (1885). So as to obstructing a railroad track, State v. Kilty, 26 Minn. 423 (1881). In Nashville, &c. R. Co. v. Carroll, 6 Heisk. 368 (1871), held that such "obstruction" was not for expert testimony.

[2] Callanan v. Gilman, 107 N. Y. 365 (1888), cases.

[3] Commonwealth v. Killian, 109 Mass. 374 (1872). See Reg. v. Hardy, L. R., 1 C. C. 280 (1870), as to false signal.

[4] R. S. § 3995: Act 8 June, 1872.

[5] United States v. Kirby, 7 Wall. 486 (1866), Field, J.

[6] United States v. Kane, 19 F. R. 42 (1884). See also United States v. Claypool, 14 *id.* 127 (1882).

[7] 4 Bl. Com. 129.

[8] United States v. Lowry, 2 Wash 170 (1806); United States v. Lukins, 3 *id.* 337 (1818); 1 Idaho, 211; 15 Mo. 497; 25 Vt. 421.

OBTAIN. See ACQUIRE.

In a statute punishing false pretenses, may refer to obtaining some benefit to the party, rather than to defrauding or depriving another of his property.[1]

OCCASIONAL. See REGULAR.

OCCUPY.[2] To hold in possession; to hold or keep for use; as, to occupy an apartment.[3]

Implies actual use, possession or cultivation by a particular person: as, in a devise of land "occupied" by the testator.[4]

"Occupy" and its inflections may well enough be used in the sense of possess; "occupancy" and "occupant" for assuming property which has no owner; "occupation" and "occupier" for the more general idea of possession.[5]

Occupied; unoccupied. As used in policies of insurance, are always construed with reference to the character of the building, the purposes for which it is designed and the uses contemplated by the parties as expressed in the contract.

The occupancy of a dwelling, and of a barn or a mill, is in each case essentially different in its scope and character. "Occupied" always implies a substantial and practical use of the building for the purposes for which it is intended, and as contemplated by the terms of the policy. A dwelling-house is occupied when human beings habitually reside in it, and unoccupied when no one lives or dwells in it.[6]

Occupation of a dwelling-house, within the meaning of a policy of insurance, requires that there be in the house the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but the house must be the place of usual return and habitual stoppage.[7] See VACANT.

Within the meaning of a tax law, the owner of land may be in occupation of it by his tenant; so that "unoccupied" will mean untenanted.[8] See USE, 2.

Occupancy. Possession; actual control; occupation,[9] *q. v.*

[1] People v. General Sessions, 18 Hun, 400 (1878); Regina v. Garrett, 1 Dears. C. C. 242 (1853), Parke, B.

[2] L. *occupare*, to lay hold of.

[3] Missionary Society v. Dallas, 107 U. S. 342 (1882); Webster's Dict.

[4] Jackson v. Sill, 11 Johns. *214 (1814), Thompson, C. J.; Inhabitants of Phillipsburgh v. Bruch, 37 N. J. E. 485–86 (1883), cases.

[5] [Abbott's Law Dict.

[6] Sonneborn v. Manufacturers' Ins. Co., 44 N. J. L. 223 (1882), Green, J. See also 112 Mass. 422; 136 *id.* 491.

[7] Herrman v. Adriatic Fire Ins. Co., 85 N. Y. 169 (1881), Folger, C. J.; Barry v. Prescott Ins. Co., 35 Hun, 603 (1885).

[8] State v. Reinhardt, 31 N. J. L. 218 (1865); Imperial Fire Ins. Co. v. Kiernan, 83 Ky. 478 (1885); Stensgaard v. National Fire Ins. Co., 36 Minn. 181 (1886).

[9] See Walters v. People, 21 Ill. 178 (1859); 38 *id.* 262; 110 Mass. 175; 113 *id.* 518; 25 Barb. 54; 36 Wis. 73.

Title by occupancy is the taking possession of those things which before belonged to nobody.[1]

The foundation of property, of holding those things in severalty which by the law of nature, unqualified by that of society, were common to all mankind.[1]

Thus, at common law, one may take to his own use goods of an alien enemy; movables returned into the common stock of things by abandonment; the benefits of the elements — light, air, water; and wild animals. Other examples of title acquired by first occupancy are: emblements; additions to property by accession, or by wrongful confusion of goods; an author's right in his literary composition; the right to the exclusive use of a trade-mark, or of a firm name.[2]

Lest this property should determine by the owner's dereliction, or death, whereby the thing would again become common, society has established contracts, conveyances, wills, and heirships, by which to continue the property of the first occupant.[3] See DISCOVERY, 1.

Occupant; occupier. The "first occupant" is he who first declared his intention to appropriate a thing to his own use, and actually took it into possession.[4]

An "occupant" has the actual use or possession of a thing.[5]

An "occupier" is one in the use and enjoyment of a thing.[6]

May imply that the person is in the actual *bona fide* possession of land as a resident.[7] See ABANDON, 1; FIND, 1.

Occupation. 1. Actual possession of real property.[8] See USE, 2.

2. Employment at a particular business; engagement; vocation; calling; trade.[9] See EMPLOYMENT; PROFESSION; TRADE; TAX, 2.

OCCUR. Generally, to happen.[10]

"After a loss shall occur," in a policy of insurance, refers to the time when liability becomes fixed, by proofs of loss, etc., — when the insurer may lawfully be compelled to pay the amount of the loss.[11]

Occurrence. See RES, Gestæ.

OCTO. See TALES.

OF. By; belonging to; upon.

In the expression "bounded north of the heirs of A," held to mean *by*.[1]

The infirmary "of" a county is equivalent to "the property of" or "belonging to" the county.[2]

Entered "of record" means upon a record or records; in the appropriate office as a matter of public record.

"Of force" means of binding force, obligatory although possibly not enforced.[3]

Of course. See COURSE, 2.

OFFENSE.[4] The transgression of a law;[5] a crime.[6]

Any crime or act of wickedness. As a genus, comprehends every crime and misdemeanor; as a species, signifies a crime not indictable but punishable summarily or by the forfeiture of penalty. Offenses are: treasons, felonies or major offenses, and misdemeanors or minor offenses.[7]

Includes also such violations of municipal ordinances as are punishable by fine or imprisonment.[8]

Offenses are spoken of as capital and non-capital, as cumulative, criminal, political, etc. See CRIME; EXTRADITION; MISDEMEANOR, 2; WRONG, Public.

OFFER. 1. A proposition to do a thing.[9]

May be convertible with "attempt,"[10] *q. v.*; but "offering" does not mean the same as "promising" a reward to a voter.[11]

An offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter according to the terms in which the offer was made. Any qualification of, or departure from, those terms invalidates the offer, unless agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties the negotiation is open and imposes no obligation upon either party.[12]

An offer to sell, subject to acceptance, binds the party offering, but not the other party until acceptance. And so, also, as to an optional purchase, based upon a sufficient consideration.[13]

An offer to do a thing, as, to insure property, made by mail, binds the person making the offer, according

[1] 2 Bl. Com. 258.
[2] 2 Bl. Com. 400, 407.
[3] 2 Bl. Com. 8–11, 400. See 110 U. S. 374.
[4] 2 Bl. Com. 258.
[5] Redfield *v.* Utica, &c. R. Co., 25 Barb. 58 (1851); City of Bangor *v.* Rowe, 57 Me. 439 (1869).
[6] [Fleming *v.* Maddox, 30 Iowa, 242 (1870).
[7] Hussey *v.* Smith, 1 Utah, 132 (1873); 3 Op. Att.-Gen. 126 (1880); *id.* 182 (1837); Abbott *v.* Upham, 18 Metc. 174 (1847); O'Neale *v.* Cleaveland, 3 Nev. 492 (1867).
[8] Lawrence *v.* Fulton, 19 Cal. 690 (1862); McKenzie *v.* Brandon, 71 *id.* 211 (1886); Fleming *v.* Maddox, 30 Iowa, 242 (1870).
[9] See Schuchardt *v.* People, 99 Ill. 506 (1881).
[10] Jenanson *v.* Humboldt Ins. Co., 91 Ill. 95 (1878).
[11] Hay *v.* Star Fire Ins. Co., 77 N. Y. 243 (1879).

[1] Hannum *v.* Kingsley, 107 Mass. 361 (1871).
[2] Davis *v.* State, 38 Ohio St. 506 (1882).
[3] See 1 Paine, 336; 21 Barb. 475.
[4] Spelled also offence. O. F. *offence, offense:* L. *offensa: of-fendere*, to dash against.
[5] Moore *v.* Illinois, 14 How. 19 (1852).
[6] People *v.* Police Commissioners, 39 Hun, 510 (1886). See also 1 Oreg. 192; 3 Tex. 314; 18 Gratt. 955.
[7] [Wharton's Law Dict.
[8] State *v.* Cantieny, 34 Minn. 9 (1885).
[9] People *v.* Ah Fook, 62 Cal. 494 (1881).
[10] Commonwealth *v.* Harris, 1 Pa. Leg. Gaz. R. 457 (1871).
[11] State *v.* Harker, 4 Harring. 561 (1845).
[12] Eliason *v.* Henshaw, 4 Wheat. 228 (1819), Washington, J. See also Tilley *v.* County of Cook, 103 U. S. 161 (1880), cases: 12 Mo. Ap. 384.
[13] Butler *v.* Thompson, 92 U. S. 415–16 (1875); Langd. Contr. § 151.

to the terms tendered, if an answer is transmitted in due course of mail accepting the terms, unless a withdrawal reaches the addressee before his letter announcing acceptance has been transmitted.[1]

The contract is deemed complete the moment the letter assenting to the latest proposition is mailed.[2]

The offer may be of such a nature that the person making it has a right to expect an answer by return mail.[3]

A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modifications suggested. The other party, having once rejected the offer, cannot afterward revive it by tendering an acceptance of it. If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time. If it does, it may, at any time within the limit and so long as it remains open, be accepted or rejected by the party to whom, or be withdrawn by the party by whom, it was made.[4] See ASSENT; COMPROMISE; TENDER, 2.

2. A proposal made to the court by counsel, at the trial of a cause, to put in as evidence testimony then about to be adduced.

The court may require such "offer" to be reduced to writing, stating clearly what it is proposed to prove, and the purpose thereof; and then either admit or reject the offer.

OFFICE.[5] 1. A right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging.[6]

The right, and correspondent duty, to execute a public or private trust, and to take the emoluments belonging to it.[7]

That function by virtue whereof a person has some employment in the affairs of another.[8]

A public station or employment, conferred by the appointment of government, and embracing the ideas of tenure, duration, emolument, and duties.[9]

Offices may be classed as *civil* and *military;* and civil offices as political, judicial, and ministerial. **Judicial offices** are those which relate to the administration of justice. **Ministerial offices** are those which give the officer no power to judge of the matter to be done, and require him to obey the mandates of a superior. **Political offices** are such as are not immediately connected with the administration of justice, or the execution of the mandates of a superior officer.[1]

A civil office, at common law, is regarded as a burden which, in the interest of the community and of good government, the appointee is bound to bear. Hence, an office cannot be laid down without the consent of the appointing power, in order that public interests may not suffer. A resignation is complete when the proper authority accepts it, or, what is tantamount, appoints a successor.[2]

Public offices are trusts, held solely for the public good. They are conferred from considerations of the ability, integrity, and fitness of the appointee. Whatever introduces other elements to control the appointing power must necessarily lower the character of the appointments, to the detriment of the public. Agreements for compensation to procure these appointments tend to introduce such elements, and are therefore viewed as inconsistent with sound morals and public policy.[3]

The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred as a trust to be exercised for the benefit of the public. Such salary as may be attached to it is designed to enable the incumbent the better to perform the duties by the more exclusive devotion of his time thereto. A public office and its creation is a matter of public, not of private law. The decisions of some States proceed upon the ground that an incumbent has a property in his office and that he cannot be deprived of his right without the judgment of a court; a view supported by the doctrines of the common law which regarded an office as an hereditament, but which has no foundation in a representative government.[4]

An office of constitutional creation is beyond the control of the legislature, except as prescribed in the constitution. The salary or compensation provided by the constitution is an incident to the office, and cannot be detached from it.[5]

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[1] Tayloe *v.* Merchants' Fire Ins. Co., 9 How. 400 (1850), Nelson, J.

[2] Darlington Iron Co. *v.* Foote, 16 F. R. 646 (1883).

[3] Dunlop *v.* Higgins, 1 H. L. 387 (1848); Maclay *v.* Harvey, 90 Ill. 525 (1878).

[4] Minneapolis, &c. R. Co. *v.* Columbus Rolling Co., 119 U. S. 151 (1886), cases, Gray, J.; 7 Am. Law Rev. 433–56 (1872), cases; 2 Kent, 477.

[5] L. *officium*, doing a service: duty; function.

[6] 2 Bl. Com. 36.

[7] 3 Kent, 454.

[8] Matter of Hathaway, 71 N. Y. 243 (1877), Allen, J.

[9] United States *v.* Hartwell, 6 Wall. 393 (1867), Swayne, J. See also 103 U. S. 8; 2 Bened. 306; 12 Rep. 483; 43 Ala. 245; 26 Cal. 389; 30 Ga. 274; 45 Ill. 414; 6 Cush. 181; 40 Miss. 629; 89 N. C. 133; 29 Ohio St. 348; 7 *id.* 556; 26 Pa. 77; 62 *id.* 349; 32 Wis. 127; 4 *id.* 646.

[1] Twenty Per Cent. Cases, 13 Wall. 575 (1871), cases, Clifford, J.

[2] Edwards *v.* United States, 103 U. S. 473 (1880), cases, Bradley, J. See also 15 Op. Att.-Gen. 3, 207, 449; 10 F. R. 463–64; 39 Ark. 211.

[3] Tool Company *v.* Norris, 2 Wall. 55 (1864), cases, Field, J.

[4] State, *ex rel.* Attorney-General *v.* Hawkins, 44 Ohio St. 109, 113 (1886), cases, Minshall, J.

[5] Blair *v.* Marye, 80 Va. 492, 490–97 (1885), cases.

2. A place for transacting business, public or private.[1]

Office book. See DOCUMENT, Public; RECORD.

Office copy. See COPY.

Office found. At common law, an alien may take realty by act of the grantor, and hold it until "office found;" that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the government.

The proceeding which contains the finding is technically designated as "office found." It removes the fact from the region of uncertainty and makes it a matter of record. It was devised as a means to give the king his right by solemn matter of record, without which he could neither take nor part with anything. Some equivalent proceeding was essential at civil law. The proceeding was necessary before the sovereign could devest title.[2] See INQUEST, Of office.

Officer. One lawfully invested with an office.[3]

One invested by a superior authority, particularly by government, with the duty of transacting affairs of a certain class; an incumbent of an office; a person designated to execute some function of government.[4]

The word "officer" is very elastic. As applied to the military establishments of the army and navy, it would be more definite, perhaps, and somewhat so as applied to the civil establishments, where there are *indicia* of authority to point them out; but, as used in statutes, the term often cannot be so confined. Even by common understanding in the army and navy, as well as in the civil service, there are distinctions, social, technical, and arbitrary, that frequently influence the judicial determination of administrative regulations. One of the earliest definitions of "*officium*" is "that function by virtue whereof a man hath some employment in the affairs of another, as of the king or another person." "The word principally implies a duty, and then, the charge of such duty; and it is a rule that where a man hath to do with another's affairs against his will, and without his leave, that is an office."[5]

In the Revised Statutes or any act or resolution of Congress passed since February 25, 1871, reference to any "officer" includes any person authorized by law to perform the duties of such office, unless the context shows that a more restricted sense is meant.[1]

One who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties and exercises no powers depending directly on the authority of law, but simply performs such duties as are required of him by the persons employing him, and whose responsibility is limited to them, is not an officer. "Office" implies authority to exercise some portion of the sovereign power of the state.[2]

City officer. One whose functions relate exclusively to the local affairs of a city.

State officer. One whose duties concern the State at large or the general public.[3]

Civil officers. Within the meaning of Art. II, sec. 4, of the Constitution, all officers of the United States who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the army or navy.[4]

What is necessary to constitute a person an officer of the United States, in any of the various branches of its service, was very fully considered in *United States* v. *Germaine*, 99 U. S. 509-10 (1878), in which case it was distinctly pointed out that, under the Constitution, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a department, and the heads of the departments were defined to be what are now called the "members of the cabinet." Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States. Where Congress may have used the word "officer" in a more popular sense, it is the duty of the court to ascertain such meaning and to be governed accordingly.[5]

Commissioned officer; non-commissioned officer. Whenever the United States statutes speak of "officers" of the army, they refer to commissioned officers. "Non-commissioned officers" are not officers in the sense in

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[1] See Commonwealth *v.* White, 6 Cush. 183 (1850); Shaw *v.* Morley, L. R., 3 Ex. 140 (1868).

[2] Phillips *v.* Moore, 100 U. S. 212 (1879), Field, J.; Hauenstein *v.* Lynham, *ib.* 484 (1879); Fairfax *v.* Hunter, 7 Cranch, 621 (1813); 3 Bl. Com. 259.

[3] [Bouvier's Law Dict.

[4] [Abbott's Law Dict.

[5] United States *v.* Trice, 30 F. R. 493-94 (1887), cases. Hammond, J.; Cowell, Dict; 4 Jac. Dict. 433; 2 Toml. Dict. 664.

[1] [R. S. § 1.

[2] Olmstead *v.* Mayor of New York, 42 N. Y. Super 487-88 (1877).

[3] Burch *v.* Hardwicke, 30 Gratt. 33-35 (1878), cases.

[4] 1 Story, Const. § 792.

[5] United States *v.* Mouat, 124 U. S. 307 (1888), Miller, J.; United States *v.* Hendee, *ib.* 313 (1888).—in which the word is used in a general sense which would include a pay-master's clerk. See also United States *v* Smith, *ib.* 532 (1888), deciding that a clerk in the office of a collector of customs is not a public officer within R. S. § 3639.

which the latter term is generally used.[1] See CADET.

Executive officer. A person in whom resides power to execute the laws.[2]

Judicial officer. A person concerned in deciding or administering the law. See JUDICIAL.

Legislative officer. A person empowered to assist in enacting laws.

Ministerial officer. A person whose duty it is to execute the mandate of a superior officer. See MINISTER, 1.

Officer de facto. Not a mere usurper (*q. v.*), nor yet within the sanction of law, but one who, "colore officii," claims and assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly. *Officer de jure.* An officer of right, a rightful officer.[3]

A *de facto* officer is one who discharges the duties of an office under color of title. One who, having been elected to an office, assumes to exercise its duties without having attempted to qualify, is without color of title and not such an officer.[4]

One who acts as an officer *de facto* is estopped from denying that he is such an officer, even on a criminal prosecution for malfeasance in office.[5]

The validity of an act done by one in a public station is not, as a rule, to be tried by his title. *State* v. *Carroll*, 38 Conn. 458–77 (1871), which contains an exhaustive examination of the cases, decides that competent authority in the appointing or electing body is not requisite to make a *de facto* officer.[6]

The acts of an officer *de facto* are held to be valid, because the public good requires it.[7] His acts, within the sphere of the powers and duties of the office, are as binding as the acts of an officer *de jure:*[8] as, for example, the act of a judge *de facto.*[9]

There can be no officer, either *de jure* or *de facto*, if there be no office to fill. The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society, their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. Endless confusion would result if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds.[1]

In ordinary cases, where an election of officers of a corporation has been omitted, the old officers may continue to act as officers *de facto*, beyond their regular term (though not compelled to do so), and their acts will bind the corporation; but not so, where the functions of the corporation have been abrogated or superseded.[2]

Public officer. A person who has some duty to perform concerning the public.[3]

Where an individual has been appointed or elected in a manner required by law, has a designation or title given him by law, and exercises functions concerning the public, assigned to him by law, he must be regarded as a "public officer."[4]

It is well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal, as well as that of appointment, is vested in executive or administrative boards or officers, or is intrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by *certiorari*, error, or appeal, or by *mandamus*, prohibition, or *quo warranto*, according to the circumstances of the case, and the established mode of procedure.[5]

Superior officer; inferior officer. These expressions designate, respectively, an official high, or low, in grade or rank, or one in authority over, or subordinate to, another.

The President "shall nominate, and by and with the Advice and Consent of the Senate shall appoint

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[1] Babbitt *v.* United States, 16 Ct. Cl. 214 (1880); R. S. §§ 1280, 1293.

[2] Thorne *v.* San Francisco, 4 Cal. 146 (1854).

[3] Hussey *v.* Smith, 99 U. S. 24 (1878), cases.

[4] Creighton *v.* Commonwealth, 83 Ky. 147 (1885), Pryor, J.

[5] People *v.* Bunker, 70 Cal. 215 (1886), cases.

[6] State, *ex rel.* Herron *v.* Smith, 44 Ohio St. 368 (1886).

[7] Hussey *v.* Smith, 99 U. S. 24 (1878), cases; Koontz *v.* Burgess of Hancock, 64 Md. 134 (1885).

[8] Phillips *v.* Payne, 92 U. S. 132 (1875), cases.

[9] Bolling *v.* Lersner, 91 U. S. 596 (1875), cases. A decree by a judge whose commission had expired four days before was held valid in Cromer *v.* Boinest, 27 S. C. 426 (1887), cases. See, as to a justice of the peace holding over, Hamlin *v.* Kassafer, 15 Oreg. 456 (1887), cases: 36 Alb. Law J. 95–98 (1888), cases.

[1] Norton *v.* Shelby County, 118 U. S. 442–43 (1886), Field, J.; *ib.* 442–49, cases; 36 Alb. Law J. 506–10 (1887), cases.

[2] Burkley *v.* Levee Commissioners, 93 U. S. 263 (1876), Bradley, J.; Mining Co. *v.* Anglo-Californian Bank, 104 *id.* 192 (1881); Cole *v.* Black River Falls, 57 Wis. 113 (1883), cases; 7 Ala. 538; 38 Conn. 471; 69 Ill. 529; 48 Me. 80; 27 Minn. 293; 3 Monta. 430; 17 Nev. 170; 33 N. J. L. 201; 24 Wend. 539; 73 N. C. 550; 21 Ohio St. 618; 55 Pa. 472; 59 Tex. 344; 33 Gratt. 513; 2 Kent, 295.

[3] Hill *v.* Boyland, 40 Miss. 625 (1866), cases.

[4] Bradford *v.* Justices, 33 Ga. 336 (1862). See also 49 Ala. 89; 45 Ill. 400; 29 Ohio St. 348; 34 N. Y. 398; 52 Vt. 104.

[5] *Re* Sawyer, 124 U. S. 212 (1888), cases, Gray J. As to the judicial control of public officers, see 24 Cent. Law J. 172 (1886), cases.

Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[1]

"Inferior officer" here means one subordinate to those officers in whom the power of appointment may be vested by act of Congress, to wit, the President, the courts of law, and the heads of departments.[2]

The rule of official obligation, as imposed by law, is that the officer shall perform the duties of his office honestly, faithfully, and to the best of his ability. This is the substance of all official oaths. In ordinary cases, to expect more than this would deter upright and reasonable men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private. If a more stringent obligation is desirable, it must be prescribed by statute or exacted by express stipulation.[3]

No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, or however malicious the motive which produced it.[4]

The government does not guarantee the integrity of its officers nor the validity of their acts. It prescribes rules for them, requires an oath for the faithful discharge of their duties, exacts a bond with stringent conditions; provides penalties for their misconduct or fraud; but there its responsibility ends. They are but the servants of the law; if they depart from its requirements the government is not bound.[5]

Official. 1. An officer, *q. v.*

2. Pertaining to the functions of an office: as, an official — act, bond, certificate, communication, oath, report and reporter, *qq. v.* Opposed, (1) **extra-official:** beyond or outside of the legitimate functions of one's office: as, an extra-official act; (2) **unofficial:** as, an unofficial report, *q. v.*

See further AMOTION; ARREST, 2 (2, 3); COLOR, 2; COMPENSATION, 1; CONTINUANCE, 3; CORPORATION; COUNTY; DISABILITY; EMBEZZLEMENT; EMOLUMENT; EXTORTION; FEE, 2; GOVERNMENT; IMPEACH, 4; INCOMPATIBLE; LIBERTY, 1, Of the press; MAGISTRATE; MARSHAL, 1; MISDEMEANOR, 1; OATH, Of office; OBSTRUCT, 3; OFFICIUM; ONUS, Cum onere; PERSONATE; POWER, Appointing; QUALIFY; RANK; REINSTATE; RESIGNATION; REVENUE; SERVICE, 3, Civil; SHERIFF; TENURE, 2; TORT; VACANCY; WARRANT, 2; WRIT.

[1] Constitution, Art. II. sec. 2, cl. 2.

[2] Collins *v.* United States, 14 Ct. Cl. 574 (1878).

[3] United States *v.* Thomas, 15 Wall. 342 (1872), Bradley, J. See also People *v.* Faulkner, 31 Hun, 325 (1884); 74 Me. 264.

[4] East River Gas-Light Co *v.* Donnelly, 93 N. Y. 559 (1883).

[5] Moffat *v.* United States, 112 U. S. 31 (1884), Field, J. See also 1 Addison, Torts, 31, note by Wood.

OFFICINA JUSTITIÆ. L. The shop of justice: the ordinary side of the court of chancery (*q. v.*), because out of it issued, and to it returned, all writs.[1]

OFFICIUM. L. Duty, authority, office. See INOFFICIOUS.

Colore officii. Under color of office: under semblance or pretense of authority.

Implies an illegal (but not a corrupt) claim of authority, by reason of holding a particular office, to do a thing in question.[2] See *Virtute Officii;* COLOR, 2.

Ex officio. From the nature of the office. *Ex officio* authority is authority by virtue of one office to perform the duties of some other office.[3]

But making a person an *ex officio* officer does not merge the two offices into one.[4]

Functus officio. Discharged his or its office; exhausted his power; fulfilled the purpose.

Applied to a person whose official authority has ceased, and to a thing which once possessed virtue or force: as, for example, an agent who has fully executed his agency; a referee who has rendered his decision; a bill, note, or mortgage which has been paid or merged into a judgment; a trust deed given to secure a note, after the note has been paid.[5]

An officer arresting a party cannot arrest him upon an exhausted first writ — it has become *functus officio.*[6]

Virtute officii. By virtue of office; officially.

A peace officer, *virtute officii*, may arrest for crime committed in his presence.

An act done *virtute officii* is an act within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law imposes in him. An act done *colore officii* is of such a nature that the office gives no authority to do it.[7]

OFFSPRING. See PARTUS; PATER.

OIL. See MINERAL; RESIDUUM, 2.

Whether benzine is a "chemical oil or burning fluid" is a question for a jury.[8]

[1] 3 Bl. Com. 273, 50.

[2] See Burrall *v.* Acker, 23 Wend. 606 (1840); Kelly *v.* McCormick, 28 N. Y. 321 (1863); Mason *v.* Crabtree, 71 Ala. 481 (1882).

[3] Clay County *v.* Simousen, 1 Dak. 425 (1877).

[4] People *v.* Leet, 13 Ill. 268 (1851); People *v.* Ross, 38 Cal. 76 (1869); Territory *v.* Ritter, 1 Wyom. 318, 333 (1875).

[5] See 93 U. S. 382; 103 *id.* 167; 82 Ill. 383; 7 Barb. 23; 23 Tex. 561; 81 Va. 648.

[6] Cook *v.* Bangs, 31 F. R. 646 (1887).

[7] People *v.* Schuyler, 4 N. Y. 187 (1850); Seeley *v.* Birdsall, 15 Johns. *269 (1818); 74 Ga. 618; 1 Bl. Com. 349.

[8] Mears *v.* Humboldt Ins. Co., 92 Pa. 19 (1879); Carrigan *v.* Lycoming Ins. Co., 53 Vt. 426 (1881).

Benzine is a "rock or earth oil," made from petroleum.[1]

If a policy of insurance forbids the keeping of gasoline or benzine on the premises, authority to use gasoline gas does not warrant keeping either fluid there for any other purpose than for the manufacture of gas.[2]

OLD. See NEW.

Referring to a road, does not necessarily mean long-existing, ancient. May be so opposed to a "new" road as to mean simply a road already laid out and used.[3]

Old people. See DEMENTIA; INFLUENCE.

OLEOMARGARINE.[4] Artificial butter made out of animal fat, milk, and other substances; imitation butter.

A patentee is not authorized by the patent laws to manufacture and sell the patented article in violation of the laws of a State.[5]

Statutes prohibiting the sale of articles made in imitation and designed to take the place of genuine butter, unless the packages are so labeled or marked as to prevent deception upon those who desire to purchase butter made from cream only, are constitutional.[6]

The legislature of a State may prohibit the sale of oleomargarine, suine, and like compositions, as an exercise of the police power, *q. v.*[7]

The New York act of 1884 was held to be unconstitutional in so far as it prohibited the making or using of any compound designed as a substitute for butter or cheese, however wholesome, and however openly and fairly the character of the substitute may be avowed. "Such enactment conflicts with the constitutional right of liberty in every citizen to adopt and follow such industrial pursuit, not injurious to the community, as he may see fit."[8] But the act of 1885, which forbids the manufacture or sale of products not made from unadulterated milk in imitation or resemblance, or designed to take the place of butter, is constitutional. It is not necessary, under the latter act, that the buyer should be deceived, or that there should be an attempt to deceive him; and evidence of the presence of unnecessary coloring matter, designed to make the oleomargarine resemble dairy butter, will justify conviction.[9]

The Pennsylvania act of May 21, 1885, is within the power to legislate for the public health. That some persons suffer loss from prohibiting the manufacture and sale of the substance cannot defeat the purpose of the act; nor either can the opinion of individuals that the legislature mistook the necessity for such a law. And the further fact that the pure substance may be wholesome is irrelevant in a judicial inquiry: the legislature may still restrict or prohibit traffic in the substance. If there is probable ground for believing that entire prohibition of traffic in any preparation is the only way effectually to prevent its being fraudulently substituted for the real article, then such prohibition may be upheld as a reasonable police regulation, although the preparation is in fact innocuous. On this principle, mixing milk and water, and adulterating confections and provisions, have been made penal offenses.[1]

That statute of Pennsylvania, which was designed "to protect the public health, and to prevent adulteration of dairy products and fraud in the sale thereof," does not deny to persons the equal protection of the laws, nor deprive them of property without compensation as required by law, nor of any right of liberty or property without due process of law,—within the meaning of the Fourteenth Amendment. "The (Supreme) court is unable to affirm that this legislation has no real or substantial relation to such objects" as are expressed in the title of the act.[2]

An act of Congress, approved August 2, 1886 (24 St. L. 209), provides, section 1, that for the purpose of the act "butter" shall be understood to mean "the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter."

Sec. 2. "That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

Sec. 3. Imposes special taxes as follows: $600 upon manufacturers for sale; $480 upon wholesale dealers — those who sell in the original packages, except such as sell only their own production; $48 upon retail dealers.

Sec. 4. Besides being liable for said tax, every per-

[1] Buchanan *v.* Exchange Ins. Co., 61 N. Y. 29 (1874); Bennett *v.* North British Ins. Co., 81 *id.* 275 (1880); Morse *v.* Buffalo Ins. Co., 30 Wis. 534 (1872).

[2] Liverpool, &c. Ins. Co. *v.* Gunthur, 116 U. S. 113, 126 (1885).

[3] People *v.* Griswold, 67 N. Y. 61 (1876).

[4] O'-le-o-mär'-ga-rine.

[5] *Re* Broenahan, 18 F. R. 62 (Mo., 1882).

[6] People *v.* State, 39 Ohio St. 236 (1883); Pierce *v.* State, 63 Md. 592 (1885).

[7] State *v.* Addington, 77 Mo. 110 (1882); Commonwealth *v.* Powell, 1 County Ct. R. 94 (Pa., 1885).

[8] People *v.* Marx, 99 N. Y. 377, 386 (1885); People *v.* Ahrenberg, 103 *id.* 388 (1886); Butler *v.* Chambers, 36 Minn. 69 (1886); People *v.* West, 44 Hun, 163 (1887), cases: Taylor *v.* State, Tex. Ap. (1886), cases.

[9] People *v.* Arensburg, 105 N. Y. 123 (1887): 106 *id.* 368 (1886).

[1] Powell *v.* Commonwealth, 114 Pa. 256, 292 (1887), Sterrett, J. See Commonwealth *v.* Waite, 93 Mass. 264 (1865), and Commonwealth *v.* Evans, 132 *id.* 11 (1882),—as to selling milk mixed with water; 26 Am. Law Reg. 88-91 (1887), cases; 26 Am. Law Rev. 97-104 (1888), cases.

[2] Powell *v.* Pennsylvania, 127 U. S. 678, 684 (1888). Harlan, J.; Field, J., dissenting.

son who carries on the business of manufacturer without having paid the tax therefor, shall be fined, for each offense, from $1,000 to $5,000; every person who so wholesales, from $500 to $2,000; and every person who so retails, from $50 to $500.

Sec. 5. Every manufacturer shall conduct his business under such regulations as the commissioner of internal revenue, with the secretary of the treasury, may require as to notices, inventories, bonds, books of account, signs, surveillance of officers, etc. The bond shall be in a penal sum of not less than $5,000, and may be increased from time to time.

Sec. 6. All oleomargarine shall be packed in wooden packages, not before used for the purpose, each containing not less than ten pounds, and marked, stamped, and branded according to the regulations; and all sales by manufacturers or wholesale dealers shall be in original stamped packages. Retail dealers may sell only from such packages, in quantities not exceeding ten pounds, and shall pack in suitable wooden or paper packages, marked and branded as prescribed. A person who knowingly violates this section shall be fined, for each offense, not more than $1,000, and be imprisoned not more than two years.

Sec. 7. Every manufacturer shall securely affix, by pasting, on each package, a label giving his number, district, and State, that he has complied with the law, and that persons are not again to use the package, or the stamp, nor to remove the contents without destroying the stamp. Neglecting to affix, and removing, the label, are finable $50 for each package in respect to which the offense is committed.

Sec. 8. Upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be collected a tax of two cents per pound, to be paid by the manufacturer. The tax levied shall be represented by coupon stamps, engraved, issued, destroyed, etc., as are stamps relating to tobacco.

Sec. 9. When any manufacturer has removed for sale or consumption oleomargarine without the use of proper stamps, the commissioner of internal revenue, within two years at most, upon satisfactory proof, shall estimate, and make an assessment for the amount, and certify the same to the collector. The tax shall be in addition to the penalties imposed by law for such sale or removal.

Sec. 10. Regulates importation from foreign countries.

Sec. 11-12. The penalty for knowingly purchasing or receiving for sale oleomargarine which has not been branded or stamped is $50 for each offense; and for oleomargarine as to which the special tax has not been paid, $100, with forfeiture of the articles or the value thereof.

Sec. 13. Provides as penalties for not destroying stamps upon emptied packages, fines up to $100 and imprisonment not more than one year.

Sec. 14. Provides for employing analytical chemists and microscopists, regularly and in particular cases; and for appeals from the decisions of the commissioner of internal revenue to a board of final decision, consisting of the surgeons-general of the army and navy, and the commissioner of agriculture.

Sec. 15. Packages subject to tax, without stamps or marks as provided, and oleomargarine adjudged deleterious to the public health, shall be forfeited to the United States.

Willfully removing or defacing stamps, marks, or brands on packages regularly taxed, is a misdemeanor, punishable by a fine of $100 to $2,000, and imprisonment thirty days to six months.

Sec. 16. Provides for exporting to foreign countries, without payment of tax or stamping, under prescribed regulations, each package being branded "Oleomargarine" in plain Roman letters at least one half an inch square.

Sec. 17. Any manufacturer who defrauds or attempts to defraud the United States of the tax shall forfeit the factory and apparatus used, and all oleomargarine and raw material on the premises, and be fined $500 to $5,000, and be imprisoned six months to three years.

Sec. 18. For any forbidden act, for which no specific penalty is imposed, the penalty shall be $1,000; if done by a manufacturer or a wholesale dealer, he shall forfeit all the oleomargarine owned by him.

Sec. 19. Penalties may be recovered in any court of competent jurisdiction.

Sec. 20. The commissioner of internal revenue, with the approval of the secretary of the treasury, may make regulations needful for carrying the act into effect.

Sec. 21. The act shall go into effect on the ninetieth day (Oct. 31, 1886) after its passage.

OLERON, LAWS OF. A code of maritime laws, promulgated during the twelfth century from the island of Oleron, off the coast of France.

The code was greatly improved, if not indeed wholly compiled, by Richard the First (1189-99), the island being then a possession of England, and became the substructure of the maritime constitutions of all the nations in Europe.[1]

OLOGRAPH. See HOLOGRAPH.

OMITTED. See BLANK, 2; CASUS, Omissus.

OMNIS. L. Every; every thing, every one; all.

Omne majus. See MAJOR.

Omnia præsumuntur. See PRÆSUMERE; SPOLIATION.

Omnia rite. See PRÆSUMERE.

Omnibus. For all: containing two or more independent matters. Applied to a count in a declaration, and to a bill of legislation, and perhaps to a clause in a will, which comprises more than one general subject.[2] See TITLE, 2, Of act.

Omnis definitio. See DEFINITIO.

Omnis ratihabitio. See RATIHABITIO.

[1] See 1 Bl. Com. 418; 4 *id.* 423; 1 Chitty, *id.* 418; Coke, Litt. 2; 3 Kent, 12; 1 Pars. Ship. & Adm. 9; 1 Pet. Adm. R. Ap.

[2] See 14 Md. 193; 64 Pa. 428; 107 U. S. 153.

ON. Upon; at; near to.

A deed described land as "on a railroad." *Held*, in a suit to set aside the conveyance for misdescription, that "on," as denoting contiguity or neighborhood, may mean as well "near to" as "at."[1] See CONTAINED.

A vessel may be in distress "on the shore" without being actually in contact with the shore.[2]

"On a decree" being made means after the decree is made — contemporaneously or immediately after.[3] See UPON, 2.

On account. See ACCOUNT, 1.

On account of. See CONCERN; CONDITION.

On condition. See CONDITION; PROVIDED.

On default. See DEFAULT.

On demand. See DEMAND.

On file. See FILE.

On or about. Unless otherwise provided by statute, may not recite a date or an occurrence with sufficient certainty.

An allegation in an indictment that the accused did the act "on or about" a certain day may be void for uncertainty, as not showing but that the action is barred by lapse of time.[4]

The actual day may be before or after the day stated.[5]

On or before. An act to be done "on or before" a day named, permits a doing on that last day.[6]

ONCE A WEEK. See NEWSPAPER; WEEK.

ONCE IN JEOPARDY. See JEOPARDY.

ONERARI. See ONUS.

ONEROUS.[7] Burdensome, oppressive. See ONUS.

In the civil law, referring to a contract: made for some consideration, however small; referring to a gift: subject to charges imposed on the donee.

ONLY. Solely; alone.

A clause in an act of sale restricting a warranty to troubles, evictions, etc., arising from the acts of the "vendor only," will be limited to that person exclusively.[8]

ONTARIO, LAKE. See LAKES.

ONUS. L. A charge, burden, incumbrance.

Cum onere. With the charge or disadvantage.

Part of the maxim *transit terra cum onere*, land passes with the charge,— is transferred as incumbered.

Every benefit is to be enjoyed *cum onere*.[1] The right to engage in a restricted business is a privilege *cum onere*.[2] If a legatee accepts the bequest, it is with the disabilities annexed, *cum onere*.[3]

The incumbent of a public office takes it *cum onere*,— with a liability of having new labors imposed upon him without any countervailing addition to his salary.[4] See COMPENSATION, 1.

Exoneretur. Let the burden, the liability, be removed; let him be discharged. A note indorsed on a bail-piece that the surety is relieved.

Allowed when the condition imposed is fulfilled by an act of God, an act of the obligee or of the law.[5] When of right, to be applied for; and the matter thereof is pleadable in defense. When of favor, available only on order of court.[6]

Onerari non. Not to be charged. A plea that defendant should not be held indebted.

Onus probandi. Burden of proof, *q. v.*

OP. An abbreviation of opinion.

OPEN. 1, *v.* (1) To begin: as, to open an argument. See AFFIRMATIVE (1).

(2) To order a resale: as, to open biddings received on judicial sale for irregularity, fraud, or gross inadequacy of price.[7] See further BID.

(3) To proclaim as convened and ready for the transaction of judicial business: as, to open court. Compare *Open*, 2, (6); CRIER.

(4) To set aside, vacate: as, to open a decree, a judgment.

(5) To restore or recall to its conditional state: as, to open a rule made absolute, in order to admit of cause being shown against the rule.

(6) To explain the nature of the issue, and the evidence to be offered: as, to open a trial, a hearing, a case.[8]

(7) To admit the public to its use; to clear of obstructions: as, to open a street or road.[9]

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[1] Burnam *v.* Banks, 45 Mo. 349, 351 (1870).

[2] The Mac, 46 L. T. 907 (1882).

[3] Bradley *v.* Bradley, L. R., 3 P. D. 50 (1878).

[4] United States *v.* Winslow, 3 Saw. 342 (1875).

[5] Conroy *v.* Oregon Construction Co., 23 F. R. 73 (1885).

[6] Wall *v.* Simpson, 6 J. J. Marsh. 155 (1831); James *v.* Benjamin, 72 Ga. 185 (1883); Scheerer *v.* Manhattan Ins. Co., 16 F. R. 720 (1883).

[7] Pronounced ŏn'-er-ous.

[8] New Orleans, &c. R. Co. *v.* Jourdain, 34 La. An. 648 (1882).

[1] Mundorff *v.* Wickersham, 63 Pa. 89 (1869), cases.

[2] Finch *v.* United States, 102 U. S. 272 (1880).

[3] Rogers *v.* Law, 1 Black, 261 (1861).

[4] State *v.* Kelsey, 44 N. J. L. 33 (1882).

[5] Taylor *v.* Taintor, 16 Wall. 369 (1872).

[6] Beers *v.* Haughton, 9 Pet. 358 (1835), Story, J.

[7] See Tripp *v.* Cook, 26 Wend. 156-57 (1841); 31 Miss. 514; 13 Gratt. 639; Sugd. Vend. 90.

[8] [3 Bl. Com. 366; 10 F. R. 825; 89 N. C. 543; 10 Oreg. 176.

[9] [State *v.* Commissioners, 37 N. J. L. 14 (1874), Beasley, C. J.

Whenever a public road is traveled it is in fact opened, although nothing may have been done by the overseers for the purpose of opening it.[1]

A road which is not closed or inclosed, shut up or obstructed, must be an opened road.[2]

A highway laid out and established through wild and unfenced lands, and afterward used and traveled by the public, is "lawfully opened."[3]

2, *adj.* (1) Subject to adjustment or dispute; still continuing: as, an open account, *q. v.*

(2) Public; overt, *q. v.*: as, an open act of crime. See (10); PATENT, 1.

(3) With names of witnesses not named, or time and place not fixed: as, an open commission to take testimony.

(4) Unperformed: as, a contract left open.

(5) In which all members have a voice in the election of officers: as, an open corporation, *q. v.*

(6) In session, organized for the transaction of judicial business; or public, free to all: as, open court.[4] See *Open*, 1, (3); CHAMBERS.

Courts of equity are said to be always "open."[5]

(7) In the presence of witnesses; public: as, an open entry upon land.[6]

(8) In a condition admitting the filing of objections: as, open to exception.

(9) With no property applicable to the payment of debts: as, open insolvency.[7]

(10) Opposed to secret.

Indecent exposure of the person to one individual of the opposite sex constitutes "open" lewdness, *q. v.*

(11) Not restricted as to person, time, or, perhaps, as to price: as, an open order to sell realty.

(12) With the value of the subject to be ascertained in case of loss: as, an open policy of marine insurance, *q. v.*

(13) An instruction that if a defect in a sidewalk was "open and notorious" the defendant is chargeable with notice, is not erroneous. "Open" would not imply the existence of an "open hole" in the sidewalk, but "not concealed, not hidden, exposed to view, apparent," a secondary signification in which the word is frequently used.[8]

Keep open. See KEEP. Open door. See HOUSE.

OPERA. A composition of a dramatic kind set to music and sung, accompanied with musical instruments, and enriched with appropriate costumes, scenery, etc.[1]

Opera house. The house in which operas are represented.[1]

A dedication to the public of the arrangement of a musical composition for the piano does not dedicate what it does not contain and what cannot be reproduced from it, and an unauthorized person does not therefore possess the right to perform such composition as set for an orchestra, although he have an opportunity to copy it. An opera is more like a patented invention than a common book, as to the rule that he who obtains similar results, better or worse, by similar means, though the opportunity is furnished by an unprotected book, should be held to infringe the rights of the composer.[2]

A performance on the stage is not such a publication as will destroy the exclusive common-law right of the author and his assigns to a dramatic or lyrical composition of this sort, though the composer as an alien is not entitled to the benefits of our law of statutory copyright.[3] See COMPOSITION, 1, Musical; COPYRIGHT; DRAMA; THEATER.

Opera glass. See BAGGAGE.

OPERATE. For associates "to operate on lands" purchased, was held to include selling timber to be cut and removed.[3]

Operation. 1. Of a law: its practical working and effect.[4] See UNIFORM.

Operation of law. The application of legal rules to a given set of facts: as, to succeed to property by act and operation of law. See MERGER.

2. In patent law, see PATENT, 2; MODE.

Operative. 1, *n.* An employee, a servant,[5] *q. v.* See also PROPRIETOR, 2.

2, *adj.* Effective: the "operative words" in an instrument contain its essential terms or conditions.

Inoperative provisions are such as cannot be enforced. See LEGAL, Illegal; SURPLUSAGE.

OPINION. An inference or conclusion drawn by a witness, expert, juror, judge or court, or counsel; and regards either or both facts and law. See VALUE, 1081.

1. The exception to the rule that the opinion of a *witness* is not competent evidence is not confined to the case of expert testimony. While it is necessary that the witness should first state the facts upon which he bases his opinion, it is not necessary to do so where the facts are not capable of reproduction in

[1] Wilson *v.* Janes, 29 Kan. 250 (1883).
[2] City of Topeka *v.* Russam, 30 Kan. 559 (1883).
[3] State *v.* Wertzel, 62 Wis. 190 (1885).
[4] Hobart *v.* Hobart, 45 Iowa, 504 (1877).
[5] 3 Bl. Com. 48.
[6] See Thompson *v.* Kenyon, 100 Mass. 111 (1868).
[7] See Hardesty *v.* Kinworthy, 8 Blackf. *305 (1846).
[8] Kelleher *v.* City of Keokuk, 70 Iowa, 475 (1883).

[1] Rowland *v.* Kleber, 1 Pittsb. 71 (1858).
[2] Thomas *v.* Lennon, 14 F. R. 849 (1883), cases, Lowell, Cir. J.
[3] Eaton *v.* Smith, 20 Pick. 157 (1838).
[4] Geebrick *v.* State, 5 Iowa, 496 (1857).
[5] See 1 Pa. L. J. 368; 2 Cranch, 240, 270.

such a way as to bring before the minds of the jury the condition of things upon which he bases his opinion. Such evidence is competent from the necessity of the case.[1]

Facts which are made up of a great variety of circumstances and a combination of appearances, which, from the infirmity of language, cannot be properly described, may be shown by witnesses who observed them; and, where their observation is such as to justify it, they may state the conclusions of their own minds. In this category may be placed matters involving magnitude or quantities, portions of time, space, motion, gravitation, value, and such as relate to the condition or appearances of persons or things. On the same principle, the emotions or feelings of persons, such as grief, joy, hope, despondency, anger, fear, and excitement, may be likewise shown.[2] See CHARACTER; EXPERT; REPRESENTATION, 2.

2. The courts are not agreed as to the knowledge upon which the opinion of a *juror* must rest in order to render him incompetent, or whether the opinion must be accompanied by malice or ill-will; but all hold that it must be founded upon evidence, and be more than a mere impression,—if hypothetical only, the partiality is not so manifest as necessarily to set the juror aside. For an opinion need not make him impartial. An impression formed from reading newspapers does not necessarily unfit one for the service.[3]

Upon the trial of the issue of fact raised by a challenge to a juror, in a criminal case, on the ground that he has formed and expressed an opinion as to the issue, the court is practically called upon to say whether the nature and strength of the opinion are such as in law necessarily raise the presumption of partiality. The question is one of mixed law and fact—the latter to be tried upon evidence. The finding ought not to be set aside, unless the error is manifest, unless it be clearly made to appear that, upon the evidence, the court should have found that the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest that the law left nothing to the conscience or discretion of the court.[4]

"Those strong and deep impressions which close the mind against the testimony which may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection" to a juror.[5]

"Sanford's impressions [based upon rumor or newspaper statements] were not such as would refuse to yield to the testimony that might be offered, nor were they such as to close his mind to a fair consideration of the testimony."[1]

Prejudice against crime will not of itself disqualify a man as a juror.[2]

A statute of Illinois, in force since July 1, 1874, provides that it shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime charged, nor shall the fact that he has formed an opinion or impression, based upon rumor or newspaper statements (about the truth of which he has expressed no opinion), disqualify him, if he shall upon oath state that he believes he can fairly and impartially render a verdict in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement. "It is not a test question whether the juror will have the opinion which he has formed from newspapers changed by the evidence, but whether his verdict will be based upon the account which may here [before the trial court] be given by witnesses under oath." A similar statute was enacted in New York in 1872, in Michigan in 1873, in Ohio in 1880, in Nebraska in 1885; all which have been sustained by express decision or treated as valid by the highest courts of those States. The rule of the statute of Illinois, as construed, is not materially different from that adopted by the courts in many of the States without legislative action; and the same is not repugnant to the guaranty for an impartial jury in criminal trials.[3] See further CHALLENGE, 4; IMPARTIAL; PREJUDICE, 1; RELIGION.

3. The view of the facts in a case entertained by the *judge* who presides at the trial.

It is no longer an open question that a judge of a court of the United States, in submitting a case to the jury, may, in his discretion, express his opinion upon the facts; and that when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, such expressions of opinion are not reviewable on writ of error.[4] See further CHARGE, 2 (2, c).

The statement of the reasons advanced by a judge or court in support of a decision rendered. See DECISION; DICTUM, 2; JUDGMENT.

Concurring opinion. An opinion that agrees with the conclusions in another opinion rendered in the same case. **Dissenting opinion.** An opinion that does not agree with the views expressed by the majority of a court in its opinion. Whence *dissentients*. (Rare.)

Judicial opinion. A ruling upon a question directly involved in an argument or cause. **Extra-judicial opinion.** A ruling upon a point either only incidentally raised

[1] Jones *v.* Fuller, 19 S. C. 66 (1882); Commonwealth *v.* Sturtivant, 117 Mass. 133 (1875); Hardy *v.* Merrill, 56 N. H. 234 (1875); 1 Whart. Ev. §§ 511, 450.

[2] State *v.* Baldwin, 36 Kan. 10 (1886), cases, Johnston, J.

[3] Reynolds *v.* United States, 98 U. S. 155-56 (1878), cases; 19 Blatch. 255; 47 Conn. 530-31; 49 *id.* 376; 6 Col. 456.

[4] Reynolds *v.* United States, 98 U. S. 156 (1878), Waite, C. J. Approved, Spies *v.* Illinois, 123 *id.* 179 (1887).

[5] United States *v.* Burr, 1 Burr's Trial, 416 (1807), Marshall, C. J.

[1] Spies *et al. v.* People, 122 Ill. 262 (1887).

[2] Spies *et al. v.* People, 122 Ill. 263-64 (1887).

[3] The Anarchists' Case,—Spies *v.* Illinois, 123 U. S. 167-69 (1887), cases, Waite, C. J.

[4] Rucker *v.* Wheeler, 127 U. S. 93 (1888), cases.

or else without any bearing whatever; a *dictum*, q. v.

Whenever, in any civil suit or proceeding in a circuit court held by a circuit justice and a circuit judge or a district judge, there occurs any "difference of opinion" between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or judge shall prevail, and be considered the opinion of the court for the time being.[1]

In criminal proceedings the point shall, "upon the request of either party or their counsel, be stated under the direction of the judges, and certified, under seal of the court, to the Supreme Court at their next session." But the cause may proceed "if in the opinion of the court, further proceedings can be had without prejudice to the merits." Where the judges disagree as to the imprisonment or punishment, none shall be permitted.[2]

Where, on a certificate of division from a circuit court, the Supreme Court is equally divided in opinion, the case will be remitted to the court below to enable it to take such action as it may be advised.[3]

The Supreme Court will not take jurisdiction of the case, if the certificate, instead of being confined to the single points of law, presents either questions of fact or the whole case for adjudication.[4]

A certificate of division can be resorted to only when "a question" has occurred in which the judges differ, and where "the point" of disagreement may be distinctly stated. It cannot be resorted to to present a question of fact, a question of fact and law, or a difference of opinion on the general case.[5]

Each question certified must be upon a distinct point of law, clearly stated, and not upon the whole case, nor whether upon the evidence judgment should be for one party or for the other.[6]

4. A statement, often in writing, made by an attorney, of what he supposes the law to be with reference to a matter or case. See ATTORNEY, At law.

OPPOSING. See INTEREST, 2 (2).

OPPOSITE. See ADVERSE; PARTY.

OPPRESSION. An act of cruelty, severity, unlawful exaction, domination, or use of excessive authority.[7] Compare EXTORTION.

To make an act oppressive on the part of an officer under Rev. St., § 3169, subdivision 1, it must be done willfully, "under color of law," and "without legal authority."[1]

OPTIMUS. See USUS, 1076.

OPTION. Right of choice, selection or election.

A covenant in a lease giving the option to purchase is in the nature of a continuing offer to sell.[2]

The option to avoid or accept a sale by a trustee is to be exercised within a reasonable time.[3]

Buyer's option. A right on the part of a purchaser to take and pay for the purchase at any time within a given period.[4]

Local option. Refers to a law which enables voters to decide whether licenses to sell intoxicating liquors within their particular district or locality shall or shall not be granted.

The weight of authority favors the constitutionality of local option laws. A legislature cannot delegate its power to make a law, but it can make a law to delegate power to determine some fact or the state of things upon which the law makes, or intends to make, its own action depend. There are many things, upon which wise and useful legislation must depend, which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.[5] Compare PROHIBITION, 2.

Option contract. An agreement between the so-called "buyer" and "seller" of a commodity (or a security for money) that they will adjust the account between them at a future day by one paying the other the difference in the market value of the article on that day as compared with the value on the day of "sale."

A contract for the sale of property to be delivered at a future time at the option of the purchaser, there being no understanding by both parties that the property is to be delivered, but rather that the obligation is to be satisfied by the payment of differences, is void.[6]

The question of the legality of sales by option de-

[1] R. S. §§ 650, 652.

[2] R. S. § 651; United States v. Harris, 106 U. S. 629 (1882).

[3] Hannauer v. Woodruff, 10 Wall. 482 (1870); Silliman v. Hudson River Bridge Co., 1 Black, 582 (1861). See generally Durant v. Essex Company, 7 Wall. 110 (1868).

[4] Weeth v. New Eng. Mortgage Co., 106 U. S. 605 (1882), cases.

[5] California Natural Stone Paving Co. v. Molitor, 113 U. S. 609 (1885).

[6] Williamsport Bank v. Knapp, 119 U. S. 360 (1886), cases; Jewell v. Knight, 123 *id.* 432-33 (1887), cases.

[7] United States v. Deaver, 14 F. R. 595 (1882), Dick, District Judge.

[1] United States v. Deaver, *ante*.

[2] Willard v. Tayloe, 8 Wall. 564 (1869), cases.

[3] Twin-Lick Oil Co. v. Marbury, 91 U. S. 591 (1875).

[4] [Pickering v. Demerritt, 100 Mass. 421 (1868), Foster, Judge.

[5] Locke's Appeal, 72 Pa. 498, 494-508 (1873), cases; Halley v. State, 14 Tex. Ap. 510-12 (1883); Menken v. Atlanta, Sup. Ct. Ga. (1887); State v. Pond, Sup. Ct. Mo. (1888); 12 Am. Law Reg. 129-43 (1873), cases; 12 Cent. Law J. 123-27 (1881), cases; 35 Ark. 69; 42 Conn. 364; 4 Harr., Del., 479; 42 Ind. 547; 33 Iowa, 134; 14 Bush, 671; 42 Md. 71; 108 Mass. 27; 109 *id.* 199; 62 Mo. 168; 36 N. J. L. 720; Cooley, Const. Lim. 125.

[6] Melchert v. American Union Tel. Co., 11 F. R. 198 (1882), cases; *ib.* 201-5, cases: s. c. 3 McCrary, 521.

pends in part on local legislation, in part on judicial precedent, and in part on the special tendency of the adjudicating court with respect to political economy.[1] See further FUTURES; PUT, 2; WAGER, 2.

OR. 1. The ending *-or*, in assignor, consignor, covenantor, devisor, donor, grantor, obligor, payor, vendor, warrantor, and like words, designates the actor or doer; while *-ee*, designates the recipient — the person toward whom the action is directed, for whom the thing is done, as in assignee, consignee, devisee, etc. Originally, a Latin suffix.

The corresponding active form of appellee, appointee, distributee, drawee, patentee, transferee, is, for the most part, the English suffix *-er*; as, drawer, transferrer, etc.[2]

2. The disjunctive particle "or" will be read "and" when such change will give effect to the evident intention of law makers, testators, or contracting parties.[3]

It cannot be construed "and" in a penal statute when the effect is to aggravate the offense.[4]

"Or" may be used in the sense of "to wit," explaining what precedes. In this sense an indictment may adopt the words of the statute; as, "a bank-bill *or* promissory note," a horse of "a bay *or* brown color." But "spirituous *or* intoxicating liquor" may be bad for uncertainty.[5]

An indictment for betting on a game of "hazard *or* skill" is unobjectionable.[6]

Under a statute against permitting gaming in a "dram-shop," an indictment for gaming in a "dram-shop or grocery" is not bad for the surplusage.[7] See AND.

ORAL. In spoken words: as, an oral agreement, oral evidence.

When a pleading sets up a contract and does not allege that it was in writing, it will be taken to have been oral.[8] See ORE TENUS; PAROL, 2.

ORATOR.[9] A petitioner in a court of equity; a complainant or plaintiff.

Oratrix is the feminine form of the word in Latin.

ORCHARD. See MESSUAGE.

ORCHESTRA. See OPERA.

[1] 11 F. R. 201, *ante*, Dr. Wharton.

[2] See 2 Bl. Com. 140 (a); Coke, Litt. § 57.

[3] United States *v.* Fisk, 3 Wall. 447 (1865); Dumont *v.* United States, 98 U. S. 142 (1878); 14 Ct. Cl. 300; 41 Iowa, 593; 20 Pick. 378, 477; 105 Mass. 185; 50 Mich. 531; 64 N. C. 493, 563; 74 *id.* 402; 24 N. J. L. 686; 24 N. Y. 463; 40 *id.* 97; 89 Pa. 326; 88 *id.* 223; 20 Tex. 488; 24 Wis. 394; 1 Williams, Ex. 962; 9 East, 366; 16 *id.* 67; 31 L. J. Ex. 58.

[4] State *v.* Walters, 97 N. C. 490 (1887), cases.

[5] Commonwealth *v.* Grey, 2 Gray, 502 (1854), cases; 7 Gratt. 592.

[6] State *v.* Hester, 48 Ark. 40 (1886); Mans. Dig. § 1835.

[7] Ballentine *v.* State, 48 Ark. 48 (1886).

[8] Schreiber *v.* Butler, 84 Ind. 588 (1882).

[9] L. *orator: orare*, to petition.

ORDAIN. 1. To make, enact, establish: as, to ordain a constitution, a system of courts.[1] See ORDINANCE.

1. To appoint, institute, clothe with authority.

A minister is ordained when invested with ministerial functions or sacerdotal power.[2]

ORDEAL. An ancient species of trial by appeal to Providence.

Fire ordeal was performed by taking in the hand, unhurt, a piece of red-hot iron of one to three pounds weight, or by walking barefooted and blindfolded over nine red-hot ploughshares laid lengthwise at unequal distances. Escaping uninjured was adjudged evidence of innocence. This species was for persons of rank.

Water ordeal was performed by plunging the bare arm up to the elbow in boiling water, or by casting the person into a pond or river. Escaping unscalded, or floating without the action of swimming, as the case might be, was deemed evidence of innocence. This species was for the common people.

Either species could be performed by a deputy; whence the expression "go through fire and water" for another. The cold-water ceremony was also a test for the possession of witches. Both species were abolished by 3 Henry III (1219).[3] Compare BATTEL, Trial by.

ORDER. A command, direction, mandate.

1. An informal note requesting the payment of money, or the delivery of personalty, to a person named or to the bearer of the note.[4]

The word does not import exclusively a written instrument.[5]

On a promissory note, bill of exchange, or check, makes the paper negotiable (*q. v.*), although impersonal words are used.[6]

By the law-merchant, the purchaser of negotiable paper, payable to order, unless it be indorsed by the payee, takes the paper subject to any defense the payor may have against the payee.[7]

In statutes against forgery, a written direction addressed by one who either has in fact, or in writing professes to have, control over a fund or thing, to another who either purports in the writing to be under obligation to obey, or who is in fact under such obligation, commanding him how to appropriate the fund or thing. There are two kinds of orders: such

[1] 1 Wheat. 304; 4 *id.* 402.

[2] Kibbe *v.* Antram, 4 Conn. 139 (1821); Baker *v.* Fales, 16 Mass. 512 (1820).

[3] 4 Bl. Com. 342; 110 U. S. 529-30; 2 Am. Jur. 280 (1829); 1 Steph. Hist. Cr. L. Eng. 250.

[4] See Hinnemann *v.* Rosenback, 39 N. Y. 100 (1868).

[5] Treat *v.* Stanton, 14 Conn. 456 (1841).

[6] Mechanics' Bank *v.* Straiton, 3 Keyes, 306 (N. Y., 1867).

[7] Osgood *v.* Artt, 17 F. R. 575 (1883); Cassidy *v.* First Nat. Bank, 30 Minn. 86 (1882).

as are orders on their face: and such as may be shown to be orders by averment and proof.[1]

See STORE-ORDERS.

2. Any direction of a court, other than a judgment or decree, made in a cause.

The judgment or conclusion of the court upon any motion or proceeding.[2]

An "order" is a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment. A "final judgment" is the determination of the court upon the issue presented, which ascertains and fixes absolutely and finally the rights of the parties in the particular suit in relation to the subject-matter of the litigation, and puts an end to the suit.[3]

An "order" is interlocutory, and made on motion or petition. A "decree" is final, and made at the hearing of the cause.[4]

Cautionary order. See CAUTION.

Charging order. In England, an order granted to a judgment creditor, that property of his debtor in public stocks shall stand charged with the payment of the amount of the judgment, with interest and costs.[5] See *Stop Order*, 1.

Decretal order. An order which, from a direction contained in it, may terminate the particular suit, like a decree made at the hearing.[6]

Interlocutory order. An order made during the progress of a suit upon some incidental matter. Opposed, **final order.** See INTERLOCUTORY.

Order nisi. A conditional order, to become *absolute* unless something be done by a specified time. See RULE, 2, Absolute.

Order of filiation. See FILIATION.

Stop order. (1) In English practice, an order in aid of a "charging order" (*q. v.*); granted, in certain cases, by a vice-chancellor, upon a fund in chancery.

(2) An order given to a broker to await a certain figure in the price of a particular bond or stock before he buys or sells, and then to "stop" buying or selling, as the case may be.[1]

Usually signifies that the broker has received and is bound to obey a direction of his principal to sell at a price prescribed, when that price is reached.[2]

The order may describe the price by referring to circumstances and contingencies; a definite figure need not be named.[3]

3. A rule of court.

Whence *general* and *special orders*. See RULE, Of court.

4. Conduct, demeanor; usually, *good order*, *public order:* quiet behavior, peaceable deportment. See DISORDER, 2; PEACE, 1.

ORDINANCE. 1. A rule or regulation adopted by municipal corporation. See ORDAIN, 1.

An ordinance of the councils of a municipality, though binding upon the community affected by it, is not a "law" in the legal sense: it is not prescribed by the supreme power in a State, from which alone a law can emanate, and it is not of general authority throughout the Commonwealth.[3]

The terms "by-law," "ordinance," and "municipal regulation" have substantially the same meaning, and are defined to be "the laws of the corporate district, made by the authorized body, in distinction from the general law of the State." They are local regulations for the government of the inhabitants of the particular place.[4]

The same act may constitute an offense against the law of a municipality and the law of the State.

Ordinances relating to the health, comfort, convenience, good order, and general welfare of the inhabitants are authorized by the general police power of the city.[5] See POLICE, 2.

The ordinances of a city are to its charter as the statutes of a State are to the constitution.[6]

The same exemption from judicial interference applies to all legislative bodies so far as their discretion extends. The fact that threatened legislative action may disregard constitutional restraints does not affect the question. A municipal corporation is generally clothed with other than legislative powers, and in their exercise may be brought under the control of the courts.[7]

2. Formerly, a state paper, operative as a fundamental law, yet not describable as either a constitution or a statute.

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[1] Powers *v.* State, 87 Ind. 100-1 (1882); Bishop, Stat. Cr. § 327.

[2] Gilman *v.* Contra Costa Co., 8 Cal. 57 (1857), Murray, C. J.

[3] Loring *v.* Illesley, 1 Cal. *27 (1850), Bennett, J.

[4] [Brown's Law Dict.

[5] See 3 Steph. Com. 597; 9 M. & W. 49; 11 *id.* 57; 1 & 2 Vict. c. 110, ss. 14-16; 3 & 4 Vict. c. 82, s. 1.

[1] Porter *v.* Wormser, 94 N. Y. 443 (1884).

[2] Wronkow *v.* Clews, 52 N. Y. Super. 178 (1885), Sedgwick, C. J.

[3] Baldwin *v.* Philadelphia, 99 Pa. 170 (1881), Paxson, J.

[4] State *v.* Lee, 29 Minn. 451-53 (1882), cases, Vanderburg, J.

[5] *Exp.* Wolf, 14 Neb. 33 (1883).

[6] Quinette *v.* St. Louis, 76 Mo. 402 (1882).

[7] Alpers *v.* San Francisco, 32 F. R. 507 (1887), Field, J.

An "act of parliament" was established by the king, lords, and commons; an "ordinance" by one or two of them. While the right of the commons to participate in legislation existed in a state of growth, an ordinance was an experimental act passed for a time only, and, as it were, on trial, and which might afterward either be converted into a statute, that is, a permanent act, or else be continued for a time, or discharged altogether.[1]

Ordinance of July 13, 1787. This was adopted by the Continental Congress and confirmed by the First Congress under the Constitution, for the government of the territory northwest of the Ohio river.

When a State was admitted into the Union from the Northwest Territory, the ordinance, it has always been held, ceased to have any operative force in limiting its powers of legislation as compared with the powers possessed by the original States. The new State at once became entitled to and possessed all the rights of dominion and sovereignty which belonged to those States.[2] See TERRITORY, 2; SCHOOL.

ORDINARY.[3] 1, *adj.* Common, usual, reasonable: as, ordinary — care, diligence, skill, losses, *qq. v.* Opposed to extraordinary, *q. v.* See also NEGLIGENCE.

2, *n.* A judicial officer who has jurisdiction, in England, in ecclesiastical causes; in the United States, in matters respecting the probate of wills, the administration of estates, guardianships, and related subjects.[4]

ORDINATION. See ORDAIN, 2.

ORE. See MINE; MINERAL; WASTE, 1.

A deed conveyed all the zinc and other ores, except franklinite existing separate from the zinc. *Held*, that the grantee took both ores when the franklinite was mixed mechanically with the zinc; also, that what was meant by "zinc" might be explained by evidence outside of the deed.[5]

ORE TENUS. L. By mouth, by word of mouth; orally, verbally.

Oral evidence is evidence *ore tenus*.[6] In early times, pleadings were *ore tenus*, or *viva voce*, in court, and minuted down by the clerk, whose minutes were called the "parol."[7]

ORGANIC. See LAW, Organic.

ORGANIZE. In the sense of to constitute, to qualify for the exercise of appropriate functions, may refer to a government, a court, a legislative body, a board of deputies or other officers. See TERRITORY, 2.

Organizing an incorporation refers to the choice and qualification of officers necessary for the transaction of business.[1]

ORIGINAL.[2] 1, *adj.* The first in order or time; primary; principal; leading: as, an original — acquisition, bill, compact, conveyance, copy, entry, jurisdiction, occupant, owner, party, patentee, proceeding, process, promise, writ, *qq. v.*

2, *n.* An original document or instrument.

Duplicate originals; single original. "Single" when there is but one original instrument; "duplicate" when there are two.

In the case of a printed document, all the impressions are originals, or in the nature of duplicate originals, and any copy will be primary evidence.[3] See COPY.

Originality. In the law of patents, the finding out, the contriving, the creating of something which did not exist, and was not known before, and which can be made useful and advantageous in the pursuits of life, or which can add to the enjoyments of mankind.[4] See INVENTION.

ORNAMENT. See APPAREL; BAGGAGE; JEWEL.

ORPHAN.[5] A fatherless child; a minor who has lost either or both parents.

A child who has lost one or both of its parents.[6]

Stephen Girard devised property to the city of Philadelphia in trust for the founding of a college for white male orphans, preference being given to orphans born in that city. Francis Lieber, who drew up the plan of government, was of the opinion that the word "orphan," meant a fatherless child. In support of this opinion he had the private views of Chancellor Kent and Judge Story, and, subsequently, a decision by the supreme court of Pennsylvania.[7]

In Wisconsin, a devise for the benefit of the "Roman Catholic orphans" of a diocese was held void for un-

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[1] [4 Coke, Inst. 25; Coke, Litt. 159 *b*; Barr. Stat. 41 (*); 3 Reeves, Eng. Law, 146.

[2] Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 9 (1888), cases. See at length R. S. pp. 13–16; 3 Scribner's Mag. 408 (1888).

[3] L. *ordinarius*, regular; also, an overseer: *ordo*, order.

[4] See 2 Bl. Com. 494, 506.

[5] New Jersey Zinc Co. *v.* Boston Franklinite Co., 15 N. J. E. 418, 447 (1863). As to the duty on zinc, see act 3 March, 1883, Sch. C: 22 St. L. p. 501; as to oxide of zinc, Sch. A, p. 494.

[6] 3 Bl. Com. 373.

[7] 3 Bl. Com. 398, 408; 2 *id.* 291.

[1] New Haven, &c. R. Co. *v.* Chapman, 33 Conn. 66 (1871).

[2] L. *origo*, beginning; *oriri*, to rise.

[3] 1 Greenl. Ev. § 558; 1 Whart. Ev. § 74.

[4] Conover *v.* Roach, 4 Fish. 16 (1857), Hall, J.

[5] Gk. *ὀρφανός*, bereft, destitute.

[6] Beardsley *v.* Bridgeport, 53 Conn. 493 (1885), Pardee, J.

[7] See Soohan *v.* Philadelphia, 33 Pa. 1, 24–33 (1859).

certainty, for the reason, among others, that it did not appear whether whole or half orphans were meant.[1]

Orphans' court. In Delaware, New Jersey, Pennsylvania, and perhaps in other States, the title of the court having jurisdiction to settle the estates of decedents. See GUARDIAN, 2; PROBATE, Court of.

ORTHOGRAPHY. See GRAMMAR; IDEM, Sonans.

OSTENSIBLE. See PARTNER.

OTHER. Following an enumeration of particulars, embraces unenumerated particulars of like nature only, unless a broader sense is obviously intended.[2]

A statute gave a lien to "mechanics, tradesmen, or others," for labor or material. *Held*, that "or others," following the enumeration of particular cases, was applicable only to persons in the same category.[3] See EJUSDEM.

Other action pending. See PEND.

Otherwise. Shall not stand in market with a "cart, wagon, sleigh, or otherwise" to vend merchandise, applies to the subject-matter and includes a box, bench, or stall.[4]

Take "by purchase or otherwise" is authority to take by devise.[5]

Others. In the expression "tenant and others" refers to persons who are not tenants.[6]

Compare ALIAS; ALITER; ALIUNDE; ALIUS; AUTRE.

OUGHT. See MAY.

OUSTER.[7] Amotion of possession: dispossession.[8]

Originally, an injury affecting a right in realty. *Amotion of a freehold* is by abatement, intrusion, disseisin, discontinuance, deforcement. *Amotion of a chattel real* is by dispossessing a tenant holding by statute-merchant, statute-staple, elegit, or under an estate for years.[9]

A wrongful dispossession or exclusion of a party from real property who is entitled to the possession.[9]

An entry upon the land of another is an ouster of the legal possession arising from the title, if made under claim and color of right; otherwise, it is a mere trespass. The "intention" guides the entry, and fixes its character.[1] Compare AMOTION.

Judgment of ouster. In proceedings by *quo warranto*, excludes an intruder from a public office.[2]

Ouster le main. Out of his hands. See WARD, 3. Compare RESPONDEAT, Ouster.

OUT. See WITHOUT.

Out of court. He who has no legal status in a court is said to be "out of court;" that is, he is not before the court: as, a plaintiff who shows he is unable to maintain his action. Having no *locus standi* is an equivalent phrase.

OUTCRY. See AUCTION; HUE AND CRY, RAPE.

OUTER. See BAR, 1.

OUTFIT. Originally, objects connected with a ship necessary for sailing her, and without which she would not be navigable.[3]

Referring to a whaling vessel, is explainable by proof of usage.[4]

OUTGOING. See PARTNER.

OUT-HOUSE. See HOUSE, 1.

OUTLAW; OUTLAWRY.[4] 1. Outlawry is putting a man out of the protection of the law, so that he is incapable of bringing an action to redress an injury, and forfeits his goods and chattels to the king.

If, after outlawry, the defendant appears publicly, he may be arrested on a writ of *capias utlagatum* [that you take or seize the outlaw] and be committed till he appears in court, in person or by attorney. Being merely to compel appearance, any cause, however slight, will reverse the judgment. The punishment under an indictment for a misdemeanor is the same as under a civil action,—forfeiture of goods. But an outlawry in treason or felony amounts to a conviction and attainder. Anciently, an outlawed felon was said to have a *caput lupinum*,—he might be knocked on the head like a wolf by any one, because, having renounced all law, he was to be dealt with as in a state of nature; yet now, no man may kill him, except in endeavoring to arrest him. And any person may arrest him, under criminal prosecution, either of his own head or by warrant. If any point be omitted or misconducted, the whole proceeding is illegal, and, after reversal upon a writ of error, the accused may defend himself against the indictment. An outlaw could represent another person under protection of the law.[5]

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[1] Heiss *v.* Murphy, 40 Wis. 290 (1876).

[2] Harlow *v.* Tufts, 4 Cush. 453 (1849); Commonwealth *v.* Dejardin, 126 Mass. 47 (1878); *ib.* 433; 112 *id.* 411; 6 Cush. 142; 20 Pick. 201; 14 Gray, 440; 140 Mass. 463; 40 Barb. 574; 67 N. Y. 149; 9 Ohio, 11; 3 Brewst. 325; 9 Tex. 521; 23 How. 117; 117 U. S. 610.

[3] The City of Salem, 31 F. R. 618 (1887); Oregon Laws, 1876, No. 9.

[4] Commonwealth *v.* Rice, 9 Metc. 258 (1845).

[5] Downing *v.* Marshall, 23 N. Y. 388 (1861).

[6] Kenney *v.* Sweeney, 14 R. I. 582 (1884).

[7] F. *outre:* L. *ultra*, beyond.

[8] [3 Bl. Com. 167, 196.

[9] Newell *v.* Woodruff, 30 Conn. 497 (1862), Butler, J.; Bath *v.* Valdez, 70 Cal. 357 (1886), Searls, C.

[1] Ewing *v.* Burnet, 11 Pet. 52 (1837); Bath *v.* Valdez, 70 Cal. 357 (1886).

[2] Campbell *v.* Talbot, 132 Mass. 177 (1882).

[3] [Macy *v.* Whaling Ins. Co., 9 Metc. 364-65 (1845).

[4] Mid. Eng. *outlawe:* Icel. *útlagi*, out of (beyond) the law,—Skeat.

[5] 3 Bl. Com. 284; 4 *id.* 319; 46 Ala. 188; 87 Me. 391.

2. Referring to a claim, as, a debt due on a promissory note, "outlawed" means barred by the statute of limitations.[1]

OUTRAGE. See DAMAGES, Exemplary; WRONG.

OUTSTANDING. 1. Not gathered or harvested: as, an outstanding crop, *q. v.*

2. Due, but not paid; overdue; uncollected: as, an outstanding draft, bond, premium, or other demand or indebtedness.

3. Existing as a distinct interest in lands: as, an outstanding title.

OVER. 1. Does not necessarily mean vertically above: as, in an indictment for playing cards in a room over a saloon.[2]

"Over" and "under" are not precisely opposites. A railroad constructed "under" a turnpike means at a level lower than the turnpike; and the railroad may be said to pass "over" the turnpike when both are at the same level.[3]

2. A devise *over* is a devise to one person contingent upon the failure or defeat of a gift to some other person.

To endorse *over;* to make *over:* to transfer. See also HOLD, Over.

Overcharge. See CHARGE, 2 (1).

Overdraft. See DRAFT, 2.

Overdue. See DUE, 1.

Over-insurance. See INSURANCE.

Overplus. See SURPLUS.

Overrule. See RULE, 1.

Overseer. See POOR; WAY, Highway.

OVERT.[4] Open; public; opposed to *covert.* An overt act is something actually done toward carrying out intention, as, to commit treason, or to effect the object of a conspiracy.[5]

An attempt to steal, accompanied by an overt act toward its commission, constitutes an attempt to commit larceny. An overt act must be such as will apparently result, in the natural course of events, if not hindered by extraneous causes, in the commission of the crime itself. Mere preliminary preparations are not overt acts.[6]

See ACCOMPLICE; CONSPIRACY; TREASON.

Market overt. A public market, *q. v.*

Pound overt. A common public pound, *q. v.*

OWE. See DEBERE; DEBT; DUE; DUTY.

OWELTY.[1] Money paid, or secured, by one co-tenant to another, to equalize a partition of their realty.

Somewhat in the nature of purchase-money for land.[2]

A court of equity, with a view to the more convenient and perfect partition or allotment of the premises, may decree a pecuniary compensation to one of the parties for owelty or equality of partition, so as to prevent injustice or unavoidable inequality.[3]

Where equal partition in value cannot be made of any shares or purparts, the inquest shall equalize them by valuing them respectively, and award that any one or more shall be subject to the payment of such sum of money as shall be equal to the difference in value of any other share or shares, and shall return the same with their inquest; which sum or sums, when final judgment shall be rendered on the writ, shall be a lien on the lands designated to pay the same.[4]

OWNER. He who has dominion over a thing, which he may use as he pleases, except as restrained by the law or by an agreement.[5]

Will include the person in possession and control of any article of personalty, as, the one who hires a carriage.[6]

In a charter providing for notice to the owner of land to be taken for a street, includes a mortgagor.[7]

Includes any person having a claim or interest in real property, though less than an absolute fee.[8]

In a tax law, may refer to one having a freehold.[9]

Absolute ownership, or an estate in fee, may not be contemplated; as, in a homestead exemption law.[10]

The precise meaning depends upon the subject-matter. May designate the person in actual possession and occupancy of premises.[11]

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[1] Drew *v.* Drew, 37 Me. 392 (1854); Waters *v.* Tompkins, 2 Crompt., M. & R. *726 (1835); 24 Mich. 22.

[2] Patterson *v.* State, 12 Tex. Ap. 222 (1882).

[3] Newburyport Turnpike Corporation *v.* Eastern R. Co., 23 Pick. 329 (1839); Boston, &c. R. Co. *v.* Mayor of Lawrence, 2 Allen, 108 (1861).

[4] F. *overt: ovrir,* to open.

[5] See 4 Bl. Com. 21, 79, 86, 307; 5 How. 228; 55 Vt. 505.

[6] Sipple *v.* State, 46 N. J. L. 197 (1884).

[1] Pronounced ō*w*′-el-ty. "A half French or half Latin word, from *owe,*"—Webster. F. *owel,* equal; *en owel main,* in equal hand or part.

[2] Reed *v.* Fidelity Ins. Trust, &c. Co., 113 Pa. 578 (1886).

[3] 1 Story, Eq. § 654, cases.

[4] Penn. Act 7 April, 1807, § 5: 2 Purd. 1293, pl. 20; 6 Phila. 183; 8 Pa. 122.

[5] See Dow *v.* Gould Mining Co., 31 Cal. 649 (1867).

[6] Camp *v.* Rogers, 44 Conn. 298 (1877).

[7] Whiting *v.* New Haven, 45 Conn. 303 (1877).

[8] See Lozo *v.* Sutherland, 38 Mich. 171 (1878).

[9] Davis *v.* Cincinnati, 36 Ohio St. 26 (1880).

[10] Tyler *v.* Jewett, 82 Ala. 98 (1886).

[11] Schott *v.* Harvey, 105 Pa. 229 (1884). See, as to land taken for public use, 57 N. H. 110; 36 N. J. L. 184; 4 N. Y. 66; 26 Pa. 238; as to property exempt, 25 Barb. 88;

Equitable owner. He for whom another holds property; a *cestui que trust;* a beneficiary, *q. v.* **Legal owner.** He who holds the property for the other.

General owner. He in whom a title is vested primarily and principally. **Special owner.** An owner for a particular purpose; as, a bailee. See AGENT; FACTOR; PROPERTY, General.

Joint owner; part owner. One of two or more persons who own a thing, especially, a vessel; a co-owner.

Designates a class of persons distinct from partners, who own property jointly, but in a different manner and by a different tenure.[1]

Reputed owner. One who, from all appearance, or from supposition, is the real owner of a thing; as, of property subject to taxation or to assessment for a municipal improvement.

A bankrupt, by English law, is the reputed owner of all property in his apparent possession.[2]

Ownership. The right by which a thing belongs to an individual, to the exclusion of all other persons.[3]

In the law of Louisiana, *perfect* ownership is perpetual; *imperfect*, such as will terminate at a certain time or on a condition being fulfilled.[4]

OXEN. See TEAM.

OYER.[5] At common law, a defendant may "crave oyer" of the writ, bond or other specialty upon which the action is brought; that is, petition to "hear" it read.[6]

The generality of defendants, in times of simplicity, being supposed incapable to read, the whole of an instrument sued upon was entered *verbatim* on the record. The defendant could then take advantage of any part not stated in the declaration.[6]

Oyer occurs where the plaintiff in his declaration, or the defendant in his plea, finds it necessary to make profert [production] of a deed, probate, letters of administration, or other instrument under seal, and the other party prays that it may be read to him. The effect is to make the instrument a part of the pleadings.[1]

Giving a copy, or setting forth the instrument in full,—the modern practice,—attains the end sought by *oyer*, as originally understood.

When the court deems that knowledge of the contents of a particular writing is proper and essential to a party to a suit, it may order that he have a copy, although the writing being unsealed is, strictly, not the subject of oyer.[2]

Oyer and terminer. Hear and terminate or determine. "Terminer" for *determiner.*

A court held, originally, before commissioners (of whom two were judges of the courts at Westminster) twice in every year in each county, for the trial of all charges of treason, felony, and misdemeanor.[3] Now, a court of original jurisdiction for the trial of crimes of the higher grades.

OYEZ;[4] **OYES.** Hear ye! give heed; attend.

Public criers began by exclaiming *oyes,*— corrupted into *O yes!*[5] Still used by the criers of courts to command attention when a proclamation is about to be made. See CRIER.

OYSTER. See FISHERY; IMPROVEMENT.

P.

P. As an abbreviation, denotes page, Parliament, part, patent, penal, people, perpetual, *placitum*, pleas, poor, practice, precedents, president (judge), private, privy, probate, protest, public:

P. C. Patent cases; penal code; pleas of the crown; political code; practice cases; precedents in chancery.

P. h. v. *Pro hac vice*, for this occasion. See PRO, etc.

P. J. President judge. See JUDGE.

P. L. Pamphlet laws; poor laws; public laws.

P. M. *Post meridiem*, after midday. See AFTERNOON; DAY.

P. P. *Propria persona*, in his own person. See PROPRIUS.

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20 Ohio St. 473; as to a homestead, 38 Mich. 168; 21 Minn. 101, 107; 2 N. M. 101; as to mechanics' liens, 3 Kan. 499; 25 N. J. E. 284; 9 N. Y. 435; 11 Barb. 13; 2 E. D. Smith, 681; 12 Abb. Pr. 129; 2 Ohio St. 114, 123; as to tax laws, 2 Gray, 189; 22 Wall. 263; as to dower, 2 Ill. 314; 3 Kan. 499; as to bailments, 2 Cranch, C. C. 83; 23 Wall. 35; as to a fire-escape, 105 Pa. 322; as to a factory, 9 Metc. 562; as to infected animals, 76 Ill. 490.

[1] Breck *v.* Blair, 129 Mass. 128 (1880); 133 *id.* 318; 18 F. R. 549, 547; Story, Partn. §§ 89, 412.

[2] See 2 Bl. Com. 488; 2 Steph. Com. 166, 200.

[3] Converse *v.* Kellogg, 7 Barb. 597 (1850); Hill *v.* Cumberland Valley Mut. Protec. Co., 59 Pa. 477 (1858).

[4] Marshall *v.* Pearce, 34 La. An. 559 (1882).

[5] Pronounced ō'-yer. L. F. *oyer:* L. *audire*, to hear.

[6] [3 Bl. Com. 299.

[1] Suydam *v.* Williamson, 20 How. 436 (1857), Clifford, J.; 58 N. H. 313.

[2] Mealey *v.* Metropolitan Life Ins. Co., 23 F. R. 26 (1885), in which case the court refused to direct the defendant to file the application and the medical examination in the clerk's office. See also Sneed *v.* Wister, 8 Wheat. 695 (1823); 1 Chitty, Pl. *430.

[3] 4 Bl. Com. 269.

[4] Norm. F. *oyes; oyer*, to hear.

[5] See 4 Bl. Com. 340 (*u*).

P. S. Public statutes.

PACK. To "pack a jury" is to improperly and corruptly select a jury sworn and impaneled to try a cause.[1]

PACKAGE. See CONTENTS, 1; PARCEL, 1.

In an express receipt stipulating that if the value of the property is not disclosed the shipper will not demand more than fifty dollars for the loss of each "package," means a small parcel or bundle, the appearance of which gives no adequate information of the value. A bale of cotton is not such a package.[2]

A wagon-box in which paintings are packed for transportation was held to be a "package or parcel."[3]

As used in a revenue law, held to mean a bundle (of matches) put up for transportation or commercial handling; a thing in form to become, as such, an article of merchandise or delivery from hand to hand.[4]

PACKET. A small bundle.

Within the meaning of a prohibition against the private conveyance of letters and packets, held to include newspapers.[5]

PACT. An agreement, engagement.

In Roman law, a pact was the utmost product of the engagements of individuals agreeing among themselves, and it distinctly fell short of a contract. Whether it ultimately became a contract depended upon the question whether the law annexed an obligation to it. A contract was a pact (or convention) plus an obligation. So long as the pact remained unclothed with the obligation it was called "nude" or "naked."[6]

Nude pact. An agreement to do or pay anything on one side without compensation on the other;[7] a promise without a consideration. See CONSIDERATION, 2; PACTUM.

PACTUM. L. An agreement, engagement, pact.

Nudum pactum. An undertaking not supported by a consideration.

Ex nudo pacto non oritur actio. From a bare agreement no action arises; no cause of action can be based upon a mere promise, without a legal consideration. See PACT.

PAIN. See DAMAGES; DECLARATION, 1.

PAINE. See PEINE.

PAINS, BILL OF. See ATTAINDER.

PAINTING. See COPYRIGHT; PRINT.

Does not include a colored working model and design for carpets and rugs, of no value as a work of art.[1]

Paintings on porcelain, and decorated china, are subject to different import duties.[2]

PAIS; PAYS. F. Country.

Cry de pais. Hue and cry raised by the country.

En or in pais. In the country; out of court; in fact: said of a matter not of record, as, an estoppel, *q. v.* See also DEED, 1.

Per pais. By the country, by a jury.[3] See COUNTRY, 2.

PAMPHLET. Within the meaning of post-office and copyright laws, see BOOK, 2; COPYRIGHT; OBSCENE.

Pamphlet laws. In Pennsylvania, the statutes enacted at each session (biennial) of the legislature, as issued in book form.

The official publication. Particular laws are referred to by their number, as, Act of June 3, 1887, P. L. 224.

PANDECTS. A compilation of the civil law, prepared by direction of the emperor Justinian, and issued as law, A. D. 533.

Called pandects ("all-receiving") from the multiplicity of its sources. Consists of fifty books, with numerous titles, and the matter of about nine thousand extracts, varying from a single line to several octavo pages of average size. Most of the extracts are taken from the law-writings of Ulpian, Paulus, and Papinian. The work, which is also called the Digest, forms the largest fraction of the Corpus Juris Civilis.[4]

PANEL. 1. The sheriff returns the names of jurors summoned in a panel (a little pane, or oblong piece of parchment) annexed to the writ of *venire*.[5]

A schedule containing the names of persons whom the sheriff returns to serve on trials.[6]

2. The body of jurors summoned and in attendance upon a court.

Includes the jurors returned upon a special *venire*, after the regular panel has been exhausted.[7] See TALES.

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[1] [Mix *v.* Woodward, 12 Conn. 289 (1837); 100 U. S. 309; 11 Lea, 284.

[2] Southern Express Co. *v.* Crook, 44 Ala. 475 (1870). But see Lamb *v.* Camden, &c. R. Co., 2 Daly, 480 (1869).

[3] Whaite *v.* Lancashire, &c. R. Co., L. R., 9 Ex. 69 (1874).

[4] United States *v.* Goldback, 1 Hughes, 530 (1875); R. S. § 3437.

[5] United States Mail, &c., 4 Hughes, 276 (1843).

[6] Maine, Ancient Law, 313. See Hadley, Rom. Law, 226.

[7] 2 Bl. Com. 445. See 22 Wall. 215; 107 U. S. 544; 60 Md. 436; 76 Va. 520.

[1] Woodward *v.* London, &c. R. Co., L. R., 3 Ex. D. 121 (1877).

[2] Arthur *v.* Jacoby, 103 U. S. 677 (1880).

[3] See 2 Bl. Com. 294; 3 *id.* 394; 4 *id.* 349.

[4] See Hadley, Rom. Law, 10-15; 1 Bl. Com. 82; Hare, Contr., Index.

[5] 3 Bl. Com. 353; Coke, Litt. 158 *b*.

[6] Beasley *v.* People, 89 Ill. 575 (1878).

[7] People *v.* Coyodo, 40 Cal. 592 (1871).

Impanel; empanel. To make out the list of persons selected as jurors; to enter names on the panel.[1]

PAPER. 1. Within the meaning of the revenue law, a book is not "paper or manufacture of paper."[2]

2. In a statute against sending obscene papers, includes a letter.[3]

3. In the sense of a printed sheet or sheets containing the current news, see NEWSPAPER.

4. A commercial, business, or negotiable instrument.

Accommodation paper. See ACCOMMODATION.

Commercial paper. Paper governed by the rules established upon the customs of merchants: bills of exchange, promissory notes, negotiable bank-checks.[4]

Negotiable promissory notes and bills of exchange, in the strictest sense.[5]

Negotiable paper given in the due course of business.[6]

That class of paper which is transferable by indorsement and delivery, and between private parties is exempt, in the hands of innocent holders, from inquiry into the circumstances under which it was put into circulation.[7] See further CURRENT, 2; NEGOTIABLE.

Paper credit. Bills of exchange and promissory notes.[8]

Paper money. See TENDER, Legal.

5. In the language of the courts, has several meanings, somewhat technical.

Standing alone, "a paper" often designates a pleading or other writing rendered necessary by the contentions between the litigants.

Lawyers speak of "making out," of "serving," and of "filing papers;" and judges are said to "take the papers" in a case just argued, for use in arriving at a decision; and, before a court of error, the record includes all "papers filed" in the court below.

Paper book. A collection of the written proceedings in a cause, for the use of the court at argument, and pending subsequent deliberations.

A copy of the record delivered to the judges of a court of appeal.[1]

By ancient practice in England, on motion days the court began by calling upon the senior barristers to move, in the order of seniority. The next day the same practice was repeated; and thus it happened that sometimes weeks elapsed before the juniors could be heard. Lord Mansfield changed this practice by going through the entire bar before returning to the seniors. He also ordered that motions requiring argument should be put down on a paper (a list), which the court would go through before entering upon the general call of the bar. The days for hearing these matters became known as "paper days," and the briefs required to be furnished the judges, in analogy to the demurrer and issue books of the previous practice, were called "paper books."[2]

Paper title. Describes a claim of title which, while evidenced by one or more writings, is without substantial legal foundation or validity.

6. In a few of the States, a writing issued by a justice of the peace to a constable, directing him to do some ministerial act, as, to make a levy.[3]

7. In international and constitutional law, a document more or less formal or solemn; as, in state paper, paper blockade. See BLOCKADE.

Compare DOCUMENT; INSTRUMENT, 8; WRITING.

PAR. L. Equal; alike.

1. **Par delictum.** Equal fault.

Pari delicto, and *in pari delicto*. In equal wrong. See further DELICTUM.

Par oneri. Equal to the burden, disadvantage, damage, or detriment.

Pari causa. In equal right; upon like or equivalent footing.

Pari materia. On a like subject. See further MATERIA.

Pari passu. By equal step; at equal rate: without preference or priority, as of one creditor over another, in marshaling assets, *q. v.*

See INTER, Pares; PEER; UMPIRE.

2. Nominal value; face value.

"Currency at par" means currency equal to gold.[4]

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[1] State *v.* Potter, 18 Conn. 175 (1846); Porter *v.* Cass, 7 How. Pr. 443 (1852).

[2] Pott *v.* Arthur, 104 U. S. 735 (1881).

[3] Thomas *v.* State, 103 Ind. 419, 422-25 (1885).

[4] [*Re* Chandler, 4 Bankr. Reg. 215 (1870), cases.

[5] Ross *v.* Jones, 22 Wall. 593 (1874), Clifford, J.

[6] *Re* Sykes, 5 Biss. 114 (1870), Blodgett, J.

[7] The Floyd Acceptances, 7 Wall. 675 (1868), Miller, Justice.

[8] [2 Bl. Com. 466.

[1] [3 Bl. Com. 317.

[2] 1 Chitt. Arch. 95; Tidd, Pr. 507, 727; Steph. Pl. 95; 3 Campb. Lives Ch. J., ch. 34; Mitch. Motions & R. 26, note.

[3] See Ewart *v.* Davis, 76 Mo. 134 (1882); 41 Ind. 333

[4] Crim *v.* Sellers, 37 Ga. 326 (1867); 63 N. C. 147.

"Par bank notes" imply a state of equality or equal value; an equality of actual with nominal value.[1]

"Par value" implies a dollar in money for every dollar in security.[2]

"At par," "above par," and "below par" denote, respectively, (1) at face or nominal value; (2) higher than nominal value, that is, at a premium; and (3) below nominal value, that is, at a discount. See EXCHANGE, 2.

PARAFFINE. See DISTILLERY.

PARALLEL. Compare ALONG.

For two lines of street railroad to be parallel, within the meaning of a statute, it may not be necessary that the routes should be parallel for the whole length of each or of either route. Substantial parallelism may be all that is contemplated.[3]

PARAMOUNT.[4] Above, higher, superior, pre-eminent.

As, a paramount equity, incumbrance, title — the origin and source of another title, as, the title of a landlord in comparison with that of his tenant. Compare PARAVAIL.

The Constitution and laws of the United States are said to be of paramount importance.[5]

PARAPHERNALIA.[6] The apparel and ornaments of a wife, suitable to her rank and degree.[7]

A term borrowed from the civil law.

Paraphernal. Pertaining to paraphernalia; also, to property declared to be given the wife in consideration of the marriage.[8]

At common law, such articles as constituted the wife's paraphernalia she became absolutely entitled to at the death of her husband, over and above her jointure or dower, and in preference to all other representatives. The husband could not bequeath, although he might sell or give them away. After his death, the wife retained them against all persons, except creditors when there was a deficiency of assets and the apparel and ornaments were not of a necessary kind.[9]

In the United States, the continued ownership and enjoyment of all of a married woman's separate property are secured to her by legislation.[9] See HUSBAND; SEPARATE, 2.

PARAVAIL.[10] Downward; inferior, subordinate: as, a title paravail, a tenant paravail. Opposed, *paramount*, q. v. See FEUD.

PARCEL. 1. A small bundle or package, *q. v.*

In an indictment, may not sufficiently describe property alleged to have been stolen.[1]

2. A piece of land of indeterminate extent, but usually not large; a lot of ground.[2]

Within the meaning of a tax law, held to apply to a whole section of land.[3]

PARCENER. See COPARCENARY.

PARCHMENT. Sheepskin dressed for writing.

Formerly, extensively used for preserving evidence of grants and commissions issued by government, of judicial records, and of private conveyances of property. See RECORD, Judicial; WRITING.

PARDON.[3] Forgiveness, release, remission.[4]

An act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.[5]

An act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within the control of the pardoning power.[6]

In the form of a deed, to the validity of which there must be both a delivery and acceptance.[6]

Absolute pardon. Frees the offender without condition. **Conditional pardon.** Has a condition annexed, on the performance of which the validity depends.[7]

General pardon. Extends to all offenders — of one or more classes; amnesty. **Special** or **particular pardon.** Relieves one individual only.

"Pardon" is a remission of guilt; "amnesty," oblivion or forgetfulness.[8]

"The President . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[9]

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[1] Bachman *v.* Roller, 9 Baxt. 410 (1877).

[2] Delafield *v.* Illinois, 26 Wend. 234 (1841); 22 Pa. 480.

[3] Cronin *v.* Highland Street R'y Co., 144 Mass. 254 (1887).

[4] F. *par amount*, by what is above, at the top.

[5] 1 Black, 23; 2 *id.* 500; 92 U. S. 33; 100 *id.* 384, 386, 392, 397, 399, 605; 101 *id.* 451, 452.

[6] Gk. *pará*, beyond, *pherna*, *pherné*, what is brought — dowery: *pherein*, to bring.

[7] [2 Bl. Com. 436.

[8] See Cambre *v.* Grabert, 33 La. An. 247 (1881).

[9] 4 Ired. L. 301; 48 N. Y. 212; 74 *id.* 116.

[10] F. *par*, by, *avaler*, to descend, be under; or *par avails*, by the avails — referring to the person who got the profits of the land.

[1] Regina *v.* Bonner, 7 Cox, Cr. Cas. 18 (1855).

[2] Martin *v.* Cole, 38 Iowa, 141, 147 (1874).

[3] F. *pardon:* L. L. *per-donare*, to remit a debt, forgive.

[4] *Exp.* Wells, 18 How. 309-12 (1855), cases, Wayne, J.

[5] United States *v.* Wilson, 7 Pet. 160 (1833), Marshall, C. J.

[6] Knote *v.* United States, 95 U. S. 158 (1877), cases, Field, J. See also 44 Ga. 361; 43 N. J. L. 241; 24 Tex. Ap. 79.

[7] [4 Bl. Com. 398; 8 Biss. 323-26; 48 Iowa, 264.

[8] *Exp.* Law, 35 Ga. 296 (1866). See generally 5 Cr. Law Mag. 457-600 (1885), cases.

[9] Constitution, Art. II, sec. 2, cl. 1.

This includes the power to commute sentences.[1]

In the Constitution, the word "pardon" conveys the idea of the power exercised by the English crown, or by its representatives in the colonies: "a work of mercy, whereby the king, either before attainder, sentence or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt or duty, temporal or ecclesiastical."[2]

An absolute pardon releases the offender from all disabilities imposed by the offense, and restores him to all his civil rights. In contemplation of law, the pardon so far blots out the offense that afterward it cannot be imputed to him to prevent the assertion of his legal rights,— gives him a new credit and capacity, and rehabilitates him to that extent in his former position. It does not make amends for the past, nor afford relief for what has been suffered by imprisonment, forced labor, or otherwise.[3]

The king could not by previous license make dispunishable an offense *malum in se;* nor release a recognizance to keep the peace; nor discharge an informer's moiety; nor remit a forfeiture to the aggrieved; nor relieve from punishment for maintaining a common nuisance. The exercise of such a power would have been against reason and the common good.[4]

A pardon may be granted before conviction. The power in the President, except in cases of impeachment, is unlimited, extends to every offense known to the law, and is not subject to legislative control.[5]

Grantable before indictment;[6] and then pleadable in bar,[7] in arrest of judgment,[8] or in stay of execution.[9] Void, if the sovereign was deceived. Construed beneficially for the offender. Allowed for all offenses, except when private justice is chiefly concerned; as, in a common nuisance, which is in the nature of a private injury to individuals, the prosecution being vested in the state to avoid multiplicity of suits. But no pardon can be granted after an information is made upon a penal statute in which the informer acquires a property in the penalty; nor in cases of legislative impeachment. When lawful, makes the offender a new man; acquits him of all corporal penalties and forfeitures; operates not so much to restore his former, as to give him a new, credit and capacity.[10]

Although pardon restores to competency as a witness one convicted of felony, the conviction may still be used to affect his credit.[10]

See ACCOMPLICE; REPRIEVE; RESPITE.

PARENS. L. A parent; a father.

In loco parentis. In the place of the parent.

Said of a person invested with the rights and charged with the duties of the parent of a child, as, a guardian, and, in some sense, a teacher, and the faculty of a school.[1]

Parens patriæ. Father of the country. In England, the sovereign; in the United States, the state.

The sovereign is, theoretically, guardian over all infants and committee over all lunatics.

As much of the royal prerogative as belonged to the king in his capacity of universal trustee enters into our political state as into the principles of the British constitution.[2]

PARENT. The lawful father, or the mother, of another person. Compare PARENS.

Parent and child. The relation or status subsisting between father, or mother, and offspring; as, in speaking of the law of parent and child.[3]

There is no implied contract on the part of a father to pay wages to a child that remains with him and renders him service after becoming of age. The child must show an express contract, before recovery can be had.[4]

See ANCESTOR; CHILD; CONFESSION, 2; FATHER; GUARDIAN; INFANT.

PARES. See PEER.

PARI. See PAR, 1.

PARISH.[5] 1. A circuit of ground committed to the charge of one parson or vicar, or other minister having the cure of souls therein.[6] Whence parochial.

A corporation established solely for the purpose of maintaining public worship.[7]

Parish church. A select body of Christians, forming a local spiritual association; also, the building in which the public worship of the inhabitants of a parish is celebrated.[8]

A "parochial church" is a consecrated place, having attached to it the right of burial and the administration of the sacraments.[9]

2. In Louisiana, a division of the State known elsewhere as a "county," *q. v.*

Parish court. A local court in one of the parishes of that State.

PARK. 1. In English law, an inclosed chase, extending over a man's own grounds;

[1] *Exp.* Wells, *ante.*
[2] *Exp.* Wells, *ante:* Coke, 3 Inst. 233.
[3] Knote *v.* United States, *ante.*
[4] *Exp.* Garland, 4 Wall. 333, 380 (1866), cases, Field, J.
[5] 4 Bl. Com. 316.
[6] 4 Bl. Com. 337.
[7] 4 Bl. Com. 376.
[8] 4 Bl. Com. 402.
[9] 4 Bl. Com. 398–402; 28 Pa. 297.
[10] Bennett *v.* State, 24 Tex. Ap. 79 (1887).

[1] See 1 Bl. Com. 460; 24 N. J. L. 683; 19 Ves. 412.
[2] Dollar Savings Bank *v.* United States, 19 Wall. 239 (1873); New York Life Ins. Co. *v.* Bangs, 103 U. S. 432 (1880); 17 How. 393; 3 Bl. Com. 427; 4 Kent, 508.
[3] See 1 Bl. Com. 446; 3 *id.* 140.
[4] Byrnes *v.* Clark, 57 Wis. 21 (1883), cases.
[5] Gk. *paroikia*, neighborhood, district.
[6] [1 Bl. Com. 111.
[7] Inhabitants of Milford *v* Godfrey, 1 Pick. 97 (1822); Baker *v.* Fales, 16 Mass. 499 (1820).
[8] Town of Pawlet *v.* Clark, 9 Cranch, 292 (1815), Story, J.

literally, an inclosure.[1] See ANIMAL; GAME, 1.

2. An inclosed place in a city or village, set apart for ornament or to afford the benefits of air, exercise, or amusement.[2]

A piece of ground adapted and set apart for purposes of ornament, exercise, and amusement. It is not a street or road, though carriages may pass through it.[3]

In the exercise of the right of eminent domain, the wer to take private property for a public park is not open question. The judgment of the legislature as the existence of the public necessity, when fairly ercised, is not revisable by the courts.[4] See COMMON, Right of; DEDICATION, 1; SQUARE.

PARLIAMENT.[5] The supreme legislature of Great Britain, consisting of the queen, or king, the lords spiritual and temporal, and the commons.

Assembles, at the queen's summons, at least once in three years. Each constituent has a negative in making laws. The powers are absolute. Each house judges of its own privileges. Members are entitled to the privileges of speech, person, domestics, and property. The distinctive duties of the house of lords are to sit as a court of review, and to mature bills affecting the peerage. The distinctive duties of the house of commons are to impose taxes, to vote money for the public service, and to determine matters concerning the election of its members. Bills are read twice in each house, committed, engrossed, and then read a third time. Concurrence in the three branches makes a bill a law. The houses may "adjourn" themselves; but the queen alone can "prorogue" (postpone) or "dissolve" parliament.[6] See CONTEMPT, 2; HOUSE, 2; KING.

PARLOR CAR. See CARRIER, Common; SLEEPING-CAR.

PAROCHIAL. See PARISH, 1.

PAROL.[7] 1. Anciently, the pleadings in a cause were *viva voce*, and thence called "the parol." See ORE TENUS.

2. Not committed to writing: that is, oral, verbal; also, written but not sealed.

At common law prior to the Statute of Frauds, no distinction was made between an agreement by word of mouth and an agreement in writing without a seal.

"Oral" and "verbal" are less comprehensive.

Parol agreement, contract, promise, undertaking. An agreement entered into by spoken words; also, an obligation not under seal. See MERGER, 2.

Parol arrest. An arrest ordered of a person violating the law in the presence of a judge, magistrate, or other officer of the peace; as, for an offense committed in open court.

Parol demurrer. A plea interposed to stay proceedings in a real action until an infant party became of age.

Parol evidence. Evidence not in writing; in particular, evidence outside of a sealed instrument relating to the same subject-matter,—as, the oral negotiations of parties who subsequently sign a statement of their reciprocal engagements.

"Parol evidence is not admissible to vary or contradict the terms of a written instrument." The object of this rule is to protect the honest, accurate, and prudent in making contracts, against fraud and false swearing, carelessness, and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction.[1]

Where an agreement is reduced to writing the intent and meaning of the same must be sought in the instrument which the parties have chosen as the repository and evidence of their purpose, and not in extrinsic facts and allegations.[2]

But the rule would become the instrument of the fraud it was intended to prevent, if there were no exceptions to the universality of its application.[1] Accordingly, it may be shown: that a deed, absolute on its face, is a mortgage; that a resulting trust exists; that a contract was without consideration, is void for fraud, illegality, or disability, has been modified as to time, place, manner of performance, or otherwise, or has been abandoned; what was the situation of parties — their surroundings, when the contract was made, thus applying it to the subject; that a joint obligor or maker of a note was a surety; that one accepted, made, or indorsed a bill or note for accommodation; that a contracting party was an agent; that a mortgage or judgment was assigned by parol.[3]

Parol evidence of surrounding circumstances is admissible to show the subject-matter of the contract, when ambiguous or indefinite; but express terms cannot be varied by proof of the negotiations out of which it grew, and the circumstances which surrounded its adoption. In construing the contract, such evidence is receivable in order to ascertain the real intention of the parties, but no new obligation can be imposed which is not warranted by a fair and reasonable construction of the language. The current of authorities shows that parol evidence is admissible in

[1] [2 Bl. Com. 38; 40 N. J. L. 612.

[2] Perrin *v.* N. Y. Central R. Co., 36 N. Y. 126 (1867).

[3] People *v.* Green, 52 How. Pr. 445 (1873).

[4] Holt *v.* Council of Somerville, 127 Mass. 413 (1879), cases.

[5] *F. parlement; parler*, to speak, confer. See 1 Bl. Com. 147.

[6] 1 Bl. Com. Ch. II; Wharton's Law Dict. On Parliamentary representation, see 37 Alb. Law J. 61-64 (1888).

[7] *F. parole*, a word, speech.

[1] Union Mutual Ins. Co. *v.* Wilkinson, 13 Wall. 231 (1871), Miller, J.

[2] Walden *v.* Skinner, 101 U. S. 584 (1879), cases, Clifford, J.

[3] Jones *v.* N. Y. Guaranty, &c. Co., 101 U. S. 622 (1879), Swayne, J.

courts of law only to aid in the *construction* of written contracts, admitted or proved; to ascertain the subject-matter; to show the real nature of the instrument; to explain latent ambiguities or indefinite terms; to give effect to general customs which do not contradict express stipulations; when the original contract was verbal and entire, and only a part of it reduced to writing; and to show a subsequent agreement, on a new consideration, varying the terms of the original contract. The exceptions that relate to fraud, mistake, or accident usually arise in courts of equity, which have ample and elastic modes of procedure in administering adequate relief. Such courts will look beyond the written terms, consider the whole transaction, and hear parol evidence as to alleged fraud inducing or affecting the contract, if the person seeking relief has acted promptly upon discovering the fraud, and has not derived such benefits as to prevent the parties from being placed *in statu quo*. Proof of fraud in actions at law is restricted to narrower limits: the alleged fraud must affect the execution of the instrument.[1]

To remove such uncertainty as may arise from applying the written terms to the subject-matter, parol testimony is always admissible. Hence, all the circumstances out of which the contract arose may be shown.[2]

The rule does not apply where part only of the original contract is reduced to writing; nor to a collateral undertaking;[3] nor to a distinct subject-matter.[4] And a stranger is not prevented from introducing such evidence.[5]

To admit parol evidence to vary the terms of an instrument for fraud in its procurement, there must be evidence of fraud other than that derivable from the mere difference between the parol and written terms. There must be fraud, accident, or mistake, established by clear, precise, indubitable evidence.[6]

Receipts, bills of lading, subscription papers, and other informal memoranda are excluded from the rule.[7]

Parol lease. An oral agreement for the use of real property. See LEASE.

See generally FRAUD, Statute, etc.; REFORM; SEAL, 1.

[1] Chandler *v.* Thompson, 30 F. R. 43 (1886), Dick, J.

[2] Stoops *v.* Smith, 100 Mass. 66 (1868), cases.

[3] Chapin *v.* Dobson, 78 N. Y. 79 (1879), cases.

[4] Graffam *v.* Pierce, 143 Mass. 388 (1887), cases.

[5] Kellogg *v.* Tompson, 142 Mass. 77 (1886), cases; 1 Gr. Ev. § 279.

[6] Thorne *v.* Warfflein, 100 Pa. 526 (1882), Green, J. See also Hopkins *v.* St. Louis, &c. R. Co., 29 Kan. 544, 550 (1883).

See also Wals *v.* Rhodius, 87 Ind. 4-11 (1882), cases; Martins *v.* Berens, 67 Pa. 462-63 (1871), cases; Kostenbader *v.* Peters, 80 *id.* 441 (1876), cases; Bast *v.* First Nat. Bank of Ashland, 101 U. S. 96 (1879); Martin *v.* Cole, 104 *id.* 30 (1881) — as to an indorsement on a note; Tuley *v.* Barton, 79 Va. 393 (1884), cases; Hughes *v.* Tinsley, 80 *id.* 263 (1885), cases.

[7] 1 Whart. Ev. § 926, cases; 1 Greenl. Ev. § 275, cases.

PARRICIDE. See HOMICIDE.

PARS. L. A part; a party.

Ex parte, or ex-parte. From a (one) party; on behalf of one side. Said of a proceeding had at the instance of one party, without opportunity in the opposing party to appear or participate; also, of a proceeding to which there is no adverse party.

Thus, *Ex parte*, or *Exp.*, Waite, denotes a petition filed by one Waite for a *mandamus*, a *quo warranto*, or other writ or proceeding.

Inter partes. Between parties; as, a paper executed, or a transaction had, by or between two acting persons.

Opposed to an act or transaction by one person only, as in the cases of a bill of sale, a promissory note, a will, a deed-poll.

Pars entita. The eldest part: the share of the oldest coparcener, *q. v.*

Pars rationabilis. Reasonable part. See PART, 1, Reasonable.

Particeps. A part-taker: a participant.

Particeps criminis. A fellow criminal; an accomplice. Plural *participes*. See ACCOMPLICE.

PARSONAGE. Not a "place of worship," although on land appurtenant to a church.[1]

PART. 1. A share, a portion; a purpart. See PORTION.

Admission of a part involves an admission of the whole of a document; as, when one writing refers to another. This includes all the parts of an account, all indorsements, etc., but not detached items, nor memoranda.[2]

Bipartite. In two parts — counterparts, *q. v.*

Purpart; purparty. A share of an estate allotted by partition to a coparcener, *q. v.*

Reasonable part. In the time of Henry II (1154-89), a man's goods were viewed as divided into three parts: one each for his lineal descendants, his wife, and himself. If he left children only, or a wife only, they or she took a moiety. The shares of the wife and children were called their reasonable part — *pars rationabilis*.[3]

2. Of part, in part; partial, partially: as, part — owner, payment, performance, *qq. v.*

Partial. (1) Pertaining to apart: as, partial — balance, eviction, loss, *qq. v.* (2) Biased, prejudiced. See IMPARTIAL.

[1] Church of Our Savior *v.* Montgomery County, 10 W. N. C. 170 (1881); Wood *v.* Moore, 1 Chest. Co. 265 (1881).

[2] 1 Whart. Ev. §§ 619-20, cases.

[3] 2 Bl. Com. 492.

PARTICEPS. See under PARS.

PARTICULAR.[1] Pertaining to a distinct thing, person or party.

1. Involving title to a part only of the whole inheritance: as, a particular estate, which is precedent to an estate in remainder,[2] *q. v.*

2. Respecting a distinct portion or thing: as, particular average, *q. v.*, a particular lien, *q. v.*, and opposed, respectively, to *total* and *general*, qq. v.

3. Directed to one fact, thing, or individual person: as, a particular — averment or statement, or malice, *qq. v.*

4. Affecting a limited district: as, a particular custom, *q. v.*

Particulars. Distinct parts, minutiæ; details, items; specific allegations.

Bill of particulars. An amplification, or more particular specification, of the matter set forth in a pleading.[3]

Gives precise information as to the nature and extent of the demand made in the declaration. Is demandable of right where there are general counts in the declaration, and as to one or all counts. May be voluntarily furnished by the plaintiff. In effect, is an amendment or amplification of the count or counts.[4]

The scope of an order for particulars must ordinarily be a question of discretion.[5]

Independently of statutes, the courts have inherent power to order a bill of particulars in either a civil or a criminal proceeding.

PARTIES. See PARTY.

PARTITIO. L. An apportioning: partitioning, partition.

From *partiri*, to divide, part.

De partitione facienda. Regarding a partition to be made; for dividing land. A writ of partition is sometimes called a writ *de partitione*, etc.

Quod partitio fiat. That partition be made: the decree ordering a partition. See PARTITION.

PARTITION. Where two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands so held among them, in severalty, each taking a distributive part.[6]

Used both as a verb and a noun.

As in some instances there is a unity of interest and in all a unity of possession, the co-owners must mutually convey and assure to each other the several estates.[1]

May be had amicably, or compulsorily — either by a suit in equity or by special statutory proceedings on an award of commissioners. Land and buildings which cannot be partitioned without injury to the whole property may be sold and the proceeds divided. The judgment upon a writ at common law is *quod partitio fiat*, that partition be made.[2]

The object is to secure to each tenant the exclusive possession of his share, thereby avoiding the inconveniences which result from holding property in common. When, therefore, possession cannot follow the judgment, partition cannot be had; that is, an estate must be a subsisting estate held in common or undivided, by persons entitled, after partition, to an immediate possession in severalty. The proceeding is subject to the rights of a dissenting life-tenant.[3]

The difference betwen a judgment and a writ of partition at common law is, that the former operates by way of delivery of possession and estoppel, while in the latter the transfer of title can be effected only by the execution of conveyances between the parties, which may be decreed by the court and compelled by attachment. In many States, where the equity powers of the court have been aided by statutes to get rid of the difficulty of compelling parties in person to execute conveyances, the court is authorized to appoint a commissioner to execute the conveyances in the names of the parties. In other cases, the statute declares that such decree itself shall operate as a conveyance of the title.[4]

See further COPARCENARY; OWELTY; PARTITION.

PARTNERSHIP. A "partner" is a member of a partnership, and a "partnership" (often called a "copartnership") is a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them.[5]

A partnership exists where parties join together their money, goods, labor, or skill, for the purposes of trade or gain, and where there is a community of profits.[6]

An association for the purpose of prosecut-

[1] L. *particula*, a small part, a "particle."

[2] [2 Bl. Com. 165.]

[3] Starkweather *v.* Kittle, 17 Wend. 21 (1837).

[4] Zacarino *v.* Pallotti, 49 Conn. 38 (1881), cases; Chesapeake, &c. Canal Co. *v.* Knapp, 9 Pet. *564 (1835).

[5] People *v.* Gibbs, 93 N. Y. 470 (1883).

[6] 2 Bl Com. 323.

[1] 2 Bl. Com. 323.

[2] See Dana *v.* Jackson, 6 Pa. 237 (1847).

[3] See Freeman, Partn. 544; Adams, Eq. 460; 2 Bl. Com. 324; Tabler *v.* Wiseman, 2 Ohio, 210 (1853); Striker *v.* Mott, 2 Paige, 389 (1831); 23 Pittsb. Leg. J. 41; Scriner, Dower, 236, § 18.

[4] Gay *v.* Parpart, 106 U. S. 690 (1883), Miller, J.; 76 Va. 492.

[5] Story, Partn. § 2. [3 Kent, 23.

[6] Ward *v.* Thompson, 22 How. 333 (1859), Grier, J.

ing any lawful business, formed by contract between two or more persons.[1]

The contract relation subsisting between persons who have combined their property, labor or skill in an enterprise or business as principals for the purpose of joint profit.[2]

No tests have yet been found which determine with absolute certainty what contracts will create a partnership relation.[3]

Persons cannot be made to assume the relation, as between themselves, when their purpose is that no partnership shall exist.[4]

A "partner" has a community of interests with the other partners in the whole property, business, and responsibilities of the partnership; an "agent," as such, has no interest in either. As far as a partner acts for himself in the common concerns of the partnership, he may be deemed a principal; as far as he acts for his partners, an agent.[5]

"Partnership" and "community" are not the same thing. The first is founded upon the contract of the parties, which thus creates the community; the other may exist independently of any contract. Every partnership is founded in a community of interest; but every community of interest does not constitute a partnership. In every case of partnership there is a community of the property of the partnership between the parties, as soon as it becomes part of the common stock. Every real partnership also imports, *ex vi termini*, a community of interest in the profits of the business, that is, a joint and mutual interest, a communion of profit, *q. v.* This is of the very essence of the contract.[6]

Articles of partnership. The instrument under which a partnership is begun or continued; articles of copartnership.

Gives the names, style, beginning and ending, nature, management, contributions, apportionment of profits and losses, accounts, expulsion of members, settlements, etc. Need not be sealed. If no other time is specified, the date of the articles indicates the inception.

General partnership. Properly, that in which the parties carry on all their trade and business for the joint benefit and profit of all parties concerned, whether the capital stock be limited or not, and the contributions equal or unequal.[1]

Special partnership. At common law, that formed for a special or particular branch of business, as contradistinguished from the general business or employment of the parties, or of one of them. Commonly called a "limited" partnership, when extended to a single transaction or adventure. But the appellation may be applied indifferently to both classes of cases.[1]

Universal partnership. In this the parties agree to bring into the firm all their property, and to employ all their skill, labor, services, and diligence in trade or business, for their common benefit, so that there is an entire communion of interest between them.[2]

Partnerships are "general" and "limited" [special]. The former exists where the parties are partners in all their commercial business; the latter, where the partnership is limited to some one or more branches, and does not include all the business of the partners. There is, probably, no such thing as a "universal" partnership in the sense that every thing done, bought, or sold is to be deemed on partnership account.[3]

Limited partnership. An association organized under a statute, with limited liability in some or all of the members.[4] By recent statutes, the liability of *each* member is "limited."

In the latter sense, the parties file a truthful statement of their names, interests, object, place of business, duration, etc., and publish the word "Limited" in connection with the firm name.[5]

Probably all of the States have enactments (copied largely from one another) authorizing the creation of "limited" partnerships. The Pennsylvania act of June 2, 1874, is illustrative. It provides that three or more persons may form such a partnership, their principal place of business being within the State, by signing, acknowledging, and recording with the recorder of deeds a statement setting forth — their full names; the amount of capital subscribed by each; the total amount of capital, and when and how paid; the character of the business; the location; the name of the association, with "limited" added as part thereof; the duration, which is not to exceed twenty years;

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[1] Payne *v.* Thompson, 44 Ohio St. 204 (1886), Owen, Chief Justice.

[2] Bates, Partn. § 1. See also 91 U. S. 134; 6 McLean, 82; 18 F. R. 888; 2 Flip. 462; 13 Ark. 31; 9 Cal. 639; 2 Col. 648; 15 Conn. 72; 8 Ga. 288; 12 Bradw. 528-29; 19 Ind. 115; 12 Iowa, 177; 24 Kan 340; 38 Me. 555; 46 Miss. 434; 97 Pa. 499; 25 Vt. 390; 12 W. Va. 390.

[3] Blair *v.* Sheaffer, 33 F. R. 221 (1887), cases, Brewer, J.; McDonald *v.* Matney, 82 Mo. 365 (1884).

[4] London Assurance Co. *v.* Drennen, 116 U. S. 461 (1886).

[5] [Story, Partn. § 1.

[6] Story, Partn. §§ 3, 16, 18. As to participation in the profits, see 30 Alb. Law J. 26-30 (1884), cases.

[1] [Story, Partn. § 74; 1 Cliff. 32.

[2] [Story, Partn. § 72.

[3] United States Bank *v.* Binney, 5 Mas. 183 (1828), Story, J.

[4] [3 Kent, 34.

[5] See Ames *v.* Downing, 1 Bradf. 326 (1850); Jacquin *v.* Buisson, 11 How. Pr. 390 (1855); Taylor *v.* Webster, 39 N. J. L. 104 (1876); Bates, Lim. Partn. § 3, Partn. § 460; 1 Lindley, Partn., Ewell's ed., *201, cases; 20 Am. Law Rev. 848-66 (1886), cases.

and the names of officers. Amendments are made and recorded in like manner. These requirements being met, no member is liable for the debts of the association beyond the amount of his subscription. The association must keep a subscription-list book, open to inspection by creditors and members, at reasonable times. The word "limited" must be affixed to the name; for indebtedness or damage due to an omission, every member acquiescing is individually liable. Interests are personalty; transferable as the association may prescribe. No transferee of an interest, nor representative of a decedent or of an insolvent, can participate in subsequent business, unless elected by a vote of a majority of the members in number and value; if no election is made, the interest is appraised by agreement or by a man appointed by court. An annual meeting of the members must be held to select from three to five managers,—one for chairman, one for treasurer, one for secretary or for both treasurer and secretary. One or more managers contract the debts; when the amount exceeds five hundred dollars, the obligation to pay must be in writing, signed by at least two managers. Dividends must not diminish or impair the capital stock. Loans of credit or capital to members are unlawful; to others, lawful when authorized in writing by a majority in number and value of interest. Dissolution is by expiration of the period fixed, or, earlier, by a vote of a majority in number and value. Notice of winding-up must be given in two newspapers of the proper city or county, six consecutive times, the business ceasing with first notice, except as to the winding-up. Upon dissolution by agreement the property must be distributed first to debts for wages of labor; then to other liabilities; the residue among the members, by three liquidating trustees, elected by the members, who are to collect and distribute the assets under direction of the court of common pleas.[1]

When contributions to the stock are to be "cash," neither credits, goods, or notes will be equivalent, although convertible into money.[2]

The statute may direct that a contribution made in property shall be so stated, and the cash value given.[3]

Limited partnerships are *quasi* corporations. The members have no general right to inspect the books of the association.[4]

They are partnerships with a limited liability. No restrictions apply to them which do not exist as to other partnerships, except by special legislation or strong inference.[5]

A person trading with a limited partnership is chargeable with notice as to the scope of the business, and as set forth in the articles, when the same have been made known according to law.[6]

[1] Penn. Statutes, 1874 (P. L. 271): 1 Purd. Dig. 937.

[2] Van Ingen *v.* Whitman, 62 N. Y. 513 (1875); Haviland *v.* Chase, 39 Barb. 283 (1860); Pierce *v.* Bryant, 5 Allen, 91 (1862).

[3] Holliday *v.* Union Bag Co., 8 Col. 342 (1877).

[4] Patterson *v.* Tidewater Pipe Co., 12 W. N. C. 452 (1882); Eliot *v.* Himrod, 15 *id.* 78 (1884).

[5] Greenwood *v.* Hampshire Manuf. Co., 41 Leg. Int. 14 (1883).

[6] Taylor *v.* Rasch, 1 Hughes, 385 (1874).

Secret partnership. Where the existence of certain persons as partners is not avowed or made known to the public.[1]

Dormant partner. A partner who takes no part in the business, and whose connection with it is unknown.[2]

A partnership is dormant when the name or names of a partner or partners are kept back — dormant as to all whose names do not appear in its transactions. The dormant, sleeping, inactive partner may be known by reputation or declaration of his copartner, but these do not make him an avowed or active one without the avowal and pledge of his name or paper. The principle which makes a dormant partner liable is, that having an interest in the profits, which are part of the fund to which a creditor looks for payment, he shall be bound for claims and losses. When discovered, he is liable as a partner; but then he must be shown to be a partner by an interest in the subject-matter.[3]

A dormant partner is interested in the business of a firm and participates in the profits, but is not publicly known in this relation. When discovered, he is responsible for the debts contracted by the firm while he was a member, although he was not known as a partner when the debts were incurred. On retirement his liability ceases as to debts subsequently contracted by the firm, except as to creditors who knew him to have been a member and who had no notice of his retirement.[4]

A dormant partner takes no part in the control or management of the partnership business. When found out, he is liable like the ostensible partner, for the reason that he is a partner. One is not a dormant partner because the person who trades with the party having possession is not aware that another is interested.[5] Compare *Ostensible Partner*.

Incoming partner. A person lately or about to be taken into a partnership as a member. **Outgoing** or **retiring partner.** One who withdraws from the firm; a withdrawing partner.

Liquidating partner. The member of a dissolved partnership who winds up its business.

Nominal partner. A person presented to the public as a partner who in reality is not a partner.

His liability to creditors is imposed upon the ground of a general policy to preserve good faith and prevent frauds in business transactions.[4]

[1] United States Bank *v.* Binney, 5 Mas. 186 (1829), Story, J.; 49 N. H. 227.

[2] [Nat. Bank of Salem *v.* Thomas, 47 N. Y. 19 (1871).

[3] Winship *v.* Bank of United States, 5 Pet. *573–75 (1831), Baldwin, J.

[4] Oppenheimer *v.* Clemmons, 18 F. R. 890, 889 (1883), Dick, J.; 6 Tex. 258.

[5] Cochran *v.* Anderson County Nat. Bank, 83 Ky. 44, 47 (1884), Pryor, J.

Ostensible partner. One who exhibits himself to the public as connected with a partnership and interested in its business.[1]

A person who conducts himself with reference to the general public in such a way as to induce others, acting with reasonable caution, to believe that he is a member of a partnership is liable as such to a creditor who contracted with the firm under such belief.[2]

Surviving partner. Although invested with the legal title to the partnership property on the dissolution of the firm by the death of his copartner, he is not the beneficial owner, but a mere trustee to liquidate the partnership affairs by selling the assets and applying them to the payment of the partnership debts.[3]

Persons are liable as partners to third persons: (1) Where, although there is no community of interest in the capital stock, the parties have a community of interest or participation in the profit and loss as principals. (2) Where, strictly, there is no capital stock, but labor, skill, and industry are to be contributed by each person as a principal, and the profit and loss shared in like manner. (3) Where the profit is to be shared between the parties as principals, but any loss, beyond the profit, is to be borne by one party only. (4) Where parties are not in reality partners, but hold themselves out, or at least are held out by the party sought to be charged, as partners to third persons, who gave credit to them accordingly. (5) Where one of the parties is to receive an annuity out of the profits, or as a part thereof.[4]

While it is generally held that sharing profits and losses will constitute a partnership, an agreement to give a share of the gross profits in consideration of services will not render the parties partners; and the weight of the later decisions is that participation in the net profits does not necessarily create the relation.[5]

As a partnership is formed for joint purposes, the members assume joint risks and incur joint liabilities. Hence, all the members sue and are to be sued. But each is liable for all the firm debts, except in limited associations.[6]

A contract made by a partner with respect to a matter not falling within the ordinary business objects and scope of the partnership is not binding on the other partners, and creates no liability to a third person who knows that the partner acted in violation of his duties. But credit given to the firm within the scope of the partnership, and in the course of its business, binds all partners, notwithstanding a secret stipulation or reservation between them, unknown to him who gives the credit.[1]

In the absence of proof of its purchase with partnership funds for partnership purposes, realty standing in the names of several persons is deemed held by them as joint-tenants, or as tenants in common; and one owner cannot sell or bind the interest of his coowners.[2]

Realty purchased with partnership funds for partnership purposes, though the title be taken in the name of one partner only, is in equity treated as personalty as far as may be necessary to pay firm debts and to adjust the equities of the partners. The survivor can sell the realty, and the purchaser compel the heirs or devisees of the deceased partner to convey their equitable titles.[3]

The joint estate of a partnership is that which belongs to the firm and in which the partners have a joint interest, at law or in equity, at dissolution. The separate estate is that in which any partner has a separate interest, at law or in equity, at the same period.[4]

Partnership effects belong to the partnership and not to the individuals. The right of each partner extends to a share of what may remain after payment of the debts of the firm and the settlement of its accounts. Included in this is the right to have partnership property applied to firm debts in preference to the debts of a partner. This right is an equity as between the partners, and enures to the benefit of creditors, who have a privilege or preference, sometimes loosely denominated a "lien," to have debts due them paid out of the assets of the firm in preference to creditors of its several members. This equity is a derivative one — not held or enforceable in their own right — but practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce the equity, the creditors of the firm cannot be.[5]

A partnership is dissolved by the death of a partner, but a member may by will authorize a continuance of the relation without subjecting his general assets to joint debts.[6]

If an executor consents to a continuance, his lien on

[1] Oppenheimer *v.* Clemmons, *ante*.

[2] Sun Ins. Co. *v.* Kountz Line, 122 U. S. 583, 593 (1887), cases, Harlan J.

[3] Fitzpatrick *v.* Flannagan, 106 U. S. 653 (1882), Matthews, J.; Emerson *v.* Senter, 118 *id.* 8 (1885).

[4] Story, Partn. § 54; Bigelow *v.* Elliott, 1 Cliff. 32-33 (1850). As to (4), see Thompson *v.* First Nat. Bank of Toledo, 111 U. S. 536 (1884); Sun Ins. Co. *v.* Kountz Line, *supra*.

[5] Buzard *v.* Bank of Greenville, 67 Tex. 89-92 (1886), cases.

[6] Mason *v.* Eldred, 6 Wall. 235-37 (1867), cases.

[1] Kimbro *v.* Bullitt, 22 How. 266-267 (1859), cases, Clifford, J.

[2] Thompson *v.* Bowman, 6 Wall. 317 (1867), Field, J.

[3] Shanks *v.* Klein, 104 U. S. 22-24 (1881), cases, Miller, J.; Davis *v.* Smith, 82 Ala. 202 (1886), cases; 9 Bened. 22; 14 F. R. 617; 87 Ind. 472; 29 Kan. 727; 100 Pa. 487.

[4] Story, Partn. § 372.

[5] Case *v.* Beauregard, 99 U. S. 124-25 (1878), cases, Strong, J.; Fitzpatrick *v.* Flannagan, 106 *id.* 655 (1882). On the effect of a deed by one partner, see 22 Am. Law Rev. 251-61 (1888), cases; as to admissions by one partner, 26 Cent. Law J. 490-98 (1888), cases. That a firm may transfer all assets to one creditor, there being no fraud in the intent, see 26 Am. Law Reg. 789-94 (1887), cases.

[6] Burwell *v.* Mandeville, 2 How. 576-77 (1844), cases; Smith *v.* Ayer, 101 U. S. 320 (1879); Jones *v.* Walker, 103 *id.* 444 (1880), cases.

after-acquired property will be postponed to that of creditors, in an equitable marshaling of assets.[1]

Accounts between partners are to be settled, in court, in one proceeding, by an action of account render or by a bill in equity. In the absence of an express agreement to pay, *assumpsit* will not lie to recover advances, until the accounts have been settled. The object is to avoid a multiplicity of suits.[2]

The practice in actions between partners for the settlement of their partnership matters is not uniform. In Massachusetts it is held that neither a settlement nor an express promise to pay need be proved on *assumpsit* for the balance; but the weight of authority is that, before one partner can sue for the recovery of money, an accounting must first be had.[3]

See further ADMISSION; AGENT; ASSOCIATION; CAPITAL, 2; COMPANY, 1; CONVERSION, 1; CONTRIBUTION; DELECTUS; DISSOLVE, 1; GOOD-WILL; JOINT; MINING; PROFITS; RECEIVER, 2.

PARTUS. L. That which is brought forth, or borne: offspring, young.

Partus sequitur patrem. The offspring follows the father,— the condition of the father. **Partus sequitur ventrem.** The offspring follows the mother.

The former rule prevails in determining the status of children born of a mother who is a citizen of the United States or of an Indian living with his people in a tribal relation. This was the principle of the Roman and of the common law with regard to the children of freemen. But in the case of animals the second maxim still obtains: the owner of the female owns her progeny — whether brood, foal, or litter. Formerly, also, in the Southern States, the children of negroes took the mother's condition.[4]

Where domestic animals are mortgaged during gestation, the offspring, when born, will, as between the immediate parties, be included as part of the security; but otherwise as to a *bona fide* purchaser or incumbrancer acquiring title or lien without notice of the facts and after the period of gestation has passed.[5]

PARTY. Compare CHARTER, 1, Party.

1. One who takes part in anything; a participant in an act, contract, or suit.

2. He or they by or against whom a suit is brought, whether at law or in equity; the party plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal persons.[1]

In legal instruments and proceedings, the common meaning is legal party.[2]

Others who may be affected by the writ indirectly or consequentially are "persons interested," not parties.[1]

Within the rule that parties having notice of the pendency of a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, "parties" includes all who are directly interested in the subject-matter, and who have a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. "Strangers" are such as do not possess these rights.[3]

Immediate parties. To a bill of exchange, drawer and acceptor, payee and drawee. **Remote parties.** Payee and acceptor, indorser and acceptor.[4]

Nominal or formal party. One who has no real interest in a suit, but is joined with another or others in conformity with some rule of law or practice. Opposed, *real or necessary party*.[5]

See, specially, decisions on next page.

Party and party. The contending parties in a suit; plaintiff and defendant, as distinguished from counsel and client. See COSTS.

Third party. A stranger to the act, contract, or suit in question. See JUS, Tertii.

As a contract is founded upon consent, there must be two or more parties to it; and, unless it is created by law, they must be: of sound mind, of legal age, and under no legal disability.

In equity proceedings, all persons who have a material interest in the subject of the litigation should be joined as parties, complainants or defendants.[6] But this rule, being founded in convenience, will yield whenever it is necessary to accomplish the ends of justice; as, where the court may proceed to a decree, and do justice to the parties before it, without injury to absent parties, equitably interested in the litigation, but who cannot conveniently be made parties.[7]

[1] Hoyt *v.* Sprague, 103 U. S. 624-26 (1880), cases. Notice of dissolution required, 21 Am. Law Rev. 418-30 (1887), cases; 24 Cent. Law J. 588 (1887), cases; 26 *id.* 567-71 (1888), cases.

[2] Leidy *v.* Messinger, 71 Pa. 177 (1872).

[3] Clarke *v.* Mills, 36 Kan. 397 (1887), cases.

[4] See generally 2 Bl. Com. 390; as to Indians, United States *v.* Sanders, 1 Hempst. 486 (1847); *Exp.* Reynolds, 5 Dill. 483 (1879); as to slaves, Andover *v.* Canton, 13 Mass. *551 (1816); Commonwealth *v.* Aves, 18 Pick. 229 (1836).

[5] Funk *v.* Paul, 64 Wis. 39-41 (1885), cases. See sheriff's sale of "mortgaged women" (slaves), with one child, at Natchez, Miss., in 1841, Fowler *v.* Merrill, 11 How. 375, 396 (1850).

[1] Merchants' Bank *v.* Cook, 4 Pick. 411 (1826), Parker, C. J.; Douglass *v.* Gardner, 63 Me. 464 (1874); Rupp *v.* Swineford, 40 Wis. 28 (1876); Treleaven *v.* Dixon, 119 Ill. 553 (1886).

[2] English *v.* Porter, 63 N. H. 215 (1884); *ib.* 295.

[3] Robbins *v.* City of Chicago, 4 Wall. 672 (1866), Clifford, J. See also 38 Cal. 640; 37 Ind. 333; 21 Me. 482; 41 Md. 369; 74 Mo. 238; 43 N. H. 57; 51 *id.* 71; 52 *id.* 162; 56 *id.* 74; 17 N. J. L. 433; 64 Pa. 245; 5 Sneed, 107.

[4] See Hoffman *v.* Bank of Milwaukee, 12 Wall. 191 (1870).

[5] See Deford *v.* Mehaffy, 14 F. R. 181-82 (1882), cases.

[6] Mechanics' Bank *v.* Seton, 1 Pet. *306 (1828).

[7] Payne *v.* Hook, 7 Wall. 431 (1868), Davis, J.

Where the parties are numerous and the suit is for an object common to all, some of them may maintain or defend a bill in equity for all.[1]

To a bill in equity there are three classes of parties: (1) Formal parties. (2) Persons having an interest in the controversy, and who ought to be made parties, that the court may act on the rule which requires it to finally determine the entire controversy and do complete justice, by adjusting all the rights involved in it. These are necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other parties not before the court, the latter are not indispensable parties. (3) Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.[2]

As to parties defendant, in particular, all whose interests will be affected by the decree sought must be before the court. If they cannot be reached by process, or do not voluntarily appear, or from a jurisdictional objection cannot be made parties, the bill must be dismissed.[3]

The exact distinction may be stated thus: (1) Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. (2) When a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party, if possible, and the court will not proceed to a decree without him if he can be reached. (3) Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be made a party or not at the option of the complainant.[4] But no proceeding will prejudice a party who cannot be found.[5]

See further ADJUDICATION, Former; AGGRIEVED; CALL, 3; CITATION, 2; CONTRACT; DEED, 2; DEFENDANT; JOINT AND SEVERAL; JURISDICTION, 2; NOTICE, 1, Judicial; PLAINTIFF; PRIVY, 2; TRUST, 1; WITNESS.

Party-wall. See WALL.

PASS. 1. To undergo an examination without being rejected: as, to pass an account.

To examine and approve: as, to pass a title.

2. To receive approval: as, for a bill, an act, a law, to pass one or both houses of legislation, and be signed by the Executive.[1]

An act of a legislature is "passed" only when it has gone through the forms necessary by the constitution to give it validity as a binding rule of conduct. Its passage dates from the time when it ceases to be a mere proposition or bill, and passes into a law.[1]

The reference may be to the time when the act is to take effect.[2] See ACT, 3.

3. To continue to another call or list: as, to pass a case.

4. To decide upon, to pronounce: as, for a jury to pass upon the weight of the testimony or the merits of a case, and for a court to pass upon a question of law, or to pass sentence upon a convicted offender.

5. To go from one person to another, to become transferred: as, in saying that a title passes by delivery of a deed or by descent, and that incidents pass with the principal. See DESCEND.

6. To put off in payment or exchange as money: as, to pass counterfeit or forged paper.

"Pass" a note may include utter, publish, and sell. "Utter and pass" includes any delivery for value, with intent that it shall be put into circulation as money.[3] Compare UTTER, 3.

Pass and repass. See TRAVEL.

PASS-BOOK. See BANK, 2 (2); DEPOSIT, 2.

PASSENGER. One who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as for the payment of fare or that which is accepted as an equivalent therefor.[4]

A mere trespasser, a person who steals a ride upon a railroad train, or who is employed thereon, is not a passenger.[4]

See BAGGAGE; CARRIER; COMMERCE; SALVAGE; TRAVEL; VESSEL, Merchant.

PASSIVE. See DECEIT; TRUST, 1. Compare ACTIVE.

PASSPORT. See SEA-LETTER.

[1] Smith *v.* Swormstedt, 16 How. 302 (1853), cases.

[2] Shields *v.* Barrow, 17 How. 139 (1854), Curtis, J.

[3] Ribon *v.* Railroad Companies, 16 Wall. 450 (1872), Swayne, J.

[4] Williams *v.* Bankhead, 19 Wall. 571 (1873), Bradley, J.; Payne *v.* Hook, 7 *id.* 431 (1868), Davis, J.; McArthur *v.* Scott, 113 U. S. 392 (1885); Conolly *v.* Wells, 32 F. R. 207-9 (1887), cases; Lynchburgh Iron Co. *v.* Taylor, 79 Va. 671 (1884).

[5] R. S. §§ 737-38, cases.

[1] Waterman *v.* Philadelphia, 33 Pa. 208 (1859), Black, C. J.; Chumasero *v.* Potts, 2 Monta. 235 (1875); 3 Heisk. 442; 1 Paine, 261.

[2] Charless *v.* Lamberson, 1 Iowa, 443 (1855).

[3] United States *v.* Nelson, 1 Abb. U. S. 135 (1867), cases; 3 Metc., Mass., 464; 4 Allen, 301; Baldw. 367.

[4] Pennsylvania R. Co. *v.* Price, 96 Pa. 267 (1880); s. c. 113 U. S. 218 (1885). See also Higley *v.* Gilmer, 3 Monta. 99 (1878); 24 Cent. Law J. 219 (1887), cases; 25 *id.* 51 (1887), cases; 139 Mass. 238, 542; Shearm. & Redf. Neg. § 262. As to rights of gratuitous passengers, see 20 Cent. Law J. 485-89 (1885), cases.

PATENT.[1] 1 (1) Open to inspection; not closed by sealing.

Grants by the king of lands, honors, liberties, franchises, etc., are contained in charters or letters-*patent*, that is, open letters: not sealed up, but exposed to view and addressed to his subjects at large. Other letters of the king, directed to particular persons, and for special purposes, not being proper for public inspection, are closed up and sealed on the outside: writs *close*, and recorded in the *close*-rolls, as others are in the *patent*-rolls.[2]

(2) Evident; apparent: as, a patent ambiguity, *q. v.*

2. By elision, equivalent to "letters-patent" (noted above, and, more at length, below) for a grant of public land or for a discovery, made by government, and constituting a "patent right."

A "patent" is a grant by the crown or government.[3]

Patentable, and **non-patentable** express, respectively, that letters-patent will or will not be issued for the thing in question — a discovery, or land.

Patentee. He to whom letters-patent have been granted or issued, in particular for a discovery. Compare GRANTEE, 2; LICENSEE, 2.

Patent for land. The instrument by which the government, State or national, passes its title to land; the government conveyance.

Of itself is evident of title because the government, being the original source of title, is presumed to have retained title until some other disposition is shown.[4]

It is the highest evidence of title, and conclusive as against the government and all persons claiming under junior patents or titles, until set aside or annulled by some judicial tribunal. . . A bill in chancery is the most convenient remedy to annul a patent; which may be done for fraud in the patentee, for mistake or want of authority in the officer, or because of a higher equity in another claimant.[5]

When a patent has been regularly signed, sealed, countersigned, and recorded, the patentee has a perfect right to its possession. His title is title by record; delivery of the instrument is not essential to pass the title: that ministerial duty can be enforced by *mandamus*.[6]

A patent, lawfully issued, cannot be collaterally impeached in a court of law. . . A patent from the United States is the conveyance by which the nation passes its title to portions of the public domain. That the provisions of the law may be properly carried out, a land department has been created to supervise the proceedings taken to obtain a title. The decisions of the officers of that department are conclusive except in direct proceedings for the correction or annulment of their acts.[1]

Lapsed patent. A patent which has become inoperative through neglect in the patentee.

Relates to the date of the original patent, and makes void all mesne conveyances.[2]

See more at length LAND, Public; PRE-EMPTION, 2; RELATION, 1.

Patent for a discovery or an invention. A public franchise granted to the inventor of a new and useful improvement to secure to him, for a limited term mentioned therein, the exclusive right to make, use, and vend the article or object, as tending to promote the progress of science and the useful arts, and as matter of compensation for the labor and expense in making and reducing the invention to practice for the public benefit.[3]

The grant of a patent is not the exercise of any prerogative to confer upon a subject the exclusive property in that which would otherwise be of common right. It more nearly resembles a contract which Congress may enter into to secure the inventor, for a limited time, the exclusive enjoyment of the practice of his invention, for disclosing his secret and relinquishing his invention to the public at the end of the term.[4]

"The Congress shall have Power . . To promote the Progress of Science and useful Arts, by securing for limited Times to . . Inventors the exclusive Right to their . . Discoveries."[5]

The most important laws passed in pursuance of this power are the acts of July 4, 1836, and July 8, 1870, each of which revised preceding legislation. The act of 1870, changed in its expressions and arrangement, and otherwise amended, was re-enacted in the Revised Statutes as sections 4883–4986.

The provisions of the acts may be thus summed up: Whoever discovers that a certain useful result will be produced, in any art, machine, manufacture, or composition of matter, by use of certain means, is entitled to a patent for it: provided he specifies the means in a

[1] The adj. is pronounced pā'-tent or păt'-ent; the noun, păt'-ent. F. *patent;* L. *patere*, to lie open.

[2] 2 Bl. Com. 346.

[3] See United States *v.* Schurz, 102 U. S. 397 (1880).

[4] Patterson *v.* Tatum, 3 Saw. 172 (1874), Field, J.; Hayner *v.* Stanly, 8 *id.* 221 (1882), Sawyer, Cir. J.

[5] United States *v.* Stone, 2 Wall. 535 (1864), Grier, J.

[6] United States *v.* Schurz, 102 U. S. 378, 392 (1880), Miller, J.

[1] St. Louis Smelting Co. *v.* Kemp, 104 U. S. 640 (1881), Field, J.; Mullan *v.* United States, 118 *id.* 278 (1886), cases; Maxwell Land-Grant Case, 121 *id.* 325, 381 (1887), cases.

[2] Wilcox *v.* Calloway, 1 Wash. 39 (Va., 1791).

[3] Seymour *v.* Osborne, 11 Wall. 533 (1870), Clifford, J.; Wilson *v.* Rousseau, 1 Blatch. 79 (1845).

[4] Attorney-General *v.* Rumford Chemical Works, 22 F. R. 617 (1876), Shepley, J.

[5] Constitution, Art. I, sec. 8, cl. 8.

manner so full and exact that any one skilled in the science to which it appertains can, by using the means specified, without any addition to or subtraction from them, produce precisely the result described. If this cannot be done by the means described, the patent is void. If it can be done, then the patent confers on the patentee the exclusive right to use those means to produce the result or effect he specifies, and nothing more. It makes no difference whether the effect is produced by chemical agency or combination, or by the application of discoveries or principles in natural philosophy known or unknown before his invention, or by machinery acting together upon mechanical principles. In any case, he must describe the manner and process as above mentioned, and the end it accomplishes. And any one may lawfully accomplish the same end, without infringing the patent, if he uses means substantially different from those described.[1] That clear and exact summary of the law affords a key to almost every case that can arise. Everything turns upon the force of the word "means" as there used. The means need not be a machine, or an apparatus: it may be a process.[2]

A patent-right confers a temporary monopoly (*q. v.*), but the benefit to the public is the primary object. This benefit is the equivalent for the labor of the patentee. Hence, the inventor who withholds his invention from the public, to be used solely by himself, will not be aided.[3] And the inventor who suffers his invention to be in public use or on sale two years before applying for a patent forfeits his right.[4] It is not necessary that more than one of the articles be publicly used. If the inventor, having made his device, gives or sells it to another, to be used by the donee or vendee without limitation or restriction or injunction of secrecy, and it is so used, such use is "public," even though the knowledge of the use is confined to that one person. But a use necessarily open to public view, if made solely to test the qualities of the invention, and for experiment, is not a public use.[5]

A patentee cannot be permitted to use for profit a machine which embodies a perfected invention for a period of two years or more, and then obtain a valid patent for the old machine by means of the addition of some new improvement intended, perhaps, to benefit the inventor, rather than the machine.[6]

The act of March 3, 1839, § 7, did not require that, to invalidate a patent, the public use or sale for the two years, should have been with the consent of the patentee.[7]

A patentable invention is a mental result. It must be new and of practical utility. Then, everything within the domain of the conception belongs to him who conceived it. The machine, process, or product is but its material reflex and embodiment.[1]

Crude and imperfect experiments are not sufficient to confer a right to a patent. The applicant must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form. He is the first inventor, and entitled to a patent, who first perfected and adapted the same to use.[2]

Such a thing, for example, as a bundle of kindling wood and a fire lighter is not patentable.[3]

It is not the object of the laws to grant a monopoly for every trifling device which would naturally and spontaneously occur to any skilled mechanic or operator, in the ordinary progress of manufactures.[4]

The design of the laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and marks a step in advance in the useful arts.[5]

An earlier published description, to invalidate a patent, must exhibit the later intervention in such a full and intelligible manner as to enable persons skilled in the particular art to comprehend it without assistance from the patent, or to make it, or to repeat the process.[6]

The patentee must be the first inventor in this country. Foreign use will not affect his right, and a foreign patent will only limit his term to seventeen years from the date or publication of the foreign patent.[7]

A patent is to receive a liberal construction, so as to uphold, and not destroy, the right of the inventor.[8]

The circuit courts, and district courts with circuit court powers, have original jurisdiction in suits respecting patents.[9]

The Federal courts have exclusive cognizance of such suits only as directly involve the validity or the infringement of a patent.[10]

A patentee, for an infringement, may seek remedy at law or in equity.[11]

[1] O'Reilly *v.* Morse, 15 How. 119 (1853), Taney, C. J.

[2] Tilghman *v.* Proctor, 102 U. S. 728 (1880), Bradley, J. See also R. S. §§ 4889, 4891.

[3] Kendall *v.* Winsor, 21 How. 328 (1858), Daniel, J.

[4] R. S. § 4886, cases.

[5] Egbert *v.* Lippmann, 104 U. S. 336 (1881), cases, Woods, J.; Worley *v.* Tobacco Co., *ib.* 340 (1881); Emery *v.* Cavanagh, 17 F. R. 243 (1883), cases.

[6] The Driven-Well Cases (Andrews *v.* Hovey), 123 U. S. 267 (1887), Blatchford, J., affirming 5 McCrary, 181, 16 F. R. 387; Andrews *v.* Hovey, 124 U. S. 694 (1888).

[7] Smith & Griggs Manuf. Co. *v.* Sprague, 123 U. S. 257 (1887), cases, Matthews, J.

[1] Smith *v.* Nichols, 21 Wall. 118 (1874), Swayne, J.

[2] Seymour *v.* Osborne, 11 Wall. 552 (1870), cases, Clifford, J.

[3] Alcott *v.* Young, 16 Blatch. 134, 138 (1879), cases.

[4] Thompson *v.* Boisselier, 114 U. S. 12 (1885), cases, Blatchford, J.

[5] Atlantic Works *v.* Brady, 107 U. S. 200 (1882), Bradley, J.; 111 *id.* 608; 112 *id.* 59.

[6] Downton *v.* Yeager Milling Co., 108 U. S. 471 (1883), cases, Woods, J.; Seymour *v.* Osborne, 11 Wall. 555 (1870); Cohn *v.* United States Corset Co., 93 U. S. 370 (1876); Eams *v.* Andrews, 122 *id.* 66 (1887).

[7] Cornely *v.* Marckwald, 17 F. R. 83 (1883); De Florez *v.* Raynolds, 17 Blatch. 436 (1880); Siemens *v.* Sellers, 123 U. S. 276 (1887), "Siemens' regenerator furnace."

[8] Turrill *v.* Michigan Southern, &c. R. Co., 1 Wall. 510 (1863); White *v.* Dunbar, 119 U. S. 51 (1886), cases; 3 Sumn. 520; 58 N. H. 351.

[9] R. S. § 629.

[10] Satterthwait *v.* Marshall, 4 Del. Ch. 348 (1872); Dale Tile Manuf. Co. *v.* Hyatt, 125 U. S. 46 (1888), cases; 3 McLean, 523; 58 Pa. 155.

[11] R. S. § 4920.

In the absence of a specific statute, the United States cannot maintain a bill in equity to cancel a patent.[1]

Letters-patent are *prima facie* evidence that the patentee is the first and original inventor.

A bill in equity for a naked account of profits and damages against an infringer cannot be sustained. Such relief, ordinarily, is incidental to some other equity, the right to enforce which secures to the patentee his standing in court. The most general ground for equitable interposition is, to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement; but grounds of equitable relief may arise, other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; and such an equity may arise out of, and inhere in, the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate, and incomplete; and as such cases cannot be defined more exactly, each must rest upon its own particular circumstances, as furnishing a clear and satisfactory ground of exception from the general rule.[2]

A person who marks upon any unpatented article the word "patented" or its equivalent, for the purpose of deceiving the public, is liable, for each offense, to a penalty of not less than one hundred dollars, with costs.[3] The plaintiff must allege an intention to affix a stamp or plate indicating a present subsisting patent. It is not an offense to give the date of a patent which has expired.[4]

State laws making void notes given in consideration of a patent-right unless the words "given for a patent-right" are prominently written upon the face of the note, have generally been held to be unconstitutional, on the ground that property in inventions exists by virtue of laws of Congress, and no State may annex conditions to the grant or otherwise interfere with its unrestricted enjoyment.[5]

A legislature may enact a statute which has the effect to pass title to letters-patent to the assignee of an insolvent.[6]

Patent office. The bureau or office from which letters-patent issue, in which assignments thereof are noted, and other records appertaining to patents made and preserved.

The responsible head is the *commissioner of patents*, whose office was created by the act of July 4, 1836. In theory, he is to issue no patent which may not be sustained by the courts, as both novel and useful. Under that act he was allowed a clerk to assist him in making the necessary examinations under applications. Since the act of 1870, there have been, besides the commissioner and assistant commissioner, three examiners in chief, a chief clerk, an examiner in charge of interferences, twenty-two principal examiners, twenty-two first and twenty-two second assistant examiners.[1]

All patents shall be issued in the name of the United States of America, under the seal of the patent office, and shall be signed by the secretary of the interior or under his direction by one of the assistant secretaries of the interior, and countersigned by the commissioner of patents, and they shall be recorded, together with the specifications, in the patent office, in books to be kept for that purpose.[2]

The secretary of the interior has no power to revise the action of the commissioner in awarding priority of invention to an applicant for a patent, such action being quasi-judicial. After determining that a patent shall issue, the commissioner acts ministerially in preparing the patent for the signature of the secretary, and in countersigning it. A *mandamus* will lie to compel the performance of these duties.[3]

As against the patentee himself, an assignment need not be recorded, to retain validity; but as respects a subsequent purchaser without notice and for a valuable consideration, a prior assignment must be recorded within three months. And as against a third person, a suit may be maintained by an assignee provided he records his assignment before the trial or hearing.[4]

See ABANDON, 1; ART, 1; CAVEAT; COMBINATION, 1; COMPOSITION, 2; DAMAGES; DEDICATION, 2; DELIVERY, 1; DESIGN, 1; DISCLAIMER, 3; DISCOVERY, 2; EQUIVALENT, 2; EXTENSION; INFRINGEMENT; INTERFERENCE; INVENTION; ISSUE, 1, Re-issue; MACHINE; MANUFACTURE; MODEL; NEW, 1; NOVELTY; PRINCIPLE, 2; PROCESS, 3; PROFIT, 2; RESIDUUM, 2; SURRENDER; TELEPHONE CASE; TRADE-MARK; USE, 1, Useful.

PATER. L. Father. Compare PARTUS. Has been used in genealogical tables.

Pater est quem nuptiæ demonstrant. The nuptials show who is the father. The marriage of the mother declares the paternity of the child.

At common law, the nuptials must precede the birth of the child; in the civil law, they may precede or follow.[5]

[1] United States *v.* American Bell Telephone Co., 32 F. R. 591 (1887), Colt, J.; Attorney-General *v.* Rumford Chemical Works, *ib.* 608 (1876), Shepley, J. The former case was argued on error, before the Supreme Court in October, 1888, and reversed: *post*, 1016.

[2] Root *v.* Lake Shore, &c. R. Co., 105 U. S. 189 (1881), cases, Matthews, J.

[3] [R. S. § 4901. See Pentlarge *v.* Kirby, 19 F. R. 501 (1884); *ib.* 507.

[4] Wilson *v.* Singer Manuf. Co., 11 Biss. 298 (1882), Drummond, J.; s. c. 12 F. R. 59.

[5] See *Exp.* Robinson, 2 Biss. 309 (1870); Cranson *v.* Smith, 37 Mich. 309 (1877); 43 Ind. 167; 53 *id.* 454; 54 *id.* 290; 70 Ill. 109; 4 Bush, 311; 25 Ohio St. 26; 18 Pa. 465; 86 *id.* 173; 23 Minn. 24.

[6] Barton *v.* White, 144 Mass. 281 (1887).

[1] R. S. §§ 476, *et seq.*

[2] Act 18 Feb. 1888 (25 St. L. 40), amending R. S. § 4883.

[3] Butterworth *v.* Hoe, 112 U. S. 50 (1884), Matthews, J.

[4] See Curtis, Pat. 183; 20 Am. Law Rev. 708-12 (1886), cases; 1 Story, 273; 2 *id.* 542, 609; 2 Blatch. 148; 7 *id.* 193.

[5] 1 Bl. Com. 446, 454-56; The King *v.* Luffe, 8 East, 193 (1807).

Paterfamilias. The father (head) of a family; one not subject to paternal power, but *sui juris*.

In the Roman law, a *paterfamilias* was one who either had no father living or had been emancipated from his power. A man who had neither wife nor child was in this position or status. But a man with a wife and child was a *filiusfamilias*, if subject to the family control of a living father — the *patria potestas*,[1] q. v.

Pater patriæ. Father of the country. See PARENS.

PATERNAL. See LINE, 8.

PATERNITY. See BASTARD; FILIATION; PATER.

PATIENT. See COMMUNICATION, Confidential, 1; PHYSICIAN.

PATRIA. L. 1. Belonging to a father; paternal.

Patria potestas. Paternal authority: the power which, under Roman law, the head of a family (*paterfamilias*) had over that family.

Continued to the close of the father's life; included his own children, the children of his sons and of his sons' sons. Did not include the children of a daughter: these belonged to a different family, the family of their own father.

Originally, and for a long time, had a terribly despotic power. Not only was the father entitled to all the service and acquisitions of his child, as much as those of a slave, but he had the same absolute control over his person. He could sell him into *mancipium*, a status analogous to slavery. Down to the Christian era, the father had the *jus vitæ et necis*, the right to take the life of the child. The reasons which caused the Romans to accept and tenaciously uphold the *patria potestas* must have been the profound impression of family unity, the conviction that every family was, and of right ought to be, one body, with one will and one executive. The English common law gave the husband a power not much less over his wife, and upon the similar idea of a natural normal unity of the married pair.[2]

2. Fatherland (*terra* being understood); country.

Nemo potest exuere patriam. No one may leave the kingdom. No subject can expatriate himself,— the English doctrine.[3] See EXPATRIATION.

Parens patriæ. Parent, father, of the kingdom or country. See PARENS.

PATRICIDE. See HOMICIDE.

[1] Hadley, Roman Law, 107, 119.

[2] Hadley, Roman Law, 119-122, 130, 140. See also Maine, Ancient Law, 130-141; 1 Bl. Com. 452, 444; Mackeldey, Rom. Law, § 589.

[3] See 3 Kent, 44-50; 9 Op. Att.-Gen. 356; 3 Dallas, 145; 1 Shars. Bl. Com. 370, note.

PATRIMONY. Property received from one's father, or ancestors. Whence patrimonial. See DESCENT.

PATRONIZE. To act as a patron toward.[1]

The patrons of a house of ill-fame cannot be said to be those who are occupied in the house or about the premises.[1]

PATTERN. See DESIGN, 2; MODEL.

PAUPER. 1. L. *adj.* Providing little: having little; indigent, needy, poor.

In forma pauperis. In the character of a poor man; as a poor suitor.

"Paupers, or such as will swear themselves not worth five pounds, are to have original writs and subpœnas *gratis*, and counsel and attorney assigned them without fee, and are excused from paying costs when plaintiff."[2]

In admiralty practice, an exception is made in favor of seamen, by Rule 45, in consideration of their necessitous condition, and their presumptive inability to give the ordinary security required of libelants. This is a result of the protection afforded them as wards of the admiralty. It is in conformity with the ancient usage, which, as in the practice in common-law actions permitting suits *in forma pauperis*, dispensed with sureties in suits by poor persons, and allowed, instead, a juratory caution, which is now rarely used.[3]

The "pauper act" is concerned with liability; the "non-resident act" with security.[4]

Dispauper. To deprive of the privilege of suing *in forma pauperis*, from subsequent acquisition of property, or other cause.

2. Eng. *n.* One who receives aid and assistance from the public, under the laws for the support and maintenance of the poor.[5]

May designate a poor and indigent person standing in need of relief, a poor person likely to become chargeable, as well as a poor person who has actually received support from the town.[6]

See POOR; VAGRANT; COMMERCE; INSPECTION, 1.

PAVE. To cover with stones, brick, or other suitable material, so as to make a level or convenient surface for horses, carriages, or foot-passengers.[7]

Re-flagging may be "re-paving."[7]

[1] Raymond *v.* People, 9 Bradw. 345 (1881).

[2] 3 Bl. Com. 400.

[3] The Georgeanna, 31 F. R. 406 (1887), Brown, J. See also, generally, Bradford *v.* Bradford, 2 Flip. 280, 283 (1878), cases, Hammond, J.

[4] Heckman *v.* Mackey, 32 F. R. 575 (1887), Lacombe, J.

[5] [Opinion of the Justices, 11 Pick. 540 (1832); Wilson *v.* Brooks, 14 *id.* 343 (1833); 124 Mass. 597.

[6] Walbridge *v.* Walbridge, 46 Vt. 625 (1874), Peck, C. J. See also 30 Ark. 768; 49 Ill. 186; 59 Iowa, 208; 3 Pittsb. 133.

[7] Matter of Phillips, 60 N. Y. 23 (1875), Allen, J.

Power to pave a street may include, as not unusual, macadamizing and making gutters; [1] also raising and lowering parts of the street.[2]

But an order to grade a street does not authorize macadamizing it.[3] See REPAIR, 2; SIDEWALK.

PAWN.[4] *v.* To deliver plate or jewels [or other personalty] as a pledge or security for the repayment of money lent thereon at a day certain.[5]

n. A bailment of goods to a creditor, to be kept till the debt is discharged.[6]

Pawnee; pawnor. The pledgee, and pledgor, respectively, in a contract of pawning. Pawner is common.

Pawnbroker. Any person whose business or occupation it is to take or receive, by way of pledge, pawn, or exchange, any goods, wares, or merchandise, or any kind of personal property whatever, as security for the repayment of money lent lent thereon.[7]

In Illinois, "every person or company engaged in the business of receiving property in pledge, or as security for money or other thing advanced to the pawnor or pledgor."

An occasional loan does not constitute a person, under that provision, a pawnbroker: he must so engage in the occupation that it may be known as his regular business; and the advances must be upon articles of personalty.[8]

The pledgor and pledgee have each a qualified property in the goods: the pledgor's property is conditional, depending upon the performance of the condition for repayment, etc.; and so likewise is the property of the pledgee, which depends upon its nonperformance.[9]

By the common law, a pawnbroker cannot retain goods illegally pawned, *e. g.*, goods stolen; nor can the purchaser from him retain them as against the rightful owner.

At common law, the rights of a pawnbroker are the rights of an ordinary pledgee; but, owing to abuses, legislatures seek to control the business by special statutory regulations. See PLEDGE.

[1] Warren *v.* Henly, 31 Iowa, 36 (1870).

[2] Smith *v.* Corporation of Washington, 20 How. 147 (1857); Hooe *v.* Mayor of Alexandria, 1 Cranch, C. C. 98 (1802).

[3] State *v.* District Court of Ramsey Co., 33 Minn. 164 (1885).

[4] F. *pan*, gown, skirt, pane: L. *pannus*, cloth. The readiest pledge was clothing,— Skeat.

[5] [2 Bl. Com. 452.

[6] See Coggs *v.* Bernard, 2 Ld. Ray. 913 (1702); Johnson *v.* Smith, 11 Humph. 396 (1850); Surber *v.* McClintic, 10 W. Va. 242 (1877).

[7] Revenue Act, 13 July, 1869, § 9: 14 St. L. 116.

[8] City of Chicago *v.* Hulbert, 118 Ill. 636 (1886).

[9] 2 Bl. Com. 396.

PAY.[1] *v.* To discharge an obligation by a performance according to its terms or requirements, whether the obligation be for money, merchandise, or services.[2]

To deliver to a creditor the value of a debt, in either money or goods, to his acceptance, by which the debt is discharged.[3]

n. Money, other property, or services, accepted in discharge of an obligation: as, an amount given to a person in the military service, in consideration of personal service.[4] See FIX, 3.

Payable. Dischargeable by delivery of an equivalent in value, usually in money; also, due in present time, matured. See DUE.

Payee. He to whom payment has been or is to be made. **Payer.** He who makes or ought to make payment. Payor is rare.

Payee refers, in particular, to the person in whose favor a bill of exchange, check, or draft is drawn.

Repay. May be synonymous with "restore." [5]

Unpaid. Is more commonly applied to a debt due than to a debt undue.[6]

Payment. 1. Delivery by a debtor to his creditor of the amount due.[7] Opposed, *non-payment.*

That is payment which the parties contract shall be accepted as payment. It may be made in something else than money.[8]

Originally, the performance of a promise to pay money, at the time and in the manner required by the terms of the contract; but has been extended to include the delivery of money in satisfaction of a debt after default made in paying according to the contract.[9]

If a commodity, like wood, is accepted, upon a note for money, in pursuance of a subsequent agreement, the transaction constitutes an "accord and satisfaction."[9]

Implies a voluntary act by the debtor looking to the satisfaction, in whole or in part, of the demand.[10]

[1] F. *paier*, *payer*, to content: L. *pacere*, to pacify, appease.

[2] Tolman *v.* Manufacturers' Ins. Co., 1 Cush. 76 (1848), Forbes, J.

[3] [Beals *v.* Home Ins. Co., 36 N. Y. 527 (1867), Hunt, J.; 15 Barb. 274.

[4] See Sherburne *v.* United States, 16 Ct. Cl. 496 (1880).

[5] Dunnegan *v.* United States, 17 Ct. Cl. 258 (1881).

[6] Sloane *v.* Anderson, 57 Wis. 133 (1883).

[7] [Bronson *v.* Rodes, 7 Wall. 250 (1868), Chase, C. J.

[8] Huffmans *v.* Walker, 26 Gratt. 316 (1875).

[9] Ulsch *v.* Muller, 143 Mass. 379 (1887), Field, J.

[10] Detroit, &c. R. Co. *v.* Smith, 50 Mich. 113 (1883); Bradford Academy *v.* Grover, 55 Vt. 465 (1883). See

2. As a plea, money or its equivalent in value.

In Pennsylvania, the courts of law, from a time antedating 1770, have exercised chancery powers upon a plea of "payment, with leave, etc." This plea, after notice of the special matter proposed to be offered by way of defense, enables the defendant to give evidence of anything which will prove that in equity and good conscience the plaintiff is not entitled to recover. The notice is considered as, in effect, a bill in equity; and the plea and the notice operate substantially as a bill of injunction. The defendant's equity is administered through the medium of a jury.[1]

Involuntary or *compulsory payment.* A payment made under compulsion, coercion, or duress. *Voluntary payment.* A payment made from choice.

A voluntary payment is made by the debtor on his own motion, without compulsory process.

A payment made upon execution is not, therefore, a voluntary payment.[2]

The coercion or duress which will render a payment involuntary must in general consist of some actual or threatened exercise of power possessed, or believed to be possessed, by the person exacting or receiving the payment, over the person or property of another, from which the latter has no other means of immediate relief than by making payment.[3]

An action does not lie to recover money claimed without right, if the payment was made voluntarily, and with full knowledge of the facts upon which the claim was predicated. It is not enough that the payment was made under protest. To authorize a recovery, the payment must have been compulsory, that is, made under coercion, actual or legal. A payment made to prevent a seizure of property which can only take place by legal proceeding, in which the defendant may defend, is voluntary.[4]

Where a party pays an illegal demand with knowledge of the facts which render it illegal, without immediate and urgent necessity therefor, and not to release from detention nor to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered. Filing a written protest cannot make a payment involuntary.[1]

That is a correct statement of the rule at common law. Cases may be found in which the language of the court, separated from the facts, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to other attending circumstances.[2]

It suffices if the payment, caused on the one part by an illegal demand, is made on the other part reluctantly, and in consequence of that illegality, and without the person being able to regain possession of his property except by submitting to the payment.[3]

See further DURESS; EXTORTION; PROTEST, 1; REVENUE; TAX, 2.

Non-payment. See PROTEST, 2.

Part payment. The part payment of a debt which will take a case out of the statute of limitations means the payment of a smaller sum on account of a larger sum due.

Payment of part of an outlawed debt implies an admission that the balance is still due and a promise to pay it. The act of payment on account takes the case out of the statute.[4]

The principle is that the payer intends to acknowledge the greater debt to be still due.[5]

Oral agreements are competent to prove that a payment of money, the delivery of a note, the settlement of accounts, or the assuming of an obligation of a pecuniary nature, are, as between the parties, payments on account or in reduction of a note or other debt within the meaning of the statute.[6]

Nothing can justly be considered as payment in fact but that which is in truth such, unless something else is expressly agreed to be received in its place.[7]

In ordinary transactions, a check on a bank, payable on demand, is payment. But a note of the debtor, or of a third party, is not a payment of a precedent debt, unless specially agreed to.[8]

By the general commercial law, a promissory note

also 2 La. An. 26; 23 Mo. 285; 3 Duer, 441; 19 Barb. 15; 6 Heisk. 135; 12 W. Va. 780.

[1] Hawk *v.* Geddis, 16 S. & R. *28 (1827); 1 Rawle, 304; 9 Pa. St. 123; 11 S. & R. *190; 94 N. Y. 333; 2 Greenl. Ev. §§ 516–36.

[2] [Nichols *v.* Knowles, 3 McCrary, 478 (1882), McCrary, Judge.

[3] Brumagim *v.* Tillinghast, 18 Cal. 272 (1861), Field, C. J.; Radich *v.* Hutchins, 95 U. S. 210 (1877), Field, J.

[4] Oceanic Steam Navigation Co. *v.* Tappan, 16 Blatch. 297–302 (1879), cases, Wallace, J.; Nichols *v.* United States, 7 Wall. 128 (1868), cases.

[1] Wabaunsee County *v.* Commissioners, 8 Kan. 436 (1871), cases, Valentine, J.

[2] Union Pacific R. Co. *v.* Commissioners, 98 U. S. 544, 543 (1878), cases, Waite, C. J.

[3] Swift Co. *v.* United States, 111 U. S. 29 (1884), cases, Matthews, J., quoting Maxwell *v.* Griswold, 10 How. 256 (1850), Woodbury, J. See also Maxwell *v.* San Luis Opispo County, 71 Cal. 466 (1886); 18 Cent. Law J. 188–90 (1884), cases; 20 *id.* 224–28 (1885), cases; 20 Cent. Law J. (1885), cases; 68 Ga. 122; 74 Me. 84; 100 Pa. 346; 101 *id.* 255–57. As to recovery of money paid under a mistake of fact, see 1 Harv. Law Rev. 211–22 (1887), cases.

[4] Waters *v.* Tompkins, 2 Crompt., M. & R. *726 (1835), Parke, B.

[5] United States *v.* Wilder, 13 Wall. 256 (1871).

[6] Blanchard *v.* Blanchard, 122 Mass. 562 (1877), cases, Endicott, J.; Taylor *v.* Foster, 132 Mass. 33 (1882), cases; 6 Col. 589; 29 Minn. 174; 91 N. Y. 210; 37 Hun, 97; 22 N. H. 219; 28 Eng. L. & E. 454.

[7] The Kimball, 3 Wall. 45 (1865).

[8] Downey *v.* Hicks, 14 How. 249 (1852).

does not extinguish the debt for which it is given, unless that be the express agreement; it merely extends the period for payment of the debt. Acceptance of the note is considered as accompanied with the condition of its payment.[1]

Demand of payment of commercial paper must be made on the maker or acceptor personally at his place of business or dwelling. Neither bankruptcy nor death will excuse a neglect. The holder is the proper person to make the demand, but the law makes a notary public his agent. What the notary does must appear distinctly in his protest.[2]

See APPLICATION, 2; ASSUMPSIT; DEBT; DEFER; DEMAND, 2; GRACE; NEGOTIABLE; PLACE, 1; REIMBURSE; TENDER, 1, Legal.

Payment into court. When the defendant in an action for a certain sum of money admits that a part of the sum is due, he may plead "payment of money into court," thereby stating that he brings a sum into court ready to be paid the plaintiff who has no claim to a larger amount.

The plea is accompanied by actual payment of the admitted sum to the proper officer of the court, for the plaintiff. Should the plaintiff not accept the same, but proceed with the action and fail to prove that a larger sum is due, he pays the costs accruing since the tender was perfected.

When a debtor, before suit is brought, tenders a certain sum in lawful tender, absolutely and without condition, to his creditor, which sum is refused, after suit brought he will be relieved from paying interest from the date of the tender, and from paying costs, if the plaintiff recovers no more than the sum tendered. But, if the tender be made pending the suit, it cannot avail, unless the defendant follows it up with an offer to pay the money into court, or submit to a judgment for the admitted sum.[3]

A species of confession of action; and necessary, for the most part, upon pleading a tender,— is itself a kind of tender. The accrued costs are also to be paid into court. All may be done by a motion.[4]

Admits a special contract, sued on. Beyond the sum brought in, is no acknowledgment. Does not waive the benefit of a defense, though that be to the whole claim. After non-acceptance, the case goes on as if no money had been proffered.[5]

PEACE.[6] A state of quiet or tranquillity; freedom from disturbance, or agitation; calm; repose.[7]

The tranquillity enjoyed by a political society, internally by the good order which reigns among its members, externally by the good understanding it has with other nations.[1]

1. Good conduct, public order and decorum, within a community.

"The common law hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society."[2]

Offenses against the public peace are: threatening, or demanding any valuable thing, by letter; affrays; riots, routs, unlawful assemblies; forcible entry and detainer; going unusually armed; spreading false news; challenges to fight; libels. All criminal offenses are against the peace, and are so laid in indictments.[3]

Articles of the peace. Complaint on oath to a magistrate of reasonable fear of harm to self or property from what another threatens; "articles to keep the peace."

The accused gives security to appear at the next quarter sessions, and, meanwhile, to keep the peace toward all persons. He may except to the complaint for insufficiency; and, by affidavits, he may reduce the amount of bail demanded; but he cannot, by affidavit, controvert the allegations in the articles. Such articles are included within "surety for good behavior;" which may be required of any person suspected to be not of good fame, even of an acquitted prisoner.[4]

Bill of peace. A bill brought by a person to establish and perpetuate a right which he claims, and which, from its nature, may be controverted by different persons, at different times, and by different actions; or, where separate attempts have already been unsuccessfully made to overthrow the same right, and justice requires that the party should be quieted in the right, if it is already sufficiently established, or if it should be sufficiently established under the direction of the court.[5]

The design is to secure repose from perpetual litigation. Equity suppresses useless litigation and prevents multiplicity of suits.[6] Compare QUIA, Timet; QUIET, 2.

Breach of the peace. An act of assault or violence.

A violation of public order; the offense of disturbing the public peace.

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[1] The Kimball, *ante;* 8 Conn. 472; 37 *id.* 559.

[2] Musson *v.* Lake, 4 How. 274-75 (1846), cases. As to presumptions of payment, see 30 Alb. Law J. 84-88, 103-8, 124-27 (1884), cases.

[3] Coghlan *v.* South Carolina R. Co., 32 F. R. 316 (1887), cases, Simonton, J.

[4] 3 Bl. Com. 304.

[5] Elliott *v.* Lycoming County Mut. Ins. Co., 66 Pa. 87 (1870): 1 Tidd, Pr. 624-25; 100 U. S. 673.

[6] L. *pax, pacem,* compact: *pacere,* to agree.

[7] Webster's Dict.

[1] [Bouvier's Law Dict.

[2] 4 Bl. Com. 349.

[3] 4 Bl. Com. 142-52, 268. The king's peace, 1 Law Q. Rev. 35-50 (1885).

[4] 4 Bl. Com. 251; 10 Pa. 389; 13 East, 171.

[5] 2 Story, Eq. § 853; Eldridge *v.* Hill, 2 Johns. Ch. 282 (1816); Alexander *v.* Pendleton, 8 Cranch, 468 (1814); Holland *v.* Challen, 101 U. S. 19-20 (1884), cases; 1 Pomeroy, Eq. § 246.

The term, which is generic, includes unlawful assemblies, riots, affrays, forcible entry and detainer, the wanton discharge of fire-arms near a sick person, sending challenges and provoking to fight, going armed in public without lawful cause, to the alarm of the public, and other acts of a similar character. The offense is committed in the presence of an officer, though at some distance from him and in the dark, if he can detect the act, and could see the person doing it if it were light.[1]

Court of quarter sessions of the peace. See SESSION, Quarter Sessions.

Justice of the peace. An officer originally appointed under the common law to maintain the public peace. An inferior judicial officer with jurisdiction to determine minor statutory controversies, and to commit offenders on criminal complaints.

Some justices have their power to maintain the peace annexed to other offices which they hold; and others have, or had, it merely by itself, and were thence named *custodes* or *conservatores pacis*. Those that were so *virtute officii* still continue; but the latter sort are superseded by the modern justices. The sovereign is the principal conservator of the peace; hence it is called the "king's peace." The lord chancellor and the justices of the king's bench (by virtue of office) are general conservators of the peace, and may commit all breakers of it, or bind them to keep it: other judges are only so in their own courts. The coroner is also a conservator of the peace; and so are sheriffs and constables.[2]

Their common-law powers relate exclusively to matters affecting the public peace, and to the arrest and punishment of wrong-doers; the extent of their jurisdiction in the trial and punishment of offenders is regulated by local statutes.[3]

They have no civil jurisdiction at common law.[4]

See ARREST, 2; BEHAVIOR; BRAWL; CONSTABLE; CONTEMPT, 1; MAGISTRATE; NIGHT-WALKERS; PAPER, 6; SHERIFF; SUMMARY.

2. The reverse of war; that state in which every one quietly enjoys his rights, or, if controverted, amicably discusses them by force of argument.[5]

A peace between states lately belligerent is a return to a state of amity and intercourse, implying no intention to recommence hostilities. It implies that redress of wrongs has been obtained, or that the intention is renounced of seeking to obtain redress. The first agreements are called preliminaries, and a peace at this stage is a "preliminary peace" in contrast with the "definitive peace."[1]

Articles of peace. The preliminary articles between Great Britain and the American Colonies were signed November 30, 1782, and the definitive treaty at Paris, September 3, 1783.[2]

PEAS. See GRAIN.

PECULATION.[3] Appropriation of public money or goods; embezzlement of public funds.

One of the purposes of the New York act of 1875, c. 19, as the word "peculation" in its title indicates, and perhaps its primary purpose, is to afford additional security against the betrayal of official trusts by imposing severer punishment for embezzlements, or other frauds by public officers in misapplying public property, than was provided by existing laws.[4]

PECUNIARY.[5] Pertaining to money; monetary.

A pecuniary loss is of money or of something by which money, or a thing of money value, may be acquired.[6]

In Rhode Island, a divorce may be had from a husband who, without cause, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for his wife, he being of "sufficient pecuniary ability" to make such provision. The reference is to the possession of means in property to provide the necessary maintenance, not to capacity for acquiring such means by labor.[7]

See CIRCUMSTANCES, 2; CONSIDERATION, 2; INTEREST, 1; MONEY; RESPONSIBLE.

PEDDLER. Originally, a foot-trader; by custom, a person who travels from place to place, and carries about with him on his back, on horseback, or in a vehicle, articles of merchandise for sale.[8]

One who deals in small or petty things; as, one who goes from house to house selling milk in small quantities.[9]

A dealer who supplies the same customers, regularly and continuously, may be a peddler; as, a butcher who delivers meat from a wagon.[10]

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[1] People *v.* Bartz, 53 Mich. 495 (1884), Champlin, J.; Galvin *v.* State, 6 Coldw. 294 (1869); City of Corvallis *v.* Carlile, 10 Oreg. 142 (1882).

[2] 1 Bl. Com. 349.

[3] Wenzler *v.* People, 58 N. Y. 530 (1874); Allbright *v.* Lapp, 26 Pa. 101 (1856); Way's Case, 41 Mich. 303 (1879); 15 Ill. 391; 4 Kan. Law J. 113, 128 (1886) — Chicago Leg. Adv.

[4] Dunnagan *v.* Shaffer, 48 Ark. 477 (1886), cases.

[5] [Vattel, Law of Nations, b. 4, § 1, *490.

[1] Woolsey, Int. Law, 5 ed. § 158.

[2] As to the effect of the treaty upon citizenship, see Shanks *v.* Dupont, 3 Pet. *247 (1830).

[3] L. *peculari*, to appropriate to one's own use: *peculium*, private property.

[4] Bork *v.* People, 91 N. Y. 16 (1883). See 4 Bl. Com 122.

[5] L. *pecunia*, property: *pecua*, *pecus*, cattle. See Webster's Dict.; 5 Binn. *244. Compare CHATTEL.

[6] [Green *v.* Hudson River R. Co., 32 Barb. 33 (1860), Allen, J.; Tilley *v.* Hudson River R. Co., 29 N. Y. 274 (1864).

[7] Farnsworth *v.* Farnsworth, 16 R. I. — (1886); Hammond *v.* Hammond, 15 *id.* 40 (1885).

[8] Higgins *v.* Rinker, 47 Tex. 402-3 (1877).

[9] City of Chicago *v.* Bartee, 100 Ill. 61 (1881).

[10] Davis *v.* Mayor of Macon, 64 Ga. 134 (1879).

A commercial traveler who does not carry with him the goods sold is not a peddler.[1]

See COMMERCE; HAWKER.

PEDESTRIAN. See ROAD, 1, Law of; SIDEWALK.

PEDIGREE. The lineage, descent or succession of families.

All authorities agree that this may be proved by reputation, that is, by hearsay. The term embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the times when those events happened.[2]

In order to come within the exception to the rule which excludes hearsay evidence, the question of pedigree itself must be in issue; and alleged declarations must have been made before the question arose.[3] See HEARSAY.

PEDIS. See POSSESSIO.

PEER.[4] An equal in rank or condition: as, in "trial by one's peers."

In early times the lord was legislator and judge over all his feudatories; and, therefore, the vassals of inferior lords were bound by their fealty to attend their domestic court barons (instituted in every manor for doing speedy and effectual justice to all the tenants) in order to form a jury or homage for the trial of their fellow-tenants. Upon this account they are distinguished as the "peers" of the court, *pares curtis*, or *pares curiæ*. In like manner, the barons themselves, or the lords of inferior districts, were denominated "peers" of the king's court, and bound to attend him upon summons.[5] Compare SUIT, 1.

By Magna Charta, ch. 29, no freeman shall be affected in his person or property "*nisi per legale judicium parium suorum vel per legem terræ*," except by lawful judgment of his peers or by the law of the land.[6]

"Judgment of his peers" means "trial *per pais*," by the country, that is, by a jury.[7]

Peerage. See PARLIAMENT.

PEINE. L. Fr. Punishment, penance; also, prison (*prisone*).

Peine forte et dure. Punishment severe and hard; or prison hard and strong. The name of the punishment inflicted upon a prisoner who refused to plead to an indictment for felony.

The accused, nearly naked, was laid on his back, upon the ground, with arms and feet drawn apart by cords, and with as great a weight of iron or stone placed upon his chest as he could bear. The next day he had three morsels of bread, and the next day three draughts of the stagnant water nearest the prison; and so on, on alternate days, till he died or answered. The practice was abolished in 1772.[1]

The desire probably was to save the accused's property, otherwise forfeited, to his family.[2]

PENAL.[3] Pertaining to, prescribing, or incurring punishment; with a penalty attached.

Penal action. A suit for a penalty.

Penal bill. See *Penal Sum.*

Penal clause. The words in a statute which attach a penalty to the act forbidden by it.

Penal servitude. See SERVITUDE, 1.

Penal statute. An act which inflicts a forfeiture for transgressing its provisions.[4] See STATUTE.

Penal sum. The sum in a bond declared to be forfeited in case of non-fulfillment of the covenant.

When the bond is for the payment of money, the penal sum is usually twice the real debt. The instrument was formerly called a "penal bill."[5] See further *Penalty.*

Penalty. Punishment; also, money recoverable by way of punishment; and, also, a sum named in a bond as a forfeit in case the obligor fails to comply with the conditions.[6]

The imposition of the payment of a sum of money, or some personal suffering.[7]

Is in the nature of a punishment for the non-performance of an act or for the performance of an unlawful act, and in the former case stands in lieu of the act.[8]

Involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil or a criminal prosecution.[9]

Includes fines, which are pecuniary penalties.[10]

"Penalty," "fine," and "forfeiture" are often used

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[1] *Exp.* Taylor, 58 Miss. 481 (1880). See also 2 Lea, 28; L. R., 8 Q. B. 303; Act of Congress, 1 July, 1862.

[2] Swink *v.* French, 11 Lea, 80 (1883): 1 Greenl. Ev. § 104; 1 Whart. Ev. § 208; American Life Ins. & Trust Co. *v.* Rosenagle, 77 Pa. 516 (1875); 105 *id.* 577.

[3] Commonwealth *v.* Felch, 132 Mass. 23 (1882). See generally Fulkerson *v.* Holmes, 117 U. S. 397 (1886), cases, Woods, J.

[4] F. *per, peer:* L. *parem, par,* equal.

[5] 2 Bl. Com. 54, 316; 1 *id.* 401; 4 *id.* 260, 348.

[6] 3 Bl Com. 350-51.

[7] Fetter *v.* Wilt, 46 Pa. 460 (1864); Craig *v.* Fetter, 65 *id.* 399 (1870); 2 Md. 453; 62 Barb. 34.

[1] 4 Bl. Com. 327, 325.

[2] See Washb. Jud. Hist. 142.

[3] L. *poena,* pain, suffering, punishment.

[4] [3 Bl. Com. 161.

[5] See 2 Bl. Com. 340.

[6] See 2 Bl. Com. 340.

[7] [Hills *v.* Hunt, 28 E. L. & E. 396 (1854), Maule, J.

[8] County of San Luis Obispo *v.* Hendricks, 71 Cal. 245 (1886), Searls, C.

[9] United States *v.* Chouteau, 102 U. S. 611 (1880) Field, J. See also 16 S. & R. 322; 13 Abb. Pr. 237; 21 How. Pr. 370; 5 Q. B. D. 596.

[10] The Strathairly, 124 U. S. 571 (1888), Matthews, J.

confusedly. "Penalty" is the general term.[1] See FINE, 2; FORFEITURE; PUNISHMENT.

When a penalty is inserted in an instrument to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, the penalty as accessory, and, therefore, intended only to secure the due performance thereof or the damage incurred by non-performance. In every such case, the true test by which to ascertain whether relief can or cannot be had in equity is to consider whether compensation can be made or not. If it cannot be made, a court of equity will not interfere. If it can be made, if the penalty is to secure the mere payment of money, then equity will relieve the party, upon paying the principal and interest. If it is to secure the performance of some collateral act or undertaking, a court of equity will direct an issue *quantum damnificatus;* and, when the amount of damages is ascertained by a jury, will grant relief upon the payment of such damages. As the penalty is designed as a mere security, when the party obtains his money, or his damages, he gets all that he expected, all that, in justice, he is entitled to. But there is a distinction between a "penalty," strictly so called, and "liquidated damages." The latter properly occur when the parties have agreed that, in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum as the just, appropriate, and conventional amount of the damages sustained by such act or omission. In cases of this sort, courts of equity will not interfere to grant relief; but will deem the parties entitled to fix their own measure of damages; provided always that the damages do not assume the character of gross extravagance, or of wanton and unreasonable disproportion to the nature or extent of the injury. On the other hand, courts of equity will not suffer their jurisdiction to be evaded merely by the fact that the parties have called a sum "damages" which is in fact and intent a penalty; or because they have designedly used language and inserted provisions which are in their nature penal, and endeavored to cover up their objects under other disguises.[2] See DAMAGES, Liquidated.

The mode in which penalties shall be enforced and what disposition shall be made of the proceeds are matters of legislative discretion.[3]

While the judgment on a penal bond is technically rendered for the full amount of the penalty, the execution will be limited to the amount of the damages proved to have been sustained by the breach of the bond.[4]

Debt lies for a statutory penalty because the sum demanded is certain, but, though in form *ex contractu*, it is founded in fact upon a tort. The necessity of establishing a joint liability does not exist; it is sufficient if the liability of any of the defendants is shown. Judgment may be entered against them and in favor of the others whose complicity in the offense, for which the penalty is prescribed, is not proved, precisely as though the action were in form as well as in substance *ex delicto*.[1] See CONTRIBUTION.

Penalties are never extended by implication. They must be expressly imposed or they cannot be enforced.[2]

Extreme penalty of the law: death, *q. v.*

PENCIL. See WRITING.

PEND.[3] To be in process of settlement or adjustment.

A petition, as soon as filed, is "pending."[4]

An action is "pending" or "depending" until the judgment is fully certified.[5]

"Another action pending" is a plea in abatement (*q. v.*) that another suit is already pending, upon the same subject-matter or cause of action, and between the same parties, in person or interest.

See further Lis, Pendens.

PENITENTIARY.[6] A prison or place of punishment;[7] any place designed for the confinement of convicts; a State's prison.

By statute 19 Geo. III (1779), all offenders liable to transportation may be confined at hard labor in certain "penitentiary houses," to be created by virtue of that act.[8]

Sir William Blackstone, co-operating with John Howard, was influential in procuring the passage of that act,— legislation which led the way to more just and rational views of prison discipline.[9]

See INFAMY; LABOR, 1, Hard; PRISON.

PENSION.[10] 1. (1) In Gray's Inn, an assembly of the members of the society to "consult" over their affairs. (2) An annual payment due from each member.

A "pension writ" was a sort of peremptory order against a member who was in arrears with his dues.[11]

2. In lieu of a corody, especially when due

[1] Gosselink *v.* Campbell, 4 Iowa, 300 (1856); United States *v.* Mathews, 23 F. R. 75 (1885).

[2] 2 Story, Eq. §§ 1318-18. Approved, Clark *v.* Barnard, 108 U. S. 455 (1883), Matthews, J.; *ib.* 454-58, cases. And see McPherson *v.* Robertson, 82 Ala. 402 (1886), cases; 18 Cent. Law J. 143-46 (1884), cases; 17 Ct. Cl. 215; 11 F. R. 119; 12 *id.* 444; 48 Pa. 450; 54 *id.* 329; 71 *id.* 180; 19 S. C. 434.

[3] Missouri Pacific R. Co. *v.* Humes, 115 U. S. 513, 523 (1885).

[4] State *v.* Estabrook, 29 Kan. 744 (1883).

[1] Chaffee *v.* United States, 18 Wall. 538 (1873), Field, Justice.

[2] Elliott *v.* East Penn. R. Co., 99 U. S. 576 (1878).

[3] L. *pendere*, to hang.

[4] Wentworth *v.* Farmington, 48 N. H. 207 (1868); 3 Cliff. 371; 4 Watts, 156.

[5] Wegman *v.* Childs, 41 N. Y. 162 (1869); Ulshafer *v.* Stewart, 71 Pa. 170, 174 (1872); 142 Mass. 96.

[6] L. *pœnitentia*, penitence: *pœna*, punishment. "Penitentiary" has meant: a penitent, an ordainer of penances, and a place for penitents. See Locus, Penitentiæ.

[7] Millar *v.* State, 2 Kan. 183 (1863).

[8] 4 Bl. Com. 371.

[9] 1 W. Bl. Rep. xxi; 1 Shars. Bl. xvi; 4 Bl. Com. 371.

[10] F. *pension:* L. *pensionem*, *pensio*, weighing, deliberation; payment.

[11] [Cowell's Law Dict.

from ecclesiastical persons, and which is a right of sustenance or to receive certain allotments of victual and provision for one's maintenance, a "pension" or sum of money is sometimes substituted.[1]

3. A periodical allowance of money granted by a government for services rendered, in particular to a soldier or sailor in connection with a war or with military operations.[2] Whence *pensionary* (n. and adj.) and *pensioner*. See DEBT, Public.

PEONAGE. The state or condition of a peon,— in Mexico, a debtor held in servitude until he has worked out his debt. See CITIZEN, Amendment, XIV.

PEOPLE. Ordinarily, the entire body of the inhabitants of a State. In a political sense, that portion of the inhabitants who are intrusted with political power; the qualified voters.[3]

The words "the people" must be determined by the connection. In some cases they refer to the qualified voters, in others to the state in its sovereign capacity.[4]

The United States government proceeds directly from the people; is "ordained and established" in the name of the people. It is emphatically and truly a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.[5]

Under our system, the "people," who in England are called "subjects," constitute the sovereign.[6]

The simple word "people" is sometimes applied to a nation or foreign power.[7]

When the constitution of a State directs that processes shall run in the name of the State, a process in the name of the "people" will be held deficient, notwithstanding the form be statutory.[8]

See CITIZEN; COUNTRY; GOVERNMENT; LEX, Salus, etc.; MAGISTRATE; NATION; SOVEREIGNTY; STATE, 3; WELFARE.

PEPPERCORN. The berry of the pepper-plant. In England, "one peppercorn" is sometimes named as a nominal rent.

A peppercorn rent is not a rent within sec. 3, subs. 4, of the Conveyancing Act of 1881, such peppercorn not being paid.[1]

PER. L. By; through. Compare PUR.

Introduces both Latin and English phrases. Examples of the latter are: *per* advice; *per* year;[2] opinion *per* Story, J.

The original of the character ℔.

Per annum. By the year; yearly.

Per capita. By heads — individuals. See CAPUT, Per, etc.

Per curiam. By the court. See CURIA.

Per fraudem. By fraud: as, a replication alleging fraud as to matter pleaded in discharge. See FRAUS.

Per industriam. By exertion or labor.

Per infortunium. By misadventure.

Per minas. By threats.

Per my et per tout. L. F. By half and by the whole; of a moiety and of all. See JOINT-TENANTS.

Per pais. F. **Per patriam.** L. By the country or jury. See COUNTRY, 2; PAIS.

Per proc. By procuration, *q. v.*; by letter of attorney.

Per quod. By which; whereby.

In common-law pleading, introduces a conclusion of law upon facts previously stated. The rule that special damage must be particularly charged, is termed "laying the action with a *per quod*."[3]

Per quod consortium (q. v.) *amisit.* By which he (the husband) lost her (the wife's) company.

Per quod servitium amisit. By which he (the plaintiff) lost her (or his) service.

Per se. By itself; in itself considered. As, an act of negligence *per se;* fraud *per se;* a nuisance *per se;* a thing *malum per se.*

Per stirpes. By roots; by the stocks; according to representation. Opposed, *per capita*, q. v.

Per verba. By words — *de futuro*, of the future (tense); — *de præsenti*, of the present (tense). See MARRIAGE.

PERAMBULATION.[4] Going around the boundaries of land, with witnesses, to determine and preserve recollection of its extent, and to see that no encroachments have been made and no land-marks removed.[5] Compare PROCESSIONING.

[1] 2 Bl. Com. 40; 1 *id.* 283.

[2] See at length R. S. §§ 4692-4791; 1 Sup. R. S. p. 468; United States *v.* Hall, 98 U. S. 343 (1878); United States *v.* Moyers, 15 F. R. 417 (1882).

[3] [Blair *v.* Ridgely, 41 Mo. 176 (1867), Wagner, J.; Koehler *v.* Hill, 60 Iowa, 568 (1883); Cooley, Const. Lim. 29, 598.

[4] Black *v.* Trower, 79 Va. 126 (1884), Lewis, P.

[5] M'Culloch *v.* Maryland, 4 Wheat. 403-4 (1819), Marshall, C. J.

[6] United States *v.* Lee, 106 U. S. 208 (1882).

[7] United States *v.* Quincy, 6 Pet. *467 (1832).

[8] Manville *v.* Battle Mountain Smelting Co., 17 F. R. 126 (1883); Perkins *v.* State, 60 Ala. 9 (1877).

[1] Moody *v.* Yates' Contract, 28 Ch. D. 661 (1885).

[2] See Curtiss *v.* Howell, 39 N. Y. 213 (1868).

[3] 3 Bl. Com. 124.

[4] L. *per-ambulare*, to walk through.

[5] [Greenville *v.* Mason, 57 N. H. 393 (1876); 1 Greenl. Ev. § 146, n.

PERCEPTION.[1] Taking, receiving; pernancy, *q. v.*

"Perception of rents and profits is the mortgagor's right until a final determination of the right to sell [by the mortgagee], and a sale made accordingly."[2]

PERCOLATE. See AQUA, Currit, etc.

May refer to any flowage of sub-surface water, other than that of a running stream, open, visible, clearly traceable.[3]

PEREMPTORY.[4] Final, determinate, without hope of renewing or altering.[5]

That for which no reason is or need be assigned; not admitting of contention or controversy; final; positive; absolute; obligatory: as, a peremptory — challenge, day, defense, instruction, *mandamus* or other writ, nonsuit, rule, *qq. v.*

PERFECT. Complete; also, to make complete: as, a perfect obligation, a perfect title; to perfect — an appeal, bail, a copyright, a deed, an invention, *qq. v.* Whence *imperfect.*

If excepted to, "bail" must be perfected; that is, the persons must justify themselves by each swearing that he is worth the sum for which he is bail, after paying his debts.[6]

A perfect external "obligation" confers the right of compulsion; a perfect "right," the right to compel those who refuse to fulfill the corresponding obligation,[7] *q. v.*

A perfect "title" means a title which is good in law and equity.[8]

A perfect "machine" may mean a "perfected" invention; not a machine perfectly constructed, but so constructed as to embody all the essential elements of the invention, in a form that would make them practical and operative, so as to accomplish the result.[9]

PERFORMANCE.[10] 1. Accomplishment, fulfillment, consummation, discharge. Specifically, doing as one has agreed; also, the thing itself as done; and, also, discharge of the obligation. Opposed *non-performance.*

Such a thorough fulfillment of a duty as puts an end to obligations by leaving nothing more to be done.[1]

"Perform" is synonymous with "fulfill."[2]

In the Statute of Frauds, "performed" means completely consummated.[3]

"Performance" of a contract means performance *in specie* of the agreement; "satisfaction" occurs where the contracting party does something in lieu of the thing contracted for.[4]

Part performance. Such an act done in performance of a contract that non-enforcement of the contract would be a fraud.[5]

The Statute of Frauds requires that a contract concerning realty shall be in writing. Courts of equity have relaxed the rigidity of the rule, holding that a part performance of an oral contract removes the bar of the statute, on the ground that it would be a fraud for a vendor to take advantage from the absence of a written instrument when he has permitted the contract to be partly executed; especially so, where valuable improvements have been made by the vendee.[6]

Nothing is to be considered as a part performance which does not put the party in a situation which is a fraud upon him unless the agreement is performed. . . The acts should clearly appear to be done solely with a view to the agreement being performed. . . On this account, acts which are merely introductory or ancillary to an agreement are not considered as a part performance thereof, although attended with expense.[7]

The existence of the parol contract and its terms must be shown by full, complete, satisfactory, and indubitable proof. The evidence must define the boundaries and fix the consideration; exclusive and notorious possession must have been taken under it, and continuously maintained; and the contract must have been so far in part performed that compensation in damages would be inadequate and rescission inequitable and unjust.[8]

Specific performance. Doing as one has agreed to do. That branch of equity jurisprudence which compels a party to perform his contract *in specie.*

[1] L. *per-cipere, capere*, to take wholly or entirely.

[2] Kountze *v.* Omaha Hotel Co., 107 U. S. 393 (1882), Bradley, J.; 2 Bl. Com. 163.

[3] Mosier *v.* Caldwell, 7 Nev. 367 (1872).

[4] Per'-emp-tory. L. *peremptorius*, decisive; *per-imere*, to take away entirely, cut off, destroy.

[5] [Furman *v.* Applegate, 23 N. J. L. 29 (1850).

[6] 3 Bl. Com. 291.

[7] [Aycock *v.* Martin, 37 Ga. 128 (1867): Vattel, Law of Nations, § 17.

[8] Warner *v.* Middlesex Mut. Assur. Co., 21 Conn. *449 (1852).

[9] American Hide, &c. Splitting, &c. Machine Co. *v.* American Tool, &c. Co., 4 Fish. 298–99 (1870), Shepley, J.

[10] M. E. *parfourmen, parfournen:* O. F. *par*, per, thoroughly; *fournir*, to furnish.

[1] Hare, Contracts, 569 (1887).

[2] Ætna Ins. Co. *v.* Kittles, 81 Ind. 97 (1881).

[3] Boydell *v.* Drummond, 11 East, 85 (1809). On substantial performance, see 19 Cent. Law J. 442–46 (1884), cases. Time, as affecting performance, 26 *id.* 283–86 (1888), cases.

[4] [Johnson *v.* Collins, 20 Ala. 441 (1852).

[5] [Armstrong *v.* Kattenhorn, 11 Ohio, 271 (1842); 15 *id.* 248.

[6] Neale *v.* Neales, 9 Wall. 9 (1869); Purcell *v.* Miner, 4 *id.* 517 (1866).

[7] 1 Story, Eq. §§ 761–62; Plymale *v.* Comstock, 9 Oreg 318 (1881); Dudley *v.* Hayward, 11 F. R. 543 (1882); Warren *v.* Warren, 105 Ill. 576 (1883).

[8] Brinser *v.* Anderson, Sup. Ct. Pa. (1888); Brown *v.* Hoag, 35 Minn. 375–76 (1886); Burns *v.* Daggett, 141 Mass 373 (1886); Halsey *v.* Peters, 79 Va. 67 (1884), cases; Browne, St. F. §§ 457–58.

An equitable remedy, for it gives more than damages for non-performance, which only are recoverable at law. The contract constitutes the right. The object is to place the complainant, as nearly as possible, in the situation in which the defendant had agreed he should be placed.[1]

A court of law is inadequate [not competent] to decree a specific performance, and can relieve the injured party only by a compensation in damages, which, in many cases, would fall far short of the redress which his situation would require. Wherever, therefore, the party wants the thing *in specie*, and he cannot otherwise be fully compensated, a court of equity will grant him a specific performance.[2]

Specific relief, execution, performance or enforcement of contract will be granted when it is apparent, from a view of all the circumstances of the case, that it will subserve the ends of justice; and it will be withheld when it appears it will produce hardship or injustice to either party. When specific execution, which would work a hardship were it unconditionally performed, will work equity when decreed on conditions, it will be decreed conditionally.

Not a matter of right in either party; but a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each case.[3]

Not decreed in favor of a party who has disregarded his own reciprocal obligation; nor where duties to be fulfilled (as, by a grantee) are continuous, and involve the exercise of skill, personal labor, and cultivated judgment; nor where there is want of mutuality; nor where there is a complete remedy at law.[4]

A contract for personal services, involving the labor, skill, and inventive genius of the person in default, cannot be specifically enforced.[5]

The original and sole equity of the jurisdiction is, that an award of damages at law will not afford adequate compensation — will not put the complainant in a situation as beneficial to him as if the agreement were specifically performed.[6]

A court of equity may decree specific performance of a contract concerning a *chattel*, and, while generally it will not exercise it, it is proper so to do where the plaintiff's case is good, his right clear, and the remedy at law inadequate or its enforcement attended with doubt or difficulty.[7]

While it is a rule that specific performance of a contract respecting personalty will not be decreed, because compensation is ordinarily sufficient, in cases where the circumstances are extraordinary, as respects either the property or the situation of the parties, and an action for damages would not afford an adequate remedy, equity may be invoked for specific performance. Letters patent and copyrights fall within the exception.[1]

He who seeks specific performance must show the facts which make such a decree equitable.[2]

The question, as already stated, is always one of sound judicial discretion. The contract must be definite in its terms, and be clearly proved.[3]

The plaintiff must come into court with clean hands. Omission or mistake in the agreement, or that it is unconscionable or unreasonable, or that there has been concealment, misrepresentation or any unfairness, are some of the causes which induce the court to refuse its aid. If the jurisdiction attaches, the court will go on to do complete justice, although in its progress it may decree on a matter cognizable at law.[4]

See CONDITION; CONTRACT; COVENANT; LACHES.

2. An exhibition, entertainment, *qq. v.*

PERIL. The risk, contingency, event, or cause of loss insured against, in a policy of marine insurance.

The old phrases "perils of the sea," "perils of navigation," and "perils of the river," are interchanged.

"Perils of the sea" are all those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man could not foresee, nor his strength resist.[5]

While the phrase "perils of the sea" does not cover all losses that happen on the sea, there is a principle of construction which gives it as extended a meaning as can be reasonably done. All navigation is perilous, and the rule that the insurer is liable only for losses occurring from extraordinary causes means nothing more than that a seaworthy vessel will endure all ordinary perils. The phrase is only used to describe those abnormal circumstances of dangerous navigation under which the loss occurs, be they what they may. Because the "peril" cannot be located it does not follow that there was none.[6]

See further DANGERS; RISK; SALVAGE.

PERIOD. Any portion of complete time. Designating an act to be done or to be begun, though its completion may take an uncertain time, it means the day when the

[1] Tasker *v.* Small, 3 My. & C. *69 (1837), Cottenham, Lord Chancellor.

[2] 1 Story, Eq. § 716; Satterthwait *v.* Marshall, 4 Del. Ch. 338 (1872).

[3] Willard *v.* Tayloe, 8 Wall. 565-67 (1869), cases, Field, J.; Nickerson *v.* Nickerson, 127 U. S. 675 (1888), cases.

[4] Rutland Marble Co. *v.* Ripley, 10 Wall. 357-59 (1870), cases, Strong, J.

[5] Wollensak *v.* Briggs, 119 Ill. 453 (1887), cases.

[6] Comer *v.* Bankhead, 70 Ala. 496 (1881); Lead. Cas. Eq., 4 Am. ed., 1093; Harnett *v.* Yielding, 2 Sch. & Lefr. *553-54 (1805).

[7] Johnson *v.* Brooks, 98 N. Y. 343 (1883), cases.

[1] New York Paper-Bag Machine Co. *v.* Union Paper-Bag Machine Co., 32 F. R. 786 (1887), cases, Butler, J.

[2] Fowler *v.* Marshall, 29 Kan. 665 (1883).

[3] Shenandoah Valley R. Co. *v.* Lewis, 76 Va. 835 (1882).

[4] Cathcart *v.* Robinson, 5 Pet. *263, 276 (1831), Marshall, C. J.

[5] 3 Kent, 300; 52 Barb. 497; 43 N. Y. 419.

[6] Moores *v.* Louisville Underwriters, 14 F. R. 226 (1882), Hammond, D. J.; Hazard *v.* New England Mar. Ins. Co., 8 Pet. *585 (1834); Thames, &c. Mar. Ins. Co. *v.* Hamilton, 57 Law T. Rep. 695 (1887), cases.

thing commences, as, the exportation of goods.[1]

A stated and recurring interval of time, a round or series of years, by which time is measured.[2]

Periodical. Recurring, made or to be made, after the lapse of a specified or regular interval of time: as, periodical allowances of money, payments of interest or of principal and interest.

PERISH. See RES, Perit, etc.

Perishable. Subject to speedy and natural decay.

But where, as in the case of a levy upon personalty, the time before a sale can be made is necessarily long, may embrace property liable to material depreciation in value from other causes than decay.[3]

In the commercial sense, designates such property as from its nature decays in a short time, without reference to the care it receives.

Of that character are many varieties of fruits, flowers, some kinds of liquors, and numerous vegetable productions. But merchantable corn is not "perishable."[4]

Fattened cattle are perishable property;[5] so are potatoes;[6] and so are skins and furs.[7]

Inherently liable to deterioration and decay. "In this case, the goods can be preserved as they are, by reasonable care, and that the sheriff is bound to bestow upon them, until the right to make a sale shall be secured by a judgment against the debtor, and an execution be issued for that purpose. The order should be modified so as to allow sale of the kid gloves, as they are shown to be inherently liable to decay and deterioration, but not so as to the underwear, neckties, shirts, jewelry, umbrellas, etc., although as to some of these the fashion may change."[8]

Where property, attached as belonging to a defendant, is sold under an order of court before judgment, the purchaser takes a title good as against all the world. Such sales, which are very ancient in their origin, proceed upon the principle of necessity. To permit the property to become worthless by natural decay would be to defeat the object of the attachment or levy.[9] See REPLEVIN, 1; SOUND, 2 (1).

A court will order the sale of realty belonging to an insolvent corporation, when there is no income with which to keep it in repair, and it is of such a character as to materially deteriorate in value pending protracted litigation.[1]

PERJURY.[2] When a lawful oath is administered, in some judicial proceeding, to a person who swears willfully, absolutely, and falsely, in a matter material to the issue or point in question.[3]

The willful giving, under oath, in a judicial proceeding or course of justice, of false testimony material to the issue or point of inquiry.[4]

The taking of a willful false oath by one who, being lawfully required to depose the truth in any judicial proceeding, swears absolutely in a matter material to the point in question.[5]

Taking a false oath in a judicial proceeding.[6]

An offense against public justice. Must be corrupt (committed *malo animo*), willful, positive, absolute; on a point material to the question in dispute; and the oath be administered by a court or officer having jurisdiction or authority over the subject-matter, and in a proceeding relative to a civil suit or a criminal prosecution. The breach of an extra-judicial oath is merely ground for damages for the private injury.[7]

The false statement must have been made "willfully."[8]

The officer must have had legal authority to administer the oath.[9]

The matter charged to have been falsely stated must have been material to the issue. The words used in Rev. St. are "material matter." These words were adopted from the common law; and they must be given a signification broad enough at least to cover cases of perjury at common law.[10] The section referred to provides that "If any person in any case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly swear or affirm falsely, every person so of-

[1] [Sampson *v.* Peaslee, 20 How. 579 (1857), Wayne, J.

[2] People *v.* Leask, 67 N. Y. 528 (1876), Folger, J.

[3] [Webster *v.* Peck, 31 Conn. 495 (1863), Butler, J.

[4] Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 67 (1870), Walker, J.

[5] M'Call *v.* Peachy, 3 Munf. 288 (1811).

[6] Williams *v.* Cole, 16 Me. 208 (1839).

[7] Astor *v.* Union Ins. Co., 7 Cow. 202 (1827).

[8] Fisk *v.* Spring, 25 Hun, 367 (1881). See Schoul. Bailm. 397.

[9] Young *v.* Keller, Sup. Ct. Mo. (1888), cases; Mo. R. S. 1879, §§ 494-95, 470: 26 Cent. Law J. 420-22, 423 (1888), cases.

[1] Middleton *v.* New Jersey West Line R. Co., 26 N. J. E. 269 (1875).

[2] L. *perjurare*, to forswear: *per*, through, over, beyond; *jurare*, to bind by oath: *jus*, right, law.

[3] Coke, 3 Inst. 164: 4 Bl. Com. 137; 26 Ohio St. 83.

[4] 2 Bish. Cr. L., 5 ed., § 1015.

[5] Commonwealth *v.* Smith, 11 Allen, 253 (1865), Hoar, Judge.

[6] The Queen *v.* Castro ("Tichborne"), L. R., 9 Q. B. 357 (1874), Blackburn, J.

[7] 4 Bl. Com. 137; Whart. Cr. Ev. § 1257.

[8] Schmidt *v.* Witherick, 29 Minn., 156 (1882).

[9] United States *v.* Curtis, 107 U. S. 672 (1882).

[10] United States *v.* Shinn, 8 Saw. 410-11 (1882), Deady, J.; s. c. 14 F. R. 447; 3 Crim. Law Mag. 459-83 (1882), cases.

fending shall be deemed guilty of perjury, and shall, on conviction thereof, be punished by fine, not exceeding two thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offense."[1]

One who swears willfully to a matter which he rashly believes, which is false, and which he had no probable cause for believing, may be convicted of the crime.[2]

The truth must be shown.[3]

Parol testimony is admissible.[4]

The testimony of one witness, unsupported, may not be enough to convict; for there may then be merely oath against oath.[5]

Subornation of perjury. Procuring another to take such a false oath as constitutes perjury in the principal.[6]

"If any person or persons shall knowingly or willingly procure any such perjury [see above] to be committed, every person so offending shall be deemed guilty of subornation of perjury, and shall, on conviction thereof, be punished" by fine, and by imprisonment at hard labor, as in cases of perjury,[7] *q. v.*; and thereafter be incapable of giving testimony in any court of the United States until the judgment is reversed.[8]

Subornation of perjury is in its essence but a form of perjury itself. An indictment must aver that the accused knew that the testimony was false, and that in giving it the witness would commit perjury.[9]

The person solicited is not an accomplice in the crime of subornation; and the fact that he committed perjury does not prevent the jury from convicting the suborner of the solicitation on his testimony.[10]

Solicitation to commit perjury, though unsuccessful, is a misdemeanor at common law.[11] See SUBORN.

See CRIMEN, Falsi; INFAMY; SWEARING, False.

PERMANENT. Does not always embrace the idea of absolute perpetuity.[12]

Thus, "permanent residence" does not involve the idea that a change thereafter may not be made;[13] it implies that there is no present intention to make a change.[14]

"Permanently establish a county seat" does not mean to keep the county seat at a place perpetually, or for all time;[1] the legislature may at pleasure remove a county seat "permanently located."[2] See FOREVER.

An institution of learning is "permanently located" when the trustees by resolution locate the buildings with intention that the place shall be the permanent place for conducting the business of the corporation.[3]

A sidewalk need not be made of stone or brick to be "permanent" rather than "temporary."[4]

Compare ESTABLISH; PERPETUAL. See ALIMONY.

PERMIT.[5] Is more positive than "allow" or "suffer:" denotes a decided assent.[6]

Implies assent given or leave granted.[7]

May mean "suffer."[8]

Includes knowledge of what is to be done, and intention that what is done is what is to be done.[9]

One definition is "to allow by not prohibiting," as in an ordinance that "no person shall permit swine to go upon a sidewalk."[10] See SUFFER.

Permissive. Allowed; suffered: as, permissive waste, *q. v.*

PERNANCY.[11] Taking, receiving; enjoyment.

Pernancy of the profits of an estate is the taking, perception, or receipt of the rents and other advantages arising therefrom. See PERCEPTION.

Pernor. He who receives such profits, etc.; a *cestui que use*.[12]

PERPETRATOR. See ACCOMPLICE.

May include an artificial person, as, a railroad company.[13]

PERPETUAL.[14] Unlimited in time; continuous: as, a perpetual — injunction, lease, statute, succession, *qq. v.*

A grant of perpetual succession to a corporation does not mean that the corporate existence shall be unending, but only unbroken during the term.[15] Compare PERMANENT.

See STATE, 3 (2).

PERPETUATE. To cause to endure indefinitely; to preserve from the contingency of loss or extinction.

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[1] R. S. § 5392: Act 3 March, 1825, § 13.

[2] See United States v. Moore, 2 Low. 235-38 (1873), cases; Baldw. 370; 1 Sprague, 558; 4 McLean, 113.

[3] 1 Whart. Ev. § 387, Cr. L. § 1321; 27 Gratt. 127.

[4] 3 Greenl. Ev. §§ 188-202; 105 Mass. 582; 107 *id.* 227.

[5] 4 Bl. Com. 358. On corroboration, see 25 Cent. Law J. 534 (1885), cases.

[6] 4 Bl. Com. 137.

[7] R. S. § 5392.

[8] R. S. § 5393. See also § 5397.

[9] United States v. Dennee, 3 Woods, 41 (1877); Commonwealth v. Douglass, 5 Metc., Mass., 244 (1842).

[10] United States v. Thompson, 31 F. R. 331 (1887), Deady, J.

[11] See 2 East, 5; 6 *id.* 464.

[12] Hascall v. Madison University, 8 Barb. 185 (1850).

[13] Newton v. Commissioners, 100 U. S. 563 (1879).

[14] Dale v. Irwin, 78 Ill. 181 (1875).

[1] Newton v. Commissioners, *ante*.

[2] Harris v. Shaw, 13 Ill. 465 (1851).

[3] Mead v. Ballard, 7 Wall. 290 (1868).

[4] City of Lowell v. French, 6 Cush. 294 (1850). See also 23 How. Pr. 448; 12 Bush, 541.

[5] L. *per-mittere*, to send through, pass through.

[6] City of Chicago v. Stearns, 105 Ill. 558 (1883).

[7] Loosey v. Orser, 4 Bosw. 404 (1859).

[8] Territory v. Stone, 2 Dak. 165 (1879).

[9] Gregory v. United States, 17 Blatch. 330 (1879).

[10] Commonwealth v. Curtis, 9 Allen, 271 (1864).

[11] Per'-nan-cy. F. *prendre*, to take.

[12] 2 Bl. Com. 163.

[13] Philo v. Illinois Central R. Co., 33 Iowa, 47 (1871).

[14] L. *perpetualis*, universal, permanent: *perpetuus*, constant, continuous.

[15] Scanlan v. Crawshaw, 5 Mo. Ap. 339 (1878).

Perpetuate testimony. If a witness to a disputed fact is old and infirm, or going abroad, it is not unusual to file a bill to "perpetuate" his testimony, although no suit be pending.[1]

Such bills are indispensable in securing justice, as it may be impossible for a party to bring his rights presently to a judicial decision; and unless, in the meantime, he may perpetuate his proofs, the rights themselves may be lost without default in him. The civil law adopted similar means of preserving testimony. Bills to take testimony *de bene esse* arise when suits are actually pending.[2]

PERPETUITY. 1. Of the sovereign: absolute immortality in his political capacity.[3]

2. The settlement of an interest in property, which will go in the succession prescribed, without any power of alienation.[4]

A grant of property wherein the vesting of an interest is unlawfully postponed.[5]

So called, not because the grant, as written, would actually make the estate perpetual, but because it transgresses the limits which the law has set in restraint of grants that *tend* to a perpetual suspense of the title, or of its vesting, or, as it is sometimes expressed, with less accuracy, to a perpetual prevention of alienation.[6]

A limitation of property which renders it inalienable beyond the period allowed by law,[6]— a life or lives in being and twenty-one years more, with a fraction of a year added for the term of gestation, in cases of posthumous birth.

All that is required is that the estate shall vest within the prescribed period. The right of possession may be postponed longer.[7]

Perpetuities are abhorred by the law. They make estates incapable of answering the ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established.[8]

Trusts created for charitable or public purposes are not subject to the rule.[9]

See ACCUMULATION; CHARITY, 2; MORTMAIN.

[1] 3 Bl. Com. 450.

[2] 2 Story, Eq. §§ 1505-13; Hall *v.* Stout, 4 Del. Ch. 273 (1871); 2 Daniel, Ch. Pr. 955; 1 Pomeroy, Eq. §§ 82, 210.

[3] 1 Bl. Com. 249.

[4] 2 Bl. Com. 174.

[5] City of Philadelphia *v.* Girard's Heirs, 45 Pa. 26 (1863), Lowrie, C. J.; 10 *id.* 334; 88 *id.* 495.

[6] Ould *v.* Washington Hospital, 95 U. S. 312 (1877), Swayne, J. See also Perin *v.* Carey, 24 How. 494 (1860); Saund. Uses, &c. 196; McArthur *v.* Scott, 113 U. S. 382-88 (1885), cases, Gray, J.

[7] Bruce *v.* Nickerson, 141 Mass. 408 (1886).

[8] 2 Bl. Com. 174; Ould's Case, *supra;* De Wolf *v.* Lawson, 61 Wis. 474 (1884); 76 Va. 147.

[9] Jones *v.* Habersham, 107 U. S. 185 (1882); Detwiller *v.* Hartman, 37 N. J. E. 354 (1883).

PERQUISITE. See EMOLUMENT.

PERSON. Persons in law are either natural or artificial. **Natural persons** are such as the God of nature formed us; **artificial persons,** such as are created and devised by human laws for the purposes of society and government — corporations or bodies politic,[1] which derive their existence and powers from legislation.[2]

In the bankruptcy acts, person included a corporation.[3]

In internal revenue laws, includes a partnership, association, company, or corporation, as well as a natural person.[4]

In the Revised Statutes, or any act or resolution of Congress passed subsequently to February 25, 1874, the word may extend and be applied to partnerships and corporations, unless the context shows that a more limited sense is intended.[5]

A private corporation is included within the prohibition of section one of the Fourteenth Amendment, that no State shall deny to any person the equal protection of the laws.[6]

May include a State, or the United States.[7]

Includes Indians, within *habeas corpus*[8] and intercourse acts.[9]

In a statute, includes women, unless the context clearly shows an intention to limit it to men.[10]

In short, while "any person or persons" comprehends every human being, the terms will be limited to the class or classes in the mind of the legislature.

While a natural person may do any act which he is not prohibited by law from doing, an artificial person can do none which the charter giving it existence does not expressly or by fair inference authorize.[11]

"Injuries to the person" import hurt to the body, physical injuries; as, in a civil damage law.[12]

Offenses against the person are: homicide, mayhem, rape, robbery, buggery, battery, wounding, false imprisonment, kidnaping, abduction.[13]

The rights of persons are those which concern and are annexed to the persons of men; and they are either absolute or relative. See RIGHT, 2.

[1] 1 Bl. Com. 123, 467.

[2] United States *v.* Fox, 94 U. S. 321 (1876).

[3] R. S. § 5013.

[4] R. S. § 3140; 15 Op. Att.-Gen. 230.

[5] R. S. § 1; 11 Wheat. 412; 12 Pet. 134; 94 U. S. 321; 8 Saw. 239, 269, 274-75, 281, 283-92; 18 F. R. 404; 87 Ind. 506.

[6] Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 189 (1888).

[7] Alabama Certificates, 12 Op. Att.-Gen. 179 (1867); *ib.* 217; 9 Kan. 194; 33 Minn. 426; 8 N. J. E. 500; 24 Ohio St. 611; 24 Tex. 61.

[8] United States *v.* Crook, 5 Dill. 458 (1879).

[9] United States *v.* Shaw-mux, 2 Saw. 364 (1873).

[10] Opinions of the Justices, 136 Mass. 580 (1883); 74 Ga. 795.

[11] Smith *v.* Alabama Life Ins. & Trust Co., 4 Ala. 568 (1843).

[12] Calloway *v.* Laydon, 47 Iowa, 456 (1877).

[13] 4 Bl. Com. 205-19.

Person, fictitious. See DECOY; FORGERY.

Persons in public employment. See LIBEL, 5.

See also ARREST, 2; BAIL, 2; BODY, 1; CITIZEN; EXPOSE; IDENTITY, 1; INDIVIDUAL; INSPECTION, 2; JURISDICTION, 2; NAME, 1.

Personal. Pertaining to the person; belonging to an individual person; individual: as, personal or a personal — action, asset, baggage, chattel, contract, covenant, credit, demand, disability, estate, goods, injury, knowledge, liability, liberty, note, performance, property, representative, security, service, servitude, tax.

Referring to some subjects — as, an action, asset, chattel, estate, property — "personal" means simply *movable, transitory:* that which may follow the person of the owner or defendant.

Again, referring to some subjects — as, an action, contract or covenant, defendant, injury, privilege, security, service, tax — "personal" is contrasted with *real*, or that which concerns real estate.

See those substantives.

Personalty. Personal property, *q. v.*

Personate. To assume the character of another without authority and do something to his or a third person's detriment.

Known as "false personation," which is a misdemeanor both at common law and, generally, by statute.[1]

In England, since 1874, to personate any person or his heir, executor, etc., with intent to claim succession to property, or falsely to claim relationship to any family, is a felony, punishable with penal servitude for life.[2]

There may be a false personation of an officer for the purpose of making a pretended arrest, or collecting fines, taxes, or other alleged dues.

Falsely personating any person under the provisions of the naturalization laws,[3] or any person holding a claim against the government, are criminal offenses.[4]

See CHINESE, p. 177, sec. 7; PRETENSE, False.

PERSONA. L. A person.

See ACTIO, Personalis; DELECTUS, DESCRIPTIO, Personæ: IN, Personam, Propria, etc.; MOBILIA.

PERSUADE. See INFLUENCE.

To "inveigle, persuade, or entice" a child into involuntary servitude, necessarily implies assent yielded as the result of the persuading or enticing, by whomsoever the influence is brought to bear, whether by parents, uncles, or others.[1]

PERTINENT. Relevant; materially relevant. Opposed, *impertinent.*

Said of evidence which is useful in proving a cause of action or a defense. See IMPERTINENCE; RELEVANT.

PETIT; PETTY.[2] Small, little; the lesser; opposed to *grand* and *high:* as, petty constable, *q. v.*; petit or petty — jury, larceny, treason, *qq. v.* See also PETTIFOGGER.

Petty-bag office. Proceedings to cancel letters-patent were in the "Petty Bag" office of the court of chancery, in which common-law proceedings were carried on, and all were entitled "In the Petty Bag Office in Chancery."[3] See HANAPER.

PETITIO. L. Requesting, seeking: petition.

Petitio principii. A begging of the question: assuming as conceded or settled the question at issue.[4]

PETITION. Formal written application to a superior for the exercise of his authority. See PETITIO.

An application, in writing, to bring before a court a matter in regard to which judicial action is necessary, a suit being inappropriate from there being as yet no adversary party.[5]

Under code practice, the first pleading filed by a plaintiff, wherein he states the facts of his case as they actually occurred.[6]

"Petition" describes an application in writing, in contradistinction to a "motion," which may be *viva voce.*[6]

Petitioner. He who presents a petition.

The person adversely interested is called the "respondent."

The use of petitions to induce the exercise of judicial discretion or power is manifold. By means of them proceedings are begun, expedited, and terminated in the settlement of decedents' and insolvents' estates; in the appointment, change, and discharge of guardians, committees, assignees, and other trustees, and in the filing, auditing, and settling of their accounts; in the appointment of viewers under laws relating to the opening of highways, the construction of bridges, canals, etc. In equity practice, they are generally ancillary to suits already begun.

There are also petitions for alimony and other al-

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[1] See 4 Bl. Com. 348; 2 Russ. Cr. 479.

[2] Stat. 37 & 38 Vict. c. 36.

[3] R. S. § 5424.

[4] R. S. § 5426.

[1] United States *v.* Aucarola, 17 Blatch. 423, 430 (1880), Blatchford, J.

[2] F. *petit.* "Petty" is the anglicised word.

[3] Attorney-General *v.* Rumford Chemical Works, 31 F. R. 618 (1876).

[4] 107 U. S. 507; 29 Wis. 197.

[5] Bergen *v.* Jones, 4 Metc., Mass., 376 (1842), Shaw, C. J.; 67 N. Y. 547; 48 Miss. 36.

[6] See Atchison, &c. R. Co. *v.* Rice, 36 Kan. 599 (1887)

lowances, petitions for summons to respondents in divorce, etc.

Statements of facts in petitions are required to be verified by accompanying affidavit. Compare PRAYER.

Petition of rights. A parliamentary declaration of the liberties of the people, assented to by Charles the First, in 1629.[1]

Right of petition. The right of petitioning the sovereign or either house of Parliament for the redress of grievances.[2]

The right which the government of Great Britain accords to aliens or subjects to prosecute claims against it. The proceeding is judicial, to be tried like a suit between subjects.[3]

Appertains to every individual when any uncommon injury happens, or any right is infringed, which the ordinary course of law is too defective to reach.[4]

Petitory. Said of a suit in which the title to property is to be enforced by means of a petition, or other proceeding.[5]

Suits in admiralty concerning property in ships are "petitory" when the mere title is litigated, and sought to be enforced independently of any possession previously accompanying that title; and "possessory" when they seek to restore to the owner a possession of which he has been unjustly deprived, that possession following a legal title, or being a possession under a claim of title with a constat of property.

The former has been silently abandoned in England, upon the principle that titles to property derived from the common law shall be litigated in the common-law courts — a proposition which, carried to the full extent, would prostrate the entire jurisdiction of admiralty in instance cases. Indeed, titles to ships principally depend upon the maritime law as recognized and enforced in the common law; and the admiralty law does little more in instance cases than carry into effect the declarations of the maritime law, so recognized and enforced. In the United States, admiralty has jurisdiction of both kinds of actions.[6]

PETROLEUM. See MINERAL; OIL; WAGER, Contract.

PETTIFOGGER.[7] 1. A practitioner of law whose business is chiefly confined to petty causes.

2. One who pretends to practice law, but is without either knowledge of the law or conscience.[8]

An inferior attorney employed in mean professional business.[1]

The expression "pettifogging shyster" can only apply to an unscrupulous practitioner who disgraces his profession by doing mean work, and who resorts to sharp practice to do it.[2]

PETTY. See PETIT.

PEW. See CHURCH.

In the United States, pews belong to the legal owners of the church building. The right of an individual holder is not partial ownership of the building itself. The sale of a pew, as a pew, conveys no such ownership. The pewholder's right is incorporeal, a mere easement, or, at most, a usufructuary interest; subject to such changes as the circumstances of the congregation require. The holder's consent is not necessary to such a change, and his right is extinguished when the edifice is taken down. He is not entitled to a pew in a new building because he held one in the old.

But while his right remains it is exclusive. He may use the pew on all occasions when the house, as a church, is open; he may put a fastening on the door, and deny access to persons other than those whom he chooses to admit; he may even maintain an action at law against an intruder.

Acquisition is by perpetual grant from the owners of the edifice, or by demise for a limited term; and, possibly, subject to assessments. For unpaid dues or rents, an action at law will lie. Whether, in the event of failure to dispose of it by will, a pew passes to the owner's heirs, or to his executor or administrator, depends upon the question whether, by the law of the State, pew rights are real or personal property. In Connecticut, Louisiana, and Maine, pews are realty, and descend to the heir-at-law; in Massachusetts and New Hampshire,— in most of the States,— they are personalty, and, unless disposed of by will, vest in the administrator or the executor.[3]

PHARMACY. See DRUGGIST.

PHOTOGRAPHER. Any person who makes for sale photographs, ambrotypes, daguerreotypes, or pictures, by the action of light.[4]

An artist who takes impressions or likenesses of things and persons on prepared plates or surfaces.[5]

His implements are not "mechanic's tools," exempted from execution.[6] See MECHANIC.

Congress may confer upon the author, inventor, designer, or proprietor of a photograph the rights con-

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[1] 1 Bl. Com. 128.

[2] [1 Bl. Com. 143.

[3] United States v. O'Keefe, 11 Wall. 183 (1870); The Fidelity, 16 Blatch. 574 (1879); United States v. Lee, 106 U. S. 205 (1882).

[4] 1 Bl. Com. 143; 4 *id.* 147; 23 & 24 Vict. (1860), c. 34.

[5] [1 Kent, 371.

[6] The Tilton, 5 Mas. 468-78 (1830), Story, J.; Ward v. Peck, 18 How. 267 (1855), cases; 15 F. R. 285.

[7] F. *petit*, little; O. Dut. *focker*, an engrosser of commodities,— Skeat.

[8] [Bouvier's Law Dict.

[1] Webster's Dict.

[2] [Bailey v. Kalamazoo Publishing Co., 40 Mich. 256 (1879), Campbell, C. J.

[3] See Strong, Relations of Civil Law to Church Polity, &c. 126-32 (1875); Washb. Easem. 515; Craig v. First Presby. Church, 88 Pa. 51 (1878); Jones v. Towne, 58 N. H. 464 (1878), cases; Livingston v. Rector of Trinity Church, 45 N. J. L. 232-37 (1883), cases.

[4] Revenue Act, 13 July, 1866, § 9; 14 St. L. 120.

[5] Story v. Walker, 11 Lea, 517 (1883).

ferred by Rev. St., § 4952, so far as the photograph is a representation of original intellectual conceptions. The object of the requirement in the act of June 18, 1874 (18 St. L. 78), that notice of a copyright in a photograph shall be given by inscribing upon some visible portion of it the word "copyright," the date, and the name of the proprietor, is to give notice of the copyright to the public. Whether a photograph is a mere mechanical reproduction or an original work of art is a question to be determined by proof of the facts of originality, of intellectual production, and of thought and conception on the part of the author.[1] See PRINT.

Having control, as business manager, of sheets of a photograph, is not such possession as will render the person liable to the penalty imposed by Rev. St., § 4965, which provides that when one without permission sells a copyrighted photograph, he shall forfeit one dollar for every sheet found in his possession.[2]

Photographs have been admitted as evidence—(1) from necessity, as, to present accurate copies of public records which cannot be withdrawn from the files;[3] (2) to identify individuals,[4] and to furnish ocular evidence of injuries;[5] (3) to identify and describe premises in dispute;[6] (4) upon questions of disputed handwriting, in addition to the writing itself: in which cases enlarged photographs point out and emphasize peculiarities.[7] See SATISFACTORY.

PHYSICAL. See DISABILITY; FORCE; LABOR, 1; NECESSITY; PRESUMPTION.

PHYSICIAN. In a statute providing for the organization of medical societies, held not limited to any school of practitioners.[8]

The law implies an undertaking that he will exercise reasonable care and skill in the treatment of a patient; not that he will effect a cure.[9]

He may testify to a statement given by his patient in relation to his condition, symptoms, and feelings, past and present—where the bodily condition of a plaintiff, alleged to have been injured, is the subject of inquiry; but the necessity does not extend to declarations by the party as to the cause of the injury when that is the principal matter of inquiry.[1]

To defend against an action for his services, on the ground of a custom among physicians not to charge each other, it must appear that that custom was so universal as to justify the conclusion that it became, by implication, a part of the contract.[2]

A physician is liable in damages for want of skill in another physician to whom he intrusts practice.[3]

See CARE; COMMUNICATION, Privileged, 1; CORONER: DRUGGIST: EXPERT; FAMILY; INFORMATION, 1; INSPECTION, 2; MEDICAL; MEDICINE; POLICE, 2; SCIENCE; SLANDER; TRADE, Restraints.

PHYSIOLOGY. See ALCOHOL.

PIA. See FRAUS.

PIANO. See EXEMPTION; IMPLEMENT; OPERA.

PICKPOCKET. See LARCENY.

PICTURE. See COPYRIGHT; DESIGN, 2; FURNITURE; HEIRLOOM; LIBEL, 5; OBSCENE; PHOTOGRAPH; PRINT; SATISFACTORY, 1.

PIECE. See BAIL; PARCEL, 2; SATISFACTION, 1.

PIER. See COMMERCE; RIPARIAN; SPAN; WHARF.

PIG. See CATTLE; HOG.

PIGNUS. In civil law a pledge, *q. v.*

PIKE. See TURNPIKE.

PILFER. In its popular sense, to steal.[4] See HOOK.

PILLORY. A contrivance for inflicting punishment by exposing the offender to public disgrace.

A frame of wood erected on a post or posts, with movable boards containing holes through which the head and hands were put. First appointed for fraudulent bakers and such as used false weights. In use in the American colonies; now abolished, except in Delaware.[5]

The punishment of standing in the pillory shall not be inflicted.[6]

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[1] Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53 (1884), Miller, J.; s. c. 17 F. R. 591, 596-601; 6 *id.* 176.

[2] Thornton *v.* Schreiber, 124 U. S. 612 (1888), Miller, J., reversing 17 F. R. 608 (Philadelphia case); s. c. 26 Cent. Law J. 550 (1888), cases.

[3] *Re* Stephens, L. R., 9 C. P. 187 (1874); Leathers *v.* Salvor Wrecking Co., 2 Woods, 682 (1875); Daly *v.* Maguire, 6 Blatch. 137 (1868); Luco *v.* United States, 23 How. 541 (1859).

[4] Udderzook *v.* Commonwealth, 76 Pa. 340 (1874); Luke *v.* Calhoun Co., 52 Ala. 118 (1875); Ruloff *v.* People, 45 N. Y. 234 (1871); Washington Life Ins. Co. *v.* Schaible, 1 W. N. C. (Pa.) 369 (1873): 9 Phila. 186.

[5] Franklin *v.* State, 69 Ga. 42 (1882); Washington Life Ins. Co. *v.* Schaible, 1 W. N. C. 369 (1873).

[6] Blair *v.* Pelham, 118 Mass. 421 (1875); Cozzens *v.* Higgins, 33 How. Pr. 439 (1866); Church *v.* Milwaukee, 31 Wis. 519 (1872); Locke *v.* Railroad Co., 46 Iowa, 112 (1877); Hollenbeck *v.* Rowley, 8 Allen, 475 (1864); 2 Tichb. Tr. 640.

[7] Marcy *v.* Barnes, 16 Gray, 163 (1860); Foster's Will, 34 Mich. 23 (1876); Tome *v.* Railroad Co., 39 Md. 90 (1873); Ebon *v.* Zimpleman, 47 Tex. 519 (1877). And see 8 Am. Law Reg. 1-8 (1869); 20 Alb. Law J. 4-6 (1879), cases; 23 *id.* 182-84 (1881), cases; 1 Whart. Ev. § 646; Popular Science Monthly, 1875, p. 710.

[8] Rayner *v.* State, 62 Wis. 289 (1885).

[9] O'Hara *v.* Wells, 14 Neb. 403 (1883); Holtzman *v.* Hoy, 118 Ill. 534 (1886); 26 Am. Law Reg. 168-73 (1887), cases; 24 Cent. Law J. 515-18 (1887), cases; 20 Am. Law Rev. 80-92 (1886), cases; 4 Kan. Law J. 145 (1886) — Ohio Law Bulletin. As to death of patient by accident, see 21 Cent. Law J. 267-69 (1885), cases.

[1] Roosa *v.* Boston Loan Co., 132 Mass. 429 (1882).

[2] Madden *v.* Blain, 66 Ga. 49 (1880).

[3] Landon *v.* Humphrey, 9 Conn. 209, 215 (1832).

[4] Becket *v.* Sterrett, 4 Blackf. *500 (1838).

[5] See Rex *v.* Beardmore, 2 Burr. *792 (1759); 1 Chitty, Cr. L. 797; 4 Steph. Com. 443, note; 1 McMasters, Hist. Peop. U. S. 100.

[6] Act 23 Feb. 1839: R. S. § 5327.

By 56 Geo. III (1816), abolished in all cases except perjury; and by 7 Will. IV (1837), abolished absolutely in general terms without exception.[1]

PILOTAGE. See COMMERCE.

A libel *in rem* may be maintained for fees allowed for pilotage services tendered in accordance with the provisions of a State statute, but declined by the master of the vessel.[2] See CONSPIRACY; SHIP, 2.

PIMP. See PROSTITUTE.[3]

PIN-MONEY. Money allowed by a man to his wife for her personal expenses.

Anciently, a tax was laid for providing the queen with pins.[4]

Not a gift out and out, but a sum set apart for a specific purpose. The husband may find the wife in apparel instead of paying this apparel-money, as it may be called.[5]

PIOS. See USE, Pious, p. 1074.

PIRACY.[6] Robbery and depredation upon the high seas.[7]

Robbery and forcible depredation upon the high sea, *animo furandi*.[8]

Robbery or forcible depredation on the high seas, without lawful authority, done *animo furandi*, and in the spirit and intention of universal hostility.[9]

Pirate. One who roves the sea in an armed vessel, without commission from any sovereign State, on his own authority, and for the purpose of seizing by force, and appropriating to himself, without discrimination, every vessel he may meet.[10]

Piratical. Imports an aggression unauthorized by the law of nations, hostile in character, wanton and criminal in its commission, and utterly without sanction from any public authority or sovereign power,—that the act belongs to the class of offenses which pirates are in the habit of perpetrating, whether the purpose be plunder, hatred, revenge, or wanton abuse of power.[11]

Hostilities committed under a commission from a party to a recognized war are not included. In that case the superior may be held for the act.[1]

Piracy is the same offense at sea as robbery on land. It is everywhere punished with death; at common law was punished as an offense against the law of nations (part of the common law)—the universal law of society: a pirate being deemed an enemy of his race, *hostis humani generis*.[2]

Congress shall have power "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."[3]

"To define" is to enumerate the crimes which shall constitute piracy.[4]

2. Infringement of a copyright by reprinting all or a substantial portion of the production, word for word; or, by imitating or copying it with colorable alterations.

Citing the most important parts of a copyrighted work, with a view not to criticism but to supersede the use of the original work and to substitute the review.[5]

In determining the question of piracy, quantity, quality and value are regarded. If the selections are made *animo furandi*, with intent to make use of them for the purpose for which the original author used them, to convey in a different publication the information he imparted, or to supplant him in his own territory, a small quantity will suffice to support the charge. If the pirated portion, being substantial, cannot be separated from the original matter without destroying the publication, the whole book will be enjoined—upon the principle of the doctrine of "confusion of goods."[6] See ABRIDGE, 1; COMPILE; REVIEW, 3.

PISCARY. See COMMON, 2; FISHERY.

PISTOL. See BAGGAGE; WEAPON.

PL. See PLACITUM, 2.

PLACE. 1. Any locality limited by boundaries, however large or small, as, a country, a State, a county, a town, or a portion thereof. The extent of the locality is to be determined by the connection in which the word is used.[7]

Often denotes a specific place within a city or town at which a person dwells or transacts business;

[1] 1 Steph. Hist. Cr. Law Eng. 490.

[2] The Alzena, 14 F. R. 174-76 (1882), cases.

[3] See also Fahnestock *v.* State, 102 Ind. 156 (1884).

[4] Barring. Stat. 181.

[5] Howard *v.* Digby, 8 Bligh, 269 (1834).

[6] F. *pirate:* Gk. *peiratês*, one who attempts or attacks.

[7] [4 Bl. Com. 71.

[8] United States *v.* Smith, 5 Wheat. 161-62 (1820), Story, J.

[9] 1 Kent, 183; Dole *v.* New England Mut. Mar. Ins. Co., 2 Cliff. 416 (1864).

[10] United States *v.* Baker, 5 Blatch. 12 (1861), Nelson, J.; Davison *v.* Seal-skins, 2 Paine, 333 (1838?).

[11] United States *v.* The Malek Adhel, 2 How. 229 (1844), Story, J.

[1] The Chapman, 4 Saw. 511 (1864).

[2] 4 Bl. Com. 71; 5 Wheat. 158, 161-62; 1 Kent, 183; R. S. § 5368; 47 Pa. 169, 187.

[3] Constitution, Art. I, sec. 8, cl. 10.

[4] United States *v.* Smith, 5 Wheat. 161-62 (1820); R. S. §§ 5368-82.

[5] Folsom *v.* Marsh, 2 Story, 106-7 (1841).

[6] Farmer *v.* Elstner, 33 F. R. 499 (1888), cases: 37 Alb. Law J. 230, in which the defendant's "Industries of Detroit" was held to infringe (in 11 out of 70 pages of the first chapter) the plaintiff's "History of Detroit and Michigan," &c.

[7] Law *v.* Fairfield, 46 Vt. 432 (1874), Ross, J.; Clapp *v.* Burlington, 42 *id.* 582 (1870); State *v.* Hart, 31 N. J. L. 429 (1866); *ib.* 414.

es, in the expressions, "place of business," "usual place of business," "usual place of abode," etc., found in statutes fixing the venue of transitory actions, referring to trustee process, taxation of partnership property, and in provisions for serving writs, notices, etc.[1] See ABODE; BUSINESS; RESIDENCE; VICINITY.

In a revenue act, may mean a locality more limited than the country where goods are bought or manufactured.[2]

In internal revenue acts, as applied to the place where a licensee may carry on business, construed with reference to the business, but not as an equivalent for county, town or State.[3]

In a statute forbidding betting in any "house, office, room, or other place," need not be covered with a roof;[4] an umbrella is such place.[5]

A canvas tent may be a disorderly house or place.[6]

In a statute forbidding the sale of liquors "in any place" within four hundred feet of a public schoolhouse, held to include a tent, a booth, an excavation in the ground or anything similar thereto.[7]

Public place. It would be difficult to define what is a "public place" within the meaning of statutes against gaming, affrays, retailing liquor, indecent exposure of person and drunkenness, for notices of sale, etc.; but, generally speaking, it means a place where the public may go uninvited.

Not, necessarily, a place devoted exclusively to the uses of the public, but "public" in fact, as distinguished from private; visited by many persons; usually accessible to the neighboring public.[8]

A public highway is not necessarily a public place: it may be abandoned or traverse a forest.[9]

A place where the public has a right to go and be; not every place where people may be congregated.[10]

For the purpose of setting up notices of sale, a place likely to give information to those interested, and who may probably become bidders. The term is relative; what is a public place for one purpose may not be public for another.[11] See PUBLIC.

Compare ALIBI; LOCUS; SITUS; VENUE.

[1] Palmer *v.* Kelleher, 111 Mass. 321-22 (1873), Morton, J.

[2] Cliquot's Champagne, 3 Wall. 142 (1865), Swayne, J.; Act 3 March, 1863, § 1.

[3] Salt Company *v.* Wilkinson, 8 Blatch. 33 (1870).

[4] Eastwood *v.* Miller, L. R., 9 Q. B. 443 (1874); 10 *id.* 102; L. R., 3 Ex. 137; 12 L. T. 355.

[5] Bows *v.* Tenwick, L. R., 9 C. P. 343 (1874).

[6] Kliman *v.* State, 2 Tex. Ap. 222 (1877).

[7] Commonwealth *v.* Jones, 142 Mass. 575 (1886).

[8] Parker *v.* State, 26 Tex. 207 (1862).

[9] Williams *v.* State, 64 Ind. 555-57 (1878), cases.

[10] State *v.* Welch, 88 Ind. 310 (1882): 52 *id.* 311.

[11] Cummins *v.* Little, 16 N. J. E. 53 (1863).

See, as to affrays, 22 Ala. 15; 35 *id.* 392; 29 Ind. 206; as to gaming, 12 Ala. 492; 13 *id.* 602; 17 *id.* 369; 19 *id.* 398, 551; 20 *id.* 47, 51, 86; 23 *id.* 39; 25 *id.* 60, 78; 26 *id.* 69, 135; 29 *id.* 46; 30 *id.* 19, 524, 532, 550; 31 *id.* 371; 32 *id.* 596; 35 *id.* 390; 37 *id.* 472; 59 *id.* 89; 9 Tex. 430; 21 *id.* 223; 26 *id.* 145, 204; 43 *id.* 602; 4 Leigh, 680; 8 *id.* 741; 6 Gratt. 689; 8 *id.* 585; 14 *id.* 679; 22 *id.* 917; as to exposure of person, 4 Hun, 636; 43 Tex. 346; 3 Car. & K. 360; 2 Cox, C. C. 376; 3 *id.* 248; L. R., 1 C. C. 282; 1 L. & C. 326; 2 Camp. 89; 1 Den. C. C. 338; as to intoxication, 52 Ind. 311, 481; 74 *id.* 103; 36 N. H. 59; 26 L. J. M. C. 178; as to sales of liquors, 74 Me. 563; 54 Vt. 155; as to public sales of property 71 Me. 547; 48 Mo. 300; 3 N. H. 179; 40 *id.* 173; 57 Ind. 556; 53 Vt. 447; 44 Wis. 213.

Place of contract. Matters bearing upon the execution, the interpretation, and the validity of a contract, are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, the admission of evidence, the statute of limitations, depend upon the law of the place where suit is brought.[1]

The general rules, and their exceptions, are familiar, but the books are full of conflicting illustrations of their application. The primary rule is that the validity of a contract is to be determined by the law of the State where it was made. If valid there, it is deemed valid everywhere, and it will sustain an action in a State whose laws do not permit such a contract. If the contract is not in itself immoral, although expressly prohibited in the State where suit is brought, the courts administering the comity of that State will not refuse to enforce the contract. The principal exception is that the law of the place of performance will govern the mode of performance, because it is presumed that the parties had this law in mind when they entered into the contract; but the presumption may be rebutted by an express declaration to the contrary, or by the fact that the obligation is illegal by the local law.[2]

Place of delivery. In a contract of sale, if no place of delivery is specified, the articles must, in general, be delivered at the place where they were at the time of sale, unless some other place is required by the nature of the article, the usage of the trade, or the previous course of dealing between the parties, or is to be inferred from the circumstances of the case. If a place is prescribed as a part of the contract, the vendee is not bound to accept, nor is the vendor obliged to make, a tender of the goods elsewhere.[3] See SALE.

[1] Scudder *v.* Union Nat. Bank, 91 U. S. 412 (1875), Hunt, J. See also Pritchard *v.* Norton, 106 *id.* 129-41 (1882), cases; Von Hoffman *v.* City of Quincy, 4 Wall. 550 (1866), cases; Oscanyan *v.* Arms Co., 103 U. S. 277 (1880); Gebhard *v.* Canada Southern R. Co., 17 Blatch. 417-18 (1880); Codman *v.* Vermont & Canada R. Co., 16 *id.* 175-76 (1879), cases; Milliken *v.* Pratt, 125 Mass. 375-88 (1878), cases.

[2] Brown *v.* American Finance Co., 31 F. R. 519-20 (1887), cases, Wallace, J.

[3] Hatch *v.* Standard Oil Co., 100 U. S. 134-35 (1879), cases, Clifford, J.; Ragland *v.* Wood, 71 Ala. 150 (1881), cases; Janney *v.* Sleeper, 30 Minn. 474-75 (1883), cases; Story, Sales, § 306; Benj. Sales, § 679; 2 Kent, 505.

Place of indictment. In general, all offenses must be inquired into and tried in the county where the fact is committed. Yet, if larceny is committed in one county, and the goods are carried into another, the offender may be tried in either, for the offense is complete in both. But for robbery, burglary, and the like, he can only be indicted where the fact was actually committed; for though the carrying away and the keeping of the goods is a continuance of the original taking, and is therefore larceny in the second county, yet it is not robbery or burglary in that jurisdiction.[1]

The crime of murder is complete where the felonious blow was struck, notwithstanding that the death happens within another jurisdiction.[2]

In the Federal courts, capital offenses are indictable in the jurisdiction where the offense was committed, when that can be done without great inconvenience; offenses committed on the high seas, or elsewhere out of the jurisdiction of a State or district, in the district where the offender is found, or into which he is first brought.[3] An offense begun in one circuit and completed in another is deemed committed in either and may be tried in either.[4] Suits for taxes, penalties, and forfeitures may be begun in the district where they accrue or in which the offender or delinquent is found.[5] Seizures, made upon the high seas, where the property is brought; made within any district, in that district, unless otherwise provided.[6] See DESCRIPTION, 4; INDICTMENT; VENUE.

Place of payment. When no place of payment is expressed in a bill or note, the rule, in the absence of any agreement or circumstances fixing or indicating a different intention, is that the place of presentment is the place where the acceptor or maker resides, or at their usual place of business.[7] See BUSINESS; PRESENT, 2 (1).

2. To negotiate, or contract, for a thing: as, to place a risk, a mortgage, or other loan; also, to deliver a thing to a person for a purpose.

A person who "places" his goods with an agent for a specified purpose does not necessarily authorize him to make a warranty.[8]

Parties to a contract for "placing" mortgages may mean selling or realizing upon them.[9]

PLACITUM. L. 1. A plea, or pleading; a suit. See PLEA.

2. A subdivision of an abridgment or digest. Abbreviated *pl.*

PLAGIARISM. See PIRACY, 2.

PLAGUE. See HEALTH.

PLAIN. Such as may be read and understood by most persons.

"Plain type" means large or ordinary sized type, within the meaning of a statute requiring innkeepers to post up copies of the hotel law.[1]

The "plain statement" required by the New York code is one that may be readily understood by all persons acquainted with the language in which it is written.[2]

PLAINT.[3] A private memorial tendered in open court to the judge, wherein the party injured sets forth his cause of action.[4]

Preserved in *complaint* and *plaintiff*.

PLAINTIFF. Originally, one who makes plaint, *q. v.*

The party in whose favor the plaint or suit purports, on the record, to have been instituted.[5]

One who complains of injury done, in court.[6]

Whoever brings a suit, bill, or complaint, is a "party plaintiff," and whoever is bound to appear and defend is the party defendant,[7] *q. v.*

In common-law proceedings we speak of the actor (the party bringing suit) as "plaintiff," and in equity proceedings as "complainant,"—a distinction without a difference. The terms are convertible, although, for the purpose of distinguishing whether the suit is at law or in equity, the different names are sometimes used. In the equity rules of the Supreme Court, the actor is always called plaintiff.[8]

Legal plaintiff. He in whom the legal title or cause of action is vested. **Equitable plaintiff.** He who in equity is entitled to the thing sued for.

Nominal plaintiff. One who is named as plaintiff, but yet has no interest in the controversy, having assigned his right to another for whose use the action is maintained, and who is therefore the *use* or *real plaintiff*.

Plaintiff in error. The party who sues out a writ of error. Called also the *plaint-*

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[1] 4 Bl. Com. 305.

[2] United States v. Guiteau, 18 Rep. 138, 718-21 (1882), cases.

[3] R. S. §§ 729-30, cases.

[4] R. S. § 731.

[5] R. S. § 782.

[6] R. S. § 734.

[7] 1 Daniel, Neg. Inst. §§ 90, 635; Cox v. Nat. Bank of New York, 100 U. S. 709-18 (1879), cases; Stubbs v. Colt, 30 F. R. 417 (1887), cases. Law of place generally, 34 Am. Law Reg. 403-12 (1885), cases.

[8] Anderson v. Bruner, 112 Mass. 14 (1873).

[9] Bailey v. Joy, 139 Mass. 359 (1883).

[1] Porter v. Gilkey, 57 Mo. 237 (1874).

[2] Mann v. Morewood, 5 Sandf. 564 (1852).

[3] F. *pleinte:* L. *planctus*, lamentation, lament.

[4] 3 Bl. Com. 273.

[5] Henry v. Bank of Salina, 5 Hill, 533 (1843).

[6] 3 Bl. Com. 25.

[7] Canaan v. Greenwoods Turnpike Co., 1 Conn. 9 (1813).

[8] Stinson v. Hildrup, 8 Biss. 378 (1878), Drummond, J

ff above: the plaintiff in the appellate tribunal.

See ACTOR; APPELLANT; ASSIGN, 1; CALL; COMPLAINANT; LIBELANT; LITIGANT; ORATOR; PARTY; PROSECUTOR; RELATOR; SUITOR.

PLAN. See PLAT.

PLANING-MILL. See NUISANCE.

PLANK-ROAD. See TURNPIKE.

PLANTATION. A place planted; all the land forming the parcel or parcels under cultivation as one farm.[1]

PLANTS. See CROP; EMBLEMENTS; LARCENY.

PLAQUE. See COPYRIGHT.

PLASTERING. As commonly understood, includes the work of "lathing."[2]

PLAT, or PLOT. A subdivision of lands into lots, streets and alleys, marked upon the earth and represented upon paper.[3] See DEDICATION, 1; MAP.

PLAY. See DRAMA; GAME, 2; REVIEW, 3.

PLAZA. See PARK, 2; PUEBLO.

PLEA.[4] 1. Anciently, a suit or action: as, in the expressions, "summoned to answer B of a plea of trespass;"[5] to "hold pleas," "have cognizance of pleas."[6]

Common pleas. Civil suits between man and man: tried in the courts of common pleas. **Pleas of the crown.** Suits prosecuted by the sovereign; crimes and misdemeanors.[7]

By "common pleas" is understood such pleas or actions as are brought by private persons against private persons, or by the government where the cause of action is of a civil nature.[8]

2. A formal answer, made by a defendant, to a demand or charge.

In common-law practice, the defendant's answer to the merits of the declaration, as opposed to a demurrer, *q. v.*

In equity practice, a short statement, in response to a bill, of facts which, if inserted in the bill, would render it demurrable.[1]

An "answer" is a complete statement of the defendant's cause, and may contain responses to interrogatories.[1]

The office of a "plea" in a suit in equity is not, like an "answer," to meet all the allegations of the bill, nor like a "demurrer," admitting those allegations, to deny the equity of the bill; but to present some distinct fact, which of itself creates a bar to the suit or to the part to which the plea applies, and thus avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large.[2]

The plaintiff may set down the plea for argument, or file a replication to it. If he sets it down for argument, he admits the truth of all the facts stated in it, and merely denies their sufficiency in point of law to prevent his recovery. If he files a general replication to the plea, no fact is in issue but the truth of the matter pleaded. Objections to the equity of the plaintiff's claim, as stated in his bill, cannot be taken by plea. A plea, though under oath and negativing a material averment in the bill, is not evidence in the defendant's favor.[3] See ANSWER, 3.

Plead. (1) To carry on a suit or plea; to litigate.

(2) To conduct the allegations of the respective parties to a cause.

(3) To make an allegation of fact in a cause.

(4) To make that allegation of fact which follows and opposes the allegation in the declaration.[3]

In the last sense, "plea" and "to plead" are now generally understood.

Plead and pled are sometimes improperly used for pleaded.[4]

"To plead a statute" is to state the facts which bring a case within the statute, without mentioning the statute itself. Compare RECITE.

Pleading. (1) A plea of any nature.

(2) The statement, in a logical and legal form, of the facts which constitute the cause of action or the ground of defense.[5]

The formal mode of alleging on the record that which would be the support or the defense of the party on evidence.[5]

"The pleadings" are the mutual altercations between the plaintiff and the defendant.[6]

These altercations are set down and delivered into the proper office in writing. Formerly, they were put

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[1] Stowe *v.* Davis, 10 Ired. L. 433 (1849). See also Attorney-General *v.* State Board of Judges, 38 Cal. 295 (1869).

[2] See Higgins *v.* Lee, 16 Ill. 495, 502 (1855); Walls *v.* Bailey, 49 N. Y. 464, 467 (1872); Mellen *v.* Ford, 28 F. R. 639, 642 (1886).

[3] McDaniel *v.* Mace, 47 Iowa, 510 (1877).

[4] F. *ple, plai, plait, plaid:* L. L. *placitum*, a decree, sentence, etc.: *placere*, to please, seem fit.

[5] Steph. Pl. 38, 39.

[6] 2 Bl. Com. 37.

[7] 3 Bl. Com. 40; 4 *id.* 2, 265.

[8] Dallett *v.* Feltus, 7 Phila. 628 (1870), Thompson, C. J.

[1] [Hunt, Eq., Part I, ch. 3. See Carter *v.* Hoke, 64 N. C. 351 (1870).

[2] Farley *v.* Kittson, 120 U. S. 303, 314-16 (1887), cases, Gray, J.

[3] [Burrill's Law Dict.]

[4] Webster's Dict.

[5] Read *v.* Brookman, 3 F. R. 159 (1789), Buller, J.

[6] 3 Bl. Com. 293.

in by counsel *viva voce*, in court, and minuted down by the chief clerks; whence in law-French the pleadings are called "the parol."[1]

The pleadings are the written allegations of what is affirmed on the one side, or denied on the other, disclosing to the court and jury the real matters in dispute.[2]

In a large sense, all proceedings from the declaration until issue is joined. In the most limited sense, the defendant's answer to the declaration.[3]

In criminal practice, may include the indictment, and pleas in abatement or in bar, but not a motion to quash.[4]

(3) The art or science of preparing such statements.

(4) In popular parlance, oral advocacy, forensic argumentation.

The office of technical pleading is to inform the court and the parties of the facts in issue: the court, that it may declare the law; the parties, that they may know what to meet by their proofs.[5]

The common law requires that the controversy, before it is submitted to the court or jury, should be reduced to one or more integral propositions of law or fact; hence, it is necessary that the parties should frame the allegations which they respectively make in support of their demand or defense into certain writings called "the pleadings." These should clearly and succinctly state the nature of the wrong complained of, the remedy sought, and the defense set up. The end proposed is to bring the matter of litigation to one or more points, simple and unambiguous.

Common-law pleading came to its perfection in the reign of Edward III. At one time, the excessive accuracy required, the subtlety of distinctions introduced by astute logicians, the introduction of cumbrous forms, fictions, and contrivances which seemed to perplex the investigation of truth, had brought the system of special pleading into disrepute. In more modern times it has been so modified, the pleadings in every form of common-law action have been so reduced to simple, clear, and unambiguous forms, that the merits of a cause are now reached directly and fully.[6]

The object of all pleadings is to develop the real issue.[7]

Definite, legal conclusions cannot be arrived at upon hypothetical averments.[8]

Courts are not established to determine what the law might be upon possible facts, but to adjudge the rights of parties upon existing facts; and when their jurisdiction is invoked parties will be presumed to present in their pleadings the actual, and not supposable, facts touching the matter in controversy.[1]

In their order, pleadings are: the declaration, defense, plea, replication, rejoinder, surrejoinder, rebutter, and surrebutter,[2] *qq. v.*

These must be single, containing one matter; direct and positive, and not argumentative; have convenient certainty of time, place, persons; must answer allegations in every material part; and must be so pleaded as to be capable of trial. No more is to be stated than is necessary to set out the cause of complaint or ground of defense; and facts, not inferences or matters of law or evidence, are required.[3]

The substantial rules of pleading are founded in strong sense and in the soundest and closest logic.[4]

All pleading is a logical process. The object is to facilitate the administration of justice, by simplifying the grounds of controversy and ultimately narrowing the contest to a single and direct affirmative and negative — a definite point of law or fact.[5]

The rules of pleading involve a methodized body of principles which constitute a complete system of legal logic, artificial in its form and structure, but admirably adapted to the ends of simplicity, uniformity, and certainty in the administration of justice. . . . All good pleading is in substance a syllogistic process. For example, in an action for a trespass upon land, the declaration may be presented thus: "From him who forcibly enters upon my land I have a right, by law, to recover damages: The defendant has forcibly entered upon my land: Therefore, from him I have a legal right to recover damages." Here the major proposition asserts the legal principle; the minor proposition alleges the matter of fact to which the principle is to be applied; the conclusion is the legal inference, resulting from the law and fact together. The judgment is but an affirmance or negation of that conclusion. The successful denial of any one of the three propositions will defeat recovery. Denial of the major proposition tenders an "issue in law;" denial of the minor proposition an "issue in fact." Assuming the major to be correct in principle, and the minor true in fact, the conclusion inevitably follows,— unless the defendant can repel it by alleging some "new matter" which is inconsistent with it, and, therefore, by consequence, implies a denial of it. This new matter must be matter of release, duress, or other matter in confession or avoidance.[6]

Dilatory pleas tend to delay or put off the suit [or the plaintiff's eventual remedy]

[1] 3 Bl. Com. 293.

[2] Desnoyer *v.* Hereux, 1 Minn. 19 (1851).

[3] Lovett *v.* Pell, 22 Wend. 375 (1839). See also 19 Johns. 37; 32 Barb. 219; 51 Pa. 375; 47 Me. 459.

[4] Wagner *v.* State, 42 Ohio St. 541 (1885).

[5] Hill *v.* Mendenhall, 21 Wall. 455 (1874), Waite, C. J.

[6] McFaul *v.* Ramsey, 20 How. 524 (1857), Grier, J.; 1 Black, 315.

[7] Thomas *v.* Mann, 28 Pa. 522 (1857).

[8] Commonwealth *v.* Allegheny County, 37 Pa. 265 (1860); Sullivan *v.* Iron Silver Mining Co., 109 U. S. 555 (1883); Territory *v.* Hauxhurst, 3 Dak. 211 (1882).

[1] Bissell *v.* Spring Valley Township, 124 U. S. 229 (1888). Field, J.; Gould, Pl. ch. 14, p. 1, § 43.

[2] 3 Bl. Com. 293, 313.

[3] 3 Chitty, Bl. Com. 293.

[4] Robinson *v.* Raley, 1 Bur. *319 (1757), Ld. Mansfield.

[5] Gould, Plead. p. 10.

[6] Gould, Plead. pp. 4-10. See also 3 Bl. Com. 294.

by questioning the propriety of the remedy, rather than by denying the injury.[1]

They are to the *jurisdiction* of the court: alleging that it ought not to hold plea of the matter; to the *disability* of the plaintiff: as being an infant, a feme-covert, that he has a committee, etc.; or in *abatement* of the writ, or declaration, for some defect: as, misnomer, that the plaintiff is dead, etc.

No dilatory plea is admitted unless verified by affidavit. Pleas to the jurisdiction conclude by praying "judgment, whether the court will have further cognizance of the suit;" pleas to the disability, "judgment, if the plaintiff ought to be answered;" pleas in abatement, "judgment of the writ or declaration, and that the same may be quashed," or "judgment of the bill" — when the action is by bill. When any of these pleas is allowed the cause is dismissed from the jurisdiction, the plaintiff is stayed till his disability is removed, or else he must either sue out a new writ or amend his declaration. When the plea is overruled, the plaintiff has judgment of *respondeat ouster* — to answer over in some better manner: it is then incumbent on him to plead.[1]

Pleas to the action dispute the cause of the suit, — confess or deny the merits of the complaint.

Confession is of all or of a part of the complaint (here applying tender, payment into court, and set-off); but the more usual is denial of the truth of the complaint by pleading the general issue, or by some special bar to recovery, such as a release, a former recovery, the statute of limitations, a justification, an accord, arbitration, estoppel, or perhaps a pardon.[1]

Pure plea. In equity practice, a plea which relies wholly upon a matter *dehors* the bill; as, a release or a settled account.

Anomalous or negative plea. Such plea as consists mainly of a denial of the substantial matters set forth in the bill.[2]

Bad plea; bad pleading. Not of the form of action with the last preceding pleading: as, a plea in contract to a declaration in tort.

Not cured by verdict, as are pleas which, although they would be held bad on demurrer as wrong in form, yet still contain enough substance to put in issue the material parts of the declaration.[3] See BAD, 2; CURE, 2.

Counter-plea. Of an incidental kind, diverging from the main object of the suit; as, a demurrer to an erroneous demand of oyer.[4] (Rare.)

[1] 3 Bl. Com. 301-3; 4 *id.* 332.

[2] [Story, Eq. Pl. §§ 651, 667; Swayze *v.* Swayze, 37 N. J. E. 186 (1883).

[3] Garland *v.* Davis, 4 How. 131, 144 (1846).

[4] See Steph. Plead. 79.

Double pleading. Alleging distinct matters, any one of which would be sufficient; duplicity, *q. v.*

Implead. To sue in due course of law: as, A impleaded with B.

Each defendant may then interpose his own answer.[1] Abbreviated *imp.*

Interplead. To become a party litigant. See INTERPLEADER.

Misplead. To plead amiss or wrongly; as, to misdeclare by misjoining parties.[2]

Plead issuably. To plead so as to raise a material issue, of law or of fact. See ISSUE, 3.

Plead over. 1. To pass over, omit to notice, a material allegation or defect in the declaration. 2. To plead again; as, the general issue, after a demurrer or special plea has been overruled.

Formal defects in a pleading are waived by pleading over after demurrer overruled.[3]

Plead to the merits. See MERITS.

Special plea, pleading, pleader. When the allegations are not of the ordinary form, but of a complex or special character, they are called "special pleadings;" and when the defendant interposes a plea of this description, that is, a "special plea," he "pleads specially," instead of pleading the general issue. Whence "special pleading" for the science, and "special pleader" for a person learned, or employed, in draughting such pleadings.

Causes were frequent in which the plaintiff could not aver his cause of action, or the defendant embody his defense, in the then settled mode, but a count or plea adapted to the peculiar facts was necessary. These were called special counts and "special pleas;" draughting them was "special pleadings;" and chamber counsel who made a business of draughting them were "special pleaders."[4]

Special plea. Also, the allegation of special or new matter to avoid the effect of an allegation by the opposite party.

See ABATEMENT, 4; ACTION, 2; ALLEGATION; AMENDMENT, 1; ASSIGNMENT, 1, NEW; BAR, 3; CERTAINTY, 3; COLOR, 2; CONFESSION, 1; CONTINUANCE, 1; COUNT, 4; DISCLAIMER, 4; DECLARATION, 2; DEMURRER; DEPARTURE, 3; DESCRIPTION, 3; FORM, Of action; INDICTMENT; INDUCEMENT, 1; ISSUE, 3; MANNER AND FORM; MATTER,

[1] See People *v.* Clarke, 9 N. Y. 368 (1853); 47 Wis. 239.

[2] See Lovett *v.* Pell, 22 Wend. 375 (1839); 2 Tidd, Prac. 954.

[3] Reynolds *v.* Lincoln, 71 Cal. 190 (1886).

[4] See Steph. Plead. *29, *162; 1 Chitty, Pl., 16 Am. ed., 491.*

New, Special; MULTIFARIOUSNESS; NEGATIVE; OYER; PAPER, 5; PRACTICE; PROCEDURE; PROFERT; PROTESTATION; REPUGNANT; SAID; STATE, 1; SURPLUSAGE; TRAVERSE; VIDELICET.

PLEDGE.[1] A bailment of personal property as a security for some debt or engagement.[2]

A deposit of personal property as security, with an implied power of sale upon default.[3]

The thing itself thus deposited or bailed.

Pledgee. He who receives a pledge; a pawnee.

Pledgor;[4] **pledger.** He who delivers a pledge; a pawnor.

A "mortgage" of a chattel is a conveyance of the legal title upon condition, and becomes absolute at law if not redeemed by a given time. A "pledge" is a deposit of goods, redeemable on certain terms, with or without a fixed period for redemption. In a pledge the general property does not pass, as in the case of a mortgage, and the pawnee has only a special property in the thing. He must choose between two remedies: a bill in chancery for a judicial sale under a decree of foreclosure, or a sale without judicial process, on the refusal of the debtor to redeem, after reasonable notice to do so.[5]

Delivery of the thing is essential to the completion of the contract. When possession is retained by the pledgor the contract is an hypothecation,[6] *q. v.*

The pledgee of bills receivable may hand them back to the debtor for collection, or to be replaced by others; and collections made thereon are for the pledgee.[7]

When the pledgee parts with the pledge to a *bona fide* purchaser (without notice of any right in the pledgor), the pledgor cannot recover against such purchaser without first tendering him the amount due.[8]

The possession which is essential need not be actual: it may be constructive; as, where the key of a warehouse containing the property is delivered, or a bill of lading is assigned. In such case, the act done will be considered as a token, standing for an actual delivery. It puts the property under the control of the creditor.[9]

Where there is no express agreement, the intention of the parties, as to the mode by which the security shall be converted into money, must be implied from the nature of the property pledged and the circumstances of the transaction.[1]

See BAILMENT; CONDITION; FACTOR; FORECLOSURE; MORTGAGE; PAWN; REDEEM; REPLEVIN; SECURITY, 1. Compare PIGNUS; VADIUM.

PLEDGES. See DOE.

PLENA. See PROBATIO.

PLENE. See ADMINISTRARE; COMPUTARE.

PLENIPOTENTIARY. See MINISTER, 3.

PLIGHT. In old English law, the habit or quality of a thing, whether property, real or personal, or an estate or right therein.[2]

To deliver a thing in "the same plight and condition" is a common expression.[3]

PLOT. See PLAT.

PLUNDER.[4] The most common meaning is, to take property from persons or places by open force, as in the case of pirates or banditti. In another common meaning (in some degree figurative), expresses the idea of taking property from a person or place without just right, but not stating the nature or quality of the wrong done.[5]

Embraces robbery and fraudulent taking, or embezzlement. Thus, a vessel may be said to be plundered, not only if openly attacked and robbed, but if property be taken from her furtively, in the night time, or after she has been abandoned by the crew.[6]

PLURAL. See NUMBER.

Plurality. See BIGAMY; MAJORITY.

PLURIES. L. Many times; often; formerly.

The emphatic word in the Latin form of a writ issued after a second writ of a like kind had been returned unexecuted.

If the sheriff cannot find the defendant upon the first writ of *capias*, and returns a *non est inventus*, there issues an *alias* writ, and after that a *pluries* writ to the same effect as the former, except that after the words "we command you as we have—" "often"

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[1] M. E. *plegge*, a hostage, security: F. *plege*, a surety.

[2] Story, Bailm. § 286; 37 Cal. 25; 59 *id.* 107; 41 N. Y. 241; 2 Kent, 577.

[3] Jones, Pledges, § 1. See also 78 Ill. 452; 83 *id.* 326.

[4] Pronounced as if spelled pledge-or, *i. e.*, pledj-or. Pledg*eor* is rarely found in standard law publications. Compare MORTGAGOR.

[5] Evans *v.* Darlington, 5 Blackf. *322 (1840); Wright *v.* Ross, 36 Cal. 428, 441 (1868); 8 Johns. 98; 2 Barb. 543; 43 *id.* 610; 38 Md. 251; 2 Ves. 378.

[6] See 2 Bl. Com. 159; Jones, Pledges, § 23; Story, Bailm. §§ 286, 308; Brewster *v.* Hartley, 37 Cal. 25 (1869); Mitchell *v.* Roberts, 17 F. R. 778, 782 (1883), cases.

[7] Clark *v.* Iselin, 21 Wall. 368–69 (1874): White *v.* Platt, 5 Denio, 271 (1848); Casey *v.* Cavaroc, 96 U. S. 476–80 (1877), cases.

[8] Talty *v.* Freedman's Savings, &c. Co., 93 U. S. 324–26 (1876), cases.

[9] Casey *v.* Cavaroc, 96 U. S. 477 (1877), Bradley, J.; Bank of British Columbia *v.* Marshall, 11 F. R. 19 (1882).

[1] Merchants' Nat. Bank *v.* Thompson, 133 Mass. 486–87 (1882), cases; Story, Bailm. § 308.

[2] Coke, Litt. 221.

[3] See 95 U. S. 764; 101 *id.* 406, 738; 2 Bl. Com. 425.

[4] Gr. *plunder*, trash, trumpery: to strip of even worthless stuff.

[5] Carter *v.* Andrews, 16 Pick. 9 (1834), Shaw, C. J.

[6] United States *v.* Pitman, 1 Sprague, 198 (1852): 14 St. L. 121: R. S. § 5361; United States *v.* Stone, 8 F. R. 246–49, 233 (1881); 1 Pet. Adm. 242; 1 Bish. Cr. L. § 141; 2 Russ. Cr. 150.

is inserted instead of "formerly," "*sicut pluries præcipimus.*"[1] See ALIAS.

PŒNA. See PENAL; SUBPŒNA.

POINT. Any question, particularly of law, arising in connection with the determination of a cause.

Points for the court's charge are generally isolated, often abstract, propositions, framed not so much upon the real aspect of the evidence as to express the extremes of the case, and lead to the expression of opinion upon the theoretical rather than upon the practical questions.[2]

Statutes require that the answer of the judge or court affirming or rejecting a point as a correct statement of law shall be reduced to writing. See RESERVE, 6.

POISON. Ordinarily, a substance taken internally, seriously injurious to health and often fatal to life.[3]

In common parlance, chloroform is classed among poisonous substances.[4]

Upon a charge of murder by poisoning, the State must prove, beyond a reasonable doubt, that the deceased came to his death by poison administered by the accused knowingly and feloniously.[5]

See ACCIDENT; ADMINISTER, 1; ADULTERATE; ATTEMPT; DRUGGIST; MURDER; NOXIOUS.

POKER. See GAME, 2.

POLE. See CATCHPOLE.

POLICE.[6] 1. The polity of a community with respect to the liberty, safety, health, morals, tranquillity, and happiness enjoyed by its members. Compare POLICY, 1.

2. Regulations for promoting the general welfare of the people of a State.

In the abstract sense, divided into *administrative* and *preventive police;* and spoken of as the police power, internal police, public police, and police purposes or regulations.

"Public police and economy" mean the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations.[7]

Offenses against public police comprise all such crimes as especially affect public society and are not comprehended under offenses against public justice, peace, trade, or health. Among these offenses are clandestine marriages, bigamy, common nuisances, idleness, gaming, and infractions of sumptuary laws.[1]

The power of "internal police" includes all those powers which relate to merely municipal legislation.[2]

The "police power" is the power vested in the legislature by the constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with or without penalties, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.[3]

The power by which the health, good order, peace, and general welfare of the community are promoted.[4]

The States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people.[5]

The power in each State to prescribe regulations to promote the health, peace, morals, education, and good order of the people.[6]

None of the amendments to the Constitution interfere with this power.[6]

Legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope; and every one must use his property subject to the restrictions which such legislation imposes. The police power of the State can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects.[7]

There is also the further limitation that no such

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[1] 3 Bl. Com. 283; 4 *id.* 319.

[2] Roberts *v.* Roberts, 54 Pa. 269 (1869).

[3] Bacon *v.* United States Mut. Accident Association, 44 Hun, 602 (1887), Learned, P. J.

[4] State *v.* Baldwin, 36 Kan. 22 (1886).

[5] Hatchett *v.* Commonwealth, 76 Va. 1026 (1882).

[6] Pō'-lēs. F. *police;* Gk. *politeí'a*, government, polity: *poli'-tēs*, a citizen: *pol'is*, a city.

[7] 4 Bl. Com. 162; Canal Commissioners *v.* Willamette Transp. Co., 6 Oreg. 222 (1877); Commonwealth *v.* Hale, 97 Pa. 408 (1881); 3 Law Q. Rev. 180-203 (1887), Eng. cases.

[1] 4 Bl. Com. 162-75. See also Tennessee *v.* Davis, 100 U. S. 300-1 (1879), cases.

[2] City of New York *v.* Miln, 11 Pet. *139 (1837), Barbour, J.

[3] [Commonwealth *v.* Alger, 7 Cush. 85 (1851), Shaw, C. J.; Commonwealth *v.* Bearse, 132 Mass. 546 (1882).

[4] Webber *v.* Virginia, 103 U. S. 348 (1880), Field, J.

[5] Escanaba & Lake Michigan Transportation Co. *v.* City of Chicago, 107 U. S. 683 (1882), Field, J.

[6] Barbier *v.* Connolly, 113 U. S. 31 (1885), Field, J.; Soon Hing *v.* Crowley, *ib.* 708 (1885).

[7] Munn *v.* Illinois, 94 U. S. 145 (1876), Field, J.; *ib.* 113.

regulation may encroach upon the free exercise of the power vested in Congress to regulate commerce.[1]

The power certainly extends to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot divest itself of the power to provide for these objects. They belong to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. This discretion can no more be bargained away than the power itself.[2]

The government may, by general regulations, interdict such uses of property as would create nuisances and become dangerous to the lives, health, peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, building with combustible materials, and the burial of the dead, may all be interdicted on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.[3]

A law passed in the legitimate exercise of this power is not obnoxious because it does not provide compensation for inconvenience to the individual. He is rewarded by the common benefits secured.[4] See TAKE, 8.

Lotteries, for example, are subjects for the exercise of the power — which the legislature cannot grant away. It is easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate.[5]

The power was not surrendered to the United States, but remains complete, unqualified, and exclusive in the States. If one were to attempt to define a subject so diversified and multifarious, we would say, that every law came within this description which concerned the welfare of the whole people of a State, or of any individual within it; whether it related to their rights or their duties; whether it respected them as men or as citizens of the State, and whether in their public or private relations; whether it related to the rights of persons, or of property, of the whole people of a State, or of any individual within it; and whose operation was within the territorial limits of the State, and upon the persons and things within its jurisdiction.[6]

Within its category comes every law for the restraint and punishment of crime, and for the preservation of the public peace, health, and morals.[1]

Although a State is bound to receive and to permit the sale, by the importer, of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, diminish the profits of the importer, or lessen the revenue of the general government.[2]

The States have power to prevent the introduction into them of articles of trade which, on account of their existing condition, would bring in and spread disease and death. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed, as intrinsically and directly the immediate sources and causes of destruction to health and life.[3]

If the right of the States to pass statutes to protect themselves in regard to the criminal, the pauper, and the diseased foreigner, exists at all, it is limited to such laws as are absolutely necessary for that purpose,— else it invades the power in Congress to regulate commerce.[4]

In their leading features, the power of "eminent domain" and the "police power" are plainly different, the latter reaching even to the destruction of property, as in tearing down a house to prevent the spread of a conflagration, or to removal at the expense of the owner, as in the case of a nuisance tending to breed disease. In the first instance, the community proceeds on the ground of overwhelming calamity; in the second, because of the fault of the owner of the thing; and in either case compensation is not a condition of the exercise of the power. The same general principles attend its exercise in other directions, and it is generally based upon disaster, fault, or inevitable necessity. On the other hand, the power of eminent domain is conditioned generally upon compensation to the owner, and for the most part is founded, not in calamity or fault, but in public utility. These distinctions clearly mark the cases distant from the border line between the two powers, but in or near to it they begin to fade into each other, and it is difficult to say when compensation becomes a duty and when not.[5] See DOMAIN, Eminent.

See also COMMERCE; HEALTH; INSPECTION, 1; LEVEE; LICENSE, 3; MONOPOLY; OLEOMARGARINE; PROHIBITION, 2.

[1] Western Union Tel. Co. *v.* Pendleton, 122 U. S. 359 (1887).

[2] Beer Company *v.* Massachusetts, 97 U. S. 33 (1877), Bradley, J.; Fertilizing Company *v.* Hyde Park, *ib.* 699 (1877); Justice *v.* Commonwealth, 81 Va. 212 (1885), cases; State *v.* Yopp, 97 N. C. 478–79 (1887).

[3] [2 Kent, 340; Munn *v.* Illinois, 94 U. S. 146 (1876), cases.

[4] Bancroft *v.* Cambridge, 126 Mass. 441 (1879), cases.

[5] Stone *v.* Mississippi, 101 U. S. 818–19 (1879), cases, Waite, C. J.

[6] [City of New York *v.* Miln, 11 Pet. *139 (1837), Barbour, J.

[1] License Cases, 5 How. 631 (1847), Grier, J.

[2] *Ibid.* 577, Taney, C. J.

[3] Bowman *v.* Chicago & Northwestern R. Co., 125 U. S. 489 (1888), Matthews, J.; Train *v.* Boston Disinfecting Co., 144 Mass. 520, 530–31 (1887).

[4] Chy Lung *v.* Freeman, 92 U. S. 275 (1875), Miller, J.

[5] Philadelphia *v.* Scott, 81 Pa. 85 (1876), Agnew, C. J.; Commonwealth *v.* Alger, 7 Cush. 85 (1851); Commonwealth *v.* Bearse, 132 Mass. 546 (1882); Bass *v.* State, 34 La. An. 496 (1882); Hollingsworth *v.* Parish of Tensas, 17 F. R. 114 (1883); Davenport *v.* Richmond City, 81 Va. 639 (1886). See generally Slaughter-House Cases, 16 Wall. 36, 57 (1872): views of minority (p. 83) explained by Field, J., in Bartemeyer *v.* Iowa, 18 *id.* 133–41 (1873);

3. The body of officers charged with the duty of enforcing those laws of a community (in particular of a municipality) intended to preserve and promote the public peace, morals, health, security, and happiness.[1]

Police court. An inferior court exercising a limited jurisdiction over offenses of a criminal nature; and, perhaps, also, a limited civil jurisdiction. See PEACE, 1, Justice; SUMMARY.

Police justice or **magistrate.** A magistrate charged exclusively with the duties incident to the common-law office of a conservator or justice of the peace.[2]

The prefix "police" may serve merely to distinguish them from justices having also civil jurisdiction.[3]

Police officer. May designate one of a class of persons who are not constables.[3] See RIOT.

POLICY. 1. Polity; police, *q. v.*

The settled method by which the government and affairs of a nation are, or may be, administered; a system of public or official administration, as designed to promote the external or internal prosperity of a state.[4]

Public policy. What is the "public policy" of a State, and what is contrary to it, if inquired into beyond what its constitution, laws, and judicial decisions make known, will be found to be a matter of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will differ.[5]

What is termed the "policy of the government," with reference to any particular legislation, is generally a very uncertain thing, upon which all sorts of opinions may be formed. It is a ground much too unstable upon which to rest the interpretation of a statute.[6]

The Federal courts can know nothing of "public policy" except from the Constitution and the laws, and the course of administration and decision. Considerations of policy or expediency must, in general, be addressed to the legislature. Cases in which arguments drawn from public policy have influence are cases in which the course of legislation and administration does not leave any doubt upon the question what the public policy is, and in which what would otherwise be obscure or of doubtful interpretation may be cleared and resolved by reference to what is already received and established.[1]

Anything more indistinct, undefined, and incapable of certainty or uniformity than "public policy" in the law determining the responsibility of common carriers, and restricting its limitation by special contract, can hardly be imagined. Of late years the principle has been invoked with increasing frequency; and, sometimes at least, seems to be made use of as authority for deciding in whatever way the court thinks would, on the whole, be most useful.[2]

Void, as "against public policy," are all agreements to control the business operations of the government, the regular administration of justice, the appointments of public officers, or the ordinary course of legislation. The law looks at the general tendency of such agreements.[3] See further LEGAL, Illegality.

The phrase "policy of law," in a statute providing that "no interest or policy of law shall exclude a party or person from being a witness," etc., does not include the "public policy" which prevents a husband or wife from proving non-access.[4]

2. A warrant for money in public funds.[5]

The ticket or writing which evidences a lottery contract. See LOTTERY.

3. A contract of insurance or assurance, as expressed in writing. See, at length, INSURANCE.

POLITIC.[6] Referring to public government: as, in "body politic;" also, concerning a public corporation, *q. v.* See also BODY, 2.

Political. Pertaining to public policy or politics; relating to state in distinction from municipal affairs.

Pertaining to policy or the administration of government.[7]

Political assessment. See SERVICE, 3, Civil.

Political corporation. See CORPORATION.

Political law. Law treating of the science of government; the jurisprudence of government.

6 South. Law R. 59-79 (1880), cases; 3 Kan. Law J. 386; 4 *id.* 36 (1886)—Chic. Leg. News; 25 Cent. Mag. 179; 5 Saw. 505; 70 Ill. 194; 29 Minn. 451; 12 Mo. Ap. 219-22; 44 N. J. L. 93.

[1] See 1 Steph. Hist. Cr. Law Eng. 194; 19 Am. Law Rev. 547-70 (1885), cases.

[2] Wenzler *v.* People, 58 N. Y. 530 (1874), Allen, J.

[3] Commonwealth *v.* Smith, 111 Mass. 408 (1873).

[4] Webster's Dict.

[5] Vidal *v.* Girard's Executors, 2 How. 197-98 (1844), Story, J.; Magee *v.* O'Neill, 19 S. C. 185 (1882).

[6] Hadden *v.* The Controller, 5 Wall. 111 (1866), Field, J.

[1] License Tax Cases, 5 Wall. 469 (1866), Chase, C. J.; Soon Hing *v.* Crowley, 113 U. S. 710 (1885), Field, J.

[2] 2 Pars. Contr. 249.

[3] Providence Tool Co. *v.* Norris, 2 Wall. 55-56 (1864).

[4] Tioga County *v* South Creek Township, 75 Pa. 437 (1874).

[5] F. *police;* L. L. *politicum:* Gk. *poly'ptychon,* a writing in many folds or leaves; a register.

[6] Gk. *politicos',* belonging to the citizen or state.

[7] People *v.* Morgan, 90 Ill. 568 (1878): Bouvier.

Political liberty. See LIBERTY, 1.

Political offense. See EXTRADITION.

Political office. May refer to an office not immediately connected with the administration of justice, or with the execution of the mandates of a superior, as, of the President or the head of a department.[1] See OFFICE, 1.

Political rights. Such rights as may be exercised in the formation and administration of the government.[2] Opposed to civil rights. See RIGHT, 2 (a).

Politics. The public polity or policy of a state or nation.

In its original meaning, comprehends everything that concerns the government of the country.[3]

The President cannot be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional.[4]

See GOVERNMENT; LIBERTY, 1, Of the press; POLICY, Public.

POLL.[5] 1, *n.* A head; a person.

Polls. Individual persons; also, the place where electors are counted, and the votes by which they are counted. Whence *polling place.*

Challenge to the polls. A challenge to single persons as jurors.[6] See CHALLENGE, 3.

Deed-poll. A deed made by one party only, the edges of the instrument being "polled" or shaven even.[7] See further DEED, 2.

Poll-tax. A tax upon individual persons. See TAX, 2.

2, *v.* To enter the names of persons on a list or in a registry, as, for purposes of taxation, or voting.

Poll a jury. To call the names of the persons who compose a jury and require each man to declare his verdict before it is recorded.

In most of the States it is the absolute right of an accused person to poll the jury. The right did not exist at common law; it seems to have grown up in practice.[8]

The rulings differ as to the right of a party to demand a poll of the jury. In some States, in both civil and criminal cases, the right may not be denied; in others, the matter is left to the discretion of the trial judge.[1]

POLYANDRY. See note 2, *infra.*

POLYGAMY.[2] The act of formally entering into marriage with a third person, by one already sustaining this relation with a second person. More frequently termed *bigamy,*[3] q. v. Whence anti-polygamy, polygamist, polygamous.

The anti-polygamy act of March 3, 1887 (24 St. L. 635), amending the act of March 22, 1882 (22 St. L. 30), which in turn amended Rev. Stat. § 5352, provides as follows:[4]

Sec. 1. That in any proceeding or examination before a grand jury, a judge, justice, or a United States commissioner, or a court, in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the person accused shall be a competent witness, and may be called, but shall not be compelled to testify in such proceeding, examination, or prosecution without the consent of the husband or wife, as the case may be; and such witness shall not be permitted to testify as to any statement or communication made by either husband or wife to each other, during the existence of the marriage relation, deemed confidential at common law.

Sec. 2. That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, whether before a United States commissioner, justice, judge, a grand jury, or any court, an attachment for any witness may be issued by the court, judge, or commissioner, without a previous subpœna, compelling the immediate attendance of such witness, when it shall appear by oath or affirmation, to the commissioner, justice, judge, or court, as the case may be, that there is reasonable ground to believe that such witness will unlawfully fail to obey a subpœna issued and served in the usual course in such cases; and in such case the usual witness-fee shall be paid to such witnesses so attached: *Provided*, That the person so attached may at any time secure his or her discharge from custody by executing a recognizance with sufficient surety, conditioned for the appearance of such person at the proper time, as a witness in the cause or proceeding wherein the attachment may be issued.

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[1] Twenty Per Cent. Cases, 18 Wall. 575 (1871), Clifford, J.

[2] People *v.* Morgan, 90 Ill. 563 (1878).

[3] Chesterfield *v.* Janssen, 2 Ves. Sr. *156 (1750), Hardwicke, Ld. Ch.

[4] Mississippi *v.* Johnson, 4 Wall. 475 (1866).

[5] O. Dut. *polle*, a head or pate.

[6] See 3 Bl. Com. 361; 4 *id.* 352.

[7] See 2 Bl. Com. 296; 2 Hill, 550.

[8] Doyle *v.* United States, 11 Biss. 106 (1881); 60 Md. 402; 10 F. R. 274, cases; South. Law J. & R., Dec. 1879: 1 Crim. Law Mag. 170-77, cases.

[1] Hindrey *v.* Williams, 9 Col. 376-77 (1886), cases.

[2] Gk. *polygami'a*, marrying many wives: *poly'*-many; *gam'os*, marriage. Polyandry: *polys'*, many; *anĕr, andros'*, man, male, husband. Monandry: *mónos*, one.

[3] 1 Bish. Mar. & Div. § 296. See 4 Bl. Com. 164; 4 Steph. Com. 278, note; R. S. § 5352.

[4] The act was received by the President, February 19, 1887, not having been returned by him to the House in which it originated within the time prescribed by the Constitution, it became a law without his approval.

Sec. 3. That whoever commits adultery shall be punished by imprisonment in the penitentiary not exceeding three years; and when the act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery; and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery.

Sec. 4. That if any person related to another person within and not including the fourth degree of consanguinity computed according to the rules of the civil law, shall marry or cohabit with, or have sexual intercourse with such other so related person, knowing her or him to be within said degree of relationship, the person so offending shall be deemed guilty of incest, and, on conviction thereof, shall be punished by imprisonment in the penitentiary not less than three years and not more than fifteen years.

Sec. 5. That if an unmarried man or woman commit fornication, each of them shall be punished by imprisonment not exceeding six months, or by fine not exceeding one hundred dollars.

Sec. 6. That all laws of the legislative assembly of the Territory of Utah which provide that prosecutions for adultery can only be commenced on the complaint of the husband or wife are hereby disapproved and annulled; and all prosecutions for adultery may hereafter be instituted in the same way that prosecutions for other crimes are.

Sec. 7. That commissioners appointed by the supreme court and district courts in the Territory shall possess and may exercise all the powers and jurisdiction that are or may be possessed or exercised by justices of the peace in said Territory under the laws thereof, and the same powers conferred by law on commissioners appointed by circuit courts of the United States.

Sec. 8. That the marshal of said Territory, and his deputies, shall possess and may exercise all the powers in executing the laws of the United States or of said Territory, possessed and exercised by sheriffs, constables, and their deputies as peace officers; and each of them shall cause all offenders against the law, in his view, to enter into recognizance to keep the peace and to appear at the next term of the court having jurisdiction of the case, and to commit to jail in case of failure to give such recognizance. They shall quell and suppress assaults and batteries, riots, routs, affrays, and insurrections.

Sec. 9. That every ceremony of marriage, or in the nature of a marriage ceremony, of any kind, in any of the Territories, whether either or both or more of the parties to such ceremony be lawfully competent to be the subjects of such marriage or ceremony or not, shall be certified by a certificate stating the fact and nature of such ceremony, the full names of each of the parties concerned, and the full name of every officer, priest, and person, by whatever style or designation called or known, in any way taking part in the performance of such ceremony, which certificate shall be drawn up and signed by the parties to such ceremony and by every officer, priest, and person taking part in the performance of such ceremony, and shall be by the officer, priest, or other person solemnizing such marriage or ceremony filed in the office of the probate court, or, if there be none, in the office of court having probate powers in the county or district in which such ceremony shall take place, for record, and shall be immediately recorded, and be at all times subject to inspection as other public records. Such certificate, or the record thereof, or a duly certified copy of such record, shall be *prima facie* evidence of the facts required by this act to be stated therein, in any proceeding, civil or criminal, in which the matter shall be drawn in question. Any person who shall willfully violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine of not more than one thousand dollars, or by imprisonment not longer than two years, or by both said punishments, in the discretion of the court.

Sec. 10. That nothing in this act shall be held to prevent the proof of marriages, whether lawful or unlawful, by any evidence now legally admissible for that purpose.

Sec. 11. That the laws enacted by the legislative assembly of Utah which provide for or recognize the capacity of illegitimate children to inherit or to be entitled to any distributive share in the estate of the father of any such illegitimate child are hereby disapproved and annulled; and no illegitimate child shall hereafter be entitled to inherit from his or her father or to receive any distributive share in the estate of his or her father: *Provided*, That this section shall not apply to any illegitimate child born within twelve months after the passage of this act, nor to any child made legitimate by the seventh section of the act to amend section 5352 of the Revised Statutes, in reference to bigamy, approved March 22, 1882.

Sec. 12. That the laws enacted by the legislative assembly conferring jurisdiction upon probate courts, or the judges thereof, or any of them, in said Territory, other than in respect of the estates of deceased persons, and in respect of the guardianship of the persons and property of infants, and in respect of the persons and property of persons not of sound mind, are hereby disapproved and annulled; and no probate court or judge of probate shall exercise any jurisdiction other than in respect of the matters aforesaid, except as a member of a county court; and every such jurisdiction so by force of this act withdrawn from the said probate courts or judges shall be had and exercised by the district courts of said Territory respectively.

Sec. 13. That it shall be the duty of the attorney-general of the United States to institute and prosecute proceedings to forfeit and escheat to the United States the property of corporations obtained or held in violation of section three of the act approved July 1, 1862, to punish and prevent polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of Utah, or in violation of section 1890 of the Revised Statutes; and all such property so forfeited and escheated shall be disposed of by the secretary of the interior, and the proceeds thereof applied to the use and benefit of the common schools in the Territory in which such property may be: *Provided*, That no building, or the grounds appurtenant thereto, which is held and occupied exclusively for purposes of the worship

of God, or parsonage connected therewith, or burial ground shall be forfeited.

Sec. 14. That in any proceeding for the enforcement of the provisions of law against corporations or associations acquiring or holding property in any Territory in excess of the amount limited by law, the court before which such proceeding may be instituted shall have power in a summary way to compel the production of all books, records, papers, and documents of or belonging to any trustee or person holding or controlling or managing property in which such corporation may have any right, title, or interest whatever.

Sec. 15. That all laws of the legislative assembly of Utah, or of the so-called government of the State of Deseret, creating, organizing, amending, or continuing the corporation or association called the Perpetual Emigrating Fund Company are hereby disapproved and annulled; and the said corporation, in so far as it may now have, or pretend to have, any legal existence, is hereby dissolved; and it shall not be lawful for the legislative assembly to create, organize, or in any manner recognise any such corporation or association, or to pass any law for the purpose of or operating to accomplish the bringing of persons into the said Territory for any purpose whatsoever.

Sec. 16. That it shall be the duty of the attorney-general of the United States to cause such proceedings to be taken in the supreme court of Utah as shall be proper to carry into effect the provisions of the preceding section, and pay the debts and to dispose of the property and assets of said corporation according to law. Said property and assets, in excess of the debts and the amount of any lawful claims established by the court against the same, shall escheat to the United States, and shall be taken, invested, and disposed of by the secretary of the interior, under the direction of the President, for the benefit of common schools in said Territory.

Sec. 17. That the acts of the legislative assembly incorporating, continuing, or providing for the corporation known as the Church of Jesus Christ of Latter-Day Saints, and the ordinance of the so-called general assembly of the State of Deseret incorporating the Church of Jesus Christ of Latter-Day Saints, so far as the same may now have legal force and validity, are hereby disapproved and annulled, and the said corporation, in so far as it may now have, or pretend to have, any legal existence, is hereby dissolved. That it shall be the duty of the attorney-general of the United States to cause such proceedings to be taken in the supreme court of Utah as shall be proper to execute the foregoing provisions of this section and to wind up the affairs of said corporation conformably to law; and in such proceedings the court shall have power, and it shall be its duty, to make such decree or decrees as shall be proper to effectuate the transfer of the title to real property now held and used by said corporation for places of worship, and parsonages connected therewith, and burial grounds, and of the description mentioned in the proviso to section thirteen of this act and in section twenty-six of this act, to the respective trustees mentioned in section twenty-six of this act; and for the purposes of this section said court shall have all the powers of a court of equity.

Sec. 18. (a) A widow shall be endowed of third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage unless she shall have lawfully released her right thereto.

(b) The widow of any alien who at the time of his death shall be entitled by law to hold any real estate, if she be an inhabitant of the Territory at the time of such death, shall be entitled to dower of such estate in the same manner as if such alien had been a native citizen.

(c) If a husband seized of an estate of inheritance in lands exchanges them for other lands, his widow shall not have dower of both, but shall make her election to be endowed of the lands given or of those taken in exchange; and if such election be not evinced by the commencement of proceedings to recover her dower of the lands given in exchange within one year after the death of her husband, she shall be deemed to have elected to take her dower of the lands received in exchange.

(d) When a person seized of an estate of inheritance in lands shall have executed a mortgage, or other conveyance in the nature of mortgage, of such estate, before marriage, his widow shall nevertheless be entitled to dower out of the lands mortgaged or so conveyed, as against every person except the mortgagee or grantee in such conveyance and those claiming under him.

(e) Where a husband shall purchase lands during coverture, and shall at the same time execute a mortgage, or other conveyance in the nature of mortgage, of his estate in such lands to secure the payment of the purchase money, his widow shall not be entitled to dower out of such lands, as against the mortgagee or grantee in such conveyance or those claiming under him, although she shall not have united in such mortgage; but she shall be entitled to her dower in such lands as against all other persons.

(f) Where in such case the mortgagee, or such grantee or those claiming under him, shall, after the death of the husband of such widow, cause the land mortgaged or so conveyed to be sold, either under a power of sale contained in the mortgage or such conveyance or by virtue of the decree of a court if any surplus shall remain after payment of the moneys due on such mortgage or such conveyance, and the costs and charges of the sale, such widow shall nevertheless be entitled to the interest or income of the one-third part of such surplus for her life, as her dower.

(g) A widow shall not be endowed of lands conveyed to her husband by way of mortgage unless he acquire an absolute estate therein during the marriage period.

(h) In case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed.

Sec. 19. That hereafter the judge of probate in each county within the Territory of Utah provided for by the existing laws thereof shall be appointed by the President of the United States, by and with the advice and consent of the Senate; and so much of the laws of said Territory as provide for the election of such judge by the legislative assembly are hereby disapproved and annulled.

Sec. 20. That it shall not be lawful for any female to vote at any election hereafter held in the Territory for any public purpose whatever, and no such vote shall be received or counted or given effect in any manner whatever; and any and every act of the legislative assembly providing for or allowing the registration or voting by females is hereby annulled.

Sec. 21. That all laws of the legislative assembly which provide for numbering or identifying the votes of the electors at any election are hereby disapproved and annulled; but the foregoing provision shall not preclude the lawful registration of voters, or any other provisions for securing fair elections which do not involve the disclosure of the candidates for whom any particular elector shall have voted.

Sec. 22. That the existing election districts and apportionments of representation concerning the members of the legislative assembly are hereby abolished; and it shall be the duty of the governor, Territorial secretary, and the board of commissioners mentioned in section nine of the act of Congress approved March 22, 1882, to amend section 5352 of the Revised Statutes in reference to bigamy in said Territory, forthwith to redistrict said Territory, and apportion representation in the same in such manner as to provide, as nearly as may be, for an equal representation of the people (excepting Indians not taxed), being citizens of the United States, according to numbers, in said legislative assembly, and to the number of members of the council and house of representatives, respectively, as now established by law; and a record of the establishment of such new districts and the apportionment of representation thereto shall be made in the office of the secretary of said Territory, and such establishment and representation shall continue until Congress shall otherwise provide; and no persons other than citizens of the United States otherwise qualified shall be entitled to vote at any election in said Territory.

Sec. 23. That the provisions of section nine of said act approved March 22, 1882, in regard to registration and election officers, and the registration of voters, and the conduct of elections, and the powers and duties of the board therein mentioned, shall continue and remain operative until the provisions and laws therein referred to to be made and enacted by the legislative assembly of said Territory shall have been made and enacted and have been approved by Congress.

Sec. 24. That every male person twenty-one years of age resident in the Territory shall, as a condition precedent to his right to register or vote at any election, take and subscribe an oath or affirmation, before the registration officer of his voting precinct, that he is over twenty-one years of age, and has resided in the Territory for six months then last passed and in the precinct for one month immediately preceding the date thereof, and that he is a native-born (or naturalized, as the case may be) citizen of the United States, and further state in such oath or affirmation his full name, with his age, place of business, his status, whether single or married, and, if married, the name of his lawful wife, and that he will support the Constitution of the United States and will faithfully obey the laws thereof, and especially will obey the act of Congress approved March 22, 1882, to amend section 5352 of the Revised Statutes in reference to bigamy, and will also obey this act in respect of the crimes in said act defined and forbidden, and that he will not, directly or indirectly, aid or abet, counsel or advise, any other person to commit any of said crimes. Such registration officer is authorized to administer said oath or affirmation; and all such oaths or affirmations shall be by him delivered to the clerk of the probate court of the proper county, and shall be deemed public records therein. But if any election shall occur in said Territory before the next revision of the registration lists as required by law, the said oath or affirmation shall be administered by the presiding judge of the election precinct on or before the day of election. As a condition precedent to the right to hold office in or under said Territory, the officer, before entering on the duties of his office, shall take and subscribe an oath or affirmation declaring his full name, with his age, place of business, his status, whether married or single, and, if married, the name of his lawful wife, and that he will support the Constitution of the United States and will faithfully obey the laws thereof, and especially will obey the said act of Congress approved March 22, 1882, and will also obey this act in respect of the crimes in said act defined and forbidden, and that he will not, directly or indirectly, aid or abet, counsel or advise, any other person to commit any of said crimes; which oath or affirmation shall be recorded in the proper office and indorsed on the commission or certificate of appointment. All grand and petit jurors in said Territory shall take the same oath or affirmation, to be administered, in writing or orally, in the proper court. No person shall be entitled to vote in any election in said Territory, or be capable of jury service, or hold any office of trust or emolument in said Territory who shall not have taken the oath or affirmation aforesaid. No person who shall have been convicted of any crime under this act, or under the act of Congress aforesaid approved March 22, 1882, or who shall be a polygamist, or who shall associate or cohabit polygamously with persons of the other sex, shall be entitled to vote in any election in said Territory, or be capable of jury service, or to hold any office of trust or emolument in said Territory.

Sec. 25. That the office of Territorial superintendent of district schools created by the laws of Utah is hereby abolished; and it shall be the duty of the supreme court of said Territory to appoint a commissioner of schools, who shall possess and exercise all the powers and duties heretofore imposed by the laws of said Territory upon the Territorial superintendent of district schools, and who shall receive the same salary and compensation, which shall be paid out of the treasury of said Territory; and the laws of the Territory providing for the method of election and appointment of such Territorial superintendent of district schools are hereby suspended until the further action of Congress shall be had in respect thereto. The said superintendent shall have power to prohibit the use in any district school of any book of a sectarian character or otherwise unsuitable. Said superintendent shall collect and classify statistics and other information respecting the district and other schools in said Territory, showing their progress, the whole number of children of school age, the number who attend school

in each year in the respective counties, the average length of time of their attendance, the number of teachers and the compensation paid to the same, the number of teachers who are Mormons, the number who are so-called gentiles, the number of children of Mormon parents and the number of children of so-called gentile parents, and their respective average attendance at school; all of which statistics and information shall be annually reported to Congress, through the governor of said Territory and the department of the interior.

Sec. 26. That all religious societies, sects, and congregations shall have the right to have and to hold, through trustees appointed by any court exercising probate powers in a Territory, only on the nomination of the authorities of such society, sect, or congregation, so much real property for the erection or use of houses of worship, and for such parsonages and burial grounds as shall be necessary for the convenience and use of the several congregations of such religious society, sect, or congregation.

Sec. 27. That all laws passed by the so-called State of Deseret and by the legislative assembly for the organization of the militia or for the creation of the Nauvoo Legion are hereby annulled, and declared of no effect; and the militia of Utah shall be organized and subjected in all respects to the laws of the United States regulating the militia in the Territories: *Provided, however*, That all general officers of the militia shall be appointed by the governor of the Territory, by and with the advice and consent of the council thereof. The legislative assembly shall have power to pass laws for organizing the militia thereof, subject to the approval of Congress.

POND. See LAKES.

The great ponds of the commonwealth belong to the public, and, like the tide-waters and navigable streams, are under the control of the government.[1] See ICE; RIPARIAN; WATER.

PONE. L. Put, place.

In old English law, an original writ issued out of chancery, to remove a plaint from an inferior to a superior court; also, the initial word of the mandate of an attachment for non-appearance on the return of an original writ. The Latin words were: *Pone per vadium*, etc., put by gage, etc.[2]

POOL.[3] The stake played for in certain games of cards.[4] See GAME, 2.

"Pool, in the sense here used ['a real estate pool'] is of modern date, and may not be well understood, but in this case it can mean no more than that certain individuals are engaged in dealing in real estate as a commodity of traffic."[5]

[1] Attorney-General *v.* Jamaica Pond Aqueduct Corporation, 133 Mass. 364 (1882). See also Angell, Wat. C. § 41; 3 Washb. R. P. 416.

[2] 3 Bl. Com. 280.

[3] F. *poule*, a hen: hen's eggs, as a stake.

[4] Webster's Dict.

[5] Kilbourn *v.* Thompson, 103 U. S. 168 (1880), Miller, J. Compare Harris *v.* White, 81 N. Y. 541 (1880).

Pooling contracts between railroad companies, by which territory and traffic is divided and rival carriers discriminated against, are against public policy They are *ultra vires*, as amounting to a partnership of corporations; they are combinations against lawful competition in trade; and the courts would possibly condemn the railway managers, who make their companies parties to such unlawful confederations, as guilty of a breach of trust toward their stockholders.[1] See COMBINATION, 2; COMMERCE, Inter-State Act; TRADE, Restraint of; TRUST, 2.

Pooling table. Keeping a pool table for hire is a thing affecting public morals, which the legislature can either absolutely prohibit or regulate. A common form of regulation is by requiring a license.[2] See GAME, 2; SALOON.

POOR. In a statute providing for the relief of the poor: persons so completely destitute of property as to require assistance from the public.[3]

In a will, held to include those who have exhausted all means of support and are in a condition to require public aid for the supply of their necessities.[4]

"Poor," "poor person," "person in distress," "indigent person," and "pauper" may be used synonymously."[5]

"Casual poor" are such poor persons as are suddenly taken sick, or meet with accident, when from home.[6]

See BELONG; CHARITY; IMPRISONMENT, For debt; PAUPER.

POP. See LIQUOR.

POPULAR.[7] Pertaining or belonging to, or obtaining among, the people in general.

A "popular action" is maintainable by any person who will sue for the penalty provided for in the case. See ACTION, 2, Popular.

The "popular sense" of words used in a statute is the sense in which they are understood by persons conversant with the subject-matter.[8]

PORCELAIN. See PAINTING.

PORK PACKER. See MANUFACTURER.

PORT. Generally, a harbor or shelter for vessels from storms. Applied to a place where there is no harbor, may mean only a

[1] Denver, &c. R. Co. *v.* Atchison, &c. R. Co., 15 F. R. 650, 667 (1883), cases, Hallett, J.; *id.* 667–74, cases.

[2] Commonwealth *v.* Kinsley, 133 Mass. 579 (1882).

[3] See State *v.* Osawkee Township, 14 Kan. 421-22 (1875), Brewer, J.

[4] Beardsley *v.* Bridgeport, 53 Conn. 492 (1885).

[5] Hutchings *v.* Thompson, 10 Cush. 289 (1852), Metcalf, J.

[6] Force *v.* Haines, 17 N. J. L. 405 (1840), Hornblower, Chief Justice.

[7] L. *popularis: populus*, the people.

[8] Grenfell *v.* Commissioners of Revenue, L. R., 1 Ex. D. 248 (1876).

road or anchorage — a place for loading and unloading cargoes.[1]

May include any place from which merchandise can be shipped for importation, or at which merchandise can be imported.[2]

Foreign port. A port outside of the United States.[3]

The ports of the States are foreign to each other for some purposes; as, for pledging the credit of the owner for supplies.[4] See VESSEL, Foreign.

Home port. The port of enrollment.

While it is difficult to formulate a rule by which the home port of a vessel belonging to persons residing in different States may be determined, it is well settled that a vessel cannot have more than one home port, or be a domestic vessel in more than one State. *A fortiori*, if owned by residents of different States, she may be a foreign vessel in the port of a State wherein certain of her owners reside. *Prima facie*, the home port is the place of enrollment, where or nearest to which the owner, or, if more than one owner, the managing owner, resides.[5]

Port of delivery. Sometimes distinguishes the port of unloading or destination from any port at which the vessel touches for other purposes.[6]

Port of destination. In a time policy, may mean any foreign port to which the vessel may be destined, as well as her home port, and include any usual stopping place for loading or unloading cargoes.[7]

Port of discharge. Any place at which it is usual to discharge cargo, and to which the vessel is destined for the purpose of discharging a substantial part.[8]

To constitute a "port of destination" a "port of discharge" some goods must be unladen or some act done to terminate the voyage there.[9]

Port of entry. A port designated for the entry of vessels, with reference to the execution of laws imposing duties. See ENTRY, II, 2.

Port-risk. A risk upon a vessel while lying in port, and before she has departed on another voyage.[1]

See ARRIVAL; BLOCKADE; COMMERCE; DISPATCH; EXPORT; IMPORT; INSPECTION, 1; USE, 1.

PORTION. Is synonymous with part.[2]

Specifically, such part of a parent's estate as is given to each child.

Portionist. One who receives a share or portion.

Share, part, and portion are frequently synonymous. Applied to property acquired from an ancestor, "portion" is the most comprehensive word that can be used.[3]

See ADVANCEMENT; PART, 1; PARTITION; RAISE; SATISFACTION, 8.

PORTRAIT. See HEIRLOOM.

POSITION. See BAGGAGE; NECESSARIES; RANK; STATUS.

POSITIVE. Express; absolute; not doubtful; affirmative; direct: as, a positive or positive — affirmation, condition, evidence, fraud, proof, statute, *qq. v.*

Positive law. Law actually ordained or established; statutory regulations; enacted law, or enactments; the *lex scripta*.

POSSE. L. To be able: power; to be possible: possibility.

In posse. In possibility; opposed to *in esse:* in actual existence.[4] See CONTINGENCY.

Posse comitatus. The power of the county, *q. v.*

POSSESSIO. L. Being near: possession; seizin.

Habere facias possessionem. That you cause to have possession. The emphatic words in the writ of execution, and now the name of the writ itself, where a plaintiff has been awarded the possession of land.[5]

Abbreviated *hab. fa. poss.*, *hab. fa.*, and, perhaps, *h. f. p.*

Pedis possessio. Possession of the foot: an actual foothold; actual possession of land.

Since standing upon land is a natural symbol of possessing it, the phrase has come to mean actual possession of any particular piece of land, as evidenced by occupancy, inclosure, etc. *Pedis positio.* Placing of the foot; a foothold.

Possessio fratris. The brother's possession.

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[1] [De Longuemere *v.* N. Y. Fire Ins. Co., 10 Johns. *125 (1813), Kent, C. J.

[2] R. S. § 2767.

[3] King *v.* Parks, 19 Johns. *877 (1822); 26 Wend. 511.

[4] The Lulu, 10 Wall. 200 (1869); Negus *v.* Simpson, 99 Mass. 303 (1868); 2 Low. 555; 2 Abb. U. S. 172.

[5] The Ellen Holgate, 30 F. R. 126 (1887), cases, Wales, Judge.

[6] [The Two Catherines, 2 Mas. 331 (1821), Story, J.

[7] [Gookin *v.* New England Mut. Mar. Ins. Co., 12 Gray, 515-16 (1859), Dewey, J.

[8] Bramhall *v.* Sun Ins. Co., 104 Mass. 513 (1870), Gray, J.; 132 *id.* 588; 5 Mas. 414; 2 Cliff. 4; 1 Sprague, 485; 18 L. R. 94.

[9] United States *v.* Barker, 5 Mas. 406 (1829), Story, J.

[1] Nelson *v.* Sun Mut. Ins. Co., 71 N. Y. 459 (1877).

[2] Holly *v.* State, 54 Ala. 240 (1875).

[3] Lewis's Appeal, 108 Pa. 137 (1885), Mercur, C. J.

[4] See 2 Bl. Com. 397; 10 Johns. 85.

[5] See 3 Bl. Com. 412.

In the English law of descents, the possession by one person in such privity with another as to be considered that other's own possession. It was a rule of law that "possession by a brother of an estate in fee-simple makes the sister to be heir:" his possession makes his sister of the whole blood his heir in preference to a brother of the half blood.[1]

Potior est conditio possidentis. The stronger is the condition of the party in possession.[2] See further CONDITIO, Melior, etc.; POSSESSION, Adverse.

POSSESSION.[3] See POSSESSIO.

Owning or having a thing in one's power.[4]

The detention or enjoyment of a thing which a man holds or exercises by himself or by another in his name.[5]

Holding an exclusive exercise of dominion over land.[6]

"Possessed" sometimes implies a temporary interest in lands; sometimes a corporal having; and sometimes no more than that one has a property in a thing — that he has it as owner, that it is his.[7]

Possessor. He who hold, detains, or enjoys a thing as his own.

A *bona fide* possessor of land is one who not only supposes himself to be the true proprietor, but who is ignorant that his title is contested by another person claiming a better right to the land.[8]

Possessory. Refers to a proceeding intended to obtain possession, and not merely to determine title.

Thus, ejectment is a possessory remedy.

In a possessory action the right of possession, and not that of property, is contested. The action decides nothing with respect to the right of property; it merely restores the demandant to that state or condition in which he was, or by law ought to have been, before dispossession.[9] See PETITORY.

Actual possession. Exists when a thing is in one's immediate occupancy. **Constructive possession.** Possession in contemplation of the law.[10]

Actual possession, which means a subjection to the will and dominion of the claimant, is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property.[1]

Constructive possession, where there is no actual possession, is in him who has the legal and rightful title.[2]

Adverse possession. Possession of realty avowedly opposed to some claim of title in another.

A possession not under the legal proprietor, but entered into without his consent, directly or indirectly given; a possession by which he is disseised and ousted.[3]

An adverse and hostile possession is one held for the possessor, as distinguished from one held in subordination to the right of another; a possession inconsistent with the possession or right of possession by another. Such is an exclusive possession of one who is not in privity with the true owner.[4]

"Visible" and "notorious" are terms employed to denote that the possession must be more than secret, and unknown to the disseised owner. Since acquiescence implies knowledge, a possession that he permits must be "notorious" or known to him.[4]

If under claim of right, and uninterrupted, open, visible, and notorious for twenty years, such possession is evidence of title in the possessor, and a good defense in ejectment.[5]

Independently of positive statute law, such a possession affords a presumption that all the claimants to the land acquiesce in the claim of the possessor, or that they forbear for some substantial reason to controvert his claim or to disturb him in his quiet enjoyment. Secret possession will not do, as publicity and notoriety are necessary as evidence of notice and to put adverse claimants upon inquiry. Mere occupation is not sufficient, but adverse and continuous possession is.[6]

The weight of authority is that, where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title — a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title.[7]

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[1] See 2 Bl. Com. 227; 4 Kent, 384; Reeve, Desc. 377; 2 Pet. 59, 625.

[2] As to possession in Roman law see 3 Law Q. Rev. 52-53 (1887).

[3] Pos-sĕsh'-un, or zĕsh'-un.

[4] Brown *v.* Volkening, 64 N. Y. 80 (1876), Allen, J.

[5] [Redfield *v.* Utica, &c. R. Co., 25 Barb. 58 (1851), W. F. Allen, J.

[6] [Booth *v.* Small, 25 Iowa, 181 (1868), Beck, J.

[7] Mayor of Detroit *v.* Park Commissioners, 44 Mich. 608 (1880), Cooley, J.

[8] Green *v.* Biddle, 8 Wheat. 79 (1823), Washington, J.; Canal Bank *v.* Hudson, 111 U. S. 80 (1883).

[9] [2 Bl. Com. 198, 190.

[10] Brown *v.* Volkening, 64 N. Y. 80 (1876), Allen, J.; Lillianskyoldt *v.* Goss, 2 Utah, 297 (1878).

[1] Coryell *v.* Cain, 16 Cal. *573 (1860), Field, C. J. See also 71 Ala. 264; 1 Cal. 263; 16 *id.* 109; 4 Nev. 68; 59 N. Y. 136.

[2] Norris's Appeal, 64 Pa. 282 (1870).

[3] [French *v.* Pearce, 8 Conn. *442-46 (1831), Hosmer, Chief Justice.

[4] Sheaffer *v.* Eakman, 56 Pa. 153 (1867), Strong, J.; Ewing *v.* Burnet, 11 Pet. *53 (1837).

[5] Hogan *v.* Kurtz, 94 U. S. 776 (1876), cases.

[6] Armstrong *v.* Morrill, 14 Wall. 145-46 (1871), cases, Clifford, J.; Hughes *v.* United States, 4 *id.* 232 (1866).

[7] Campbell *v.* Holt, 115 U. S. 623 (1885), cases, Miller, J.; Gilbert *v.* Decker, 53 Conn. 401-5 (1885), cases; Hollingsworth *v.* Sherman, 81 Va. 671, 674 (1886), cases.

Adverse possession of vacant lands, under color of title, includes as much as is within the boundaries of the title, and to that extent the true owner is disseised. But if the latter be in actual possession of any part, his constructive seizure extends to all not in fact occupied by the intruder. The reason is, the intruder's acts give notice only to the extent of actual occupancy.[1]

Though a presumption of a deed may be rebutted by proof of facts inconsistent with its supposed existence, yet, where no such facts are shown, and the things done and the things omitted, with regard to the property in controversy, by the respective parties, for long periods after the execution of the supposed conveyance, can be explained satisfactorily only upon the hypothesis of its existence, the jury may be instructed to presume such a conveyance. The presumption of a grant is indulged merely to quiet a long possession which might otherwise be disturbed by reason of the inability of the possessor to produce the muniments of title, which were actually given at the time of the acquisition of the property by him or those under whom he claims, but have been lost, or which he or they were entitled to have at that time, but had neglected to obtain, and of which the witnesses have passed away, or their recollection of the transaction has become dimmed and imperfect. And hence, as a rule, it is only where the possession has been actual, open, and exclusive for the period prescribed by the statute of limitations to bar an action for the recovery of the land, that the presumption of a deed can be invoked. . . The presumption may be invoked where a proprietary right has long been exercised, although the exclusive possession of the whole property may have been occasionally interrupted during the period necessary to create a title by adverse possession, if in addition to the actual possession there were other open acts of ownership, as, the payment of taxes.[2]

The maxim that the plaintiff must recover upon the strength of his own title, and not upon the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover from a mere trespasser who entered without any title. He may do so by a writ of entry, where that remedy is still practiced, or by an ejectment, or he may maintain trespass. This rule is founded upon the presumption that every possession peaceably acquired is lawful, and it is sustained by the policy of protecting the public peace against disorder. But, as it is intended to prevent and redress trespasses and wrongs, it is limited to cases where the defendants are trespassers and wrong-doers. It is therefore qualified in its application by the circumstances which constitute the origin of the adverse possession, and the character of the claim on which it is defended. It does not extend to cases where the defendant has acquired possession peaceably and in good faith, under color of title. It is also understood that the prior possession of the plaintiff has not been voluntarily relinquished without the *animus revertendi*, and that the subsequent possession of the defendant was acquired by mere entry, without legal right. The action, also, to regain the prior possession must have been brought within a reasonable time after it has been lost. If there has been delay in bringing suit, the *animus revertendi* must be shown, and the delay satisfactorily accounted for, or the prior possessor will be deemed to have abandoned his claim.[1]

The party who challenges the title of his adversary to realty must be diligent in discovering that which will avoid the title or render it invalid, and diligent in his application for relief. Unreasonable delay, not explained by equitable circumstances, is evidence of acquiescence.[2]

Bare possession. See *Naked Possession.*

Concurrent possession. Possession in one person contemporaneous with possession in another person, whether for the same time and in the same right or otherwise.

Dispossession. Deprivation of possession; unlawfully excluding from the occupation of realty a person who is entitled thereto. Compare OUSTER; SEISIN, Disseisin.

Fraudulent possession. Such possession of property by an insolvent vendor as secures him new credit from, and to the injury of, a person unaware of the alleged transfer.

By statute 13 Eliz. (1572), c. 5, a gift or grant of personalty or realty, with intent to defraud creditors or others, is voidable by such defrauded persons. Under this statute it was held, in *Twyne's Case*,[3] that if the grantor continues to retain possession it is a badge of fraud. Some American cases make retention of possession fraudulent *per se* and in law; others, only evidence of fraud for the jury.

Transfer of possession and actual removal of personalty is necessary to render a sale or attachment valid as against creditors. This is to prevent fraud—which seeks to favor the vendor or debtor by shielding his property for his benefit from the claims of creditors. The rule is one of policy. As matter of evidence, the continued possession of a vendor or debtor, who is in embarrassed circumstances, yields a presumption that the process or the sale is colorable; for, in general, no reason can be given why possession should not be taken, except that he should not be in-

[1] Hunnicutt *v.* Peyton, 102 U. S. 368-69 (1880), cases, Strong, J. On tacking the possession of several successive holders together, see Sherin *v.* Brackett, 36 Minn. 152 (1886), cases. See also, generally, 43 Ala. 633; 33 Ga. 539; 35 *id.* 141; 13 Ill. 193; 58 *id.* 589; 30 Md. 409; 32 *id.* 359; 3 Metc., Mass., 510; 37 Miss. 152; 47 *id.* 326; 9 Wend. 511; 39 Barb. 513; 54 *id.* 9; 6 Pa. 210; 11 *id.* 189; 19 *id.* 202; 25 *id.* 259; 58 *id.* 122, 313; 61 *id.* 146; 69 *id.* 300; 85 *id.* 37.

[2] Fletcher *v.* Fuller, 120 U. S. 551-52, 545-54 (1887), cases, Field, J.

[1] Sabariego *v.* Maverick, 124 U. S. 296 (1888), cases, Matthews, J., quoting Christy *v.* Scott, 14 How. 292 (1852), cases, Curtis, J.

[2] Howe *v.* South Park Commissioners, 119 Ill. 117 (1886), cases, Scott, J.

[3] 3 Coke, R. *81 (1602); 2 Bl. Com. 442.

dulged with the disposition or use of the property to the injury of others.[1]

In the Federal courts, and in Alabama, Florida, Illinois, Indiana, and Kentucky, unless possession follows an absolute sale, the transfer is fraudulent in law and void, as against creditors and subsequent *bona fide* purchasers; but in the case of a contingent sale or a mortgage, retaining possession is not inconsistent with the nature of the conveyance. The law of New Hampshire, and of South Carolina, resembles this. In Connecticut, New York (before the revised statutes), Pennsylvania, and Vermont, delivery of possession is necessary, as against creditors, in cases of mortgages, contingent transfers, and absolute sales; but the court may say that the reason for non-delivery is good. Arkansas, Georgia, Maine, Massachusetts, Missouri, North Carolina, Ohio, Tennessee, and Texas, follow the Federal courts in the distinction between absolute and contingent sales, but regard retention of possession which is inconsistent with the conveyance as only evidence of fraud and for the jury.[2] See further CONVEYANCE, 2, Fraudulent; DELIVERY, 1; SALE.

Naked possession. Actual occupation of an estate, without apparent right, or shadow or pretense of right, to hold or continue such possession. Called also *bare possession*.[3]

Thus, where one man invades the possession of another, and by force or surprise turns him out of his occupation, till some act be done by the rightful owner to devest this possession and assert his title, such actual possession is *prima facie* evidence of a legal title, which, by length of time, may ripen into an indefeasible title.[4]

A man out of possession has remaining the right of possession, which is an apparent right of possession, defeasible by proof of a better right, and, an actual right of possession, which will stand the test against all opponents.[4]

Reduce to possession. To change a right existing as an actionable claim into actual custody and enjoyment.

Thus, at common law, a husband who converted his wife's choses in action into money or property in hand was said to reduce them to possession.

[1] Mills *v.* Camp, 14 Conn. 225 (1841), Sherman, J.; Norton *v.* Doolittle, 32 *id.* 410 (1865); Hull *v.* Sigsworth, 48 *id.* 266 (1880); Warner *v.* Norton, 20 How. 459-60 (1857).

[2] Twyne's Case, 1 Sm. L. C., 7 ed., 52, cases: continued in 18 Am. Law Reg. 137-53 (1879), cases. See also Lewis *v.* McCabe, 49 Conn. 148-55 (1881), cases; Lund *v.* Fletcher, 39 Ark. 332 (1882); City Nat. Bank *v.* Goodrich, 3 Col. 139 (1876); Bassinger *v.* Spangler, 9 *id.* 175, 183-87 (1886), cases; McKibbin *v.* Martin, 64 Pa. 356 (1870); Crawford *v.* Davis, 99 *id.* 578 (1882); Sauerwein *v.* Costigan, 41 Leg. Int. 16 (1883); Mead *v.* Gardiner, 13 R. I. 259 (1881), cases; Blanchard *v.* Cooke, 144 Mass. 225 (1887); 22 Cent. Law J. 57 (1886) — Irish Law Times.

[3] See Gillett *v.* Gaffney, 3 Col. 300 (1877).

[4] 2 Bl. Com. 195-96; 3 *id.* 177, 179.

Repossession. Retaking into custody; recaption.

See DETAINER; ESTATE, 3, 4; LARCENY; LIEN; OCCUPANCY; REMAINDER; SEISIN; TITLE, 1; VEST.

POSSIBLE. 1. Liable, but not likely, to happen or come to pass. 2. Practicable; reasonable.

"Forthwith give notice" of a loss by fire and "as soon as possible" render an account of the loss, cannot mean instantly and directly, for that might be impossible, but as soon as could be, under the circumstances, or within reasonable time, or as soon as practicable.[1]

Possibility. An event which may or may not happen; something that is uncertain.[2]

Spoken of as "near" or "remote," and as "ordinary" or "extraordinary," according to the degree of probability.[2]

When the condition of an obligation is possible at the time of its making, but, before it can be performed, becomes impossible by act of God, the law, or the obligee, the obligation is saved. Otherwise, if impossible at the time of making.[3]

If what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability will not avail. It must be shown that the thing cannot be effected by any means. If a hardship, it might have been guarded against. At common law, if a lessee covenants to repair and the house burns down, he is bound to rebuild; so, as to repairing a bridge which is swept away by flood; so, as to building a foundation, although there be a latent defect in the soil.[4] The principle rests upon reason and justice. It regards the sanctity of contracts; requires a party to do what he has agreed to do. Contingent impediments should be guarded against.[5]

"In contracts in which the performance depends upon the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."[6]

Bona, non impossibilia, cogit lex. Effective, not impossible acts, the law requires.

Lex non cogit ad impossibilia. The law does not compel doing impossible things.[7] See ACT, Of God; RES, Perit.

POST. 1. L. *prep.* After; afterward.

Introduces Latin phrases, and is used in Latin and English compound words.

[1] Palmer *v.* St. Paul Ins. Co., 44 Wis. 208-9 (1878), cases; 4 Q. B. D. 673; 29 Moak, 102; 17 F. R. 431.

[2] See Bodenhamer *v.* Welch, 89 N. C. 81 (1883); 46 Barb. 87; 7 Ohio St. 443.

[3] Coke, Litt. 206 *a*; 2 Bl. Com. 340; Davis *v.* Gray, 16 Wall. 229 (1872).

[4] The Harriman, 9 Wall. 172 (1869), cases, Swayne, J.

[5] Dermott *v.* Jones, 2 Wall. 7-8 (1864), cases, Swayne, J.; 2 Story, Eq. §§ 1004-5.

[6] Eliot Nat. Bank *v.* Beal, 141 Mass. 567-70 (1886), cases.

[7] 101 U. S. 690; 14 Gray, 78; 7 Cush. 42, 393; 2 *id.* 549

Post diem. After the day — when due; as, a plea of payment *post diem*.

Post facto. After the fact. See FACTUM, Post, etc.

Post hac. After this.

Post litem motam. After controversy begun. See LIS, Mota.

Post mortem. After death. See CORONER.

Post natus. After-born. See NATUS, Ante.

Post obit. After he dies. See OBIT.

Post-date. To date after the true time. See DATE.

Post-due. Past due. See DUE.

Post-note. A note payable at a distant day, and not on demand.

Differs from other promissory notes only as to time of payment.[1]

Post-notes are a species of obligation resorted to by banks when the exchanges of the country, and especially of the banks, have become embarrassed by excessive speculations. They are intended to supply the place of demand notes, which the banks cannot afford to issue or re-issue, to relieve the necessities of commerce or of the banks, or to avoid a compulsory suspension. They are under seal, or without seal, and at long or short dates, and with or without interest, as the necessities of the bank may require.[2]

Post-nuptial. After nuptials or marriage. Opposed, *ante-nuptial*. See SETTLE, 4.

2. Eng. *n.*[3] (1) A military station; (2) any fixed place on a line of road; (3) a conveyance between such places, and the person who used relays of horses; (4) speedy conveyance, rapid travel, quick communication, communication by letter or message. Whence "the post," "post haste," etc.

Military post. A military establishment where a body of troops is permanently stationed.[4]

Post-office. (1) The department of government concerned in receiving and delivering postal matter.

The postmaster-general, deputy postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers; and each is answerable for his own negligence only.[5] See TORT, 2.

(2) The "business" of keeping, forwarding and distributing mailable matter, equally with the "place" where such business is conducted.

Such place, to constitute a post-office, may be a building, an apartment in a building, a desk, or a trunk or box to be carried about a house or from one building to another. The place of deposit is the post-office, in this sense. Hence, feloniously removing a letter out of the place where kept, in a post-office, is stealing it from the post-office.[1]

"The Congress shall have Power . . To establish Post Offices and Post Roads."[2]

This power authorizes the regulation of the entire system: the designation of route, the matter — its weight and form, the places where receivable, the charges for carriage, measures to secure safe and speedy transit, prompt delivery, etc.[3]

Under this power the department also determines what matter shall and shall not be mailable. The protection of the public morals is incidental to the protection of the mails.[4]

Post-road. A highway by land or water over which mails may be lawfully transmitted. **Post-route.** A post-road, or a definite portion thereof, over which mails are usually transported by contract; a route for which the department contracts for the transportation of a mail.[5]

Letters, and sealed packages subject to letter-postage, when once entrusted to the care of the postal department, for transmission, are as fully guarded from inspection, except as to outward form and weight, as if retained by the forwarder in his own domicil. The guarantee against "unreasonable searches and seizures" extends to articles placed in the mails. They can be opened only under warrant, duly sworn to and particularly describing the thing, as if it were a paper in one's own household. But what is purposely left open to inspection, as, newspapers, magazines, pamphlets, and other printed matter, may be examined without warrant.[6]

See further LETTER, 3; MAIL, 2; BOOK, 2; CIRCULAR, 2; LIBERTY, Of the Press; LOTTERY; OBSCENE; REVENUE; TELEGRAPH.

POSTEA. L. Afterward. Whatever was done in a cause subsequently to joining issue and awarding trial was entered on the record, and called the *postea*.

The substance is, that *postea*, afterward, the parties appeared by their attorneys at the trial, and a

[1] *Re* Dyott's Estate, 2 W. & S. 489 (1841).

[2] Hogg's Appeal, 22 Pa. 488-89 (1854).

[3] F. *poste*, a carrier, messenger: L. L. *postus*, *posta*, a station, post: L. *positus*, placed: *ponere*, to place. A "post-horse" was a horse placed at a station in readiness for a traveler.

[4] [Caldwell's Case, 19 Wall. 268 (1873), Hunt, J.

[5] Keenan *v.* Southworth, 110 Mass. 474 (1872), cases. Compare Robertson *v.* Sichel, 127 U. S. 516 (1888), cases.

[1] United States *v.* Marselis, 2 Blatch. 110 (1849), Betts, J.; United States *v.* Campbell, 16 F. R. 234 (1883).

[2] Constitution, Art. I, sec. 8, cl. 7.

[3] *Exp.* Jackson, 96 U. S. 732 (1877), Field, J.

[4] United States *v.* Bott, 11 Blatch. 346 (1873).

[5] Railway Mail Service Cases, 18 Ct. Cl. 204 (1877), Davis, J.; Blackham *v.* Gresham, 16 F. R. 611 (1883); 18 *id.* 591; R. S. § 3829.

[6] *Exp.* Jackson, *supra;* 107 U. S. 218.

jury found a verdict,—stating it; or, that the plaintiff made default, or otherwise, as the case may be. This is added to the roll, which is then returned (from *nisi prius*) to the court from which it was sent. The history of the cause from the time it was carried out is thus continued in the *postea*.[1]

POSTERITY. Embraces descendants to the remotest generation.[2]

POSTHUMOUS. Describes a child born after the death of its father.

Any such legitimate child inherits as if born before the parent's death, and a will which does not provide for it is regarded as revoked *pro tanto*.[3] See ANNUS, Luctus.

POSTLIMINY. Claiming property after recapture; restitution after recapture.

The *jus postliminii* of the Roman law. From *post*, behind, and *limen*, the threshold. A legal fiction, according to which a Roman citizen captured by the enemy was treated as not having been away from home, and all his rights were restored to him. Slaves, ships, mules, horses, and land, on recapture, were also returned to the original owner.[4]

The right of *postliminium* is that in virtue of which persons and things taken by the enemy are restored to their former state, on coming again into the power of the nation to which they belonged.[5]

POSTNATUS. See NATUS.

POST-OFFICE. See POST, 2.

POSTPONE. 1. To put after, place one thing after another; to defer: as, to postpone a claim or lien. See DEFER.

2. To put off to a later day; to adjourn; to continue, *q. v.*: as, to postpone a cause or hearing.[6]

POSTREMOGENITURE. See PRIMOGENITURE.

POTESTAS. L. Power, authority, dominion. See DEDIMUS; DELEGATA; PATRIA; SUB. Compare VIRES.

POTIOR. See DELICTUM, In pari, etc.

POTTERY. See COPYRIGHT.

POUND. 1. Twenty shillings.

In calculating the rates of duties, the pound sterling shall be taken as of the value of four dollars, eighty-six cents, and six and one-half mills.[7]

The Colonial pound, in Georgia, contained fifteen hundred and forty-seven grains; in Virginia, Massachusetts, Rhode Island, Connecticut, and New Hampshire, twelve hundred and eighty-nine grains; in New Jersey, Delaware, Pennsylvania, and Maryland, one thousand and thirty-one and a quarter grains; in New York, and North Carolina, nine hundred and sixty-six grains. . . In New England, six shillings, or one hundred and eight coppers, made a *dollar;* in New Jersey, Pennsylvania, Delaware, and Maryland, ninety pence; in New York, and North Carolina, ninety-six coppers.[1]

In Pennsylvania currency, a pound was equivalent to $2.66⅔, a shilling to 13⅓ cents, and sixpence to 6⅔ cents; although the latter passed for 12½ and 6¼ cents respectively. It is suggested that in these values is found the explanation of the origin of the practice by which juries in that State award 6¼ cents (a sixpence) as nominal damages — which carry full costs; and the origin of the statutory limit from which no appeal may be had from the judgment of a justice of the peace, to wit, $5.33⅓, that is, two pounds.[2]

2. A legal inclosure for the confinement of estrays, or the custody of goods distrained.[3]

An enclosed piece of land, secured by a firm structure of stone, or of posts and timber, placed in the ground.[4]

Like the grant of a mill, house, etc., carries with it the land on which it stands as parcel of the subject-matter of the grant. Necessarily requires land, and is in its nature perpetual.[4]

The board of supervisors of San Francisco granted to one A., and his assigns, the exclusive privilege, for twenty years, of having and removing the carcasses of dead animals, not slain for food, subject to certain sanitary regulations, and with the provision that the keeper of the public pound should notify A. to remove animals destroyed therein. *Held*, that the plaintiff could restrain the pound-keeper from delivering carcasses to any other person.[5]

Impound. 1. To confine in a pound; as, an animal estray.

2. To place in the custody of the law; as, an instrument discovered, in the course of a trial, to be a forgery. An original will is said to be impounded with the register of wills.

An executor may impound a legacy to set off a debt due by the legatee.[6]

Things distrained must be first carried to some pound. Once impounded, even though without cause, the owner may not break the pound and take them out; for they are then in the custody of the law.

If a live distress of animals be impounded in a common *pound-overt* (i. e., open overhead), the owner

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[1] 3 Bl. Com. 386.

[2] Breckinridge *v.* Denny, 8 Bush, 527 (1871).

[3] 1 Bl. Com. 130; 2 *id.* 169; 4 Kent, 412, 521, 525; 3 Washb. R. P. 412; 25 Ga. 549; 4 Paige, 52; 5 *id.* 172; 18 S. C. 55; 3 Munf. 20; 1 Murph. 233.

[4] Woolsey, Int. Law, 5 ed. § 151.

[5] Vattel, Law of Nations, § 204. See also 1 Kent, 108; 1 N. Mex. 44.

[6] See State *v.* Underwood, 76 Mo. 639 (1882); 8 How. Pr. 448; 13 *id.* 89.

[7] R. S. § 3565. See 8 Saw. 169.

[1] 1 McMaster, Hist. Peop. U. S. 23, 191, 199-200.

[2] See Chapman *v.* Calder, 14 Pa. 357 (1850); Hinds *v.* Knox, 4 S. & R. 417 (1819); Winger *v.* Rife, 101 Pa. 152, 160 (1882).

[3] A. S. *pund:* L. *parcus*, an inclosure,— 3 Bl. Com. 12.

[4] Wooley *v.* Groton, 2 Cush. 309 (1848), Shaw, C. J.

[5] Alpers *v.* San Francisco, 32 F. R. 506-6 (1887).

[6] Ballard *v.* Marsden, 37 Eng. R. 53, 55 (1880), cases.

must take notice at his peril; but if in a special pound-overt, constituted for the particular purpose, the distrainor must give notice to the owner; and in both cases the owner is bound to feed the beasts. But if put in a *pound-covert* (i. e., closed), in a stable or the like, the distrainor must feed them.[1]

Being in the custody of the law, taking the distress back by force is a "rescous," for which *pound-breach*, a remedy in damages, lies in the distrainor.[1] See DISTRESS.

Pound-master. The keeper of a pound.

Poundage. 1. Money paid for the release of animals impounded.

2. An allowance to a sheriff of a percentage upon the amount levied under an execution.

Whether referable to a percentage upon each pound sterling collected, or to the charge for keeping goods impounded, is not settled.

POUR. See PUR.

POVERTY. See POOR.

Poverty-affidavit. A statement, verified by oath or affirmation, required to be filed in court by the law of some States, by a litigant to the effect that he cannot furnish security for paying the costs in the case in the event of the issue being determined against him.[2] Compare PAUPER, 1.

POWDER. See POLICE, 2.

POWER. 1. The authority which one person gives another to act for him: as, the powers of an agent, of an executor, a power of attorney, *qq. v.*

Authority conferred by law to act for one's self or in behalf of the interest or estate of another or others: as, the powers of infants, lunatics, married women, of administrators, arbitrators, assignees, executors, guardians, or other trustees, *qq. v.* See INTEREST, 2, Coupled, etc.

Power and authority. When a statute confers a power upon a corporation, to be exercised for the public good, the exercise of the power is imperative; the words "power and authority" then mean "duty and obligation."[3] See MAY.

2. Authority conferred upon one person to dispose of an estate vested in another.

A "power" in a will is never imperative: it leaves the act to be done at the will of the party to whom given. A "trust" is always imperative and obligatory upon the conscience of the party intrusted.[4]

[1] 3 Bl. Com. 12-13, 146; 45 Conn. 161; 126 Mass. 364.

[2] See Cole *v.* Hoeburg, 36 Kan. 263 (1887).

[3] Rankin *v.* Buckman, 9 Oreg. 262 (1881): 20 Md. 458, 477; Dwar. Stat. 712.

[4] Stanley *v.* Colt, 5 Wall. 168 (1866): Wilmot, C. J., 2 Sugd. Pow. 588.

Powers under the Statute of Uses. Methods of causing a use, with its accompanying estate, to spring up at the will of a given person.[1]

A mere right to limit a use.[2]

The right to designate the person who is to take the use is termed the "power of appointment."

If the donee of the power has no estate in the land, the power is *collateral* or *naked;* if he has an estate, it is *appendant* or *in gross.* A power "appendant" is such as he may execute out of the estate limited to him,—depends for its validity upon that estate. He may create an estate which will attach on his interest; as where, while being a tenant for life, he may make sub-leases. A power "in gross" is a power to create an estate which will not attach on the interest limited to the donee, or take effect out of his interest; as, where, as tenant for life, he may create an estate to begin after his estate ends. Called "in gross," because his estate has no concern in it. If the donee may appoint to whom he pleases, the power is *general.* If he is restricted to an appointment to or among particular objects, the power is *special* or *particular.* If the power be to create a new estate in any one, it is a power of *appointment;* if to divest or abridge an existing estate, a power of *revocation.*[3]

A power *coupled with an interest* imports an interest in the thing itself,—a power engrafted on an estate in the thing.[4]

The power and the interest then unite in the same person, who, in executing the power, may act in his own name. He is not a substitute, but a principal; and the power survives the person who gives it.[4]

If the donee of a power clearly intends to execute, and the mode is unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative.

Three classes of cases at least have been held to be sufficient demonstration of an intended execution of a power: where there is reference in the instrument to the power; a reference to the property, as the subject, on which it is to be executed; or where the pro-

[1] Williams, Real Prop. 245.

[2] 4 Kent, 334.

[3] [2 Washb. Real Prop. 305, 307, cases. As to naked power, generally, see Franklin *v.* Osgood, 14 Johns. R. 553 (1817), cases; as to powers in gross, Thorington *v.* Thorington, 82 Ala. 491 (1886).

[4] Hunt *v.* Rousmanier, 8 Wheat. 203-5 (1823), Marshall, C. J.

vision in the instrument, executed by the donee, would otherwise be ineffectual or a mere nullity.[1]

If the will of the donee contains no expressed intent to exert the power, and it may reasonably be gathered from the gifts and directions that the purpose was to execute it, the will must be regarded as an execution. An appointment under a power is an intent to appoint carried out, and if made by will the intent and its execution are to be sought for through the whole instrument.[2]

The courts look at the design of the parties, and the substantial, rather than the literal, execution of the power.[3]

When a power is given to executors to be executed in their official capacity, and there are no words in the will warranting the conclusion that the testator intended a joint execution of the power, as the office survives, the power will be construed as surviving. And courts of equity will lend their aid to uphold the power, in order to carry into execution the intention of the testator.[4]

If land is devised to a person, with general power to dispose of the same, an estate in fee-simple passes. But if the devise is for life, with power to dispose of the reversion, only a life estate passes; and if the devisee dies without having disposed of the reversion, it goes to the heir of the devisor.[5]

While at common law a married woman could not make a will, she could make an appointment by will: the latter concerning the estate of the donor of the power.[6]

A person, having a power for the benefit of another, cannot use it for his own benefit.[7]

See further APPOINTMENT, 2; DISCRETION, 2.

8. Authority in the departments of government to do any particular act: as, the power in a legislature to make laws; power in a judge or court to decide what the law is, or to administer justice; power in the executive to enforce the law.

Power of appointment. The appointing power; the power to select and indicate by name individuals to hold office and to discharge the duties and exercise the powers of office.[1]

Constitutional powers are spoken of as *granted* or *reserved;* as *express, expressed,* and *implied;* as *incidental* or *ancillary;* as *enumerated* and *non-enumerated* or *unenumerated;* as *plenary;* as *legislative, judicial,* and *executive.*

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[2]

"The Congress shall have Power . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[3]

Executive power; judicial power; legislative power. "Judicial power" is authority to decide controversies and to administer justice; "legislative power," authority to enact laws; "executive power," authority to enforce the laws.

In particular, "judicial power" is that power by which judicial tribunals construe the Constitution, the laws enacted by Congress, and the treaties made with foreign powers or with the Indian tribes, and determine the rights of the parties in conformity with such construction.[4]

"Judicial power" is undoubtedly power to hear and determine; but this is not peculiar to the judicial office. Many of the acts of administrative and executive officers involve the exercise of the same power. Boards for the equalization of taxes, of public works, of county commissioners, township trustees, judges of election, viewers of roads, all, in one form or another, "hear and determine" questions in the exercise of their functions, more or less directly affecting private as well as public rights. It may be conceded that power to hear and determine rights of property and of person between private parties is judicial, and can be conferred only upon the courts. But such a definition does not necessarily include the case of the governor of a State, like that of Ohio, empowered to remove any police commissioner, and cannot, therefore, conflict with the constitutional provision conferring judicial power upon the courts.[5] See further JUDICIAL.

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[1] Blagge *v.* Miles, 1 Story, 446-47 (1841), cases, Story, J.; Funk *v.* Eggleston, 92 Ill. 534-47 (1879), cases; Gindrat *v.* Montgomery Gas-Light Co., 82 Ala. 603-6 (1886), cases; White *v.* Hicks, 33 N. Y. 392-93 (1865), cases; Hutton *v.* Benkard, 92 *id.* 301-3 (1883), cases; Sewall *v.* Wilmer, 132 Mass. 134 (1882), cases.

[2] Blake *v.* Hawkins, 98 U. S. 326 (1878), Strong, J.; Warner *v.* Connecticut Mut. Life Ins. Co., 109 *id.* 65-67 (1883).

[3] Harker *v.* Reilly, 4 Del. Ch. 80 (1871); *th.* 77; 4 Kent, 544.

[4] Peter *v.* Beverly, 10 Pet. *564 (1836); Osgood *v.* Franklin, 2 Johns. Ch. 19 (1816).

[5] Funk *v.* Eggleston, 92 Ill. 533 (1879), cases.

[6] Osgood *v.* Bliss, 141 Mass. 477-79 (1886), cases.

[7] Shank *v.* Dewitt, 44 Ohio St. 242 (1886), cases. See generally *Re* Thomson's Estate, 37 Eng. R. 26-35 (1880), cases.

[1] Attorney-General *v.* Kennon, 7 Ohio St. 556 (1857).

[2] Constitution, Amd. Art. X.

[3] Constitution, Art. I, sec. 8, cl. 18. See Civil Rights Cases, 109 U. S. 18 (1883).

[4] Gilbert *v.* Priest, 65 Barb. 448 (1873), Mullin, P. J. See also New Orleans, &c. R. Co. *v.* Mississippi, 102 U. S. 141 (1880).

[5] State, *ex rel.* Attorney-General *v.* Hawkins, 44 Ohio St. 109 (1886), Minshall, J.

Implied power. Such power as is necessary to carry into effect powers expressly granted.[1]

See CONSTITUTION; COURTS; DELEGATUS, Potestas, etc.; DISCRETION, 5; GOVERNMENT.

PRACTICABLE. Compare POSSIBLE.

An agreement to locate a railway station "at the nearest practicable point" within a mile of a courthouse was held not to intend the nearest possible point, but the nearest point at which the depot could be located at a reasonable and ordinary cost, with reference to all the circumstances under which the work was to be done, and in view of the object and purpose inducing the contract.[2]

PRACTICAL. Compare PRACTICABLE.

A "practical construction" of a constitution refers to practice sanctioned by general consent.[3]

The "practical location" of a division line was held to be identical with an actual location.[4]

See PATENT, 2; PRINCIPLE, 2; PROCESS, 2.

PRACTICE. The rules adopted by a court to facilitate the transaction of business before it in a proper and orderly manner.[5]

Sometimes these rules are printed, and called "rules of practice;" sometimes they are embodied in statutes, but perhaps as frequently they are unwritten.

In the larger sense, the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or declares the right. Sometimes convertible with "procedure."[6]

The procedure in a court of justice, through the various stages of any matter, civil or criminal, depending before it. *Rules of pleading* tell what is the most efficient form to adopt in shaping pleadings. *Rules of practice* tell in what manner pleadings should be brought under the notice of the court, and what steps should be taken to obtain the benefit of them.[7]

Compare PROCEDURE. See ERROR, 1, Communis, etc.; TECHNICALITIES; USUS, Malus, etc.

PRÆ. See PRE.

PRÆCIPE. L. Command.

1. An original writ in the alternative, commanding the defendant to do the thing required or to show cause why he has not done it.

Abridged from *præcipe quod reddat*, command that he return. The writ issued where something certain was demanded, incumbent upon the defendant to perform.[1]

2. A paper containing the particulars of a writ, for the instruction of the officer who is to issue it. Spelled also *precipe*. See PRECEPT.

PRÆMIUM. L. Profit; consideration; price.

"Premium" (*q. v.*) is the Anglicized word.

Præmium pudicitiæ. Price of chastity. Compensation for illicit intercourse. Sometimes termed **præmium pudoris**, pay for shame, or disgrace.

An agreement, or security given, for future illicit intercourse, is incapable of confirmation, or enforcement.[2]

PRÆMUNIRE. L. A corruption of *præ-moneri*, to fore-warn. The offense, affecting the king and his government, of maintaining the papal power — of introducing a foreign power into the realm, and creating *imperium in imperio*, by paying that obedience to papal process which belongs to the king alone.[3]

Statutes of this name were meant to repress the civil power of the pope. *Præmunire* (*facias*), originally the emphatic word in the writ for prosecuting the offense, became the name of the writ and of the offense itself.[3]

The same penalties were subsequently applied to other offenses.

PRÆSUMERE. L. To take in advance of; to take to be true without positive proof, but upon the basis of probability; to presume. **Præsumptio.** Supposition, assumption, presumption, *q. v.*

Omnia præsumuntur contra spoliatorem. All things are inferred against one who destroys (or withholds) documentary evidence. See further SPOLIATION, 2.

Omnia præsumuntur rite et solemnitur esse acta. All things are presumed to have been done in due and solemn form.

The principle is, that there is a disposition in the courts to uphold official, judicial, and other acts, rather than to render them inoperative. Where, then, there is general evidence of acts having been legally and regularly done, proof of circumstances, essential to the validity of those acts, and by which

[1] People *v.* Brown, 2 Utah, 465 (1879).

[2] Wooters *v.* International, &c. R. Co., 54 Tex. 300 (1881).

[3] Farmers', &c. Bank *v.* Smith, 3 S. & R. 69 (1817).

[4] Hubbell *v.* McCulloch, 47 Barb. 294 (1866).

[5] [Butler *v.* Young, 1 Flip. 279 (1872), Sherman, J.; Bowlies *v.* Brier, 87 Ind. 395 (1882).

[6] Payson *v.* Minors, L. R., 7 Q. B. D. 333 (1881), Lush, Lord Justice.

[7] Hunter, Suit in Equity, 2-3.

[1] 3 Bl. Com. 274.

[2] See 1 Story, Eq. §§ 296, 299; Contr. § 670.

[3] [4 Bl. Com. 103, 115, 423; Coke, Litt. 129.

they are accompanied in most instances, will be dispensed with.[1]

The law presumes that every man in his private and official character does his duty, until the contrary is proved; that all things are rightly done, unless the circumstances of the case overturn this presumption. Thus, it presumes that a man acting in a public office has been rightly appointed; that entries in public books were made by the proper officer; that, upon proof of title, matters collateral thereto are consistent and regular.[2]

A superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law are in favor of its acts. It is presumed to have jurisdiction to give the judgment it renders, until the contrary appears — jurisdiction of the cause or subject-matter of the action, and of the parties. The former will generally appear from the character of the judgment, and will be determined by the law creating the court or prescribing its general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant or his appearance in the action. But where the former exists, the latter will be presumed. The rule is different with respect to courts of special and limited authority: there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face.[3]

Presumptions as to the judgments of superior courts only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence, or that the fact was otherwise than as averred. Were this not so it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed. These presumptions are also limited to jurisdiction over persons within the territorial limits of the courts, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law.[3]

"The extent to which presumptions will be made in support of acts depends very much upon whether they are favored or not by law, and also on the nature of the fact required to be presumed." The maxim does not apply to give jurisdiction to magistrates or other inferior tribunals, nor to give jurisdiction in proceedings which are not according to the common course of justice.[1]

Præsumptio juris. A presumption of law. **Præsumptio juris et de jure.** A presumption of law and of right. The former characterizes a rebuttable, the latter an irrebuttable, presumption.

The latter was originally intended to express intense or "superlative" presumptions. Difficulty being felt in finding suitable limits for such presumptions, doubt as to their force was got rid of by making them irrebuttable. Our courts, while holding to the old phraseology, are so far contracting the range of this class of presumptions that no perfect individual of the class can be found.[2]

PRÆTOR. See JUDEX, 1.

PRAYER. Petition; request.

In a bill in equity, a request that the court will grant the relief desired; also, that part of the bill in which the request is made.

Such prayer is for process, for special or general relief, or for both. A common formula for the conclusion is "And he will ever pray, etc." See EQUITY; RELIEF, 2. Compare ORATOR; PETITION; PRECATORY.

On prayers for instruction, see CHARGE, 2 (2, c).

PRE. The Anglicized form of the Latin preposition *præ*, before. In compounds, expresses priority of time, place, or rank.

PREAMBLE.[3] An introduction or preface.

1. A clause introductory to, and explanatory of, the reasons for establishing a constitution.

Preamble to the Constitution of the United States: "WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America."

This preamble has been constantly referred to by statesmen and jurists to aid them in expounding the provisions of the Constitution.[4] See WELFARE.

2. The introductory clause or section of a statute, ordinance, or other like enactment.

Usually recites the motives for passing the enactment. Referred to when doubts and ambiguities arise upon the words of the enacting part. Its office is to expound powers conferred, not substantially to create

[1] 2 Best, Ev. § 353; 1 Greenl. Ev. § 19.

[2] Bank of United States *v.* Dandridge, 12 Wheat. 69-70 (1827), Story, J. See also 20 Wall. 250; 115 U. S. 451; 18 F. R. 96; 4 Hughes, 519.

[3] Galpin *v.* Page, 18 Wall. 365-73 (1873), cases, Field, J.; Cornett *v.* Williams, 20 *id.* 250 (1873).

[1] Sabariègo *v.* Maverick, 124 U. S. 284 (1888); 2 Best, Ev. §§ 353, 363.

[2] 2 Whart. Ev. §§ 1232-37; 1 Greenl. Ev. § 15, note; 2 Best, Ev. § 306.

[3] L. *præ-ambulare*, to go before.

[4] 1 Story, Const. §§ 460, 458-517; Chisholm *v.* Georgia, 2 Dall. 474 (1793), Jay, C. J.

powers. It serves as a guide to the intentions of the framers, which is only the first stage on the road to construction. Not being an essential part of a statute, it is frequently omitted.[1]

8. A recital in a contract declaring the intention of the parties. See CONTRACT.

PREBEND. An endowment in land, or a pension in money, given to a cathedral or conventual church *in præbendam:* for maintaining a secular priest or regular canon as a prebendary.[2]

PRECARIOUS. Revocable at the will of the creator or owner: as, a precarious right or loan. See PRECARIUM. Compare PRECATORY.

The circumstances of an executor are "precarious" when his conduct evidences such improvidence as, in the opinion of prudent men, endangers the security of the trust estate.[3]

PRECARIUM. L. A thing held by entreaty — at the will of another.

A contract by which a thing was delivered into the custody of a person until such time as the owner might want it back.[4]

PRECATORY.[5] Describes an expression in a will which requests that something be done — recommendatory words.

Courts of equity have gone great lengths in creating implied or constructive trusts from such words. The tendency is to discourage extending the doctrine. Whenever the object, or the property, of the supposed trust is not certain or definite, or a clear discretion and choice to act is given, and whenever prior dispositions import uncontrollable ownership, the courts will not create a trust from precatory words.[6]

Words of entreaty, recommendation or wish, addressed by a testator to a devisee or legatee, make him a trustee for the person in whose favor such expressions are used, provided the testator has pointed out with clearness the objects of the trust, and the subject-matter on which it is to attach or from which it is to arise and be administered.[7]

If there be a trust sufficiently expressed and capable of enforcement, it does not disparage, much less defeat it, to call it "precatory." The question of its existence depends, after all, upon the intention of the testator as expressed by the words he has used, according to their natural meaning, modified only by the context and the situation and circumstances of the testator when he used them. On the one hand, the words may be merely those of suggestion, counsel, or advice, intended only to influence, and not to take away the discretion of the legatee growing out of the right to use and dispose of the property given as his own. On the other hand, the language may be imperative in fact, though not in form, conveying the intention of the testator in words equivalent to a command, and leaving to the legatee no discretion to defeat his wishes, although there may be a discretion to accomplish them by a choice of methods, or even to defeat and limit the extent of the interest conferred upon his beneficiary.[1]

PRECEDENCE. See MINISTER, 3; PRECEDENT; PRIORITY; PRIVILEGE; RANK.

PRECEDENT.[2] 1, *adj.* Going before; to happen or be performed before any right under it can vest or be claimed: as, a precedent condition, *q. v.*

2, *n.* An authoritative example.

A decision cited in support of a proposition.[3] See further DECISUM, Stare, etc.

A draught of a deed, pleading, will, or other instrument serviceable as a model or form.

As the title of a law book, "precedents" denotes a collection of forms approved by usage and, perhaps, by judicial decision.

PRECEPT. A command or mandate in writing. Of equal import with writ or process.[4] See PRÆCIPE.

PRECINCT. The limits of an officer's jurisdiction, or of an election district.

As used in the return to a process, the territory within which the officer may legally discharge the duties of his office.[5]

A general word, indicating any district marked out and defined. In a given connection, may signify a district inferior to a county and superior to a township.[6]

In Wisconsin, formerly referred to certain districts having similar functions to those of towns, and which passed away upon the formation of the first legislative

[1] Copeland *v.* Memphis, &c. R. Co., 3 Woods, 660 (1878), Woods, J.; Beard *v.* Rowan, 9 Pet. *317 (1835); Commonwealth *v.* Smith, 76 Va. 484-85 (1882), cases; 18 Cent. Law J. 27-29 (1884), cases — Irish Law Times; 15 Johns. 116; 1 Pick. 251; 69 Pa. 382; Dwar. Stat. 107.

[2] Randolph *v.* Milman, L. R., 4 C. P. *111 (1868).

[3] Shields *v.* Shields, 60 Barb. 61 (1870), Potter, J.

[4] See Story, Bailm. §§ 227, 253 *b;* Hadley, Rom. Law, 178.

[5] L. *precari*, to pray, entreat, request.

[6] 2 Story, Eq. §§ 1068-70.

[7] Warner *v.* Bates, 98 Mass. 276-78 (1867), cases, Bigelow, C. J.; Handley *v.* Wrightson, 60 Md. 198-206 (1883), cases; Knox *v.* Knox, 59 Wis. 172, 178-85 (1884), cases; Howard *v.* Carusi, 109 U. S. 725 (1884); 44 Am. Dec. 365, 369; Hawk. Wills, 159 (1835), cases.

[1] Colton *v.* Colton, 127 U. S. 312-21 (1888), cases, Matthews, J. See generally 20 Cent. Law J. 63-66 (1885), cases; 27 Am. Law Reg. 459-63 (1888), cases; 1 Perry, Trusts, §§ 112-23, cases.

[2] 1. Pre-cĕd'-ent. 2. Prĕc'-e-dent.

[3] On the value of, see 10 Va. Law J. 582 (1886).

[4] Adams *v.* Vose, 1 Gray, 58 (1854), Dewey, J.

[5] Brooks *v.* Norris, 124 Mass. 178 (1878), Colt, J.

[6] Union Pacific R. Co. *v.* Cheyenne, 113 U. S. 524 (1885), Bradley, J.

districts after the admission of the State into the Union. The term is no longer used, except, perhaps, occasionally as interchangeable with election district.[1]

PRECLUDE. See ESTOPPEL.

Precludi non. L. Ought not to be barred.

The clause in a replication to a plea in bar, "that by reason of anything in said plea alleged, plaintiff 'ought not to be barred' from maintaining his said action." The two words were the most emphatic in the Latin writ.

PRE-CONTRACT. See CONTRACT; MARRIAGE.

PREDOMINANT. Something greater or superior in power and influence to others, with which it is connected or compared: as, a predominant motive.[2]

PRE-EMPTION.[3] 1. The first buying of a thing.

A privilege allowed the king's purveyor up to 1661.[4]

2. The right to purchase at a fixed price in a limited time in preference to others.[5]

The exclusive right in a person to purchase a quantity of the public lands in consequence of having complied with the laws of Congress upon the subject.[6]

Pre-emptor; pre-emptioner; pre-emptionist. He who holds such prior right of purchase. One who by settlement upon the public land or by cultivating a portion of it has obtained the right to purchase a portion of such land, to the exclusion of all other persons.[6]

Pre-emption claimant. One who settles upon land subject to pre-emption, with the intention to acquire its title, and has complied, or is proceeding to comply, in good faith, with the requirements of the law, to perfect his right to it.[7]

All public lands are subject to pre-emption, except land included in reservations, land within the limits selected as the site of a city or town, land actually settled and occupied by trade and business and not for agriculture, and lands on which are found or situated any known salines or mines. Any adult citizen of the United States, or a foreigner who has filed his declaration to become a citizen, who makes a settlement in person, and inhabits and improves the same, and shall erect a dwelling thereon, may enter, for one hundred and sixty acres, with the land-register, upon paying the minimum price of such land, and proving settlement. But one who has three hundred and twenty acres in any State or Territory cannot pre-empt; nor can one who quits his residence on his own land to reside on public lands in the same State or Territory. Nor can any one file a second declaration for another tract.[1]

A party by mere settlement, with declared intention to obtain a title, does not thereby acquire such interest as to deprive Congress of the power to devest it by a grant to another party. The power of Congress ceases when all the preliminary acts, prescribed for the acquisition of the title, have been performed by the settler. Then the settler's interest is vested, and he is entitled to a certificate of entry from the local land-office, and, ultimately, to a patent from the United States. Until such entry, the settler has only a privilege or preference of pre-emption in case the lands are offered for sale in the usual manner. The United States only declare by the pre-emption laws that if lands are thrown open for sale, the preference of sale, in limited quantities, shall be in the first person who settles and improves them.[2]

The pre-emption laws imperatively require a residence both continuous and personal upon the land. The settler may be excused for temporary absences caused by well-founded apprehension of violence, by sickness, by the presence of an epidemic, by judicial expulsion, or by engagement in the military or naval service.[3]

See LAND, Public; PATENT, 2.

PRE-EXISTING. Referring to a debt, will include every debt previously contracted, whether payable or not.

This, at least, is the meaning in the insolvent law of Massachusetts.[4] Compare PREVIOUS; PRIOR.

PREFER. 1. To bring or lay a matter before a court: as, to prefer a criminal charge, a petition in divorce.

2. To give advantage, priority (*q. v.*), or privilege to. Specifically, to favor one or more creditors over others, when the debtor has not the means with which to pay all alike.

In this sense are used the expressions *preferred* or *preferential* — assignment, bonds, creditors, dividend, shares, stock. See DIVIDEND, 3; STOCK, 3 (2).

"Preferred" means that the thing to which it is attached has some advantage over another thing of the same character, which but for this advantage would be like the other.[5]

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[1] Chicago, &c. R. Co. v. Town of Oconto, 50 Wis. 196 (1880), Orton, J.

[2] Matthews v. Bliss, 22 Pick. 53 (1839), Shaw, C. J.

[3] L. *præ*, before; *imere*, to take. Also printed pre-emption.

[4] 1 Bl. Com. 287.

[5] Bowers v. Keesecker, 14 Iowa, 307 (1862); Davenport v. Farrar, 1 Scam. 317 (1836), Lockwood, J.

[6] [Dillingham v. Fisher, 5 Wis. 480 (1856), Whiton, C. J.

[7] Hosmer v. Wallace, 97 U. S. 581 (1878), Field, J.

[1] R. S. §§ 2257-61.

[2] The Yosemite Valley Case, 15 Wall. 77 (1872), cases, Field, J.

[3] Bohall v. Dilla, 114 U. S. 51 (1885), Field, J.

[4] Fletcher, Appellant, 136 Mass. 342 (1884).

[5] State v. Cheraw, &c. R. Co., 16 S. C. 580 (1881), Simpson, C. J.

Preference. A payment to one creditor which will or, possibly, may give him an advantage over others.[1]

In the absence of a bankrupt law, a failing debtor may prefer one creditor to another by a deed, a judgment, or other means, except, in some States, by an assignment in trust. The effect may be to delay a creditor not preferred, in fact to prevent his obtaining payment at all; but if the honest intent was to pay the preferred debt, the transaction is not invalidated by the statute of 13 Elizabeth. That statute is aimed at intended fraud,— at transfers of property or preferences which are not *bona fide*, but collusive arrangements "to delay, hinder, or defraud" particular creditors.[2]

The mere existence of a desire that a particular creditor may succeed by suit, judgment, execution, and levy, in obtaining a preference, is not sufficient to establish that the debtor "procured or suffered" his property to be taken on legal process with intent to prefer such creditor, if the proceedings were the usual proceedings in a suit, unaided by any act of the debtor, either by facilitating the proceedings as to time or method, or by obstructing other creditors who otherwise would obtain priority.[3]

If debtors could not give preferences to *bona fide* creditors, while they yet retain dominion over their property, the transaction of business would be embarrassed.[4]

See CONVEYANCE, 2, Fraudulent; SUFFER.

PREGNANCY. Being with child.

Existing at the time of marriage by another than the husband, is ground for divorce, provided the husband was without knowledge of the woman's condition, either from her confession or appearance.[5]

A woman "with child" is a "pregnant woman," within the meaning of a statute punishing assault with intent to procure a miscarriage.[1] See QUICKENING.

As to pretended or alleged pregnancy, see REPRIEVE; VENTER, 1.

Pregnant. In pleading, see AFFIRMATIVE (2); NEGATIVE.

PREJUDICE. Fore-judgment, pre-judgment; detriment, disadvantage.

A prejudice is a pre-judgment. The popular meaning involves some grudge or ill-will, as well as a pre-conceived opinion. A disqualifying prejudice in a juror is a fixed judgment or opinion as to guilt or innocence.[2]

A man cannot be "prejudiced" against another without being "biased" against him; but he may be biased without being prejudiced.[3]

Implies nearly the same thing as opinion; a pre-judgment of the case, and not necessarily enmity or ill-will against a party. A statute excluding as a juror a person who has "formed or expressed an opinion, or is insensible of any bias or prejudice," intends to exclude any person who has made up his mind, or formed a judgment in advance. Yet, the opinion or judgment must be something more than a vague impression, formed from casual conversations with others, or from reading imperfect newspaper reports. The opinion must be upon the merits of the question, and be such as would be likely to bias or prevent a candid judgment, upon a full hearing of the evidence. If one has formed what in some sense might be called an opinion, but which yet falls short of exciting any bias or prejudice, he may consistently discharge his duty as a juror.[3]

The right to a trial by an impartial jury does not mean that the jurors must have no prejudice or opinion as to the policy of enforcing the laws.[4] See further BIAS; IMPARTIAL, 1; OPINION, 2.

The "prejudice" in the mind of a judge which will afford ground for a change of venue refers to an opinion in regard to the case, formed beforehand, without examination, or a prepossession; not, an opinion on the questions of law involved;[5] prejudice against the party personally.[6]

Without prejudice. That what is said or done is not (1) to be construed as an admission of liability, or (2) to affect the rights

[1] [*Re* Hapgood, 2 Low. 202 (1873), Lowell, J.

[2] York County Bank *v.* Carter, 38 Pa. 453 (1861), Strong, J.; Worman *v.* Wolfersberger, 19 *id.* 61 (1852); Smith *v.* Craft, 11 Biss. 347 (1852); Clarke *v.* White, 12 Pet. 200 (1838); Lucas *v.* Claflin, 76 Va. 276–79 (1882), cases; Tootle *v.* Coldwell, 30 Kan. 134 (1883), cases; Jewett *v.* Noteware, 30 Hun, 194 (1883), cases; Sartwell *v.* North, 144 Mass. 192–95 (1887), cases; 48 Ala. 376; 10 Cal. 277; 19 *id.* 46; 4 Del. Ch. 536; 4 B. Mon. 296; 13 R. I. 463; Bump, Fraud. Conv. 220, cases.

[3] Brown *v.* Jefferson County Bank, 19 Blatch. 316–17 (1881), Blatchford, J.; Wilson *v.* City Bank of St. Paul, 17 Wall. 483–87 (1873), Miller, J.; Jewell *v.* Knight, 123 U. S. 434 (1887), cases.

[4] Campbell *v.* Colorado Coal & Iron Co., 9 Col. 64–65 (1885), cases. As to assignments with preferences, see Woonsocket Rubber Co. *v.* Falley, 30 F. R. 808, 811–12 (1887), cases; Weil *v.* Polack, *ib.* 813 (1887), cases.

[5] See Hoffman *v.* Hoffman, 30 Pa. 417, 421 (1858); Baker *v.* Baker, 13 Cal. 87, 92–106 (1859), cases; Reynolds *v.* Reynolds, 3 Allen, 609 (1862); Leavitt *v.* Leavitt, 13 Mich. 452 (1865); Foss *v.* Foss, 12 Allen, 26 (1866); Crehore *v.* Crehore, 99 Mass. 330 (1867); Hedden *v.* Hedden, 21 N. J. E. 61 (1870); Farr *v.* Farr, 2 McArthur, 35 (1875); Allen's Appeal, 99 Pa. 196 (1882); State *v.* Shoemaker, 62 Iowa, 344 (1884); Sissung *v.* Sissung, Sup. Ct. Mich. (1887), cases; 18 Cent. Law J. 115–16 (1884), cases; 1 Bish. Mar. & D. §§ 179–91, cases; 44 Am. R. 112, cases.

[1] Eckhardt *v.* People, 83 N. Y. 464 (1881).

[2] Willis *v.* State, 12 Ga. 448–50 (1853), Nisbet, J.

[3] Commonwealth *v.* Webster, 5 Cush. 297 (1850), Shaw, C. J.

[4] United States *v.* Noelke, 17 Blatch. 562–63 (1880), cases, Choate, J.; 2 McCrary, 257.

[5] Hungerford *v.* Cushing, 2 Wis. *405 (1853), Whiton, Chief Justice.

[6] Wheeler *v.* Lawson, 57 Wis. 402 (1883).

of the party before the law or his standing in court.

Thus, an offer in compromise (*q. v.*) of litigation is presumed to have been made "without prejudice."[1]

A letter marked "without prejudice," and the reply, although the latter is not so marked, cannot be used as an admission.[2]

When a bill in equity is dismissed without a consideration of the merits, the practice is for the court to express in its decree that the dismissal is "without prejudice." An omission of the qualification will be corrected.[3] The decree of dismissal is not a bar to a subsequent suit for the same cause of action, if the complainant, in another suit, can obviate the defects of the existing bill.[4]

PRELIMINARY. See INJUNCTION; PEACE, 2, Articles of; PROOF.

PREMEDITATE. To think of in advance; to determine upon beforehand; to intend, design.

To plan, contrive, or scheme beforehand.[5]

A "premeditated design" to kill means simply an intent to kill. Design means intent, and both words essentially imply "premeditation." Premeditation does not exclude sudden intent, and need not be slow or last long.[6]

"Premeditated" has been invariably defined by the supreme court of Missouri as "thought of beforehand for any length of time, however short."[7]

The execution of the guilty purpose must be settled upon reflection. A full and determined purpose is necessary, as distinguished from an impulsive fatal act. No particular period of time is requisite, but still deliberation must take place.[8]

"Deliberation and premeditation" imply that the act has been "done with reflection," "conceived beforehand." Some time for deliberate reflection is necessary.[9]

A charge of killing with "premeditation" means that there was design or intent before the act; that is, that the accused planned, contrived and schemed beforehand to kill. A killing with "deliberation" means that the act was determined upon after reflection, and that "the consequences, chances, and means were weighed, carefully considered and estimated."[10]

A design to kill must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. When the time is sufficient for this, it matters not how brief it is. The mind acts with a celerity which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case.[1]

The killing must be a pre-determined killing upon consideration, and not a sudden killing upon a momentary excitement and impulse of passion, upon provocation given at the time, or so recently before as not to allow time for reflection. This design may be formed at the moment of the commission of the act.[2]

The law leaves the existence of a fully formed intent as a fact to be determined by the jury from all the facts in evidence.[3]

See DELIBERATION, 8; DRUNKENNESS; MURDER.

PREMISES.[4] Something sent or put before: foregoing statements; facts already mentioned; introductory matter.

1. (1) In a bill in equity, the stating part, the narrated facts upon which the complainant expects to recover. (2) In a declaration, the statements, in the early part, out of which the defendant's liability grows: as, in the expressions, "by reason of the premises," "in consideration of the premises."

2. In a deed, all that precedes the *habendum;* that is, the date, parties, consideration, grant, description, recitals, exceptions, etc.[5]

The premises being the part of a deed in which the thing is granted, the *habendum*, which serves to limit the certainty of the estate, cannot increase the grant.[6]

3. A distinct portion of realty; land, or lands; tenements, buildings.[7]

In common parlance, land with its appurtenances. In a conveyance, "the thing demised or granted by the deed."[8]

In a policy of insurance on a vessel, "insured premises" means the vessel.[9]

In a policy upon a habitation, covers the whole property insured — dwellings, out-houses, and appurtenances, which together compose the establishment.[10]

[1] West *v.* Smith, 101 U. S. 273 (1879), cases.

[2] Hoghton *v.* Hoghton, 15 Beav. 331 (1852).

[3] Durant *v.* Essex Company, 7 Wall. 109 (1868), Field, Judge.

[4] County of Mobile *v.* Kimball, 102 U. S. 705 (1880), Field, J.; Ragsdale *v.* Vicksburg, &c. R. Co., 62 Miss. 688 (1884); Mobile, &c. R. Co. *v.* Davis, *ib.* 271 (1884).

[5] [Craft *v.* State, 3 Kan. 483 (1866), Crozier, C. J.

[6] [Hogan *v.* State, 36 Wis. 244 (1874), Ryan, C. J.

[7] State *v.* Harris, 76 Mo. 363 (1882), Norton, J.

[8] People *v.* Mangano, 29 Hun, 262 (1883), Cullen, J.

[9] Simmerman *v.* State, 14 Neb. 569 (1883), Lake, C. J.

[10] State *v.* McGaffin, 36 Kan. 319 (1887), cases, Johnston, J.

[1] People *v.* Majone, 91 N. Y. 212 (1883), Earl, J.

[2] McDaniel *v.* Commonwealth, 77 Va. 284 (1883), Hinton, J.

[3] Commonwealth *v.* Drum, 58 Pa. 16 (1868), Agnew, J.

[4] L. *præmissa* (*sententia*), that which is stated beforehand.

[5] See 2 Bl. Com. 298; 44 Me. 416; 15 Md. 63.

[6] Brown *v.* Manter, 21 N. H. 533 (1859).

[7] See Bowers *v.* Pomeroy, 21 Ohio St. 190 (1871); 4 Duer, 191.

[8] Zinc Co. *v.* Franklinite Co., 13 N. J. E. 331 (1861), Green, Ch.; 15 *id.* 462.

[9] Reid *v.* Lancaster Fire Ins. Co., 19 Hun, 286 (1879).

[10] Herman *v.* Adriatic Fire Ins. Co., 45 N. Y. Super.

"Premises adjacent to" a place where liquor is sold, embraces a public street or alley fronting on the place.[1]

In a lease of a factory, "premises" does not include a portable machine worked by a belt attached to the factory.[2]

The word never describes personalty.[3]

See CONTAINED; LOCUS, In quo; VIEW.

PREMIUM.[4] Reward, recompense; price; the sum paid or to be paid.

To a "wager" or "bet" there are two parties. To a "premium" or reward there is but one party until the act, thing, or purpose for which it is offered, has been accomplished. A "premium" is a reward or recompense for some act done; a "wager" is a stake upon an uncertain event. In a "premium" it is known who is to give before the event; in a "wager" it is not known until after the event.[5] Compare further BET; BOUNTY; PRIZE; WAGER, 3.

At a premium. At a price higher than the nominal value; as, when it is said that a share of stock, or exchange, is at a premium.

Premium note. A promissory note given for the price of insurance. **Premium of insurance.** The sum paid for undertaking the risk in a contract of insurance.

The payment of the annual premium in life insurance is a condition subsequent only, the non-performance of which may incur a forfeiture of the policy, or may not, according to circumstances. The insured may show a waiver of the condition, or a course of conduct which gave him a just and reasonable ground to infer that a forfeiture would not be exacted.[6] See INSURANCE.

PRENDER; PRENDRE. F. To take, seize. The right to take a thing before it is offered.

Whence "it lies *in prendre*, but not *in render*." See PROFIT, A prendre.

PREPARATION. See ATTEMPT; OVERT.

PREPENSE.[7] Aforethought; premeditated: as, malice prepense, *q. v.*

PREPONDERANCE.[8] Superiority of weight; outweighing. More, therefore, than "weight."[9]

A mere preponderance of evidence, however slight, must prevail in civil cases. But to sustain a finding of crime, the preponderance must be sufficient to outweigh the opposing evidence, including evidence of good character, if any, and the presumption in favor of innocence.[1]

In a civil case, the law does not require that the jury be convinced beyond all reasonable doubt, much less beyond any doubt; they must determine the issue upon the weight or preponderance of evidence.[2]

See further DOUBT, Reasonable; FAIR, 1.

PREROGATIVE.[3] That special pre-eminence which the king hath over and above all other persons, and out of the course of the common law, in right of his regal dignity. That law in case of the king which is law in no case of the subject.[4]

According to Vattel, the "prerogatives of majesty" are all the prerogatives without which the sovereign command, or authority, could not be exerted in the manner most conducive to the public welfare. One of these prerogatives is the right of eminent domain.[5]

Prerogative writs. *Certiorari*, prohibition, *procedendo*, *mandamus*, *quo warranto*, and *habeas corpus:* writs which do not issue without showing why the extraordinary power of the crown is called to the party's assistance.[6]

Some of the prerogative writs have been, in this country, largely shorn of their prerogative character, so far as their general use is concerned.[7]

In the United States, the cases proper for the issue of prerogative writs are largely defined by statutes. Before the passage of these statutes no such writ issued purely of right, but in the exercise of a sound judicial discretion, which took into consideration the general welfare of the community.

See the writs named.

PRESCRIPTION.[8] That which is declared, published, or directed beforehand.

1. Municipal law is "a rule prescribed." That is, the resolution of the legislator is to be notified to the people who are to obey it, before its commencement as a law.

This may take place by universal tradition and long practice, which supposes a previous publication, as in the case of the common law; by *viva voce* proclamation; or by writing, printing, or the like.[9]

The constitutional provision that "a jury trial may

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402 (1879); Northwestern Mut. Life Ins. Co. *v.* Germania Fire Ins. Co., 40 Wis. 446 (1876).

[1] Bandalow *v.* People, 90 Ill. 218 (1878).

[2] Holbrook *v.* Chamberlin, 116 Mass. 161 (1874).

[3] Carr *v.* Fire Association, 60 N. H. 520 (1881).

[4] L. *præmium*, profit, advantage. See PREMIUM.

[5] Alvord *v.* Smith, 68 Ind. 62 (1874), Biddle, J.

[6] Thompson *v.* Knickerbocker Life Ins. Co., 104 U. S. 260 (1881), Bradley, J. On the effect of delivering a policy without payment of premium, see 35 Alb. Law J. 104-5 (1887), cases.

[7] F. *pre-penser*, to think beforehand.

[8] L. *præ-ponderare*, to outweigh.

[9] Shinn *v.* Tucker, 37 Ark. 586 (1881), Eakin, J.

[1] Hills *v.* Goodyear, 4 Lea, 241-43 (1880), cases.

[2] Whitney *v.* Clifford, 57 Wis. 157-58 (1883).

[3] L. *præ*, before; *rogare*, to require, demand.

[4] 1 Bl. Com. 239; 37 Wis. 443.

[5] Charles River Bridge *v.* Warren Bridge, 11 Pet. *641-42 (1837); Vattel, Law of Nations, § 45.

[6] [3 Bl. Com. 132; 3 Steph. Com. 629.

[7] Wheeler *v.* Irrigation Co., 9 Col. 252 (1886).

[8] L. *præ-scribere*, to write beforehand.

[9] [1 Bl. Com. 45.

be waived in the manner to be prescribed by law," contemplates actual legislation upon the subject.[1]

"Prescription" of a statute is necessary to give it effect. There are other modes of publication than that by the session laws. The doings of the legislature are necessarily public, and the journals of each house are required to be published regularly. Every enactment is, therefore, published in the sense in which publication is intended in the word "prescribed," though, by some oversight, it is omitted from the annual volume of laws.[2] Compare PROMULGATE.

2. In the Roman law, *præscriptio* was an exception written in front of the plaintiff's pleading. It became applied exclusively to the *præscriptio longi temporis*, etc., or the prescription founded on length of possession,[3] which see, below.

3. "When a man can show no other title to what he claims than that he and those under whom he claims have immemorially used to enjoy it."[4]

Whence prescriptible, imprescriptible, prescriptive.

All prescription must be either in a man and his ancestors, or in a man and those whose estate he has, which last is called prescribing in a *que* estate (*quorum statum*). Nothing but incorporeal hereditaments can be claimed by prescription; as, a right of way, or a common. No prescription can give title to lands of which more certain evidence may be had; and it must always be laid in him that is tenant of the fee: since usage beyond time of memory cannot be predicated of any lesser estate. Nor, again, can it be for a thing which cannot be raised by grant: for the law allows prescription only in supply of the loss of a grant, and, therefore, every prescription presupposes a grant to have existed.[4]

Title by prescription is a right which a possessor of land acquires by reason of his adverse possession during a period of time fixed by law, and where it does not originate in fraud, and is under a claim of right.[5]

Prescription is a legal fiction to quiet ancient possession.[6]

It rests upon the presumption that there was a grant which by lapse of time (usually twenty years) has become lost. The presumption is rebuttable.[7]

The doctrine is broader than that of a statute of limitations, although based upon analogous principles of repose to society.[8]

"What the primary owner has lost by his laches, the other party has gained by continued possession, without question of his right." This is the foundation of the doctrine, which, in the English law, is mainly applied to incorporeal hereditaments, but which in the Roman law, and the codes founded on it, is applied to property of all kinds.[1] See USE, 2, User.

4. To fill a druggist's prescription is to furnish and combine the requisite materials in due proportion as directed.[2]

When a druggist, in good faith, recommends a prescription as that of another person, and, at the request of his customer, fills it, charging only for the drugs and for compounding them, he is not responsible for injury that may result from the use of the alleged remedy.[3] See DRUGGIST.

PRESENCE. Being in a particular place.

Actual presence. Being bodily in the precise spot indicated. **Constructive presence.** Being so near to, or in such relation with, the parties actually in a designated place, as to be considered, in law, as in the place.[3]

In the commission of crime, not always an actual immediate standing by, within sight or hearing of the fact; may be a constructive presence, as when one commits a robbery or murder and another keeps watch at a convenient distance.[4] See ACCESSARY; PRINCIPAL, 5.

Does not depend upon whether a person can be distinctly seen.[5]

Obscene words uttered in the *hearing* of a female, are used in her presence; especially so, when addressed to her by name.[6]

"In the presence of the testator" who can see, means within his sight, at reasonable proximity.[7]

Statutes of wills do not make the test of the validity of a will to be that the testator must *see* the witnesses subscribe their names. They must subscribe "in his presence;" but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, and he is sensible of what is being done, and the witnesses subscribe in the same room, or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, they subscribe in his presence.[8]

Statutory provisions which require that a will be signed in the presence of the testator are intended to enable him to see that the persons he confides in are those who attest, and to prevent a false paper being

[1] Exline *v.* Smith, 5 Cal. 112 (1885).

[2] Peterman *v.* Huling, 31 Pa. 436 (1858), Strong, J.

[3] Sandar's Justinian, 47, 126; Maine, Anc. Law, 275.

[4] 2 Bl. Com. 263-66.

[5] Burdell *v.* Blain, 66 Ga. 170 (1880), Crawford, J.

[6] Folsom *v.* Freeborn, 13 R. I. 205-7 (1881), cases.

[7] Brookline *v.* Mackintosh, 133 Mass. 226 (1882); Thomas *v.* England, 71 Cal. 458 (1886).

[8] Boseman *v.* Boseman, 82 Ala. 391 (1886).

[1] Campbell *v.* Holt, 115 U. S. 622 (1885), Miller, J.; Angell, Limitations, §§ 1, 2. See also 51 N. H. 329; 11 Lea, 338; 32 Pa. 398; 38 La. An. 318.

[2] [Ray *v.* Burbank, 61 Ga. 511 (1878), Bleckley, J.

[3] [Baldwin *v.* Baldwin, 81 Va 410 (1886): Bouvier's Law Dict.

[4] 4 Bl. Com. 34.

[5] People *v.* Bartz, 53 Mich. 495 (1884).

[6] Brady *v.* State, 48 Ga. 313 (1873); 1 Keyes, 66.

[7] Ray *v.* Hill, 3 Strob. 301 (1848).

[8] Riggs *v.* Riggs, 135 Mass. 241 (1883), Morton, C. J.

imposed upon them. "Presence" is the opposite of absence; it means in company with, within the view of, in the same room with the testator, coupled with consciousness on his part of such proximity.[1]

As to the presence of the husband when a wife is acknowledging a deed, see EXAMINATION, 5. As to presence in the law of estoppel, see STAND BY.

PRESENT. 1, *adj.* (1) To be in a designated place, actually, or by construction of law. See PRESENCE.

(2) Now existing; neither ended nor yet to begin; neither past nor future: as, present — time, estate, use, enjoyment, *qq. v.*

A bequest to a "present" attending physician, refers to the physician in attendance at the date of the will.[2]

Presently. Now; at once; immediately.

A jointure takes effect "presently after the death of the husband;"[3] and a donation *mortis causa* "presently belongs to the donee," in case the donor dies.[4]

2, *v.* (1) To offer for acceptance or payment.

Presentment. Producing or tendering, according to the terms of either instrument, (1) a bill of exchange to the drawee for acceptance or to the acceptor for payment; or (2) a promissory note to the maker for payment.[5]

Presentment of a bill is to be made on the drawee that he may judge of the genuineness and of the right of the holder to receive the contents, and that he may obtain immediate possession of the bill upon payment of the amount.[6]

Ordinarily, the instrument should be produced, so that, upon payment, it may be delivered up.[7] See ACCEPT, 2; NEGOTIABLE; PLACE, Of payment.

(2) In criminal law, to find, represent, or report officially.

Presentment. The notice taken by a grand jury of an offense from their own knowledge or observation, without a bill of indictment being laid before them.[8]

Upon this presentment an indictment is framed.

In Massachusetts, an indictment begins "the jurors on their oath *present*." In some other jurisdictions, where the offense is continuing, the charge is that the defendant, on a day named, and between that day and the day of the "taking of this inquisition," committed certain acts. And in some others the words are "the day of the making of this presentment." At common law, every indictment is a presentment. "Presentment" here means, not the delivery of the indictment to the court, but that a certain person has committed the acts set forth. The jurors "represent" or "show" those facts; *present* what they find to be the facts, and they *find* what they represent. The finding and the presentment mean the same.[1] See INDICTMENT.

Presents. (1) In the expressions "Know all men by these presents" and "To all to whom these presents may come," refers simply to the instrument or writing then in hand, or being read or spoken of.

The original was *præsentes literæ*, words before the reader: formal words of description in old conveyances.

"By these presents" is a phrase peculiar to conveyances and contracts in common-law countries. It is not found in documents executed under the civil law.[2]

(2) See BAGGAGE; GIFT, 1; INSOLVENCY; SERVICE, 3, Civil.

"No Person holding any Office of Profit or Trust under them [the United States], shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[3]

PRESIDE. A judge may "preside" whether sitting alone or as one of several judges.[4] See JUDGE.

PRESIDENT. See AGENT; DESCRIPTIO, Personæ.

Of a bank or corporation. See BANK, 2 (2); CORPORATION.

Of the Senate. See CONGRESS.

Of the United States. "The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected as follows"[5]— by electors, appointed by each State, as see, at length, ELECTORS, Presidential.

"No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States."[6]

"In Case of the Removal of the President from Office

[1] Baldwin *v.* Baldwin, 81 Va. 410-14 (1886), cases, Lacy, J.; Neil *v.* Neil, 1 Leigh, 11 (1829), Carr, J. See generally 17 Cent. Law J. 412-47 (1883), cases.

[2] Everett *v.* Carr, 59 Me. 333 (1871).

[3] 2 Bl. Com. 137.

[4] 1 Story, Eq. § 606.

[5] See 1 Daniel, Neg. Inst. § 449, as to acceptance; § 571, as to payment.

[6] Musson *v.* Lake, 4 How. 274 (1846).

[7] Codman *v.* Vermont, &c. R. Co., 17 Blatch. 4 (1879), cases. See generally Cox *v.* Nat. Bank of New York, 100 U. S. 712-18 (1879), cases.

[8] 4 Bl. Com. 301; 18 Fla. 663.

[1] Commonwealth *v.* Keefe, 9 Gray, 291 (1857), Metcalf, J. See also Commonwealth *v.* Adams, 4 *id.* 88 (1855); 2 Story, Const. § 1784.

[2] Bouldin *v.* Phelps, 30 F. R. 574 (1887).

[3] Constitution, Art. I, sec. 9, cl. 8.

[4] Smith *v.* People, 47 N. Y. 334 (1872).

[5] Constitution, Art. II, sec. 1, cl. 1.

[6] *Ibid.*, cl. 5.

or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."[1]

An act approved January 19, 1886 (24 St. L. 1), provides, section one, that "in case of the removal, death, resignation, or inability of both the President and Vice-President, the secretary of state, or if there be none, or in case of his removal, death, resignation, or inability," then each of the following officials, in the order here given and subject to the same conditions as to removal, death, etc.,—the secretary of the treasury, the secretary of war, the attorney-general, the postmaster-general, the secretary of the navy, and the secretary of the interior,—"shall act as President until the disability of the President or Vice-President is removed or a President shall be elected: *Provided*, That whenever the powers and duties of the office of President . . shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of such person . . to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting."

Sec. 2. The act shall only apply to officers appointed by the consent of the Senate, and to such as are eligible to the office of President, and not under impeachment by the House of Representatives at the time. Sec. 3. Repeals Rev. St. §§ 146–50.

"The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States or any of them."[2]

His salary is at present fifty thousand dollars a year.[3]

"Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[4]

"The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments (*q. v.*), upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons (*q. v.*) for Offences against the United States, except in Cases of Impeachment."[5]

He may meet invasion or insurrection by military force, previous to any declaration of war by Congress.[1] See WAR.

"He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties (*q. v.*), provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint (*q. v.*) Ambassadors, other public Ministers (*q. v.*) and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[2] See OFFICE.

"The President shall have Power to fill up all Vacancies (*q. v.*) that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[3]

"He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient [see MESSAGE]; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."[4]

He and the Vice-President "shall be removed from Office on Impeachment (*q. v.*) for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[5]

See subjects relating to the Constitution and government of the United States; in particular CONGRESS; SERVICE, 3, Civil.

PRESS. See COPY; LIBERTY, 1, Of the press.

PRESUME. To take or assume a matter beforehand, without proof; to take for granted.

Infer is stronger than presume. The law does not presume, much less infer, fraud.[6] See INFER.

Presumption. Next to positive is circumstantial evidence, or the doctrine of presumptions. When a fact cannot itself be demonstrated, that which comes nearest to

[1] Constitution, Art. II, sec. 1, cl. 6.
[2] *Ibid.*, cl. 7.
[3] R. S. § 153: Act 3 March, 1873, c. 226.
[4] Constitution, Art. II, sec. 1, cl. 8.
[5] *Ibid.*, sec. 2, cl. 1.

[1] R. S. § 1642: Acts 28 Feb. 1795, 3 March, 1807.
[2] Constitution, Art. II, sec. 2, cl. 2. "Had the consent of the Senate been made necessary to displace as well as to appoint, the Executive would have suffered degradation; and the relative importance of the House of Representatives a grave diminution." 2 Bancroft, Const. 191.
[3] Constitution, Art. II, sec. 2, cl. 3.
[4] Constitution, Art. II, sec. 3.
[5] *Ibid.*, sec. 4. See generally 2 Bancroft, Const. 166–94, 2 Story, Const. §§ 1410–1572.
[6] Morford v. Peck, 46 Conn. 385 (1878), Loomis, J.

proof of it is proof of the circumstances necessarily, or usually, attending it: this proof creates a presumption, which is relied upon till the contrary is established.[1]

Presumptive evidence proceeds upon the theory that the jury can infer the existence of a fact from another fact that is proved, and which most usually accompanies it.[2]

Presumption of law. A rule which, in certain cases, either forbids or dispenses with any ulterior inquiry.[3]

A judicial postulate that a particular predicate is universally assignable to a particular subject.[4]

It is founded upon the first principles of justice, a law or laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things.[5]

Derives its force from jurisprudence. Probability is not necessary to it. It relieves from producing evidence. Its conditions are fixed and uniform. It is irrebuttable or absolute, and rebuttable or provisional.[6]

Conclusive, imperative, or *absolute presumptions of law.* Rules determining the quantity of evidence requisite to support any particular averment, which may not be overcome by proof that the fact is otherwise.[3]

Cases in which the long experienced connection between things has been found so uniform as to make it expedient for the common good that this connection be taken as inseparable and universal,[3] and indisputable.

Disputable or *rebuttable presumptions of law.* These are such presumptions as may be overcome by opposing proof: that facts, usually together, were so in a given case.[5]

The law infers one fact from the proved existence of its common companion; directs how much shall be proved to make a *prima facie* case, and that that may be overcome by counter-proof.[5]

Presumption of fact. A mere argument upon the facts in a case; a natural presumption derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of rules of law.[6]

A logical argument from a fact to a fact; an argument which infers a fact otherwise doubtful from a fact already proved.[1]

An inference of the existence of a certain fact arising from its necessary and usual connection with other facts which are known.[2]

Derives its force from logic. To it probability is necessary. It requires evidence. Its conditions fluctuate.[1]

There are certain departments of scientific knowledge where an entire series of facts or forms may always be inferred from the existence of any one, according to the maxim *ex pede Herculem.* The conclusion in such cases is deduced from the observed uniformity of physical nature, which by a necessity of our own minds we believe to be invariable. But this mode of reasoning has but a very limited application in the law of evidence as judicially applied to ascertain the facts and motives of human conduct. It is the foundation of the doctrine of presumptions to the extent to which they are admitted.[3]

Psychological presumptions. These are of knowledge of law; of a fact from a known fact; of innocence; of love of life; of good faith; of sanity; of prudence; against danger; as to supremacy of husband; of intent as to probable consequences; of malice; against a spoliator.[4]

Physical presumptions. Of incompetency through infancy; of identity; of death; of survivorship in a common catastrophe; of loss of a ship from lapse of time.[5]

Presumptions of uniformity and continuance. As to residence, occupancy, habit, coverture, solvency, value; that foreign law is like our law; as to constancy of nature — of physical sequence, animal habits, conduct of men in masses.[6]

Presumptions of regularity. As to marriage, and legitimacy; negotiation of paper; judicial proceedings; dates; formalities of documents; appointments of officers and agents; acts of public officers, of business and professional men; of the due delivery of letters.[6]

Presumptions of title. In favor of possession of realty — not tortious, and independent; and of personalty — as to vessels, and papers; that the proprietor adjacent to a road owns the soil thereof; as to ownership of hedges, land covered by water, alluvion, trees, and minerals. Missing links are proven from long possession, and grants from lapse of time. Applied, also, to licenses from use.[6]

Presumption as to payment. This arises after the lapse of twenty years.[7]

"Facts presumed are as effectually established as facts proved, where no presumption is allowed."[8]

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[1] [3 Bl. Com. 371.]

[2] Home Ins. Co. *v.* Weide, 11 Wall. 440 (1870), Davis, J. See also 26 Ala. 30; 66 Ind. 432; 11 Me. 146; 34 N. H. 365; 27 N. J. L. 150, 153; 6 Wend. 181; 7 *id.* 66; 97 Pa. 34; 16 Vt. 71; 12 Wis. 257.

[3] [1 Greenl. Ev. § 14; Improvement Co. *v.* Munson, 14 Wall. 449 (1871).

[4] 1 Whart. Ev. ch. XIV.

[5] 1 Greenl. Ev. § 33; 29 Minn. 15.

[6] [1 Greenl. Ev. § 44; 4 Whart. 172; 107 U. S. 502-3; 71 Cal. 276.

[1] 1 Whart. Ev. ch. XIV.

[2] Roberts *v.* People, 9 Col. 474 (1886), Beck, C. J.

[3] Sabariego *v.* Maverick, 124 U. S. 295 (1888), Matthews, J.

[4] 2 Whart. Ev. §§ 1240-69.

[5] 2 Whart. Ev. §§ 1270-83.

[6] 2 Whart. Ev. §§ 1331-59.

[7] 2 Whart. Ev. §§ 1360-65.

[8] Dickens *v.* Mahana, 21 How. 283 (1858).

If the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury.[1]

Inferences from inferences are not permitted: only immediate inferences from facts proved. If the presumed fact has no immediate connection with or relation to the established fact from which it is inferred, it is regarded as too remote. Thus, the presumption that a public officer has done his duty does not supply proof of independent and substantial facts.[2]

In a case where the ultimate fact was whether a renewal premium had been paid to the defendant, it was held that the jury could not infer (1) that the policy did not lapse but was renewed; (2) that the renewals were paid to the plaintiff's sub-agent; and (3) paid over by the agent to the defendant.[3]

A judge, in deciding that evidence of a particular circumstance is not receivable, impliedly decides that no presumption can be drawn from it which ought to have effect with the jury. A presumption which the jury is to draw is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no "open and visible connection" between the facts out of which the two presumptions arise.[4] An inference from an inference, if allowed at all, has little probative force.[5]

See PRÆSUMPTIO; EVIDENCE.

PRETENSE.[6] Representation; simulation; device.

False pretenses. The offense of "obtaining property by false pretenses." An offense variously defined by statutes; as generally understood: a knowingly false statement of a supposed by-gone or existing fact with intent to defraud, and an obtaining of property thereby.[7]

Many statutes are copied from 30 Geo. II (1757), c. 24 — "knowingly and designedly, by false pretenses," obtaining "from any person money, goods, wares, or merchandise, with intent to cheat and defraud any person of the same;" and from 24 and 25 Vict. (1861), c. 96 — obtaining "any chattel, money, or other valuable security with intent to defraud."[8]

A representation of some fact or circumstance, calculated to mislead, which is not true.[9]

A false pretense *prima facie* imports a misrepresentation as to something existing. . . The offense and the facts constituting it must be stated; where these facts consist in words, the words must be set forth.[1]

Four things must concur: an intent to defraud; actual fraud committed; false pretenses used; the fraud accomplished by means of those pretenses.[2]

There must be a *scienter* and a fraudulent intent. The representation must relate to past events: a representation for the future may be only a promise; it may be made in any of the ways by which ideas are communicated; and it may be inferred. The reason of the law is to protect the weak and credulous from the stratagems of the artful and cunning; it does not extend to those who, having the means in their own hands, neglect to protect themselves.[3]

The law gives a different effect to a representation of existing facts, from that given to a representation of facts to come into existence. To make a false representation the subject of an indictment, or of an action, two things are necessary, viz., that it should be a statement likely to impose upon one exercising common prudence and caution, and that it should be the statement of an existing fact. A "promissory" statement is not, ordinarily, the subject either of an indictment or of an action. The law also gives a different effect to promissory statements based upon general knowledge, information, and judgment, and to representations which, from knowledge peculiarly his own, a party may certainly know will prove to be true or false.[4]

Collecting money by falsely personating a creditor constitutes false pretenses.[5]

When the owner parts with the possession of his property, a felonious receiving is "larceny." When he parts with the possession and title (his right of property), the offense is false pretenses.[6]

In England, and Massachusetts, and perhaps in other States, obtaining money as a charitable gift by false pretenses, is indictable; but otherwise, it seems, in New York.[7]

Any words equivalent to "by means of a false pretense," may be used in the indictment.[8]

The indictment must set forth distinctly that there was an actual transaction between the parties, a payment of money or a delivery of property; that it was

[1] Home Ins. Co. *v.* Weide, 11 Wall. 440 (1871).

[2] United States *v.* Ross, 92 U. S. 283–84 (1875), Strong, J.; Grand Trunk R. Co. *v.* Richardson, 91 *id.* 470 (1875).

[3] Manning *v.* Hancock Mut. Life Ins. Co., 100 U. S. 698 (1879), Strong, J.

[4] Douglass *v.* Mitchell, 35 Pa. 446–47 (1860), Strong, J.; McAleer *v.* McMurray, 58 *id.* 126 (1868).

[5] Ayer *v.* Glaucus, 4 Cliff. 171 (1870).

[6] L. *prætensus: præ-tendere*, to spread before, hold out, pretend. Spelled also pretence.

[7] [Broom, Common Law, 966.

[8] 2 Whart. Cr. L. §§ 1130, 1175, 1186–89; Broom, Com. L. 963.

[9] Commonwealth *v.* Drew, 19 Pick. 184–86 (1837), Morton, J.

[1] Bardlaugh *v.* The Queen, L. R., 3 Q. B. D. 623 (1878), Bramwell, L. J.

[2] Commonwealth *v.* McDuffy, 126 Mass. 470 (1879), cases.

[3] Commonwealth *v.* Drew, *ante*.

[4] Sawyer *v.* Prickett, 19 Wall. 160 (1873), Hunt, J.; 4 Hill, 9; 22 N. Y. 413; 99 Pa. 575; 26 Alb. Law J. 105–6 (1882), cases.

[5] State *v.* Goble, 70 Iowa, 447 (1888).

[6] Loomis *v.* People, 67 N. Y. 326–29 (1876), cases; Zinc *v.* People, 77 *id.* 114 (1879), cases; 53 *id.* 111; 47 111 397; 57 Ind. 341; 39 Mich. 505; 26 Ohio, 15; 11 Ind. 154, 12 Johns. 292.

[7] Commonwealth *v.* Whitcomb, 107 Mass. 486 (1871), cases; People *v.* Clough, 17 Wend. 351 (1837).

[8] Commonwealth *v.* Walker, 108 Mass. 313 (1871), cases.

the accused's purpose, in making the false pretenses, to effect such a transaction; and that the party alleged to have been defrauded was actually deceived by the false pretenses.[1]

See further CHEAT; LARCENY; OBTAIN: SPIRITUALISM.

PRETIUM. L. Price; value.

Pretium affectionis. Price from affection; value bestowed on account of association or endearment.

As, regard for a house as an inheritance or a home, for a jewel as a present, for a picture as an heirloom. Unless expressly provided for, this extrinsic value is not recoverable under a contract of insurance. When, if ever, the law affords no adequate remedy for withholding an article thus enhanced, equity will grant relief by ordering a delivery to the owner.[2]

Pretium periculi. Price of the risk. Payment in consideration of which a risk is assumed; in particular, the risk in a contract of insurance.

Compare PRÆMIUM; PREMIUM.

PREVAIL. He is the prevailing party, within the meaning of a statute entitling such party to costs, who prevails on the main issue, to a greater extent than admitted by his adversary, though not to the full extent of his claim.[3]

To be a prevailing party does not depend upon the degree of success at different stages of the suit; but whether at the end of the suit or proceeding the party who has made a claim against the other has successfully maintained it.[4] See COSTS.

PREVENTION. See CRIME; DEFENSE, 1; HOMICIDE; INJUNCTION; POLICE, 2; PROHIBITION; QUIA TIMET; SUFFER.

PREVIOUS. Compares an act or state named, to another act or state, subsequent in the order of time, for the purpose of asserting the priority of the first.[5] Compare PREEXISTING; PRIOR.

PRICE. The sum of money for which an article is sold; also, the equivalent or compensation, in whatever form received, for property sold.

The first and general meaning originates in the fact that property is ordinarily sold for money; not because the word has necessarily such a restricted meaning.[6]

The Latin is *pretium*, reward, value, estimation. equivalent. Webster shows that "price" is sometimes still used in this sense.[1]

Cost price. The price paid for a thing, as, for goods.[2]

Prices-current. Prepared by parties furnishing them in the ordinary course of business, may be used as evidence of the value of the articles mentioned in them.[3] See BOOK, 1; SCIENCE.

See also CASH; COST; INADEQUACY; MARKET-PRICE; VALUE.

PRIEST. See COMMUNICATION, Privileged, 1.

PRIMA. See PRIMUS.

PRIMAGE. A small payment to the master of a vessel for his care and trouble, paid by the owners of the merchandise laden on board, and for his own personal use, unless otherwise agreed with the owners of the vessel.[4]

No longer considered a gratuity to the master, unless specially so stipulated. It belongs to the owners or freighters, as an increase of the freight rate.[5]

PRIMARY. First: principal, chief, leading, the best: as, a primary conveyance (*q. v.*), primary evidence (*q. v.*), obligation, power. See PRIMUS.

Primarily. "Designed primarily" for advertising purposes was held to mean "chiefly or principally intended" for such purposes.[6]

PRIMOGENITURE. The rule of descent, in English law, that of two or more males in equal degree, the eldest inherits; while females all inherit together. **Postremogeniture.** The right of the youngest son to inherit.[7]

When the emperors began to create honorary feuds, or titles of nobility, it was found necessary, in order to preserve their dignity, to make them impartible, and in consequence descendible. to the eldest son alone. This example was further enforced by the inconveniences which attended the splitting of estates.[7]

PRIMUS. L. First. See PRIMARY.

Imprimis. In the first place. See FIRST, 2.

Prima facies. First view, or appearance.

Prima facie. At first view; on first appearance.

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[1] Commonwealth *v.* Howe, 132 Mass. 258 (1882), C. Allen, J. As to title to the property, see 94 Cent. Law J. 103 (1887), Eng. cases.

[2] 1 Story, Eq. § 709.

[3] [Weston *v.* Cushing, 45 Vt. 537 (1873).

[4] Bangor, &c. R. Co. *v.* Chamberlain, 60 Me. 286 (1872); Hawkins *v.* Nowland, 53 Mo. 330 (1873).

[5] Lebrecht *v.* Wilcoxon, 40 Iowa, 94 (1874), Beck, J.

[6] Hudson Iron Co. *v.* Alger, 54 N. Y. 177 (1873), Earl, C.

[1] Hudson Iron Co. *v.* Alger, *ante.*

[2] Buck *v.* Buck, 18 N. Y. 340 (1858).

[3] Cliquot's Champagne, 3 Wall. 141, 115 (1865); 1 Bened. 249.

[4] [Peters *v.* Speights, 4 Md. Ch. 381 (1853): Abbott, Shipp. 493.]

[5] Carr *v.* Austin, &c. R. Co., 18 F. R. 421 (1883).

[6] Advertising Publications, Postage on, 16 Op. Att.-Gen. 304 (1879).

[7] 2 Bl. Com. 214-16.

A *prima facie* case or evidence is that which is received or continues until the contrary is shown.[1]

Possession of a negotiable instrument, payable to bearer or indorsed in blank, is *prima facie* evidence of lawful ownership; and nothing short of fraud, not even gross negligence, will invalidate the holder's title.[2] But if the defendant proves that the paper originated in an illegality, or was lost or stolen, the presumption arises that the holder gave no value for it. In that case, to recover, the plaintiff must show value paid.[3] See further EVIDENCE; FAITH; NEGOTIATE, 2; RECEIPT.

Primæ impressionis. Of the first impression, *q. v.*

PRINCIPAL.[4] Leading; highest in importance. See PRIMARY.

1. The original debt or sum loaned: as, in principal and interest. See INTEREST, 2 (3).

2. The more worthy; opposed to accessory, appurtenant, incident, secondary, inferior, *qq. v.* Applied to estates, rights, and obligations. See CHALLENGE, 4.

3. The person primarily liable; the original debtor; opposed to bail, surety, *qq. v.*

4. The employer of an agent or attorney; opposed to agent, *q. v.*

One primarily and ordinarily concerned, and who is not an accessary or auxiliary; as, the person receiving goods or employing workmen for his own advantage. An "agent" is a person employed to manage the affairs of another; as, he who receives or employs workmen for another.[5]

Vice-principal. A servant to whom his master deputes general supervision of his work, with the power of appointment and dismissal; a deputy master.

Especially is he a vice-principal who is engaged to manage a business distinct from the principal's regular occupation. The word "manager," as a synonym, is somewhat ambiguous.[6] See MANAGER, 1.

5. The chief actor in a crime; opposed to accessary.

Either the chief actor, that is, the actual perpetrator of the crime, or else he is present aiding and abetting the fact to be done.[7]

One present, consenting, aiding, procuring, advising, or assisting in the commission of a crime. Each person present consenting to the commission of the offense, and doing any act which is either an ingredient in the crime or immediately connected with or leading to its commission.[1]

A principal in the *first degree* is he that is the actor or absolute perpetrator of the crime. A principal in the *second degree* is he who is present, aiding and abetting the fact to be done.[2]

In treason and trespasses all participants are principals. See further ACCESSARY; AID, 1; PRESENCE.

PRINCIPLE.[3] 1. A fundamental truth; an elementary proposition; a settled rule of action or procedure. Compare MAXIM.

2. In patent law, a fundamental truth, an original cause.

These cannot be patented, as no one can claim in either of them an exclusive right. . . The processes used to extract, modify, and concentrate natural agencies, constitute the invention. The elements of the power exist; the invention is not in discovering them, but in applying them to useful objects.[4]

There is no authority for granting a patent for a "principle," an idea, or any other abstraction. . . The principle of a machine is "its mode of operation," or that peculiar combination of devices which distinguish it from other machines. The machine is not the principle or the idea.[5]

To make useful and patentable the discovery of a new principle, it must be applied to a practical purpose. . . The practical application to some useful purpose is the test of its value.[6]

When mechanical devices operate substantially in the same way, producing a similar result, they are considered the same in principle.[7] See PATENT, 2.

PRINT. A mark or form made by impression: anything printed; that which, being impressed, leaves its form, as cut in wood or metal, to be impressed on paper; the impression made; a picture; a stamp; the letters in a printed book; an impression from an engraved plate; a picture impressed from an engraved plate, etc.[8]

A chromo is a lithographic "print" in colors; and playing cards, printed in colors, are "prints."[9]

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[1] Troy *v.* Evans, 97 U. S. 3 (1877); *ib.* 267, cases.

[2] Collins *v.* Gilbert, 94 U. S. 754 (1876), cases.

[3] Commissioners *v.* Clark, 94 U. S. 285 (1876), cases.

[4] L. *principalis*, taking the first place; chief.

[5] [Adams *v.* Whittlesey, 3 Conn. 567 (1821), Hosmer, Chief Justice.

[6] Murphy *v.* Smith, 19 C. B. N. S. *366 (1865); Gallagher *v.* Piper, 16 *id.* *669 (1864); Dwyer *v.* American Express Co., 55 Wis. 456 (1882); Foley *v.* Chicago, &c. R. Co., 64 Iowa, 650 (1884); 1 Shearm. & R. Neg. §§ 230-31 (1888).

[7] [1 Hale, Pl. Cr. 615, 618.

[1] United States *v.* Wilson, Baldw. 103 (1830), Baldwin, J.; United States *v.* Hartwell, 3 Cliff. 226-27 (1869), cases.

[2] 4 Bl. Com. 34; 33 Gratt. 868.

[3] F. *principe*, beginning: maxim, axiom

[4] Le Roy *v.* Tatham, 14 How. 175 (1852), McLean, J.

[5] Burr *v.* Duryee, 1 Wall. 570 (1863), Grier, J.

[6] Le Roy *v.* Tatham, 22 How. 137 (1859), McLean, J

[7] Roberts *v.* Ward, 4 McLean, 566 (1849), McLean, J.; 2 *id.* 178; 5 *id.* 63; 102 U. S. 707; 15 F. R. 448.

[8] Yuengling *v.* Schile, 20 Blatch. 463-64 (1882), cases.

Print means, apparently, a picture, something complete in itself, similar in kind to an engraving cut or photograph.[1]

Although the law recognizes a distinction between a "painting" and a "print," a copyright of the former will protect the owner in the sale of copies which may appropriately be called prints or lithographic copies.[2] See COPYRIGHT; DESIGN, 2; NOSCITUR, A sociis.

Printed. The "printed" copy of the title of a book or other article required by Rev. St., § 4956, to be deposited with the Librarian of Congress, may be printed with a pen.[3]

The place from which a newspaper is issued to subscribers is the place where it is "printed and published," although the press-work is done in another city.[4]

That one may subscribe by a printed name, see SUBSCRIBER, 1.

Printer. In a statute, may include the publisher of a newspaper.[5]

Printing. See COPYRIGHT; ORIGINAL, 2; PUNCTUATION; WRITING.

PRIOR; PRIORITY. Prior: a going before. Priority: precedence; legal preference.

A debt, incumbrance, or invention, is said to have or to take priority over another or others; and United States law, over State law. Compare JUNIOR, 3.

In paying the debts of a decedent, his executor or administrator must observe the rules of priority; otherwise, on deficiency of assets, if he has paid those of a lower degree first, he will have to pay those of a higher degree out of his own funds.[6]

See TEMPUS, Prior, etc.

PRISON.[7] A public building in which may be confined persons charged with or convicted of a crime, and persons who can give important testimony on the trial of criminal cases. Compare JAIL; PENITENTIARY; REFORMATORY.

A "state prison," in its general sense, means a place of confinement for state prisoners; that is, for persons charged with political offenses, and confined for reasons of state. But in some States the term designates the penitentiary maintained by the State for the confinement of prisoners convicted of certain crimes, in distinction from other prisons maintained and used by counties and cities.[8]

Prison bounds, or limits; rules of prison. A district around a prison within which a debtor, released from confinement under bond, may go at large.

A slight, temporary, unintentional overstepping of the line is not such breach of the condition not to go beyond the limits set as will render the sureties liable for the debt.[1]

Prison breach, or breaking. The act of a prisoner in escaping from the place in which he is in lawful custody; also, the act of breaking into such place to aid a prisoner in escaping.[2] See ESCAPE, 2.

Prisoner. A person deprived of his liberty by virtue of judicial or other lawful process.

Not then, necessarily, a person confined within the walls of a prison, as see IMPRISONMENT; BAIL, 2.

Rev. St., § 5541, provides that a person convicted of an offense against the United States and sentenced for a term longer than one year, may, by direction of the court, be confined in a State prison.[3]

To the same effect are §§ 5542 and 5548. Congress here recognizes a distinction between a "sentence," and an "order" for the execution of the sentence: the "order" is not necessarily a part of the judgment.[4]

There is no reason, in principle, why the prisoner should be present when an order changing the place of his confinement is signed by the court.[4]

PRIVATE.[5] Affecting or belonging to a single person or persons, as distinguished from the people at large; opposed to public or state. Compare PUBLIC; PRIVY.

As, private or a private — agent, boundary, bridge, carrier, charity, corporation, conveyance, counsel, easement, examination of a married woman or witness, law — act or statute, nuisance, person, property, rights, wrong, *qq. v.*

Privateer. A vessel owned and officered by private persons, but acting under a commission from a hostile or belligerent state, usually called "letters of marque,"[6] *q. v.*

PRIVIES. See PRIVY, 2.

PRIVILEGE.[7] 1. Exemption from such burdens as others are subjected to.[8]

A right peculiar to the person on whom conferred, not to be exercised by another or others.[9]

Brown, J.; Rosenbach *v.* Dreyfuss, 2 F. R. 221 (1880); 5 Blatch. 325; 97 U. S. 365.

[1] Yuengling *v.* Schile, *ante.*

[2] Schumacher *v.* Schwenke, 30 F. R. 691 (1887).

[3] Chapman *v.* Ferry, 18 F. R. 539 (1883).

[4] Boyer *v.* Hoboken, 44 N. J. L. 181 (1882).

[5] Bunce *v.* Reed, 16 Barb. 350 (1853).

[6] 2 Bl. Com. 511; 1 Story, Eq. §§ 553, 557, 837.

[7] F. *prison:* L. *prensio, prehensio,* a seizing, seizure.

[8] Martin *v.* Martin, 47 N. H. 52 (1866), Perley, C. J.

[1] Randolph *v.* Simon, 29 Kan. 406 (1883).

[2] See 4 Bl. Com. 130; 48 N. J. L. 555.

[3] *Exp.* Karstendick, 93 U. S. 396 (1876).

As to condition of prisons and the prison system, at the close of the last century, see McMaster's Hist. Peop. U. S., Vol. 1, pp. 98–102.

[4] *Exp.* Waterman, 33 F. R. 30 (1887).

[5] L. *privatus,* apart: *privus,* sundered, single.

[6] [Woolsey, Int. Law, § 127; 1 Kent, 96.

[7] L. *privilegium,* q. v.

[8] State *v.* Betts, 24 N. J. L. 557 (1854), Potts, J.

[9] City of Brenham *v.* Brenham Water Co., 67 Tex. 552 (1887), Stayton, A. J.

The exercise of mental power cannot be a privilege: it is not derived from a law granting a special prerogative contrary to common right.[1]

A right peculiar to an individual or body.[2]

An exemption or immunity; as, from taxation.[3] See under TAX, 2.

Personal privilege. Such privilege as is granted to or concerns an individual person. **Real privilege.** In English law, a privilege granted to a place.

Illustrations of personal privileges are: a debtor's claim for exemption; immunity from taxation; a widow's rights; most disabilities, as, disability in a feme-covert. Many such privileges may be waived.

Special or exclusive privilege. Any particular or individual authority or exemption existing in a person or class of persons, and in derogation of common right; as, the grant of a monopoly.[4]

Within the meaning of the prohibition in the constitution of New York against granting to private corporations "any exclusive privilege," describes grants in the nature of monopolies, of such inherent or statutory character as to make impossible the coexistence of the same right in another.[5]

Grants of special privileges are strictly construed; whatever is not given in unequivocal terms is withheld.[6] See FRANCHISE, 1; MONOPOLY.

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[7]

This provision is confined to such privileges and immunities as are fundamental; which belong of right to the citizens of all free governments; and which have always been enjoyed by citizens of the several States, from the time of their becoming free, independent, and sovereign. What these fundamental principles are may be comprehended under these heads: protection by the government, and enjoyment of life and liberty, with the right to acquire and possess property and to pursue and obtain happiness and safety, subject to such restraints as the government may prescribe for the general good of the whole.[8, 9]

The privileges and immunities intended are those which are common to the citizens of a State under its constitution and laws, by virtue of their being citizens. Special privileges enjoyed in one State are not secured in other States.[1]

That section of the Constitution is directed against State action. Its object is to place the citizens of each State upon the same footing with citizens of other States, and inhibit discriminative legislation.[2, 3]

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[4]

The privileges of a citizen are those which he has as a citizen, first, of the United States, and, second, of the State where he resides as a member of society. The XIVth Amendment forbids the States to abridge the former, but not so the latter — one of which, for example, is marriage.[5]

"Privileges and immunities" are words of very comprehensive meaning. They include, at least, the right of a citizen of one State to pass into any other State for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personalty; to take and hold realty; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.[6]

The right to practice law in the State courts is not a privilege or immunity of a citizen of the United States, within the meaning of the XIVth Amendment; nor does the Amendment affect the power of the State to prescribe the qualifications for admission to the bar.[7]

Abridgment of the right to sell intoxicating liquors is not forbidden;[8] nor of the right of trial by jury in suits at common law pending in the State courts.[9]

The Amendment refers to actions of the political body denominated a State: no agency of a State or of the officers or agents by whom its powers are executed, shall deny to any persons within its jurisdiction the equal protection of the law.[10]

See IMMUNITY; PROCESS, 1, Due; SUFFRAGE.

2. Exemption from arrest, *q. v.*

3. A communication from a client to his attorney which the latter may not divulge without the consent of the client. See COMMUNICATION, Privileged, 1.

4. The constitutional provision (intended to secure free expression of opinion) that for any speech or debate in either house of a

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[1] Lawyers' Tax Cases, 3 Heisk. 649 (1875), Turney, J.; *ib.* 473–75.

[2] Ripley *v.* Knight, 123 Mass. 519 (1878), Endicott, J.

[3] See Tennessee *v.* Whitworth, 117 U. S. 146 (1886); 9 Baxt. 546; Louisville, &c. R. Co. *v.* Gaines, 3 F. R. 278–79 (1880); 80 Ky. 274; 2 N. M. 169; 4 Tex. Ap. 317.

[4] See Elk Point *v.* Vaughn, 1 Dak. 118 (1875); 1 Utah, 111; 1 Bl. Com. 272.

[5] Trustees of Exempt Firemen's Fund *v.* Roome, 93 N. Y. 328 (1883), Finch, J.

[6] Moran *v.* Commissioners, 2 Black, 722 (1862); Delaware Railroad Tax, 18 Wall. 225 (1873); Hannibal, &c. R. Co. *v.* Missouri Packet Co., 125 U. S. 271 (1888), cases.

[7] Constitution, Art. IV, sec. 2.

[8] Corfield *v.* Coryell, 4 Wash. 380 (1823), Washington, J.; Felkner *v.* Tighe, 39 Ark. 357 (1882).

[9] Slaughter-House Cases, 16 Wall. 75–78 (1872).

[1] Paul *v.* Virginia, 8 Wall. 168 (1868), Field, J.

[2] United States *v.* Harris, 106 U. S. 643 (1882), Woods, Justice.

[3] Slaughter-House Cases, 16 Wall. 75–78 (1872).

[4] Constitution, Amd. Art. XIV, sec. 1. Ratified July 28, 1868.

[5] *Exp.* Kinney, 3 Hughes, 12–13 (1879), cases.

[6] Ward *v.* Maryland, 12 Wall. 430 (1870), Clifford, J.

[7] Bradwell *v.* Illinois, 16 Wall. 137–42 (1872).

[8] Bartemeyer *v.* Iowa, 18 Wall. 133 (1873).

[9] Walker *v.* Sauvinet, 92 U. S. 92 (1875).

[10] *Exp.* Virginia, 100 U. S. 346–47 (1879), Strong, J.

legislature the member shall not be questioned in any other place.[1]

The privileges of members of Parliament are: of speech, of person, of domestics, and of goods.[2]

"A breach of privilege is any contempt of the high court of Parliament, whether relating to the House of Lords or to the House of Commons."

5. In maritime law, the lien of a seaman on a vessel for wages. See LIEN, Maritime.

6. In civil law, a claim on a thing which exists apart from possession, and until waiver or satisfaction.

Privileged. Enjoying a peculiar right or immunity: as, privileged from arrest, a privileged communication, *qq. v.*

A privileged debt is payable prior or in preference to some other debt. See PRIORITY.

PRIVILEGIUM. L. A private law: an enactment which conferred upon a person some anomalous or irregular right, or imposed some such obligation or punishment.

PRIVITY. See PRIVY, 2.

PRIVY.[3] 1, *adj.* (1) Connected with; concerned with; affected alike.

(2) In the sense of "private," used in the English phrases privy council, privy seal, *qq. v.*

Privy verdict. A verdict given privily to the judge, out of court; similar to a sealed verdict.[4] See further VERDICT.

2, *n.* A person so connected with another in an estate, a right, or a liability as to be affected as he is affected.

Privies are persons between whom some connection exists, arising from a mutual contract: as, donor and donee; lessor and lessee; or, persons related by blood: as, ancestor and heir.[5]

Privies in blood. Ancestor and heir, and co-parceners. *Privies in estate.* Lessor and lessee, donor and donee, and joint-tenants. *Privies in representation.* Testator and executor, intestate and administrator. *Privies in law.* Are created by the law casting land upon a person, as, in escheat.[5]

Privity. (1) Mutual or successive relationship to the same rights of property.[6]

(2) Participation; complicity.

May refer to some fault or neglect in which one personally participates; as, in the expression, "loss occasioned without the privity" of another vessel.[1]

Privity of contract. Something on which an obligation, an engagement, a promise can be implied.[2]

No action lies where there is no privity of contract. Thus, B cannot maintain an action against C, where A, who is under a contract to sell an article to B, is induced by C to sell to C himself.[3]

The holder of a bill or check cannot sue the bank for refusing payment, in the absence of proof that the bill was accepted by the bank or charged against the drawer.[4]

When one suffers loss from the negligence of another, and there is neither fraud or collusion nor privity of contract, the person causing the loss is not liable therefor, unless the act is one immediately dangerous to the lives of others, or is an act not performed in pursuance of a legal duty.[5]

The rule undoubtedly is that a person cannot be affected by any evidence, decree, or judgment to which he was not actually, or in consideration of law, a privy. This rule has been departed from so that wherever reputation would be admissible evidence, there a verdict between strangers, in a former action, is also evidence; as, in cases of public rights of way, immemorial customs, disputed boundaries, and pedigrees.[6]

A party claiming through another is estopped by that which is established as to that other respecting the same subject-matter.[7]

The ground upon which persons standing in this relation to a litigating party are bound by the proceedings is, that they are identified with him in interest; and whenever this identity is found to exist, all are alike concluded.[8] See ADJUDICATION, Former.

Because they are identified in interest, the admission of one privy binds his fellows.[9] See RES, Inter alios.

PRIZE. 1. Ordinarily, some valuable thing, offered by a person for the doing of a thing by others, into the strife for which he does not enter.[10] See BET; LOTTERY.

[1] See Constitution, Art. I, sec. 6.

[2] 1 Bl. Com. 164.

[3] Priv-y. L. *privatus*, apart: *privus*, single.

[4] 3 Bl. Com. 377; 5 Phila. 124; 6 *id.* 520.

[5] 1 Greenl. Ev. § 189. As to privies in estate, see 20 Am. Law Rev. 389–411 (1886), cases.

[6] 1 Greenl. Ev. § 189; 6 How. 59; 15 Barb. 588.

[1] Lord *v.* Steamship Co., 4 Saw. 300 (1877), cases; R. S. § 4283; 102 U. S. 541.

[2] Cary *v.* Curtis, 3 How. 247 (1845), Daniel, J. See also 4 Pet. 83; 7 Ct. Cl. 526; 3 Ga. 430; 41 Iowa, 516; 20 Minn. 431; 35 N. H. 16; 54 *id.* 378; 48 Barb. 82; 64 Pa. 246; 4 Lea, 128.

[3] Ashley *v.* Dixon, 48 N. Y. 430 (1872).

[4] Bank of the Republic *v.* Millard, 10 Wall. 152 (1869); First Nat. Bank of Washington *v.* Whitman, 94 U. S. 344 (1876).

[5] Savings Bank *v.* Ward, 100 U. S. 205–6 (1879), cases. Clifford, J.

[6] Patterson *v.* Gaines, 6 How. 599 (1848), cases. Wayne, J.

[7] Stacy *v.* Thrasher, 6 How. 59–60 (1848).

[8] 1 Greenl. Ev. § 523, cases; Litchfield *v.* Goodnow 123 U. S. 551 (1887), cases.

[9] 1 Greenl. Ev. § 189. See generally 1 Harv. Law Rev. 226–32 (1887), cases.

[10] Harris *v.* White, 81 N. Y. 539 (1880), Folger, C. J

Prize-fighting. Persons who agree to engage in a prize-fight or pugilistic contest may be held to answer for a conspiracy, and to keep the peace. The pretense that the contest is for scientific "points" will not avail, when the evidence shows that a fight is intended.[1]

2 In marine insurance, a capture; any taking or seizing, even unlawfully, by force.[2]

3. Property captured at sea under the laws of war; prize of war.

Prize-court. A tribunal which administers the law upon the subject of maritime captures made in time of war.

The district courts of the United States possess original jurisdiction in all matters relating to the law of prize.

Prize-courts are constituted to try judicially the lawfulness of captures at sea, according to the principles of public international law, with the double object of preventing and redressing wrongful captures, and of justifying the rightful acts of the captors in the eyes of other nations. From the necessity of the case, and to interrupt as little as may be the exercise of the belligerent duties of the captors, or the voyage and trade of the captured vessel if neutral, the proceedings are summary. The libel is filed as soon as possible after the prize has been brought into a port of the government of the captors, and does not contain any allegation as to title, or even set forth the grounds of condemnation, but simply prays that the vessel be forfeited to the captors as lawful prize of war. The monition issued and published upon the filing of the libel summons all persons interested to show cause against the condemnation, and is returnable within a very few days, too short a time to allow of actual notice to or appearance or proof in behalf of owners residing abroad. The law of nations presumes and requires that in time of war every neutral vessel shall have on board papers showing her character, and shall also have officers and crew able to testify the facts establishing her neutrality. The captors are therefore required immediately to produce to the prize-court the ship's papers, and her master, or some of her principal officers or crew, to be examined on oath upon standing interrogatories, and without communication, or instruction by counsel. The cause is heard in the first instance upon the proofs, and if they show clear ground for condemnation or acquittal, no further proof is ordinarily required or permitted. If the evidence *in præparatorio* shows no ground for condemnation, and no circumstances of suspicion, the captors will not ordinarily be allowed to introduce further proof, but there must be an acquittal and restitution. When further proof is ordered, it is only from such witnesses and upon such points as the prize-court may in its discretion think fit.[3]

A capture made by the army, or by the army and navy operating together, inures to the benefit of the United States. If a captor unnecessarily delays instituting proceedings for condemnation, the court may in case of restitution, decree demurrage against him as damages.[1]

See ADMIRALTY; CAPTURE; CONDEMN, 4; CONFISCATE.

PRO. L. For; as for.

In such expressions as pro-slavery, pro-license, opposed to *anti*, q. v.

Pro confesso. As confessed. See DECREE.

Pro facti. For the fact; as a fact.

Pro forma. For form: as a matter of form; formally.

Pro hac vice. For this turn; for the occasion: as, an attorney or judge *pro hac vice*. Abbreviated *p. h. v.*[2]

A charterer is an owner *pro hac vice*.[3]

Pro indiviso. For an undivided part; as undivided.

Pro interesse suo. For his interest; to the extent of one's interest.

Said of a person admitted to intervene in a suit.

Pro rata (*parte*). For the estimated part; in proportion; ratably (or rateably).

Whence "prorate:" to divide, as, gain or loss;[4] to divide or distribute proportionately; to assess *pro rata*.[5]

Pro rata itineris. According to the voyage made. See FREIGHT.

Pro re nata. For the thing created: for the exigencies of the occasion; for the occasion.

Pro salute animæ. For the welfare of the soul; for reformation.

Pro se. For himself; representing oneself: as, "Mr. Miner, *pro se*, contra."

Pro tanto. For so much; for as much as may be; as far as it goes.

A perpetual lease by a life-tenant is good for such interest as he may convey, that is, *pro tanto*.

Pro ut. See RECORDUM, Prout, etc.

PROBABLE.[6] Apparently true or real; seeming to be founded in fact or reason; reasonable: as, probable cause. See CAUSE, 2; DOUBT; PRESUMPTION; PROSECUTION, Malicious.

[1] Commonwealth *v.* Sullivan and McCaffrey, 16 W. N. C. 14 (Phila., 1885).

[2] [Dole *v.* New Eng. Mut. Mar. Ins. Co., 6 Allen, 388-90 (1863), cases, Bigelow, C. J.

[3] Cushing *v.* Laird, 107 U. S. 76-82 (1882), cases, Gray, J.; 15 Blatch. 289.

[1] The Nuestra Señora De Regla, 108 U. S. 101, 103 (1882), cases.

[2] See 66 Ga. 715; 89 N. C. 513; 1 Bl. Com. 345; 2 *id.* 278; 3 *id.* 13, 243; 4 *id.* 261, 268.

[3] Thomas *v.* Osborn, 10 How. 29 (1856).

[4] Penniman *v.* Stanley, 122 Mass. 316 (1877); 7 How. Pr. 415.

[5] Rosenberg *v.* Frank, 58 Cal. 405 (1881); 19 Am. Law Reg. 360, n.

[6] L. *probabilis*, provable.

Probably. An instruction, otherwise correct, was held not vitiated by the conclusion that "if there be a reasonable doubt whether the person premeditated to kill the deceased, or to do him bodily harm which would *probably* [necessarily] occasion death, the jury ought not to find the accused guilty of murder in the first degree."[1]

Probability. "Probability" and "proof" each expresses a particular effect of evidence; but "proof" is the stronger term. The dictionaries give different definitions of "probability," as see Worcester and Webster.[2]

A committee of viewers reported that certain land would "in all probability" continue to be used for railroad freight purposes. *Held*, that if a degree of probability amounting to a practical certainty was intended, the facts on which the conclusion was based should have been stated, that the court might see on what it rested; also, that a lighter degree of probability could not affect the case.[3]

PROBARE. L. To prove.

Probandum. See FACTUM, Probandum; ONUS, Probandi.

Probata. Things proven; proofs. See ALLEGATA.

Probatio. Proving; proof.

Actori incumbit probatio. Upon the plaintiff rests the proving — the burden of proof. *Affirmanti, non neganti, incumbit probatio.* Upon the one alleging, not upon him denying, rests the duty of proving. *Ei incumbit probatio qui dicit, non qui negat.* Upon him rests the burden of proof who avers, not upon him who denies. See further PROOF, Burden of.

Plena probatio. See OATH, Suppletory.

PROBATE.[4] Formal, official or legal proof: as, the probate of (and to probate) a claim, a will.

When a will is proved, the original is deposited in the registry, and a copy, made under the seal of the register, is delivered to the executor or administrator, along with a certificate of its having been proven: all which together is styled "the probate."[5]

Strictly used, relates to the proof of a will before an officer or tribunal having jurisdiction to determine the question of its validity. In common usage, however, often refers to the proceeding incident to the administration and settlement of the estates of decedents, and is, therefore, sometimes so used in statutes.[1]

Federal courts have jurisdiction in a controversy between parties of different States respecting the validity, construction, or enforcement of a decree admitting a will to probate: it is in the nature of a proceeding *in rem*.[2]

Jurisdiction as to wills, and their probate as such, is neither included nor excepted out of the grant of the judicial power to the Federal courts. So far as it is *ex parte* and merely administrative, it is not conferred, and cannot be exercised at all, until, in a case at law or in equity, its exercise becomes necessary to settle a controversy as to which those courts have jurisdiction by reason of citizenship.[3]

A probate is conclusive until revoked.[4]

Generally speaking, a court of equity will not entertain a bill to set aside the probate of a will. Succession to the estate is in the nature of a proceeding *in rem*, in which all who have any interest are parties, and are concluded as upon a *res adjudicata* by the decision of the court, which generally has ample powers of process and investigation.[5]

A statute which provides for an *ante mortem* probate is inoperative and void.[6]

Court of probate. A court exercising jurisdiction over the estates of deceased persons, possessing, as to personal assets, nearly all the powers formerly exercised by the courts of chancery and the ecclesiastical courts of England.

Such courts collect the assets, allow claims, direct payments and distribution of the property to legatees or others entitled, and, generally, do everything essential to a final settlement of the affairs of the deceased, and the claims of creditors against the estate. Other names are "orphans'" and "surrogates'" courts.[7]

Such a court has power to administer the equities directly involved in the matter before it.[8] See RES, 2.

PROBATIO. See PROBARE.

PROBATIVE. Tending to prove: as, probative evidence, the probative force of a presumption.

PROCEDENDO. L. For proceeding: to proceed.

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[1] Honesty *v.* Commonwealth, 81 Va. 294 (1886).

[2] Brown *v.* Atlanta, &c. R. Co., 19 S. C. 59 (1882).

[3] New York, &c. R. Co. *v.* New Britain, 49 Conn. 40 (1881).

[4] L. *probare*, q. v.

[5] 2 Bl. Com. 508.

[1] Reno *v.* McCully, 65 Iowa, 632 (1885), Reed, J.

[2] Gaines *v.* Fuentes, 92 U. S. 21 (1875).

[3] Ellis *v.* Davis, 109 U. S. 485, 494–98 (1883), Matthews, Judge.

[4] Davis *v.* Gaines, 104 U. S. 391–96 (1881), cases.

[5] Broderick's Will, 21 Wall. 509–14 (1874), cases, Bradley, J.

[6] Lloyd *v.* Wayne Circuit Judge, 56 Mich. 236 (1885); 24 Am. Law Reg. 790, 794–96 (1885), cases.

[7] Public Works *v.* Columbia College, 17 Wall. 551 (1873), Field, J.; Davis *v.* Hudson, 29 Minn. 34 (1881); Robertson *v.* Pickrell, 109 U. S. 608 (1883).

[8] Hewitt's Appeal, 53 Conn. 37 (1885).

A writ by which a court of review remits to the inferior court a cause removed on insufficient ground.

A writ of *procedendo ad judicium* (to judgment) issues out of the court of chancery, when the judges of any subordinate court delay the parties, as by not giving judgment. In such case a *procedendo* will be awarded, commanding them to proceed to judgment, but without specifying the form.[1]

PROCEDURE. The body of rules, whether of practice or of pleading, whereby rights are effectuated through the successful application of proper remedies. Opposed to the sum of the legal principles which constitute the substance of the law, and also distinguished from the law of evidence.[2]

The term is so broad that it is seldom employed as a word of art. It includes whatever is embraced by the three technical terms pleading, evidence, and practice (*qq. v.*)—practice here meaning those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in; and evidence meaning those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.[3] Compare PROCEEDING.

The practice, pleadings, and forms and modes of proceeding in civil cases, other than in equity and admiralty, in the circuit and district courts, shall conform, as near as may be, to those existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held.[4]

The conformity is to be "as near as may be," not as near as possible or as near as may be practicable.[5]

Adopting the forms of proceeding in the State courts, as near as may be, in the Federal courts, does not authorize an equitable defense (*q. v.*) to an action at law, nor blending legal and equitable claims in one suit.[6]

The purpose was to bring about uniformity in the law of procedure in the Federal and State courts of the same locality. The legislation had its origin in the code enactments of many of the States. While in the Federal tribunals the common-law pleadings, forms, and practice were adhered to; in the State courts of the same district the simpler forms of the local code prevailed. This involved the necessity of studying two distinct systems of law, and of practicing according to the wholly dissimilar requirements of both.[1]

The forms of mesne process and proceedings in equity and admiralty shall be according to the principles, rules, and usages which belong to the courts of equity and of admiralty, respectively, except when otherwise provided by statute or rules of court made in pursuance thereof; but the same may be altered by said courts or by the Supreme Court, by prescribed rules, consistent with the laws of the United States.[2]

PROCEED. See PROCEDENDO; PROCEDURE; PROCEEDING.

PROCEEDING. Any step taken by a party in the progress of an action.[3]

A proceeding in court is an act done by the authority or direction of the court, express or implied.[4]

The performance of an act; an act to be done in order to attain a given end; a prescribed mode of action for carrying into effect a legal right.[5]

"Proceedings," in its more general sense in law, means all the steps or measures adopted in the prosecution or defense of an action. In ordinary acceptation, when unqualified, includes the whole of the subject. Thus, the proceedings of a suit embrace all matters that occur in its progress judicially; proceedings upon a trial, all that occur in that part of the litigation.[6]

A suit is a proceeding;[7] so is a writ of attachment.[8]

Common proceeding. That kind of proceeding which is instituted and conducted in a manner common to other civil actions.[9]

Judicial proceeding. Any proceeding in a court of justice.

Summary proceeding. The determination of a matter without a jury. See SUMMARY.

See generally DISCONTINUANCE, 1 (1); PARE, EX parte; PROCEDURE; PROCESS, 1; RECORD, 2; RES, 2; STAY; STET.

PROCEEDS. A word of great generality, but not necessarily money.[10]

[1] 3 Bl. Com. 109.

[2] [Brown's Law Dict.

[3] Bishop, Crim. Proc. § 2; Kring *v.* Missouri, 107 U. S. 289 (1883).

[4] R. S. § 914.

[5] Phelps *v.* Oaks, 117 U. S. 239 (1886); Indianapolis, &c. R. Co. *v.* Horst, 93 *id.* 301 (1876); Senior *v.* Pierce, 31 F. R. 633 (1887).

[6] Doe *v.* Roe, 31 F. R. 97 (1887).

[1] Nudd *v.* Burrows, 91 U. S. 441 (1875), Swayne, J.; Lamaster *v.* Keeler, 123 *id.* 388 (1887).

[2] R. S. § 913.

[3] Wilson *v.* Allen, 3 How. Pr. *371 (1849), Harris, J.

[4] Bulkeley *v.* Keteltas, 3 Sandf. 741 (1851); 48 Barb. 119; 3 S. C. 338.

[5] [Rich *v.* Husson, 1 Duer, 620 (1852), Duer, J.

[6] Morewood *v.* Hollister, 6 N. Y. 319-20 (1852), Gardiner, J.; Gordon *v.* State, 4 Kan. 501 (1868).

[7] Dodd *v.* Middleton, 63 Ga. 638 (1879); 57 *id.* 140.

[8] Langstaff *v.* Miles, 5 Monta. 554 (1885).

[9] Brown *v.* Crego, 29 Iowa, 322 (1870), Beck, J.

[10] Phelps *v.* Harris, 101 U. S. 380 (1879), Bradley, J.

The income of an estate.[1]

Power to dispose of land and to take in return such proceeds as one thinks best includes power to exchange for other lands.[2]

PROCES VERBAL. F. A written statement, in legal form, of what has been said and done in the presence of an official, and of what he does in the matter.[3]

PROCESS.[4] 1. Something issuing out of a court or from a judge;[5] a writ of any nature.

At common law, the means of compelling the defendant to appear in court.[6]

In criminal practice, its office is to bring the defendant into court to answer the charge or information against him; the "information" being the foundation upon which it issues.[7]

In a large sense, comprehends the whole proceeding after the original writ and before judgment, but generally refers to the writs which issue out of any court to bring the party to answer, or for execution. It proceeds or goes out upon former matter, either original or judicial.[8]

A summons or notice to a defendant, for the commencement of a suit, is a process, as much so as a *capias* or a subpœna to appear and answer.[9]

"Mode of process" means mode of proceeding.[10]

Compulsory process. For a witness, a process that will compel his attendance — bring him into court if he refuses to come without it.[11]

Legal process. A process issued by virtue of and pursuant to law.[12]

Process issued by a court of justice.[13]

In a technical sense, usually only a writ, an execution, an attachment, or the like, running in the name of the people, and addressed to the sheriff or like officer. In bankrupt law, the writ, mandate, or order of a court taking hold of property and withdrawing it from the possession and control of the debtor, and from the ordinary reach of creditors for the payment of what is due.[1]

Original, mesne, and final process. The means of compelling the defendant to appear is sometimes called "original process," being founded upon the original writ (*q. v.*), and also to distinguish it from "mesne (intermediate) process," which issues, pending the suit, upon some collateral interlocutory matter, as, to summon juries, witnesses, and the like. Mesne process is also sometimes put in contradistinction to "final process" or process of execution; and it then signifies such process as intervenes between the beginning and the end of the suit.[2]

"Mesne process" ordinarily signifies any writ issued between the original writ and the execution. By "original process," the first writ at common law, is not now meant the first process: such original process is not used here. All of our writs preceding the execution are mesne process.[3]

"Mesne process" describes any except the final process.[4]

The equitable powers of courts of equity and of law over their own process to prevent abuse, oppression, and injustice, are inherent, and equally extensive and efficient.[5]

A "malicious abuse of process" occurs when a party employs legal process for some unlawful object, not the purpose it is intended by law to effect; that is, when he perverts the process. In an action for such abuse, it is not necessary to prove that the action has been determined, or to aver that it was sued out without probable cause. It is immaterial whether the proceeding was baseless or not. Legal process may be "maliciously used" so as to give a cause of action where no object but its proper effect and execution is contemplated. In such case both malice and want of probable cause must be averred and proved, and the proceeding must be determined before an action can be maintained.[6] See PROSECUTION, Malicious; OBSTRUCT, 3; ISSUE, 1; REGULAR, Irregular.

Due process of law. A course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights.[7]

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[1] Thomson's Appeal, 89 Pa. 46 (1879), Sharswood, C. J. See also 59 Wis. 179; 12 Mass. 71; 8 Wend. 160.

[2] Phelps *v.* Harris, *ante*.

[3] See Burdett *v.* Spilsbury, 6 Man. & G. *458 (1843); 6 How. 38.

[4] L. *pro-cedere*, to go before or forward; to issue forth.

[5] [People *v.* Nash, 1 Idaho, 210 (1868), McBride, C. J.

[6] 3 Bl. Com. 279.

[7] [City of Davenport *v.* Bird, 34 Iowa, 527 (1872), Miller, J.

[8] [Gilmer *v.* Bird, 15 Fla. 421 (1875): Comyn.

[9] Dwight *v.* Merritt, 18 Blatch. 306 (1880): R. S. § 911; 19 F. R. 253.

[10] United States *v.* Martin, 17 F. R. 155 (1883). See also 33 Cal. 292; 7 Ill. 670; 11 *id.* 420, 443; 70 *id.* 258; 10 Iowa, 187; 27 La. An. 457; 12 Minn. 86, 255; 1 N. M. 385; 6 Lans. 204; 1 Hill, 169–70; 11 Phila. 164; 44 Pa. 329; 49 *id.* 246; 1 Wis. 457; 11 *id.* 70; 98 E. C. L. 359.

[11] *Exp.* Marmaduke, 91 Mo. 238 (1886), Norton, C. J.

[12] Cooley *v.* Davis, 34 Iowa, 130 (1871), Day, J.

[13] [*Re* Bininger, 7 Blatch. 274 (1870), Woodruff, J.; 6 Lans. 204.

[1] [*Re* Bininger, *ante*.

[2] 3 Bl. Com. 279.

[3] Ferguson *ads.* State, 31 N. J. L. 291 (1865).

[4] Arnold *v.* Chapman, 13 R. I. 586 (1882).

[5] Krippendorf *v.* Hyde, 110 U. S. 283 (1884).

[6] Mayer *v.* Walter, 64 Pa. 285–86 (1870), cases, Sharswood, J.

[7] Pennoyer *v.* Neff, 95 U. S. 715 (1877), Field, J.

"Nor shall any person . . be deprived of life, liberty, or property, without due process of law."[1]

"Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[2]

The first of the foregoing provisions is found in perhaps identical language in the constitution of each one of the States.

An equivalent phrase, according to Lord Coke,[3] is "law of the land," used in the Great Charter in connection with the writ of *habeas corpus*, the trial by jury, and other guaranties against oppression by the Crown, and meaning the ancient and customary laws of the English people, or the laws enacted by the Parliament of which the barons were a controlling element; not protection against the enactment of laws by Parliament.

The meaning of the phrase remains without that satisfactory precision of definition which judicial decisions have given to nearly all the other guaranties of personal rights found in the constitutions. There is wisdom in ascertaining the intent and application of the phrase by the process of judicial inclusion and exclusion, as the cases presented require.[4]

Whenever, by the laws of a State, a tax, an assessment, a servitude or other burden is imposed upon property for the public use, and those laws provide for a mode of confirming or contesting the charge, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment cannot be said to deprive the owner of his property without due process of law.[4]

Generally implies an *actor*, *reus*, *judex*, regular allegation, opportunity to answer, and a trial according to some settled course of judicial proceeding. Yet this is not universally true; as, where process, in its nature final, under oath, issues against the body, lands, and goods of public debtors.[5]

The necessities of government, the nature of the duties to be performed, and usage, have established a procedure for the levy and collection of taxes which differs from proceedings in courts of justice, but which is still due process of law.[1]

The revenue laws of a State need not provide that a person shall have an opportunity to be present when a tax is assessed against him, or that the tax shall be collected by suit.[2] See SUMMARY; TAX, 2.

A trial in which the rights of the party shall be decided by a tribunal appointed by law and governed by the rules of law previously established, is what is meant.[3] In this there is a strong implication against punishment for contempt by order of a legislative body.[3]

Opportunity to be heard is absolutely essential.[4]

The expression means due process according to the law of the land. This process in the States is regulated by the law of each State. The power of the Supreme Court over that law is to determine whether it is in conflict with the supreme law of the land. The State courts may decide whether a proceeding is in accordance with the law of the State; the Supreme Court, whether it is in accordance with the Constitution, acts of Congress, and treaties of the United States.[4]

That kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. "Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society.'"[6]

By "due process" is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought.[7]

In England, the requirement was originally designed to secure the subject against the arbitrary action of

[1] Constitution, Amd. Art. V.

[2] Constitution, Amd. XIV, sec. 1.

[3] 2 Inst. 50.

[4] Davidson *v.* New Orleans, 96 U. S. 101-5 (1877), cases, Miller, J. Approved, 107 *id.* 289; 111 *id.* 707; 115 *id.* 519.

[5] Murray's Lessee *v.* Hoboken Land, &c. Co., 18 How. 280 (1855), cases, Curtis, J.; Springer *v.* United States, 102 U. S. 594 (1880), cases.

[1] Kelly *v.* Pittsburgh, 104 U. S. 78 (1881); Adler *v.* Whitbeck, 44 Ohio St. 569 (1886).

[2] McMillen *v.* Anderson, 95 U. S. 41 (1877); Kentucky Railroad Tax Cases, 115 *id.* 331 (1885).

[3] Kilbourn *v.* Thompson, 103 U. S. 182 (1880).

[4] Stuart *v.* Palmer, 74 N. Y. 190-95 (1878), cases; Railroad Tax Case, 8 Saw. 288-96 (1882), cases.

[4] Walker *v.* Sauvinet, 92 U. S. 93 (1875), Waite, C. J.

[5] *Exp.* Wall. 107 U. S. 289 (1882), Bradley, J.; Cooley, Const. Lim. 353; Hurtado *v.* California, 110 U. S. 530-38 (1884), cases, Matthews, J.

[7] Hagar *v.* Reclamation District, 111 U. S. 707-8 (1884), Field, J.; Railroad Tax Case, 8 Saw. 274-75 (1882), Field, J.; Baldwin *v.* Ely, 66 Wis. 188 (1886).

the Crown, and to place him under the protection of the law. The words, as stated, were held to be the equivalent of "law of the land." A similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended, in addition to other guaranties of private rights, to give increased security against the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property.[1]

See LAW, Of the land; NOTICE, Judicial; RES, In rem; TAKE, 8.

2. In patent law. A "process," *eo nomine*, is not made the subject of a patent. It is included under the general term "useful art." An art may require one or more processes or machines in order to produce a certain result or manufacture. . . Where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called "processes."

It is for the discovery or invention of some practical method or means of producing a beneficial result or effect, that a patent is granted, and not for the result or effect itself. It is when the "process" represents the means or method of producing a result that it is patentable, and it will include all methods or means which are not effected by mechanism or mechanical combinations.

A new "process" is usually the result of a discovery; a "machine," of an invention. The arts of tanning, dyeing, making water-proof cloth, vulcanizing India rubber, and smelting ores are usually carried on by processes, as distinct from machines. One may discover a new and useful improvement in the process of tanning, dyeing, etc., irrespective of any particular form of machinery or mechanical device. And another may invent a labor-saving machine by which this operation or process may be performed, and each may be entitled to a patent.

The term is often used in a vague sense, in which it cannot be the subject of a patent. Thus, we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine, as distinguished from a process. In this use of the word it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. A man cannot have a patent for the function or abstract effect of a machine; only for the machine which produces it.[1]

A process is a mode of treatment of certain materials to produce a certain result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is as patentable as a piece of machinery. In the language of the patent law, it is an "art." The machinery pointed out as suitable to perform the process may or may not be new or patentable; while the process itself may be altogether new, and produce an entirely different result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence.[2]

A "machine" is a thing. A "process" is an act, or a mode of acting. The one is visible to the eye. The other is a conception of the mind, seen only by its effects when being executed or performed. Either may be the means of producing a useful result.[3]

When a new process produces a new substance, the invention of the process is the same as the invention of the substance, and a patent for the one may be reissued so as to include both, as in the case of Goodyear's vulcanized-rubber patent. But a process and a machine for applying the process are not necessarily one and the same invention. They are generally distinct and different.[4]

A process producing a new product, like that of celluloid, differing from any known before, not merely in degree of usefulness and excellence, but in kind, having new properties and uses, is the proper subject of a patent, although some or all of the parts of the apparatus used are not new.[5]

The mixing of certain substances together, or the heating of a substance to a certain temperature, is a process. If the mode of doing it, or the apparatus in or by which it may be done, is sufficiently obvious to suggest itself to a person skilled in the particular art, it is enough, in the patent, to point out the process to be performed, without giving supererogatory directions as to the apparatus or method to be employed. If the mode is not obvious, then a description of a particular mode by which it may be applied is sufficient. There is, then, a description of the process and of one practical mode in which it may be applied. Perhaps the process is susceptible of being applied in many modes, and by the use of many forms of apparatus. The inventor is not bound to describe them all, in order to secure to himself the exclusive right to the process, if he is really its inventor or discoverer. But he must describe some particular mode, or some ap-

[1] Missouri Pacific R. Co. *v.* Humes, 115 U. S. 519 (1885), Field, J. See also Bertholf *v.* O'Reilly, 74 N. Y. 519, 515 (1878), Andrews, J.; State *v.* Beswick, 13 R. I. 218 (1881), Durfee, C. J.; Lavin *v.* Emigrant Industrial Savings Bank, 18 Blatch. 17-30 (1880), cases; 18 F. R. 410, 416, 449-50, cases; 76 Mo. 479-83.

[1] Corning *v.* Burden, 15 How. 267-68 (1853), Grier, J. See also Fermentation Co. *v.* Maus, 122 U. S. 427-28 (1887), cases.

[2] Cochrane *v.* Deener, 94 U. S. 788 (1876), Bradley, J.

[3] Tilghman *v.* Proctor, 102 U. S. 728-29 (1880), Bradley, J.

[4] James *v.* Campbell, 104 U. S. 377 (1881), Bradley, J.

[5] Celluloid Manuf. Co. *v.* American Zylonite Co., 31 F. R. 910 (1887), cases, Gray, J.

paratus, by which the process can be applied with at least some beneficial result, to show that it is capable of being exhibited and performed in actual experience.[1] See ART, 1; PATENT, 2.

PROCESSION. See ASSEMBLY.

PROCESSIONING. A going around.

To prevent controversies concerning the boundaries of land between adjacent owners, they were required, once every ten years, to have their lands "processioned" or gone around, and the land-marks renewed.[2] Whence processioners. Compare PERAMBULATION.

PROCHEIN.[3] Nearest, next.

Prochein ami or **amy.** Nearest friend. See further AMI.

PROCLAMATION. 1. An announcement made by the ministerial officer of a court that some particular thing is about to be done officially by the court.

As, that court is about to open or adjourn; that an accused person is about to be discharged; and, in Pennsylvania, that a sheriff's deed is about to be acknowledged. See CRIER.

2. In affairs of state, the king's edict concerning the execution of the laws.[4]

A notice publicly given of anything whereof the king thinks fit to advise his subjects.[5]

Made under the great seal and published, so that the people may be apprised of its existence and do as it commands.[6]

A proclamation by the President relieving parties, who had been transacting business in ignorance of it, from penalties, may take effect when signed by the President and sealed with the seal of the United States, officially tested. Publication in newspapers may not be requisite.[6]

A proclamation is a crying aloud; making publicly known; official notice given the public. One may proclaim, as of old, by the sound of a trumpet, by voice, by print, or by posting. A proclamation may be published in the newspapers, or scattered by writing, or in any other demonstrative manner. Publicity is an important ingredient. It cannot be published by mere deposit in a place to which the public have no access.[7]

A proclamation by the President, reserving lands from sale, is his official public announcement of an order of that effect. No particular form of announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained. Such order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect — the acts of the heads of departments, within the scope of their powers, being the acts of the President.[1] See WAR.

PROCTOR. 1. An agent, or proxy.

2. An attorney in an admiralty, ecclesiastical or probate court.

3. An attorney in admiralty.

An attorney at law answers to the "procurator" or proctor, of the civilians and canonists.[2] See ATTORNEY, 2.

Procuration. Acting as agent for another; agency; proxy, *q. v.*

When one person indorses a bill of exchange, or makes any other contract for another, the transaction is sometimes said to be effected *per proc.*, by procuration.

Procurator. A person employed to manage the affairs of another; an agent; a representative. See MINISTER.

PROCURE. A bankrupt procures the seizure of his property when the initiation of the proceeding comes from him, when he is the person who begins to procure, when he caused the thing to be done, in the ordinary sense of the word.[3]

But signing, however reluctantly and under pressure, a warrant to confess judgment, under a stipulation that the warrant should not unnecessarily be put in force, is "suffering" a taking. Decisions on "procuring" have no application on "suffering."[3] See further SUFFER; PREFERENCE.

To "procure a female to have illicit carnal connection with any man" refers to intercourse with another than the "procurer" or "procuress."[4] See ABDUCTION. As to procuress, see BAWD.

See also ABET; CONSPIRACY.

PRODUCE.[5] 1, *v.* To bring forward or exhibit, for inspection by one's adversary.

After due and timely notice to an adversary to produce, at trial, specified documents alleged to be in his possession, and which the demandant has a right to inspect, secondary evidence of the contents will be received, provided the documents are not produced in court, and that, if produced, they would be evidence.[6]

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[1] Tilghman *v.* Proctor, 102 U. S. 728, *ante;* 12 F. R. 615, 618; 20 Blatch. 471; 22 Cent. Law J. 294 (1886), cases.

[1] Watson *v.* Bishop, 69 Ga. 53 (1882).

[2] Prō'shĕn; a law-French term.

[3] [1 Bl. Com. 270.

[4] [Cowell, Law Dict.

[5] Lapeyre *v.* United States, 17 Wall. 191, 195–96 (1872), Swayne, J.; Chase, C. J., Clifford, Davis, and Strong, JJ., concurring.

[6] Lapeyre *v.* United States, *supra*, Hunt, Miller, Field, and Bradley, JJ., dissenting.

[1] Wolsey *v.* Chapman, 101 U. S. 770 (1879), Waite, C. J.

[2] 3 Bl. Com. 25; 4 *id.* 137; 3 H. L. C. 686.

[3] *Re* Black, 2 Bened. 204–5 (1868), cases, Blatchford, J.; Brown *v.* Jefferson County Nat. Bank, 19 Blatch. 317–21 (1881). See also as to procuring and suffering a preference, Sartwell *v.* North, 144 Mass. 194–95 (1887), cases.

[4] People *v.* Roderigas, 49 Cal. 11 (1874).

[5] 1. Prō-dūce'. 2. Prŏd'-ūce.

[6] See R. S. §§ 724, 914, cases; 1 Greenl. Ev. §§ 560–63, 1 Whart. Ev. §§ 152–63, 753; 10 Bened. 268; 3 McCrary.

Congress cannot compel the production of the private books and papers of a citizen for its inspection, except in the progress of judicial proceedings, or in suits instituted for that purpose, and in both cases upon averment that its rights are dependent for enforcement upon the evidence those writings contain.[1] See INSPECTION, 2; SUBPŒNA, Duces.

2, *n.* A bequest of the "produce" of a fund, directly or in trust without limitation, carries the principal.[2]

The "produce of a farm" was held not to include beef raised and killed on it.[3]

Compare INCOME. See BROKER; PERISHABLE.

PRODUCT. See NOVELTY; PROCESS, 2; RESIDUUM, 2.

In the pork-packing business, by general usage, may not include certain portions of slaughtered hogs.[4]

PROFANITY. Compare BLASPHEMY.

Public profane swearing from its tendency to disturb the peace, corrupt the morals of the community, and undermine the foundations of Christianity, was an indictable offense at common law. The view now is that a single utterance of a profane word is not *per se* indictable, if it is not spoken with a loud voice, nor with repetitions. To be indictable, the profanity should take such form, and be uttered under such circumstances, as to constitute a public nuisance.[5]

PROFERT.[6] He produces, he proffers; also, the act of producing.

When either party alleges a deed as in existence, he must make "profert" of it, that is, produce it in court simultaneously with the pleading.

When oral pleading was in vogue, the deed was actually produced; but, later, "profert" consisted merely of a formal allegation that the party showed the deed in court; it being, in fact, retained in his own custody.[7]

Hence, for a time, there could be no remedy on a lost instrument; as, on a bond. Now, however, profert is dispensed with, if an allegation of loss is stated.[8] See further OYER.

PROFESSION. "Professional employment" relates to some of the occupations universally classed as professions, the general duties and character of which the courts notice judicially.[1] See PROPERTY; TAX, 2.

PROFFER. See PROFERT; PROPOUND; TENDER, 2.

PROFIT; PROFITS. 1. The gain made upon any business or investment, when receipts and expenses are taken into account.[2] Compare EARNINGS.

Net income; as, in the expression "profits used in construction." Not, therefore, that which is required and expended to keep property (as, a railroad) in its usual condition, proper for operation, and which is classed with repairs, part of the current expenses.[3]

Mesne profits. The pecuniary benefit received by one who dispossesses another of realty, between the disseisin and the restoration of possession.[4]

The provisions of the New York Code of Civil Procedure providing for recovery in an action of ejectment, as damages for withholding the property, "the rents and profits, or the value of the use and occupation of the property," may be regarded as a legislative definition of the ancient technical expression "mesne profits." The owner should have either the rents actually received or the rental value, as may be just under the circumstances. The "mesne profits" consist of the net profits, the rental value, or the value of the use and occupation, in ascertaining which necessary payments for taxes and ordinary repairs are to be deducted.[5]

Net profits. The gain that accrues on an investment after deducting losses and expenses; not what is made over losses, expenses, and interest.[6] See INCOME.

The words "net profits" define themselves. They mean what shall remain, as the clear gains of any business venture, after deducting the capital invested in the business, the expenses incurred in its conduct, and the losses sustained in its prosecution.[7]

In the law of partnerships, "profits" are the excess of returns over advances; the excess of what is obtained over the cost of obtaining it. "Losses" are the excess of advances over returns; the excess of the cost of obtaining over what is obtained. "Profits" and "net profits" are, for all legal purposes, synonymous expressions; but the returns themselves are often called "gross profits;" hence it becomes necessary to

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274; 12 F. R. 813-14, cases; 10 *id.* 529; 15 *id.* 718-30, cases; 2 Blatch. 23, 301; 20 How. 194.

[1] *Re* Pacific Railway Commission, 32 F. R. 250 (1887), Field, J.

[2] Craft *v.* Snook, 13 N. J. E. 122 (1860), cases; 4 La. An. 109; 7 *id.* 449.

[3] The Mayor *v.* Davis, 6 W. & S. 279 (1843).

[4] Morningstar *v.* Cunningham, 110 Ind. 333 (1886).

[5] Goree *v.* State, 71 Ala. 9 (1881), cases, Somerville, J.; Gaines *v.* State, 7 Lea, 410 (1881); State *v.* Crisp, 85 N. C. 528 (1881); 1 Bish. Cr. L. § 498; 2 *id.* § 79; 3 Whart. Am. Cr. L. § 2536; Cooley, Const. Lim. 476.

[6] L. *proferre*, to bring forward.

[7] Steph. Pl. 74; 2 Arch. Pr. 1059; 46 N. J. L. 505.

[8] 1 Story, Eq. § 81.

[1] Pennock *v.* Fuller, 41 Mich. 155 (1879).

[2] [People *v.* Supervisors, 4 Hill, 23 (1842), Bronson, J.; 9 Wall. 788; 142 Mass. 102.

[3] Grant *v.* Hartford, &c. R. Co., 98 U. S. 227 (1876), Bradley, J.; s. c., 9 Blatch. 542.

[4] See Leland *v.* Tousey, 6 Hill, 333 (1844); Nash *v.* Sullivan, 32 Minn. 190 (1884); 14 Neb. 12.

[5] Wallace *v.* Berdell, 101 N. Y. 14-15 (1885), cases, Rapallo, J.

[6] [Tutt *v.* Land, 50 Ga. 350 (1873), Trippe, J.; 105 Mass. 105; 13 East, 543.

[7] Park *v.* Grant Locomotive Works, 40 N. J. E. 121 (1885), Van Fleet, V. C.

call profits "net profits," to avoid confusion.[1] See further PARTNERSHIP.

Profit a prendre. The right *to take* a part of the soil or produce of the land.

A right to the products or proceeds of land.[2]

This right, if enjoyed by reason of holding another estate, is regarded as an easement appurtenant to the estate; whereas, if it belongs to an individual, distinct from ownership in other lands, it takes the character of an interest or estate in the land itself, rather than that of a proper easement.[3]

The right, although capable of being transferred in gross, may be attached by the owner of the land to other land as an appurtenance, and pass as such upon conveyance of the latter. While the technical definition of an easement excludes such right, the right is nevertheless in the nature of an easement.[3] See PERMANCY.

Profits of a business. The receipts, deducting concurrent expenses; the equivalent of "net receipts."[4]

Depreciation of buildings is not ordinarily or necessarily considered in the estimate.[4]

Wherever profits are spoken of as not a subject of damages it will be found that something contingent upon future bargains, or speculations, or states of the market, are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value or cost.[5]

2. In patent law, the rule of damages for an infringement is the amount the infringer actually realized in profits; not what he might have made by reasonable diligence.[6]

This amount is estimated by finding the difference between cost and sales. The elements of cost of materials, interest, expense of manufacture and sale, and bad debts, considered by a manufacturer in finding his profits, are taken into account, and no others. Profits due to elements not patentable may sometimes be allowed. Salaries, as dividends of the profit under another name, are disallowed. The wrong-doer is made liable for actual, not for possible, gains. The controlling consideration is that he shall not profit by his own wrong. The rule compensates one party and punishes the other. A decree "for all the profits made in violation of the rights of the complainant under the patent aforesaid, by respondent, by the manufacture, use, or sale of any of the articles named in the bill of complaint," is correct in form.[7]

Interest upon the various sums is not allowed.[8]

In an action *at law* for the infringement of a patent, the plaintiff can recover a verdict for only the actual damages which he has sustained; and the amount of such royalties or license fees as he has been accustomed to receive for the use of the invention, with interest thereon from the time when they should have been paid, is generally, though not always, taken as the measure of his damages; but the court may, whenever the circumstances of the case appear to require it, inflict punitive damages, by rendering judgment for not more than thrice the amount of the verdict. Upon a bill *in equity*, the plaintiff is entitled to recover the amount of gains and profits that the defendant has made by the use of the invention. This rule was established by a series of decisions under the patent act of 1836, which simply conferred upon the courts of the United States general equity jurisdiction, with the power to grant injunctions, in cases arising under the patent laws. The reasons for the rule are, that it comes nearer than any other to doing complete justice; that in equity the profits made by an infringer belong to the patentee; and that it is inconsistent with the ordinary principles and practice of courts of chancery either to permit a wrong-doer to profit by his own wrong or to make no allowance for the expense of conducting his business, or to undertake to punish him by obliging him to pay more than a fair compensation to the person wronged. The infringer is liable for actual, not for possible, gains. The profits, therefore, which he must account for, are not those which he might reasonably have made, but those which he did make, by the use of the invention; or, in other words, the fruits of the advantage which he derived from the use, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result. If there was no such advantage, there can be no decree for profits, and the plaintiff's only remedy is by an action at law for damages. But if the defendant gained an advantage by using the invention, that advantage is the measure of the profits to be accounted for, even if from other causes his business did not result in profits. If, for example, the unauthorized use of a patented process produced a definite saving in the cost of manufacture, he must account for the amount so saved. This application or corollary of the general rule is as well established as the rule itself. . . The profits allowed in equity have been, and are still, considered as a measure of unliquidated damages, which, as a rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained.[9]

PROHIBERE. L. To hold before, put in one's way: to prevent, forbid, prohibit.

[1] Lindley, Partn. 15; Story, Partn. § 23; 49 Conn. 240, 272; 60 Md. 475; 15 Minn. 519.

[2] Huntington *v.* Asher, 96 N. Y. 610–14 (1884), cases, Finch, J.

[3] Pierce *v.* Keator, 70 N. Y. 421–22 (1877), Church, C. J.; 22 Wend. 433; 4 Pick. 145; 5 B. & C. 221; 2 Washb. R. P. 25.

[4] Eyster *v.* Centennial Board of Finance, 94 U. S. 500 (1876), Waite, C. J.

[5] Hinckley *v.* Pittsburgh Steel Co., 121 U. S. 275–76 (1887), cases, Blatchford, J.

[6] Dean *v.* Mason, 20 How. 203 (1857), McLean, J.

[7] Rubber Co. *v.* Goodyear, 9 Wall. 801–4 (1869), Swayne, J.; Livingston *v.* Woodworth, 15 How. 558 (1853); Dobson *v.* Hartford Carpet Co., 114 U. S. 444–45 (1885), cases; Freeman *v.* Freeman, 142 Mass. 102–3 (1886).

[8] Parks *v.* Booth, 102 U. S. 106 (1880).

[9] Tilghman *v.* Proctor, 125 U. S. 142–49, 160 (1888), cases, Gray, J.

Qui non prohibet, cum prohibere possit, jubet. He who does not forbid, when he might forbid, commands.

Qui non prohibet, quod prohibere potest, assentire videtur. He who does not prevent what he can prevent, is viewed as assenting. See ESTOPPEL; SUFFER.

PROHIBITION.[1] 1. The act of forbidding or interdicting. Whence prohibitory. Compare INHIBITION; MANDATE.

The imposition of punishment implies a prohibition of the act punished.[2]

While the XIIIth and XIVth Amendments are prohibitory, they imply positive immunity from legal discriminations.[3]

In marine insurance, words equivalent to a prohibition amount to a warranty.[4]

The right to pass an ordinance usually involves the incidental right to enforce it by a reasonable pecuniary penalty.[5]

Power "to prohibit and suppress" the maintenance of a place as a nuisance includes the power to provide a punishment.[6]

Power in the authorities of a city to prohibit or regulate a thing includes partial prohibition or regulation.[7]

If a statute does not declare void a contract which is in violation of it, and if it is not necessary to hold the contract void to accomplish the purpose of the statute, the inference is that the statute was intended to be directory, and not prohibitory of the contract.[8]

A statute often speaks as plainly by inference, and by means of the purpose which underlies it, as in any other manner. When it appears by necessary inference from what is expressed that an act is opposed to the policy of the law, and will defeat its purpose, such act should be held to be prohibited. When a statute directs that a thing should be done in a given manner, it ordinarily excludes other modes of doing it.[9]

See LEGAL; ILLEGAL.

Writ of prohibition. A writ directed to the judge and parties to a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.[1]

Commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do.[2]

Suspends all action, prevents further proceeding in the prohibited direction; is never used as a remedy for an act already completed.[3]

Prevents an unlawful assumption of jurisdiction.[4]

Cannot be made to perform the office of a proceeding for the correction of mere errors and irregularities. If there is jurisdiction, and no provision for appeal or writ of error, the judgment of the trial court is conclusive.[5]

It is often said that the granting or refusing of the writ is discretionary, and, therefore, not the subject of a writ of error. That may be true, where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court, whose action is sought to be prohibited, is doubtful, or depends on facts which are not made matter of record, or where a stranger, as he may in England, applies for the writ. But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as a matter of right; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error.[6]

The writ will not be granted unless the defendant has unavailingly objected to the jurisdiction.[6]

2. Interdiction of the liberty of making, and of selling or giving away, intoxicating liquors, for other than medicinal, scientific, and religious (sacramental) purposes.

Sometimes called **total prohibition**, and, of late years, effected by amendments to the constitutions of several of the States.

Authority conferred upon a town, by its charter, to prohibit the sale of intoxicating liquors, does not fairly embrace a power to regulate sales. The exercise of the power to regulate sales provides for the continuance of the traffic under prescribed rules. The power to prohibit is to be wielded only for suppression.[7]

"The weight of authority is overwhelming that no

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[1] L. *prohibere*, q. v.

[2] *Exp.* Siebold, 100 U. S. 388 (1879).

[3] Strauder *v.* West Virginia, 100 U. S. 507 (1879); *Exp.* Virginia, *ib.* 345 (1879).

[4] Odiorne *v.* New England Mut. Mar. Ins. Co., 101 Mass. 554 (1869), cases.

[5] 1 Dillon. Mun. Corp. §§ 338, 376, cases; 1 Bishop, Stat. Cr. § 21.

[6] Rogers *v.* People, 9 Col. 453 (1888).

[7] Chicago Packing, &c. Co. *v.* Chicago, 88 Ill. 221, 225 (1878); Keokuk *v.* Dressell, 47 Iowa, 599 (1878).

[8] Bowditch *v.* New England Ins. Co., 141 Mass. 228-95 (1886), cases, Morton, C. J.

[9] United States *v.* O'Connor, 31 F. R. 451 (1887), Thayer, J.

[1] 3 Bl. Com. 112.

[2] United States *v.* Hoffman, 4 Wall. 161-62 (1866), Miller, J.

[3] *Exp.* Gordon, 104 U. S. 516 (1881), Waite, C. J.

[4] *Exp.* Ferry Co., 104 U. S. 520 (1881), Waite, C. J.

[5] Smith *v.* Whitney, 116 U. S. 173-74 (1886), cases, Gray, J. See also 49 Conn. 124; 29 Minn. 523; 77 Va. 229, 332; 21 W. Va. 140.

[6] State *v.* Williams, 48 Ark. 227 (1886); 26 *id.* 52, cases

[7] State *v.* Fay, 44 N. J. L. 476-77 (1882), Dixon, J., citing 68 Ill. 444; 92 *id.* 569; 2 Mo. 113. See also 48 Ind 308; 25 *id.* 283; 25 Iowa, 440; 54 Mo. 33, 172; 42 N. J. L. 364; 82 N. Y. 318.

such immunity has heretofore existed as would prevent State legislatures from regulating, and even prohibiting, traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, that of *Wynehamer* v. *The People* [3 Kernan, 378, N. Y., 1856], has held that as to such property, the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a State or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States, and in this regard the case falls within the principles laid down by this court in the *Slaughter-House Cases* [16 Wall. 36, 1872]." [1]

"No one has ever doubted that a Legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with vested rights of property. When such rights stand in the way of the public good, they can be removed by awarding compensation to the owner. When they are not in question, the claim of a right to sell a prohibited article can never be deemed one of the privileges and immunities of the citizen. It is *toto coelo* different from the right not to be deprived of property without due process of law, or the right to pursue such lawful avocation as a man chooses to adopt, unrestricted by tyrannical and corrupt monopolies." [2]

"I have no doubt of the power of the State to regulate the sale of intoxicating liquors, when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any State, the Fourteenth Amendment affords protection. But the prohibition of sale in any way, or for any use, is quite a different thing from a regulation of the sale or use so as to protect the health and morals of the community. All property, even the most harmless in its nature, is equally subject to the power of the State in this respect with the most noxious." [3]

"If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State" — a power of which the legislature cannot divest itself by contract. [4]

"In *Bartemeyer* v. *Iowa* it was decided that a State law prohibiting the manufacture and sale of intoxicating liquors was not repugnant to the Constitution of the United States. This was re-affirmed in *Beer Company* v. *Massachusetts*, and that question is now no longer open in this court." [1]

But a State may not by taxation discriminate against the products or the citizens of another State. The police power of a State to regulate the sale of intoxicating liquors does not warrant the enactment of a law infringing a positive provision of the Constitution of the United States. [2]

"All property is the creation of the law, either the common or the statute law, and must, in its existence and enjoyment, be subjected to the policy and provisions of the law." [3]

December 5, 1887, Mr. Justice Harlan, in writing the opinion of the Supreme Court in the cases of *Mugler* v. *Kansas* and *Kansas* v. *Ziebold*, reported in 123 U. S. 623, 657-74, said: The general question is whether the prohibition statutes of Kansas, approved February 19, to take effect May 1, 1881, and March 7, 1885, amendatory and supplementary to the act of 1881, are in conflict with that clause of the Fourteenth Amendment which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law." That legislation by a State prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution, is made clear by the decisions of this Court, rendered before and since the adoption of that Amendment.

In the *License Cases*, 5 How. 504 (1847), the question was whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors, were repugnant to the Constitution. In determining the question, it became necessary to inquire whether there was any conflict between the exercise by Congress of its "power to regulate commerce" and the exercise by a State of what are called "police powers." The members of the Court were unanimous in holding that the statutes under examination were not inconsistent with the Constitution or any act of Congress. Chief Justice Taney said: "If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution to prevent it from regulating and restraining the traffic or from prohibiting it altogether." Mr. Justice McLean said: "A State regulates its domestic commerce, contracts, transmission of estates, and acts upon internal matters, which relate to its moral and political welfare. Over these subjects the

[1] Bartemeyer v. Iowa, 18 Wall. 133 (1873), Miller, J.

[2] *Ibid.*, 136, Bradley, J.

[3] *Ibid.*, 137-38, Field, J. See also State v. Mugler, 29 Kan. 252 (1883).

[4] Boston Beer Company v. Massachusetts, 97 U. S. 32 (1877), Bradley, J.

[1] Foster v. Kansas, 112 U. S. 206 (1884), Waite, C. J. See also Prohibitory Amendment Cases, 24 Kan. 7[illegible] (1881).

[2] Walling v. Michigan, 116 U. S. 454 (1886), Bradley, J.

[3] Oviatt v. Pond, 29 Conn. 487 (1861), Ellsworth, J. See also Intoxicating Liquor Cases, 25 Kan. 761 (1881), 32 Iowa, 252.

Federal government has no power. . . The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to health or morals may be removed." Mr. Justice Woodbury observed: "How can they [the States] be sovereign within their respective spheres, without power to regulate all their internal commerce, as well as police, and direct how, when, and where it shall be conducted in articles intimately connected with the public morals, public safety, or public prosperity." Mr. Justice Grier said: "The true question is whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. . . Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint or punishment of crime, for the preservation of the public peace, health, and morals comes within this category. . . It is not necessary, for the sake of justifying the legislation under consideration, to array the appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority."

In *Bartemeyer* v. *Iowa*, 18 Wall. 129 (1873), it was said that, prior to the Fourteenth Amendment, State enactments, prohibiting traffic in intoxicating liquors, raised no question under the Constitution; and that such legislation was left to the discretion of the respective States, subject to no other limitation than those imposed by their own constitution, or by the general principles supposed to limit all legislative power. Referring to the contention that the right to sell intoxicating liquors was secured by the Fourteenth Amendment, the court, speaking by Mr. Justice Miller, said that "so far as such right exists, it is not one of the rights growing out of citizenship of the United States." In *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 33 (1877), it was said, by Mr. Justice Bradley, speaking for the court, that "as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution. Finally, in *Foster* v. *Kansas*, 112 U. S. 206 (1884), the court, by Chief Justice Waite, said that the question as to the constitutional power of a State to prohibit the manufacture and sale of intoxicating liquors was no longer an open one. These cases rest upon the acknowledged rights of the States to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution. The power to establish such regulations, as was said by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 203 (1824), reaches everything within the territory of a State not surrendered to the National government.

It is, however, contended that, although the State may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, "no convention or legislature has the right to prohibit any citizen from manufacturing for his own use, or export or storage, any article of food or drink not endangering or affecting the rights of others." The proposition concedes that the right to manufacture drink for one's personal use is subject to the condition that it does not endanger or affect the rights of others. If such manufacture does prejudicially affect the interests of the community, it follows, from the premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As was said in *Munn* v. *Illinois*, 94 U. S. 124 (1876), by Chief Justice Waite, while power does not exist in the whole people to control rights that are purely and exclusively private, government may require "each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another." But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, for general personal use, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislature. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

It does not follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police power. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, the courts must obey the Constitution rather than the law-making department, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. Their solemn duty is to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and hereby give effect to the Constitution.

Keeping in view these principles, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is aiming to deprive the citizen of his constitutional right; for we cannot shut out of view the fact, within

the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drink; nor the fact established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a State deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, or mechanical purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp power committed by the constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the efforts to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, from their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the constitution and laws of a State, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that the government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured in our government by the observance, upon the part of all, of such regulations as are established by competent authority, to promote the common good. No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare.

This conclusion is unavoidable, unless the Fourteenth Amendment takes from the States those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in *Barbier* v. *Connolly*, 113 U. S. 31 (1885), that that Amendment had no such effect.

Upon this ground, it is contended, that, as the primary and principal use of beer is as a beverage; as the breweries of the defendants were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer, for every purpose,— the prohibition upon their being so employed is, in effect, "a taking of property for public use without compensation, and depriving the citizen of his property without due process of law." In other words, although the State, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happened to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in value of their property, resulting from such prohibitory enactments.

This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. In respect to contracts, the obligations of which are protected against hostile State legislation, this court in *Butchers' Union Co.* v. *Crescent City Landing Co.*, 111 U. S. 751 (1884), said that the State could not, by any contract, limit the exercise of her powers to the prejudice of the public health and the public morals. So, in *Stone* v. *Mississippi*, 101 U. S. 816 (1879), where the Constitution was invoked against the repeal by that State of a charter, granted to a private corporation, to conduct a lottery, and for which that corporation had paid to the State a valuable consideration in money, the court said: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. . . Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them." Again, in *New Orleans Gas Light Co.* v. *Louisiana Light Co.*, 115 U. S. 672 (1885): "The Constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts in a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations."

The principle that no person shall be deprived of life, liberty, or property without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property is held under the implied obligation that the owner's use of it shall not be injurious to the community. Illustrations of this doctrine are afforded by the cases of *Patterson* v. *Kentucky*, 97 U. S. 501 (1878), and *Northwestern Fertilizing Co.* v. *Hyde Park*, *ib.* 659, 667 (1878), both decided after the adoption of the Fourteenth Amendment. In the first case, a statute of Kentucky, enacted in 1874, imposed a penalty upon any one selling fluids, the product of coal, petroleum, or other bituminous substances, which would ignite at a temperature below 130° Fahrenheit. Patterson having sold a certain oil for which letters patent had been issued in 1867, but

which did not come up to the standard required by said statute, and having been indicted therefor, disputed the State's authority to prevent or obstruct the exercise of his rights under the letters patent. This court upheld the legislation, upon the ground that while the State could not impair the exclusive right of the patentee, or of his assignee, in the discovery described in the letters patent,— the tangible property, the fruit of the discovery, was not beyond control in the exercise of her police powers. In the second case, the court sustained the validity of an ordinance of Hyde Park, in Cook county, Illinois, passed under legislative authority, forbidding any person from transporting through that village offal or other offensive or unwholesome matter, or from maintaining or carrying on an offensive or unwholesome business or establishment within its limits. The fertilizing company, at large expense, and under authority expressly conferred by its charter, had located its works at a particular point in the county. Besides that, the charter of the village provided that it should not interfere with parties engaged in transporting animal matter from Chicago, or from manufacturing it into a fertilizer or other chemical product. The enforcement of the ordinance operated to destroy the business of the company and seriously to impair the value of its property. As, however, its business had become a nuisance, producing discomfort, and often sickness, among large masses of people, the court maintained the authority of the village, acting under legislative sanction, to protect the public health against such nuisance,— to regulate and to abate nuisances being an ordinary exercise of the police power, which the States had never surrendered, but which they all retained and still possess.

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a "taking" or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of a police regulation, to deprive the owner of his liberty and property, without "due process of law." The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciative, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from the innocent owner. It is true, when the defendants erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone* v. *Mississippi*, the supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require;" and that, "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." So in *Beer Co.* v. *Massachusetts:* "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer."

A portion of the argument in behalf of the defendants is to the effect that the statutes of Kansas forbid the manufacture of intoxicating liquors to be exported, or to be carried to other States, and, upon that ground, they are repugnant to the clause of the Constitution giving Congress power to "regulate commerce" with foreign nations and among the several States. We need only say, upon this point, that there is no intimation in the record that the beer which the respective defendants manufactured was intended to be carried out of the State or to foreign countries. And, without expressing an opinion as to whether such facts would have constituted a good defense, we observe that it will be time enough to decide a case of that character when it shall come before us. (See *Kidd* v. *Iowa*, p. 832.)

Section thirteen of the act of Kansas of 1885 provides, that "All places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of this act, or where intoxicating liquors are kept for sale, barter, or delivery in violation of this act, are hereby declared to be common nuisances, and upon the judgment of any court having jurisdiction finding such place to be a nuisance under this section, the sheriff, his deputy, or undersheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance, and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty nor more than ninety days. The attorney-general, the county attorney, or any citizen of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action, and no bond shall be required."

By this section it is not declared that every establishment is to be deemed a common nuisance because it may have been maintained, prior to the passage of the statute, as a place for manufacturing liquors. The statute is prospective in its operation; that is, it does not put the brand of a common nuisance upon any place, unless, after its passage, that place is kept and maintained for purposes declared by the legislature to be injurious to the community. Nor is the court required to adjudge any place to be a common nuisance simply because it is charged by the State to be such. It must first find it to be of that character; that is, must ascertain, in some legal mode, whether the place in question has been or is being so used as to make it a common nuisance.

Equally untenable is the proposition that proceedings in equity for the abatement of the nuisances indicated in the thirteenth section are inconsistent with due process of law. See further NUISANCE.

To the objection that the statute makes no provision for a jury trial, it is sufficient to say that such a mode of trial is not required in suits in equity brought to abate a public nuisance. The statutory direction that an injunction issue at the commencement of the action is not to be construed as dispensing with such preliminary proof as is necessary to authorize an injunction pending the suit. The statute leaves the court at liberty to give effect to the principle that an injunction will not be granted to restrain a nuisance, except upon clear and satisfactory evidence that one exists. Here the fact to be ascertained was not whether a place, kept for purposes forbidden by the statutes, was *per se* a nuisance, that fact being conclusively determined by the statute itself, but whether the place in question was so kept and maintained. If the proof upon that point is not sufficient, the court can refuse an injunction, or postpone action until the State first obtains the verdict of a jury in her favor.

Mr. Justice Field, dissenting from the judgment concurred in by the rest of the court in *Ziebold's Case*, in substance said: I am not prepared to say that the State can prohibit the manufacture of intoxicating liquors within its limits if they are intended for exportation, or forbid their sale within its limits, under proper regulations for the protection of the health and morals of the people, if Congress has authorized their importation, though the act of Kansas is broad enough to include both such manufacture and sale. The right to import an article of merchandise, recognized as such by the commercial world, whether the right be given by an act of Congress or by a treaty with a foreign country, would seem necessarily to carry the right to sell the article when imported. In *Brown* v. *Maryland*, 12 Wheat. 447 (1827), Chief Justice Marshall, in delivering the opinion of the court, said: "Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

If one State can forbid the sale within its limits of an imported article, so may all the States, each selecting a different article. There would then be little uniformity of regulations with respect to articles of foreign commerce imported into different States, and the same may be said of regulations with respect to articles of inter-State commerce. . . By the thirteenth section of the act of 1885, the legislature, without notice to the owner or hearing of any kind, declares every place where liquors are sold, bartered, etc., to be a common nuisance; and then prescribes what shall follow, upon a court having jurisdiction finding one of such places to be what the legislature has already pronounced it. The court is not to determine whether the place is a common nuisance in fact, but is to find it to be so if it comes within the definition of the statute, and, having thus found it, the executive officers of the court are to be directed to shut up and abate the place by taking possession of it; and, as though this were not sufficient security against the continuance of the business, they are to be required to destroy all the liquor found therein, and all other property used in maintaining the nuisance. It matters not whether they are of such a character as could be used in any other business, or be of value for any other purposes. No discretion is left in the judge or in the officer. These clauses appear to deprive one who owns a brewery and manufactures beer for sale, of property without due process of law. The destruction to be ordered is not as a forfeiture upon conviction of any offense, but merely because the legislature has so commanded. Assuming, which is not conceded, that the legislature, in the exercise of that undefined power called the "police power," may, without compensation to the owner, deprive him of the use of his brewery for the purposes for which it was constructed under the sanction of law, and for which alone it is valuable, I cannot see upon what principle, after closing a brewery, and thus putting an end to its use in the future for manufacturing spirits, it can order the destruction of the liquor already manufactured, which it admits by its legislation may be valuable for some purposes, and allows it to be sold for those purposes. Nor can I see how the protection of the health and morals of the people can require the destruction of property, like bottles and other utensils which may be used for many lawful purposes. It has heretofore been supposed to be an established principle that where there is a power to abate a nuisance, the abatement must be limited by the necessity, and no wanton or unnecessary injury be committed to the property or rights of individuals. Thus, if the nuisance consists in the use to which a building is put, the remedy is to stop such use, not to tear down or to demolish the building itself, or to destroy property found within it. The decision of the court, as it seems to me, reverses this principle. The supreme court of Kansas admits that the legislature, in destroying the values of such kinds of property, may have gone to the utmost verge of constitutional authority. In my opinion it has crossed the line which separates regulation from confiscation.

Section 1553 of the code of Iowa, as amended by the act of April 5, 1886 (Laws, c. 66), § 10, forbids any common carrier to bring within that State, for any person or corporation, intoxicating liquors from any other State or Territory, without first having been furnished

with a certificate under the seal of the auditor of the county to which such liquor is to be transported, or is consigned, certifying that the consignee or person to whom the liquor is to be transported or delivered is authorized to sell intoxicating liquors. Section 1524 excepts from the operation of the law sales by the importer thereof of foreign intoxicating liquor, imported under the authority of the laws of the United States, provided that the liquor at the time of sale by the importer remains in the original casks or packages in which it was by him imported, and in quantities of not less than the quantities in which the laws of the United States require such liquors to be imported, and is sold by him in the original casks or packages and in said quantities only. *Held*, that § 1553, as amended in 1886, is void, being in conflict with the provisions of the Constitution granting to Congress the power to regulate commerce among the States.[1]

Mr. Justice Matthews, delivering the opinion of the court, in the course of his argument, said, in substance: The provision in question (§ 1553, as amended in 1886) was adopted, not expressly for the purpose of regulating commerce between its citizens and those of other States, but as subservient to the general design of protecting the health and morals of its people, and the good order of the State, against the physical and moral evils resulting from the unrestricted manufacture and sale of intoxicating liquors. . . The point in judgment in the *License Cases*, 5 How. 504 (1847), was confined to the right of the States to prohibit the sale of intoxicating liquor *after* it had been brought within their territorial limits. The right to bring it within the States was not questioned; and the reasoning which justified the right to prohibit sales admitted, by implication, the right to introduce intoxicating liquor, as merchandise, from foreign countries or from other States, free from the control of the States and subject to the exclusive power of Congress over commerce. It cannot be doubted that the law of Iowa under examination, regarded as a rule for the transportation of merchandise, operates as a regulation of commerce. . . That law, while it professes to regulate the conduct of carriers engaged in transportation within the limits of the State, nevertheless materially affects, if allowed to operate, the conduct of such carriers, as respects both their rights and obligations, in every other State into or through which they pass in the prosecution of their business of inter-State transportation. The defendant is sued as a common carrier in Illinois, and the breach of duty alleged is a violation of the law of that State in refusing to transport goods which as a common carrier, by that law, it was bound to accept and carry. It interposes as a defense the law of Iowa which forbids the delivery of such goods within that State. Has the law of Iowa an extra-territorial force which does not belong to the law of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter? In view of this necessary operation of the law of Iowa, if it be valid, the language of this court in the case of *Hall v. De Cuir*, 95 U. S. 488 (1877), is exactly in point, viz.: "We think it may safely be said that State legislation which seeks to impose a direct burden upon inter-State commerce, or to interfere directly with its freedom, encroaches upon the exclusive power of Congress."

The statute of Iowa cannot be justified by classifying it as an inspection law which the States may pass (Constitution, Art. I, § 10). It has never been regarded as within the scope of an inspection law to forbid trade in respect to any article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse.

For similar reasons the statute cannot be regarded as a regulation of quarantine, or a sanitary provision for the purpose of protecting the physical health of the community, or a law to prevent the introduction of disease,— all exercises of power not viewed as prohibited regulations of commerce.

For the purposes of its policy a State has legislative control, exclusive of Congress, within its territory of all matters of strictly internal concern. In order to protect its people from the evils of intemperance, it may prohibit the manufacture within its limits of intoxicating liquors. It may prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other States or from foreign countries. It may adopt any measures tending, even indirectly and remotely, to make the policy effective, until it passes the line of power delegated to Congress. It cannot, without the consent of Congress expressed or implied, regulate commerce between its own people and those of other States, in order to effect its end, however desirable such a regulation might be. This particular statute falls within this prohibition. It is essentially a regulation of commerce among the States, within any definition heretofore given to that term, or which can be given; and, although its motive and purpose are to perfect the policy of the State in protecting its citizens against the evils of intemperance, it is none the less a regulation of commerce. If it had extended its provisions so as to prohibit the introduction of all importations of intoxicating liquor

[1] Bowman *v.* Chicago & Northwestern R. Co., 125 U. S. 465, 473-500 (March 19, 1888), Matthews, Miller, Field, and Blatchford, JJ. Field, J., filed a concurring opinion, 500-9. Waite, C. J., Gray, and Harlan, JJ., dissented — opinion by Harlan, J., 509-24. Lamar, J., not having been present at the argument of the case, took no part in its decision. The plaintiffs — one of them a citizen of Iowa — applied to the board of supervisors of Marshall county, Iowa, for permission to buy and sell intoxicating liquors for medicinal, culinary, mechanical, and sacramental purposes, but their application was rejected. They then bought 5,000 barrels of beer in Chicago, and tendered them to the railroad company for transportation to Marshalltown, said county, without furnishing the required certificate — the company being a common carrier of merchandise from Chicago, Illinois, to Council Bluffs, Iowa, and under a duty to carry to all stations along its line merchandise entrusted to it for that purpose. The refusal of the company to transport the beer into Iowa, in violation of her laws, was the basis of the suit. The plaintiffs claimed damages upon the ground that they could have sold the beer in that State at an advance.

produced abroad, no one would have doubted the nature of the provision as a regulation of foreign commerce. Its nature is not changed by its application to commerce among the States. Can it be supposed that, by omitting any express declarations on the subject, Congress has intended to submit to the States the decision of the question in each locality of what shall and what shall not be articles of traffic in the inter-State commerce of the country? If so, it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured, or sold in any State, and sought to be introduced as an article of commerce into any other. . . The section of the statute in question is an attempt to exercise the jurisdiction of the State of Iowa over persons and property within the limits of other States. It seeks to prohibit their importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border. It is not one of those local regulations designed to facilitate commerce; it is not an inspection law to secure the due quality and measure of a commodity; it is not a law to regulate or restrict the sale of an article deemed injurious to the health and morals of the community; it is not a regulation confined to the purely internal commerce of the State; it is not a restriction which only operates upon property after it has become mingled with and forms part of the mass of the property within the State. It is, on the other hand, a regulation directly affecting inter-State commerce in an essential and vital point. If authorized, in the present instance, upon the grounds and motives of the policy which have dictated it, the same reason would justify any and every other State regulation of inter-State commerce upon any grounds and reasons which might prompt in particular cases their adoption. It is, therefore, a regulation of that character which constitutes an unauthorized interference with the power given to Congress. If not in contravention of any positive legislation by Congress, it is nevertheless a breach and interruption of that liberty of trade which Congress ordains as the national policy, by willing that it shall be free from restrictive regulations.

It may be argued, however, that a prohibition of the sale cannot be made effective except by preventing the introduction of the subject of sale; that, if its entrance into the State is permitted, traffic in it cannot be suppressed. But the right to prohibit sales, so far as conceded to the States, arises only after the act of transportation has terminated, because the sales which the State may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within its limits. It might be very convenient and useful, in the execution of the policy of prohibition within the State, to extend the power of the State beyond its territorial limits. But such extra-territorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence; for, if they belong to one State, they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution, by its delegations of national power, to prevent. It is easier to think that the right of importation from abroad, and of transportation from one State to another, includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in the case of *Brown* v. *Maryland*, 12 Wheat. 419 (1827), as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the States. But it is not necessary now to express an opinion upon the point because that question does not arise in the present case. The precise line which divides the transaction, so far as it belongs to foreign or inter-State commerce, from the internal and domestic commerce of the State, we are not now called upon to delineate. It is enough to say that the power to regulate or forbid the sale of a commodity, after it has been brought into the State, does not carry with it the power to prevent its introduction by transportation from another State.

Mr. Justice Harlan, delivering the opinion of the minority, in substance said: The decision of the majority is placed upon the broad ground that intoxicating liquors are merchantable commodities, or known articles of commerce; and that consequently the Constitution, by the mere grant to Congress of the power to regulate commerce, operates, in the absence of legislation, to establish unrestricted trade, among the States, in such commodities or articles. To this view we cannot assent. . . The decision, it seems to us, does not conform to the doctrines enunciated and adhered to in the cases decided heretofore, the last being *Mugler's Case*, and may impair, if it does not destroy, the power of a State to protect her people against the injurious consequences that are admitted to flow from a general use of intoxicating liquors. . . If, as the court decides, the Constitution gives the right to transport intoxicating liquors into Iowa from another State, and if that right carries with it, as an essential ingredient, authority in a consignee to sell or exchange such articles after they are so brought in, and while in his possession, in the original packages, the regulation forbidding sales of intoxicating liquor, within the State, for other than medicinal, mechanical, culinary, or sacramental purposes, and then only under a permit, will be of little practical value. In this view, any one, desiring to sell intoxicating liquors, need only arrange to have them delivered to him from some point in another State, in packages of varying sizes, as may suit customers; or he may erect his own manufacturing establishment or warehouse just across the Iowa line, in some State having a different public policy, and thence, with wagons, transport liquors into Iowa in original packages. If the State arraigns him for a violation of her laws, he may claim that, although such laws were enacted solely to protect the health and morals of the people, and to promote peace and good order among them, and although they are fairly adapted to accomplish those objects, yet the Constitution, without any action upon the part of Congress, secures to him the right to bring or receive from other

States intoxicating liquors in original packages, and to sell them, while held by him in such packages, to all who choose to buy them. Thus, the mere silence of Congress upon the subject of trade among the States in intoxicating liquors is made to operate as a license to persons doing business in one State to jeopardize the health, the morals, and good order of another State, by flooding the latter with intoxicating liquors, against the expressed will of her people.

It is admitted that a State may prevent the introduction within her limits of goods infected with disease, or of cattle or provisions, which, from their condition, are unfit for human use or consumption; because, it is said, such articles are not merchantable or legitimate subjects of trade and commerce. But suppose the people of a State believe, upon reasonable grounds, that the general use of intoxicating liquors is dangerous to the public peace, the public health, and the public morals, what authority has Congress or the judiciary to review their judgment upon that subject, and compel them to submit to a condition of things which they regard as destructive of their happiness and the peace and good order of society? If, consistently with the Constitution, a State can protect her sound cattle by prohibiting altogether the introduction within her limits of diseased cattle,— as was decided in *Hannibal & St. Joseph R. Co.* v. *Husen*, 95 U. S. 471 (1877),— she ought not to be deemed disloyal to their Constitution when she seeks by similar legislation to protect her people and their homes against the introduction of articles, which are, in good faith, and not unreasonably, regarded by her citizens as "laden with infection" more dangerous to the public than diseased cattle, or than rags containing the germs of disease. It is not a satisfactory answer to these suggestions to say that if the State may thus outlaw the manufacture and sale of intoxicating liquors as a beverage, and exclude them from her limits, she may adopt the same policy with reference to articles that confessedly have no necessary or immediate connection with the health, the morals, or the safety of the community, but are proper subjects of trade the world over. This possible abuse of legislative power was earnestly dwelt upon by the counsel in *Mugler's Case*. The same argument can be, as it often is, made in reference to powers that all concede to be vital to the public safety; but it does not disprove their existence. This court there said that the judicial tribunals were not to be misled by mere pretenses, and were under a solemn duty to look at the substance of things whenever it became necessary to inquire whether the legislature had transcended the limits of its authority; and, further, that it was difficult to perceive any ground for the judiciary to declare that the prohibition by a State of the manufacture or sale, within her limits, of intoxicating liquors for general use as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. (123 U. S. 661–62.) In the same case the court sustained, without qualification, the authority of Kansas to declare, not only that places where liquors were manufactured or kept for sale, barter, or delivery, in violation of her statutes, should be deemed common nuisances, but to provide for the forfeiture, without compensation, of the intoxicating liquors found in such places, and the property used in maintaining such nuisances.

Now, can it be possible that the framers of the Constitution intended — whether Congress chose or not to act upon the subject — to withhold from a State authority to prevent the introduction into her midst of articles the manufacture of which, within her limits, she could prohibit, without impairing the Constitutional rights of her own people? If a State may declare a place where liquors are sold for use as a beverage a common nuisance, subjecting the keeper to fine and imprisonment, can her people be compelled to submit to the sale of such liquors when brought there from another State for that purpose? This court has often declared that the most important function of government was to preserve the public health, morals, and safety; that it could not divest itself of that power, nor, by contract, limit its exercise; and that even the Constitutional prohibition upon laws impairing the obligation of contracts does not restrict the power of the State to protect the health, the morals, or the safety of the community, as one or the other may be involved in the execution of such contracts. Does the mere grant of the power to regulate commerce among the States invest individuals of one State with the right, even without the express sanction of Congressional legislation, to introduce among the people of another State articles which, by statute, they have declared to be deleterious to their health, and dangerous to their safety? In our opinion, these questions should be answered in the negative. It is inconceivable that the well-being of any State is at the mercy of the liquor manufacturers of other States. These views are sustained by *Walling* v. *Michigan*, 116 U. S. 446 (1886), the judgment in which case the majority suggest is conclusive upon the issue in this case. The clear implication from the language used in the judgment in that case is that the law of Michigan would have been sustained if it had applied the same rule to the products (intoxicating liquors) of Michigan which it attempted to apply to the products of other States.

At the argument it was insisted that the contention of the plaintiffs was supported by *Brown* v. *Maryland*, 12 Wheat. 436 (1827), where the question was whether the legislature of a State could require an importer of foreign articles or commodities to take out a license before he should be permitted to sell a bale or package so imported. Among other things, it was said in the opinion that the right to sell articles imported from foreign countries is connected with the law permitting the importation, as an inseparable incident; observing, at the close of the opinion, that it supposed the principle laid down to apply equally to importations from a sister State. But from the whole opinion it was clear that the court referred to commerce in articles having no connection with the health, morals, or safety of the people, and that it had no purpose to qualify the explicit declaration in *Gibbons* v. *Ogden*, 9 Wheat. 198 (1824), that the health laws of the States were a component part of that mass of legislation, the power to enact which remained with the States, because never surrendered to the general government. It was insisted, on behalf of Maryland, that the prohibition of State imposts or duties upon imports

ceases the instant goods enter the country; otherwise, it was argued, the importer "may introduce articles — as, gunpowder — which endanger a city into the midst of its population; he may introduce articles which endanger the public health, and the power of self-preservation is denied." To this Chief Justice Marshall replied: "The power to direct the removal of gunpowder is a branch of the police power which unquestionably remains, and ought to remain, with the States. . . The removal or destruction of infectious or unsound articles is undoubtedly an exercise of that power [to pass inspection laws], and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly recognize the health laws of a State." This we understand to have been a distinct re-adjudication that the police power remains with the States, and is not overridden by the national Constitution.

The purpose of committing to Congress the regulation of commerce was to insure the equality of commercial facilities, by preventing one State from building up her own trade at the expense of sister States. But that purpose is not defeated when a State employs appropriate means to prevent the introduction into her limits of what she lawfully forbids her own people from making. It certainly was not meant to give citizens of other States greater rights in Iowa than Iowa's own people have. But if this be not a sound interpretation of the Constitution; if intoxicating liquors are entitled to the same protection as ordinary merchandise entering into commerce among the States; if Congress, under the power to regulate commerce, may, in its discretion, permit or prohibit commerce in intoxicating liquors; and if, therefore, State police power, as the health, morals, and safety of the people may be involved in its proper exercise, can be overborne by national regulations of commerce,— the former decisions of this court would seem to show that such laws of the States are valid, even where they affect commercial intercourse among the States, until displaced by Federal legislation, or until they come in direct conflict with some act of Congress. . . This principle has been announced in many cases decided by this court — all of them cases of the erection of bridges and other structures within the limits of States, and under their authority, across public navigable waters of the United States. They were held not forbidden by the Constitution, although the structures actually interfered with inter-State commerce.

Perhaps the language of this court — all the judges concurring — which most directly bears upon the question is found in *County of Mobile* v. *Kimball*, 102 U. S. 701 (1880), re-affirming *Willson* v. *Marsh Company*, 2 Pet. 250 (1829). It was there said: "In the *License Cases*, 5 How. 504 (1847), there was great diversity of views in the opinions of the judges upon the operation of the grant of the commercial power in the absence of Congressional legislation; but the decision reached was confirmatory of the doctrine that legislation of Congress is essential to prohibit the actions of the States upon the subject thus considered." This language is significant in view of the fact that in one of the *License Cases* — *Peirce* v. *New Hampshire*, 5 How. 557, 578 — the question was as to the validity of an act of that State, under which Peirce was convicted and fined for having sold, without license, a barrel of gin which he had purchased in Boston, transported to Dover, New Hampshire, and there sold in the identical cask in which it had been transported from Massachusetts. In harmony with these principles, the court affirmed at the present term, in *Smith* v. *State*, 124 U. S. 465 (1888), the validity of a statute of Alabama making it unlawful for a locomotive engineer, even when his train is employed in inter-State commerce, to operate a train of cars upon a railroad in that State, used for the transportation of persons or freight, without first having obtained a license, after examination, from a board of engineers. This court held that the statute in question was "an act of legislation within the scope of the admitted power reserved to the States to regulate the relative rights and interests of persons within its territorial jurisdiction, intended to operate so as to secure the public safety of personal property;" and that, "so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them; and in the particulars on which it touches those transactions at all it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

It would seem that if the Constitution does not, by its own force, displace or annul a State law, authorizing the construction of bridges or dams across navigable waters, thereby preventing the passage of vessels engaged in inter-State commerce, the same construction ought not to be held to annul or displace a law of one of the States which, by its operation, forbids the bringing within her limits, from other States, articles which that State, in the most solemn manner, has declared to be injurious to the health, morals, and safety of her people. The silence of Congress upon the subject of inter-State commerce, as affected by the police laws of the State, enacted in good faith to promote the public health, morals, and safety, and to that end prohibiting traffic, within her limits, in intoxicating liquors to be used as a beverage, ought to have at least as much effect as the silence of Congress with reference to physical obstructions placed, under the authority of a State, in a navigable water of the United States. The reserved power of the States to guard the health, morals, and safety of their people is more vital to the existence of society than their power in respect to trade and commerce having no possible connection with those subjects.

October 22, 1888, the Supreme Court, speaking by Mr. Justice Lamar, in the case of *Kidd* v. *Pearson*, decided that the statute of Iowa, under which it had been held by the supreme court of that State [1] that a person had no right to manufacture liquors within the State for exportation to other States, was not in conflict with the power to regulate commerce vested exclusively in Congress.[2]

See further POLICE, 2. Compare OLEOMARGARINE; OPTION, Local; MORALS; SUMPTUARY.

[1] Pearson *et al. v.* International Distillery *et al.*, 72 Iowa, 348 (Sept. 1887).

[2] To be reported in 128 U. S. See ADDENDA.

PROLICIDE. See HOMICIDE.

PROMISE. A declaration, verbal or written, made by one person to another for a good or valuable consideration, by which he binds himself to do or to forbear from doing some act, and gives to the other a legal right to demand and enforce fulfillment.[1]

Refers to the engagement of a party without reference to the reason for it or to the duties of other parties. See PROPOSAL.

"Agreement" is seldom applied to specialties, and "contract" is generally confined to simple contracts.[2] See those terms.

Promisor. He who makes a promise. **Promisee.** He to whom a promise is made.

Promissory. Involving a promise; executory: as, a promissory — note, oath of office, representation, *qq. v.*

Concurrent promises. Where the acts to be performed are simultaneous.

Dependent promises. When the agreements go to the whole of the consideration on both sides; when one promise is made the consideration of another. **Independent promises.** To the extent that the agreements do not go to a part of the consideration on both sides.[3]

Express promise. A promise made in express terms,— openly stated. **Implied promise.** Is inferred from the acts or position of a person. See RAISE.

Mutual promises. Promises exchanged at the same time, the one in consideration of the other.

A promise on the part of the plaintiff to do something of advantage in law to the defendant, and on the part of the defendant to do something of advantage in law to the plaintiff — one promise being the consideration of the other.[4]

Whether one promise be the consideration for another, or whether the performance, and not the mere promise, be the consideration, is to be determined by the intention and meaning of the parties, as collected from the instrument, and the application of good sense and right reason to each particular case.[5]

One dependent promise is a condition precedent to the other. The breach of an independent promise may be paid for in damages. Either party to a concurrent promise may sue the other for a breach of the contract, on showing that he was ready to do his part, or was prevented from doing it by the other party.[1]

New promise. A promise to pay a debt barred by the statute of limitations.

The promise by which a *discharged* debt is revived must be clear, distinct, and unequivocal. It may, at the same time, be either absolute or conditional. If the latter, the occurrence of the condition must be averred. The rule is different in regard to a debt *barred* by lapse of time. Acts and declarations recognizing the present existence of the debt have been held to take a case out of the statute.[2]

The expression of an intention to pay the barred debt is not sufficient. There must be a promise before the debtor is bound. An intention is but the purpose a man forms in his own mind; a "promise" is an express undertaking or agreement to carry that purpose into effect, and must be express, in contradistinction to a promise implied from an acknowledgment of the justness or existence of the debt. The promise must be clear, distinct, unequivocal.[3]

"I will send you the first spare 'V' or 'X' I have," does not fairly import a promise to pay absolutely five or ten dollars.[4]

See further ACKNOWLEDGMENT, 1; PAYMENT, Part.

Original and collateral promise. Expressions used in speaking of liability under the statute of frauds "to answer for the debt or default of another:" the former designating the obligation of the principal debtor; the latter, the obligation of the person undertaking to answer for the debt. "Original" also characterizes any *new promise* to pay an antecedent debt of another.[5]

When the object of the promise is a direct benefit to the promisor which he did not enjoy before, and the promise to pay another's debt is a mere incident, the former is not within the statute. Within the statute is a promise, where the main object is to obtain the release of the person or the property of the debtor, or other forbearance or benefit to him, though a new consideration moves to the promisor.[6]

Cases in which a promise is collateral to the principal contract, but is made at the same time, and be-

[1] [Newcomb *v.* Clark, 1 Denio, 228-29 (1845), Jewett, J.

[2] [1 Pars. Contr. 6. See 3 Bl. Com. 158.

[3] [3 Pars. Contr. 677, 528; Dermott *v.* Jones, 23 How. 881 (1859).

[4] Schweider *v.* Lang, 29 Minn. 256 (1882), Berry, J.

[5] Jones *v.* United States, 96 U. S. 27 (1877), Clifford, J.

[1] 2 Pars. Contr. 677. On implied promises, see 19 Cent. Law J. 462-65, 486-88 (1884), cases; promises enforcible by strangers, 18 *id.* 136 (1884), cases.

[2] Allen *v.* Ferguson, 18 Wall. 3 (1873), Hunt, J.

[3] Shockey *v.* Mills, 71 Ind. 292 (1880), Worden, J.; Hubbard *v.* Farrell, 87 *id.* 217 (1882); Denny *v.* Marrett, 29 Minn. 361 (1882); Parker *v.* Butterworth, 46 N. J. L. 246-47 (1884), cases; Shepherd *v.* Thompson, 122 U. S. 234-39 (1887), cases; R. S. § 955: 14 F. R. 390, 392, cases.

[4] Bigelow *v.* Norris, 141 Mass. 15 (1886); Elwell *v.* Cumner, 136 *id.* 102 (1883); Dennan *v.* Gould, 141 *id.* 16 (1886). See generally 27 Cent. Law J. 431 (1888), cases.

[5] [Mallory *v.* Gillett, 21 N. Y. 414-33 (1860), cases, Comstock, C. J.; 2 Pars. Contr. 7, 9.

[6] Furbish *v.* Goodnow, 98 Mass. 297 (1867), cases, Gray, C. J.

comes an essential ground of credit given to the principal debtor, are generally within the statute; so, also, cases in which the collateral agreement is subsequent to the execution of the debt, and not the inducement to it. But whenever the main purpose of the promisor is not to answer for another, but to subserve some pecuniary or business end of his own, involving benefit to himself or damage to the other party, his promise is not within the statute, although in form and effect to pay the debt of another.[1]

The person for whose benefit a binding promise to another is made, unless only incidentally benefited, may maintain an action on it against the promisor.[2] Compare GUARANTY.

PROMOTER. 1. A person who, in a popular or penal action (*q. v.*), prosecuted offenders in the name of the crown and of himself.

He was a common informer; he promoted charges.[3]

2. A person who, by his active endeavors, assists in procuring the formation of a company and the subscription to its shares.[4]

Not a term of law, but of business, usefully summing up in a single word a number of business operations, familiar to the commercial world, by which a company is generally brought into existence.[5]

The promoters of a corporation secured subscriptions to its stock without informing purchasers that they were to have stock for nothing. *Held*, that the promoters were fiduciaries, with no right to derive advantage over other stockholders without full disclosure, and that the shares of stock should be transferred, and profits refunded, to the corporation.[6]

PROMULGATE.[7] 1. To publish or make known a law after its enactment. Compare PRESCRIPTION, 1.

2. To announce officially or publicly: as, to promulgate a postal convention, a treaty, a state paper.[8] See STATUTE.

PRONOUNCE. See PASS, 4.

PRONOUNS. See BLANK, 2.

The use of "he" in an instrument, in referring to a person whose Christian name is designated by an initial, is not conclusive that the person is a male. Parol evidence is admissible to show that the person intended is a female.[9]

[1] Emerson *v.* Slater, 22 How. 43 (1859), cases, Clifford, J.; Wilson *v.* Hentges, 29 Minn. 104-5 (1882), cases.

[2] Burton *v.* Larkin, 36 Kan. 249-50 (1887), cases.

[3] See Trench, Glossary, 160-61.

[4] Morawetz, Priv. Corp. § 545.

[5] Whaley Bridge Printing Co. *v.* Green, L. R., 5 Q. B. D. 111 (1879), Bowen, J. See at length 16 Am. Law Rev. 981-95 (1882), cases; Thomp. Liab. Officers, 219; 2 Lindl. Partn. 580; 3 Ap. Cas. 1218.

[6] Chandler *v.* Bacon, 30 F. R. 540 (1887), cases.

[7] L. *promulgare*, to publish.

[8] See 1 Bl. Com. 45; Aust. Jur., Lect. 38; 17 La. An. 390.

[9] Berniaud *v.* Beecher, 71 Cal. 38 (1886).

PROOF. "Evidence" and "proof" are often used indifferently, as synonymous; but the latter is applied, by the most accurate logicians, to the effect of evidence, and not to the medium by which truth is established.[1]

A sufficient reason for the truth of a judicial proposition.[2]

This truth is "formal," as distinguished from "real." The object of sound jurisprudence is to render formal truth the reflex of real,—a result which can only be approximately reached; no witness can detail all he saw; no instrument can be framed so as to exclude all doubt as to the intention; and a party may even refuse to explain his conduct.[3]

"Proof" means the reasons or grounds on which a proposition may be maintained; also, conviction; and, also, the instrument or means which tend to lead the mind to a conclusion.[3]

"Evidence" includes the reproduction of the admissions of parties and of facts relevant to the issue. "Proof" includes, in addition, presumptions of law and of fact and citations of law.[4]

Judicial proof is not a matter of arbitrary rule. Its principles are drawn from the experience and observation of men and should be applied as they are by men in general.[5]

Full proof. Evidence which satisfies the mind of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt.[6]

Preliminary proof; proof of loss. See Loss, 2.

Proofs. Evidence given in proof at a trial.[7]

The aggregate of evidence adduced by one or both parties.

The obligation to establish by evidence an allegation of fact is called the **burden of proof** (*onus probandi*), and often, simply, "the burden."

"Burden of proof" is properly applied only to a party affirming some fact essential to the support of his case. In this sense it never shifts from side to side during the trial. Loosely used, it is confounded with the "weight of evidence," which often shifts as

[1] 1 Greenl. Ev. § 1; Schloss *v.* His Creditors, 31 Cal. 203 (1866); Perry *v.* The Dubuque Southwestern R. Co., 36 Iowa, 106 (1872).

[2] 1 Whart. Ev. §§ 1, 2.

[3] 1 Whart. Ev. § 3.

[4] Lindley *v.* Dakin, 13 Ind. 389 (1859).

[5] Bell *v.* Brewster, 44 Ohio St. 699 (1887).

[6] Kane *v.* Hibernia Mut. Fire Ins. Co., 38 N. J. L. 450 (1876); Starkie, Ev. *617.

[7] 3 Bl. Com. 367.

facts and presumptions appear and are overcome.[1]

The principle is that he who affirms the existence of a given state of facts must prove it: a rule adopted because the negative does not admit of the direct and simple proof of which the affirmative is capable.[2]

The burden of proof resting on a plaintiff is coextensive only with the legal proposition upon which his case rests. It applies to every fact which is essential to or necessarily involved in that proposition; not to facts relied upon in defense to establish an independent proposition, however inconsistent with that upon which the plaintiff's case depends. It is for the defendant to furnish the proof of such facts; and, when he has done so, the burden is upon the plaintiff, not to disprove these particular facts, nor the propositions which they tend to establish, but to maintain the proposition upon which his own case rests, notwithstanding such controlling testimony, and upon the whole evidence in the case. The distinction may be narrow, but it is real, and often decisive.[3]

He who sets up another's tort must prove it. Contributory negligence is to be proven by the defendant. In a suit for non-performance of a contract the plaintiff proves the non-performance. The rule is altered when the plaintiff sues in tort; as, in a contract against a bailee, in which case it is sufficient to prove the bailment. If one alleges, he must prove: causes, want of good faith, non-legality. License and formalities are proved by the party to whom they are essential; crime, beyond a reasonable doubt.[4]

The burden of proof rests upon the party against whom judgment would be given, were no proof to be offered on either side.[5]

In criminal cases the burden of proof never shifts, but is upon the government throughout.[6]

The weight of evidence shifts from side to side according to the varying strength of the proofs.[7]

See ALLEGATION; DEMONSTRATION, 1; DOUBT, Reasonable; EVIDENCE; NEGATIVE; NEGLIGENCE; OFFER, 2; PRESUMPTION; PROBABILITY; REDUNDANCY; TEND; VARIANCE. Compare PROBATE.

Proof-sheets. See MAIL, 2.

PROPER.[8] 1. Own; one's own: as, proper — costs, county, debt, goods and chattels, person.

2. Appropriate, *q. v.*; well adapted; suitable; fit; sufficient: as, proper — action, county, court, form of decree or judgment, legislation. See NECESSARY.

The proper instructions under which the issue in a contested will case is made up and tried are such instructions as the law of the case and the testimony before the jury make pertinent.[1]

PROPERTY.[2] That which is one's own; something that belongs or inheres exclusively in an individual person.

1. In an abstract sense, ownership, title, estate, right. 2. In a concrete sense, the thing itself which is owned.

The right of property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the rights of every other individual in the universe. The "absolute right of private property" consists in the free use, enjoyment, and disposal of all one's acquisitions, without any control or diminution, save only by the law of the land.[3]

Standing alone, the term includes everything that is the subject of ownership.[4]

Every species of thing in which there may be ownership, and which may be made available in the payment of judgments.[5]

A *nomen generalissimum;* extends to every species of valuable right and interest, including real and personal property, easements, franchises and other incorporeal hereditaments.[6]

The word "property" alone may include both realty and personalty, unless a different meaning is apparent from the context, as the Revised Statutes of Texas, art. 3140, provide.[7]

May refer to goods and chattels, on the principle of *noscitur a sociis.*[8]

Applied to land, comprehends every species of title, inchoate or incomplete. Embraces rights which lie in contract; those which are executory, as well as those which are executed.[9]

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[1] Pease *v.* Cole, 53 Conn. 71 (1885), Loomis, J.

[2] 1 Greenl. Ev. § 74; 5 Pet. 148; 6 Del. 95; 52 Ga. 180; 119 Ill. 357; 2 Gray, 132, 527.

[3] Wilder *v.* Cowles, 100 Mass. 490 (1868), Wells, J.; Willett *v.* Rich, 142 Mass. 357 (1886).

[4] 1 Whart. Ev. §§ 358-71, cases; 1 Greenl. Ev. Ch. III. As to a liquor license, see Mugler *v.* Kansas, 123 U. S. 674 (1887).

[5] 1 Whart. Ev. § 357.

[6] Commonwealth *v.* McKee, 1 Gray, 62-65 (1854), cases; Commonwealth *v.* Rogers, 7 Metc. 501 (1844).

[7] Central Bridge Corporation *v.* Butler, 2 Gray, 132 (1854). On proof and allegation, see 8 Va. Law J. 65 (1884); on right to begin and reply, 25 Cent. Law J. 171, 458-88 (1887), cases.

[8] F. *propre;* L. *proprius*, q. v.

[1] Wagner *v.* Ziegler, 44 Ohio St. 69 (1887).

[2] F. *propreté;* L. *proprietas*, ownership: *proprius*, q. v.

[3] 1 Bl. Com. 139; 2 *id.* 2; 102 Ill. 77.

[4] Stanton *v.* Lewis, 26 Conn. 449 (1857), Hinman, J.

[5] Baker *v.* State, *ex rel.* Mills, 109 Ind. 56 (1886), Zollars, J.

[6] Boston, &c. R. Co. *v.* Salem, &c. R. Co., 2 Gray, 36 (1854), Shaw, C. J.

[7] Moffett *v.* Moffett, 67 Tex. 644 (1887).

[8] Harwood *v.* City of Lowell, 4 Cush. 313 (1849).

[9] [Soulard *v.* United States, 4 Pet. *512 (1830), Marshall, C. J.; 9 *id.* 133; 10 *id.* 329.

The mere possession of real estate is constantly treated as property.[1]

The word includes choses in action as well as choses in possession — everything that goes to make up one's wealth or estate.[2]

The right to take and prosecute an appeal is property, within the meaning of a statute against extorting property by threats.[3]

Everything which has an exchangeable value is property. The right of property includes the power to dispose of it according to the will of the owner. Labor is property.[4]

That only is property which is recognized as such by the law. When, then, an article, either intrinsically or by use, becomes prejudicial, the law may withdraw from it the attribute of property; as, in the law of nuisances *per se*.[5] See PROHIBITION, 2.

8. The single word "property" is used as a plea in actions of replevin when a defendant claims that the right of property lies exclusively in him.

In that case the defendant gives an obligation called a "claim-property bond," which is substituted for the property.[6] See REPLEVIN, 1.

Absolute property. A full and complete title to and dominion over personalty. **Qualified property.** A temporary or special interest, liable to be totally destroyed by the happening of a particular event.[7]

The interest which can be acquired in external objects or things is "property." The things themselves are not, in a true sense, property, but they constitute its foundation and material, and the idea of property springs out of the connection, or control, or interest which, according to law, may be acquired in or over them. This interest is "absolute" when a thing is objectively and lawfully appropriated by one to his own use in exclusion of all others; and "limited" or "qualified" when the control acquired falls short of that. To entitle one to bring an action for an injury to any specific object or thing, he must have a property therein of one kind or the other. An administrator has no property in the body of his intestate.[1]

General property. The general right which one person has in a thing. **Special property.** Some temporary right of control, until a common purpose is accomplished.[2]

In a contract of bailment the bailor has the general property, and the bailee a special property, in the thing bailed; and an officer has a special property in goods levied upon.

Property in possession "absolute" is where a man has, solely and exclusively, the right, and also the occupation, of any movable chattels; so that it cannot be transferred from him, or cease to be his, without his own act or default. "Qualified," "limited," or "special" property is such as is not in its nature permanent, but may sometimes subsist and at other times not subsist.[3]

Private property. Things which belong to an individual or private person. **Public property.** Anything that belongs to the government — local, State, or national. See LAND, Public; TERRITORY, 2.

The power of the state over private property is well defined: it may take the property for a public use, upon compensation being made or secured. It may take by taxation. It may control the use so as to secure equal enjoyment. It may destroy it to arrest a conflagration or the ravages of a pestilence, or to prevent other calamity under an immediate and overwhelming necessity.[2] See COMPENSATION, 3; POLICY, Public.

Private property becomes "clothed with a public interest" when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest to that use, and must submit to be controlled by the public for the common good, to the extent of the interest thus created. He may withdraw his grant by discontinuing the use. In this category is the business of a common carrier, an innkeeper, a warehouseman, miller, ferryman, bridge-keeper, turnpike company, and the like.[3]

Real property. Consists of such things as are permanent, fixed, and immovable; as, lands, tenements, and hereditaments of all kinds, which are not annexed to the person, nor can be moved from the place in which they subsist. **Personal property.** All movable chattels and things thereunto incident; property which may attend a man's person wherever he goes. **Mixed prop-**

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[1] King *v.* Gotz, 70 Cal. 240 (1886), approving Soulard *v.* United States, *ante*.

[2] Carlton *v.* Carlton, 72 Me. 116 (1881); Ide *v.* Harwood, 30 Minn. 195 (1883); Vaughan *v.* Murfreesboro, 96 N. C. 317 (1887).

[3] People *v.* Codman, 57 Cal. 564 (1881).

[4] Slaughter-House Cases, 16 Wall. 127 (1873), Swayne, J., dissenting; *Re* Jacobs, 33 Hun, 374, 379 (1884).

[5] Cooley, Princ. Const. Law, 315-16; Fisher *v.* McGirr, 1 Gray, 27 (1854).

See also, generally, 4 McLean, 603; 34 Ala. 239; 2 Ark. 299; 2 Cal. 289; 9 *id.* 143; 31 *id.* 637; 35 Ga. 294; 102 Ill. 77; 9 Ind. 202; 34 La. An. 497; 7 Cush. 53; 51 N. H. 511; 33 N. J. L. 561; 1 N. Y. 24; 13 *id.* 397; 24 *id.* 384; 86 *id.* 268; 84 *id.* 565; 91 *id.* 5; 1 Ohio St. 662; 36 Wis. 155; 17 F. R. 116, 118.

[6] See 1 Wall. Jr. 327; 25 Pa. 197; 52 *id.* 484; 65 *id.* 105; 93 *id.* 221; 2 T. & H. § 1737.

[7] [2 Kent, 347

[1] [Griffith *v.* Charlotte, &c. R. Co., 23 S. C. 25 (1885), Simpson, C. J.

[2] 2 Bl. Com. 388, 391.

[3] Munn *v.* Illinois, 94 U. S. 145, 126, 130 (1876), Field, J

erty. Partakes of the characters of realty and personalty; as, a leasehold.[1]

When the term "property" is applied to lands, all titles are embraced, legal or equitable, perfect or imperfect.[2]

Personal property has no locality. The law of the owner's domicil determines the validity of a transfer thereof, unless there is some law of the country, where it is found, to the contrary.[3] In a qualified sense, it accompanies the owner wherever he goes, and he may deal with it and dispose of it according to the law of his domicil. If he dies intestate, that law, wherever the property may be situated, governs its disposal and fixes the rights and shares of the distributees. Such property is taxable where it has its actual *situs*.[4]

The maxim that personal property follows the person of the owner is but a legal fiction, invented for useful purposes, and must yield whenever the purposes of convenience or justice make it necessary to ascertain the fact concerning the *situs*. In cases of attachment and for purposes of taxation, the maxim is constantly disregarded.[5]

The power of a State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of descent, and the extent to which a testamentary disposition may be exercised, is undoubted. This follows from her sovereignty within her limits, as to all matters as to which jurisdiction has not been transferred to the Federal government. Control over realty would be foreign to the purpose for which the Federal government was created, and embarrass the landed interests of the States.[6]

At common law, every corporation has, as an incident to its existence, the power to acquire, hold, and convey realty, except as restrained by its charter or act of parliament. And so, also, as to personalty.[7]

See ABANDON, 1; CAPITAL, 2; CAPTION; CHATTEL; COMMODITY; CONCEAL, 1; CONDITION, Real; CONFUSION; CONVERSION, 2; DESCENT; DEVISE; DISTRIBUTION, 2; EFFECTS; ESTATE; FIND, 1; FIXTURE; IMPROVE; INCOME; INSURANCE; INTEREST, 2; INVENTORY; INVOICE; MONEY; MORTGAGE; NUISANCE; OUSTER; OWNER; PARTNERSHIP; PERISHABLE; PERPETUITY, 2; PLEDGE; POSSESSION; PREMISES, 3; PRESCRIPTION, 3; PROCESS, 1, Due; PURCHASE, 2; PURPRESTURE; REALTY; REPLEVIN, 1; RESULTED; RES, 2; RESTITUTION; RULE, 3; SALE; SEPARATE, 2; TAX, 2; TIMBER; TITLE, 1; TRADE; USE; USUS; UTERE, Sic, etc.; VALUE; VEST; WILL, 2.

[1] 3 Bl. Com. 144; 2 *id.* 16; 3 Law Q. Rev. 406 (1887); 106 Mass. 585.

[2] Hornsby *v.* United States, 10 Wall. 242 (1869), Field, J.; Bryan *v.* Kennett, 113 U. S. 192 (1885).

[3] Black *v.* Zacharie, 3 How. 514 (1845), Story, J.

[4] St. Louis *v.* Ferry Co., 11 Wall. 430 (1870), cases, Swayne, J.; Robertson *v.* Pickrell, 109 U. S. 610 (1883); 22 Cent. Law J. 7-14 (1886), cases.

[5] Dundee Mortgage Co. *v.* School District, 19 F. R. 909 (1884), cases.

[6] United States *v.* Fox, 94 U. S. 320 (1876), Field, J.

[7] Jones *v.* Guaranty, &c. Co., 101 U. S. 625 (1879); Graham *v.* La Crosse, &c. R. Co., 102 *id.* 161 (1880); Page *v.* Heineberg, 40 Vt. 85 (1868), cases: 94 Am. Dec. 381-87, cases; 2 Bl. Com. 256.

PROPONENT. See PROPOUND.

PROPOSAL. When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence.[1]

When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise. The person making the proposal is called the "promisor," the person accepting, the "promisee." Every promise, and every set of promises forming the consideration for each other, constitutes an agreement. An agreement enforceable by law is a contract.[1] See OFFER, 1.

PROPOSITUS. L. Put forward; proposed: the person from whom descent is reckoned.[2] See ANCESTOR.

PROPOUND.[3] To bring forward; to proffer for judicial action; to propose as genuine: as, to propound a will for probate. See ARTICULATELY.

Proponent; propounder. He who offers for proof, before a court of probate, a writing purporting to be a will.

PROPRIA. See PROPRIUS.

PROPRIETOR.[4] 1. Owner.

In the copyright laws, the representative of an artist or author who might himself obtain a copyright.[5]

From the act of 1790 down to 1870, there could be no "proprietor" except the owner of the work of a citizen or resident author, including a transferee of such resident's right of copyright. When, therefore, in the act of 1870, the word "proprietor" is found used, for the first time, in connection with the words "author, inventor, designer," as a person to whom a copyright may be granted, it must be construed, if possible, in harmony with the inflexible policy and intent of the copyright law up to that date, and held to be used in the sense in which the word had always been used in our copyright law, viz., as meaning the lawful owner and representative, whether by assignment, employment, death, or other lawful succession, of the exclusive rights of some native or resident author or artist only. The proprietor of a *native* work is intended.[6] See PRINT.

Proprietary. Belonging to ownership; belonging or pertaining to a proprietor — one who has the legal right or exclusive title to anything, whether in possession or not; an

[1] [Pollock, Contr. *6, quoting Indian (India) Contract Act, 1872.

[2] 2 Bl. Com. 224; 5 Pa. 166.

[3] L. *pro-ponere*, to put forward, propose.

[4] L. *proprius*, q. v.

[5] Yuengling *v.* Schile, 20 Blatch. 459, 461-62 (1883), Brown, J.

owner; relating to a certain owner or proprietor.[1]

2. A person in possession; a manager, or operator.

A law imposing a penalty upon the "proprietors" of a railroad, for negligence causing death, applies to a corporation owning and operating a road.[2]

PROPRIUS. L. One's own; individual.

Propria persona. In his own person; personally. Abbreviated *p. p.*

Applied to an appearance made, a pleading filed, or other thing done in court by a party "in person."

Proprio vigore. By its own force; intrinsically. The same as *ex proprio vigore.*

State rules of practice have no efficacy, *proprio vigore*, upon the United States courts. They must first be adopted.[3]

When judgment is affirmed by an appellate court, the sureties, *proprio vigore*, become liable to the same extent as the principal obligor.[4]

See under BONA, 2; INJURIA.

PROPTER. L. On account of; by reason of; owing to; for.

Propter affectum. Because of favorable inclination.

Propter defectum. For incompetency.

Propter delictum. For criminal conduct. See CHALLENGE, 4.

Propter impotentiam. On account of helplessness. See ANIMAL.

Propter privilegium. By virtue of special exemption. See ANIMAL.

PROSECUTE.[5] To carry on a judicial proceeding; in particular, a proceeding of a criminal nature.

Prosecute with effect. To carry on, with due diligence, to a final issue or judgment, and without fraud or unnecessary delay: as, to prosecute an appeal, or a writ of error.[6]

The condition to prosecute a replevin bond "with effect" is to be construed as meaning with success, or to a successful termination. The condition is broken by a dismissal of the action.[7]

Prosecution. 1. The act of conducting any judicial proceeding; also, such proceeding itself.

2. Specifically, a suit in a criminal court.

3. The informant or complainant in a penal or criminal proceeding, and his counsel.

The manner of formal accusation of crime, which is by presentment, indictment, or information.[1]

A criminal proceeding at the suit of the government.[2]

Criminal prosecution. A prosecution in a court of justice, in the name of the government, against one or more individuals accused of crime.[3]

In the provision that "in all prosecutions the accused shall have a speedy trial," the reference is to criminal prosecutions for violation of the laws of the State, not to prosecutions for violating city ordinances.[4]

Malicious prosecution. A prosecution on some charge of crime, which is willful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or is bound to know are wrong and against the dictates of public policy.[5]

"Malicious" is not used in the sense often ascribed to it. There may exist ill-will, malevolence, spite, a spirit of revenge, or a purpose to injure without cause; but not necessarily so.[6]

When the general issue is pleaded, the plaintiff must prove: the fact of the prosecution; that the defendant was the prosecutor or instigator; that the proceedings were finally determined in favor of the accused; that the charge was unfounded; that it was made without probable cause; and that the defendant was actuated by malice. Malice alone is not sufficient, as a person actuated by the plainest malice may nevertheless prefer a well-founded accusation, and have a justifiable reason for the prosecution of the charge.[6]

In trespass against a collector of revenue for a wrongful seizure, the sole question is probable cause.[7]

Malice and the want of probable cause must both concur. The existence of malice is always for the jury. The question of probable cause is for the court, on the facts found. Malice may be inferred from the want of probable cause, but the want of probable cause cannot be inferred from any degree of even express malice. Failure in a suit is not evidence of either malice or want of legal cause.[8]

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[1] Ferguson *v.* Arthur, 117 U. S. 487 (1886): The Imperial, Webster's, and Worcester's Dictionaries; Duty Laws, R. S. § 2504, Sched. M. p. 480.

[2] Commonwealth *v.* Boston, &c. R. Co., 11 Cush. 512, 516 (1853).

[3] The Mayor *v.* Lord, 9 Wall. 413 (1869).

[4] 101 U. S. 15; 1 Black, 266; 86 Pa. 127.

[5] L. *prosequi*, q. v.

[6] Kasson *v.* Brocker, 47 Wis. 87-88 (1879), Taylor, J.

[7] Boom *v.* St. Paul Foundery, &c. Co., 33 Minn. 254 (1885), cases, Dickinson, J.; 101 U. S. 15; 7 Conn. 436; 5 C. & B. 284; 8 M. & W. 477.

[1] [4 Bl. Com. 301.

[2] Tennessee *v.* Davis, 100 U. S. 269 (1879), Strong, J.

[3] Harger *v.* Thomas, 44 Pa. 130 (1862): 1 Chitty, Cr. L.; State *v.* Williams, 34 La. An. 1199 (1882); 30 Kan. 763; 3 A. K. Marsh. 74.

[4] State *v.* City of Topeka, 36 Kan. 87-88 (1886), cases.

[5] Hamilton *v.* Smith, 39 Mich. 229 (1878), Graves, J.

[6] Wheeler *v.* Nesbitt, 24 How. 549-50 (1860), Clifford, J.

[7] Stacey *v.* Emery, 97 U. S. 645 (1878), Hunt, J.

[8] Stewart *v.* Sonneborn, 98 U. S. 192-96 (1878), cases. Strong, J. See further McCarthy *v.* De Armitt (Pittsburgh Riot, July, 1877), 99 Pa. 63 (1881), cases; Jones *v* Jones, 71 Cal. 89 (1886); Neall *v.* Hart, 115 Pa. 354 (1887):

Legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive; it is not essential that actual malevolence or corrupt design be shown.[1]

The criminal prosecution must have terminated — by a verdict of not guilty, by an ignoring of the bill, by the entry of a *nolle prosequi*, or by a discharge of the accused from bail or imprisonment.[2]

No action lies to recover damages for the prosecution of a civil suit, however unfounded, where there has been no actual interference with either the person or the property of the defendant.[3]

See CAUSE, Probable; CRIME; INDICTMENT; MALICE; SUSPICION, 3.

Prosecutor. He who carries on or maintains any criminal proceeding. **Prosecutrix.** The feminine form of the Latin word.

Public prosecutor. An officer of government, as the attorney-general, or a district or county attorney, whose duty it is to conduct criminal proceedings on behalf of the people. See ATTORNEY-GENERAL.

PROSEQUI. L. To pursue: sue, prosecute.

Nolle prosequi. To not wish to prosecute. See NOLLE, Prosequi.

Non prosequitur. He does not prosecute. Said of a judgment in a civil action for some default in the plaintiff, as, a failure to file a declaration or other pleading. Spoken of, briefly, as a *non pros.*, and the plaintiff is said to be "nonpros'd."[4] Compare NONSUIT.

PROSPECT. See LANDSCAPE; LIGHT.

PROSPECTIVE. See DAMAGES; RETROSPECTIVE; STATUTE.

PROSPECTUS. The purpose of a prospectus of an intended company is merely to invite persons to become allottees of the shares, or original stockholders in the company.

A prospectus of an intended company ought not to misrepresent actual and material facts, or to conceal facts material to be known, the misrepresentation or concealment of which may improperly influence and mislead the reader; for if he is thereby deceived into becoming an allottee of shares, and, in consequence, suffers loss, he may proceed against those who thus misled him.[1]

PROSTITUTE. A female given to indiscriminate lewdness for gain.[2]

But incontinence with one or two may suffice.[3]

A woman who is unchaste, who has surrendered herself to illicit sexual intercourse with men.[4]

Common prostitute. A public prostitute, who makes a business of selling the use of her person to the male sex for the purpose of illicit intercourse.[4]

A woman may be a prostitute and have illicit connection with one man only; but, to be a "common" prostitute, her lewdness must be more general and indiscriminate.[4]

Prostitution. 1. In its most general sense, the act of setting one's self up for sale, or of devoting to infamous purposes what is in one's power: as, the prostitution of talents or abilities, the prostitution of the press, etc. 2. In a more restricted sense, the act or practice of a female offering her body to an indiscriminate intercourse with men; the common lewdness of a female.[5]

Not defined at common law; offenses of the nature not being punishable by common-law tribunals. The definitions of Walker, Webster, and Johnston refer to the act of permitting illicit intercourse for hire, an indiscriminate intercourse, or what is deemed "public" prostitution: common, indiscriminate, sexual intercourse, in distinction from sexual intercourse confined exclusively to one individual. The word has been used in a more loose and general sense.[6]

While the testimony of prostitutes is to be closely scrutinized, credit is not to be withheld if the testimony appears to be worthy of confidence.[7] See ABDUCTION; BAWD.

PROTECTION. See ASSAULT; DEFENSE, 1.

"Nor shall any State . . deny to any person within its jurisdiction the equal protection of the laws."[8]

By "equal protection of the laws" is meant equal security to every one in his private rights — in his right to life, to liberty, to

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Brewer *v.* Jacobs, 22 F. R. 217-44 (1885), cases; 24 Cent. Law J. 563 (1887), cases; 26 *id.* 286-88 (1888); 12 F. R. 253; 35 Ind. 15, 286; 43 *id.* 65; 34 La. An. 246; 4 Cush. 289; 30 Minn. 518; 76 Mo. 669; 100 Pa. 94; 13 R. I 617; 64 Tex. 673.

[1] Cooley, Torts, 185; Peck *v.* Chouteau, 91 Mo. 149 (1886), cases.

[2] Lowe *v.* Wartman, 47 N. J. L. 413 (1885).

[3] Muldoon *v.* Rickey, 103 Pa. 112 (1883), cases; Burton *v.* St. Paul, &c. R. Co., 33 Minn. 191 (1885); 18 Cent. Law J. 242-45 (1884), cases; 32 Alb. Law J. 124-26, 145-48 (1885), cases.

[4] See 3 Bl. Com. 296, 316, 376.

[1] Peek *v.* Gurney, L. R., 6 Eng. & Ir. Ap. 377 (1873); Simons *v.* Vulcan Oil, &c. Co., 61 Pa. 202 (1869).

[2] State *v.* Stoyell, 54 Me. 27 (1866), Appleton, C. J.

[3] State *v.* Rice, 56 Iowa, 431 (1881).

[4] Springer *v.* State, 16 Tex. Ap. 593 (1884), Willson, J.

[5] [Carpenter *v.* People, 8 Barb. 610 (1850), Welles, P. J.

[6] Commonwealth *v.* Cook, 12 Metc. 97 (1846), Dewey, J.; Fahnestock *v.* State, 102 Ind. 162-63 (1885); cases.

[7] Paul *v.* Paul, 37 N. J. E. 25 (1883), cases.

[8] Constitution, Amd. XIV, sec. 1.

property, and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances.[1] See CITIZEN, page 184.

The inhibition quoted was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation "person" a private corporation is included.[2]

Legislation which applies to particular bodies or associations, imposing upon them additional liabilities, is not forbidden, if all persons brought under its influence are treated alike under the same conditions.[3]

PROTEST.[4] A declaration, more or less formal, against an act about to be done or already done, intended to express dissent on the ground of impropriety or illegality, to preserve a right which otherwise might be held relinquished, or to exonerate from a liability which might otherwise attach.

1. Objection, disapproval, dissent: as, to pay money under protest.

Duties or taxes illegally demanded may be paid "under protest" and the receiver afterward be compelled to refund them. Such payments are involuntary.[5]

Under acts relating to the recovery of duties paid under protest, a written protest, signed by the party making it, with a definite statement of the grounds, is a condition precedent to the right to sue for a recovery.[6]

Protests against the levy of duties are commercial documents, and if they are sufficiently formal and accurate to inform the collector distinctly of the position of the importer, the object of the statute requiring them is accomplished. They have always been liberally construed by the courts, and great formality or fullness is not required.[7]

See further PAYMENT, Involuntary.

2. Referring to commercial paper, in a strictly technical sense, not applicable to a promissory note. The word, however, by general usage has acquired a more extensive signification, and in a given case may include all the acts which by law are necessary to charge an indorser on such paper.[1]

The formal declaration drawn up and signed by a notary that he presented a [foreign] bill of exchange for acceptance or payment and that that was refused. But, with business men, includes all the steps necessary to charge an indorser.[2]

Demand of payment of a note in proper form and at a proper time; and, in case of non-payment, due and reasonable notice to the indorsers, by any suitable person.[3]

In the popular sense, includes demand of the maker and notice of non-payment to indorsers.[4]

Mercantile paper which has "gone to protest" is said to be dishonored, *q. v.*

Protest includes, in a popular sense, all the steps taken to fix the liability of a drawer or an indorser. When there is nothing else in a **waiver of protest** to limit the meaning, the word must be taken as used in that sense, whether applied to foreign or domestic bills or to promissory notes.[5]

The object of the notice is to enable the indorser to take measures for his own security. The language used should be such as to reasonably apprise the party of the particular paper on which he is sought to be charged.[6]

Supra protest. Over protest: said of acceptance of a bill of exchange by a person not a party to it, after a protest for non-acceptance by the drawee; also, of a payment, by such a person, after protest for non-payment.

When a bill is protested for non-acceptance or for better security, any person may accept it *supra protest*, for the honor of the drawer or of any indorser The acceptor personally appears before a notary, with a witness, and declares that he accepts the bill in

[1] County of Santa Clara *v* Southern Pacific R. Co., 18 F. R. 398 (1883), Field, J.; *ib.* 450–51, cases. See also Claybrook *v.* City of Owensboro, 16 *id.* 302–3 (1883), cases.

[2] Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 188 (1888).

[3] Missouri R. Co. *v.* Mackey, 127 U. S. 209 (1888).

[4] L. *protestari*, to bear witness.

[5] Philadelphia *v.* The Collector, 5 Wall. 732 (1866); 13 Pet. 267; 17 F. R. 505.

[6] Nichols *v.* United States, 7 Wall. 126 (1868); R. S. §§ 2931–32, 3011–12, cases.

[7] Herman *v.* Schell, 18 F. R. 892 (1884), cases, Coxe, J.; United States *v.* Lang, *ib.* 15 (1883).

[1] Coddington *v.* Davis, 1 N. Y. 189 (1848), Gardiner, J.; 1 Comst. 186; 3 Denio, 25; 1 Pars. Bills & N. 471, 575, 579, 582, cases.

[2] Townsend *v.* Lorain Bank, 2 Ohio St. 353 (1853), Ranney, J. See also McFarland *v.* Pice, 8 Cal. 636–37 (1837); Sprague *v.* Fletcher, 8 Oreg. 370 (1880).

[3] [Ayrault *v.* Pacific Bank, 47 N. Y. 575 (1872), Allen, J.

[4] [Brannon *v.* Hursell, 112 Mass. 70 (1873), Morton, J.; 2 Bl. Com. 469.

[5] Wolford *v.* Andrews, 29 Minn. 251 (1882); Baker *v* Scott, 29 Kan. 137 (1883); Annville Nat. Bank *v.* Ketterling, 106 Pa. 531 (1884); 2 Daniel, Neg. Inst. §§ 929, 1094–95; 42 Miss. 807; 37 Mo. 91; 53 Barb. 467; 7 Hun, 562.

[6] Bank of Cooperstown *v.* Woods, 28 N. Y. 559 (1864) 19 *id.* 518; Edwards, Bills, 289.

honor of a party named, and that he will satisfy the same at the appointed time; and he then subscribes the formula — "Accepted, *supra protest*, in honor of A. B.;" or, as is more usual, "Accepts, S. P."[1]

Payment *supra protest* is where a bill, protested for non-payment, is paid by another person for the honor of one of the parties. Any party to a bill may pay for honor; and so may a mere stranger, without previous request or authority. This is a provision of the law-merchant, introduced to aid the credit and circulation of bills of exchange. It extends to no other instruments.[2] See NEGOTIATE, 2.

3. When a vessel from a foreign port is compelled to put into a port for which it is not destined, the master, or person next in command, makes a protest, that is, a declaration under oath, as to the causes and circumstances of the distress or necessity.[3]

4. A declaration by a member of a legislative body that he dissents from some act or resolution of the body.

Protestation. Pleading so as to avoid an implied admission of a fact which cannot be positively affirmed or denied, is by a "protestation:" the party[4] interposes an oblique allegation or denial of the fact by protesting (*protestando*) that the matter does or does not exist; at the same time avoiding a direct affirmation or denial. Coke's definition is "an exclusion of a conclusion."[4]

Prevents the party from being concluded by a fact or circumstance which cannot be directly affirmed or denied without "duplicity," and which, without protest, he might be deemed to have tacitly waived or admitted.[4]

PROTESTANT. Includes all those who believe in the Christian religion and do not acknowledge the supremacy of the pope.[5]

The word is capable of sustaining a charitable bequest.

PROTHONOTARY.[6] The chief scribe in a court.[7]

The head clerk in some courts, whose principal duty is to make and preserve accurate records of proceedings in court, and as prescribed by law.

In England, prior to 1837, there were three such officials in the court of common pleas, and one in the king's bench.

[1] [Byles, Bills, 267.

[2] [Byles, Bills, 272.

[3] [R. S. § 2891.

[4] [3 Bl. Com. 311; Coke, Litt. 124; 1 Chitty, Pl. 534; Steph. Pl. 235.

[5] Tappan's Appeal, 52 Conn. 418 (1884), Park, C. J.; Beardsley v. Bridgeport, 53 *id.* 493 (1885).

[6] L. *protonotarius:* Gk. *prō'tŏs*, first, chief; L. *notarius*, scribe, clerk.

[7] [1 Bl. Com. 72.

PROUT. See RECORDUM, Prout, etc.

PROVE. See APPROVE; DERAIGN; PROBATE; PROOF.

Provable debts. See BANKRUPTCY.

PROVIDED; PROVISO.[1] Employed in contracts, deeds, wills, statutes, and treaties in the senses indicated by the authorities subjoined.

"Provided" is an apt word to create a condition. Yet it may not import a condition: it is often used by way of limitation or qualification, especially when it does not introduce a new clause, but only serves to qualify or restrain the generality of a former clause.[2]

No word better expresses a condition; and it is always so taken, unless the context shows the intent was to create a covenant.[3]

"Provided," "so that," and "if it shall happen" are all of the same import as "on condition." "Provided always" may constitute a condition, limitation, or covenant, according to the circumstances.[4] See IF.

"Provided always" refers to all that has gone before, and qualifies preceding limitations.[5]

"Provided" or "proviso," in a deed or will, though appropriate to constitute a common-law condition, does not invariably or necessarily do so. Giving way to the intent, may express a limitation in trust.[6]

"Proviso," in a statute, is generally intended to restrain the enacting clause; to except something which otherwise would have been within it; in some measure to modify it.[7]

In deeds and laws "proviso" is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided.[8]

In a statute, excepts something from the enacting clause, qualifies or restrains its generality, or excludes some possible ground of misinterpretation, as, extending to cases not within the purview.[9]

Carves special exceptions out of the body of a statute.[10]

Is ordinarily confined to the last enactment; but the context may evince a different intent.[11]

He who sets up any such exception must establish

[1] L. *pro-videre*, to foresee, act with foresight. *Proviso:* it being provided.

[2] Chapin v. Harris, 8 Allen, 596 (1864), Gray, J.

[3] Rich v. Atwater, 16 Conn. 419 (1844), Williams, C. J.

[4] Heaston v. Commissioners, 20 Ind. 403 (1863), Worden, J.

[5] Martelli v. Holloway, 5 L. R., H. L. 549 (1872).

[6] Stanley v. Colt, 5 Wall. 166 (1866), Nelson, J.

[7] Wayman v. Southard, 10 Wheat. 30 (1825), Marshall, Chief Justice.

[8] Voorhees v. Bank of the United States, 10 Pet. 471 (1836), Baldwin, J.

[9] Minis v. United States, 15 Pet. 445 (1841), Story, J.

[10] United States v. Dickson, 15 Pet. 165 (1841), Story, J.; Ryan v. Carter, 93 U. S. 83 (1876).

[11] Friedman v. Sullivan, 48 Ark. 215 (1886), cases; Exp. Lusk, 82 Ala. 523-23 (1886), cases.

it, as being within the words as well as within the reason of the law.[1]

An "exception" is of that which otherwise would be included in the category from which it is excepted.[2] See EXCEPTION, 2.

PROVINCE. In a figurative sense, power, authority, prerogative: as, in saying that it is the province of the jury to decide the facts, and the province of the court or judge to decide the law.

PROVISION. That which is provided, arranged, or stipulated for: as, the provisions of a contract, of a will, of a constitution, statute, treaty.

A rule or doctrine established by judicial decision is a "provision of law," equally with one enacted by the legislature.[3] See PROVIDED.

PROVISIONAL. Temporary; for the time being: as, a provisional — assignee, committee, court, injunction or other remedy.

PROVISIONS. See GROCERIES; HEALTH; MARKET; PERISHABLE.

The "provisions" of a ship mean articles of food or sustenance; her "stores" include wood, coal, and the like.[4] See NECESSARIES, 2.

Fat cattle,[5] Indian corn,[6] wine and brandy,[7] have been held to be provisions.

PROVISO. See PROVIDED.

PROVOCATION. See DEFENSE, 1.

No provocation by words, however opprobrious, will mitigate an intentional homicide, so as to reduce it to manslaughter.[8]

In the law of voluntary manslaughter, it is not the degree of the force with which a blow may be struck or an assault inflicted that constitutes "legal provocation," but it consists in an assault or battery of some degree which, under the attending circumstances, or by reason of its force, is calculated to create, and does create, sudden heat and passion.[9]

No provocation can render homicide justifiable or excusable; but it may reduce it to manslaughter.[10]

That circumstances of mitigation must form part of the *res gestæ* has been repeatedly ruled.[11]

In an action of trespass for an assault and battery the defendant cannot give in evidence, in mitigation of damages, matters of provocation on the part of the plaintiff, unless they happened contemporaneously with the assault and battery, or so recently as to induce the presumption that the assault was committed under the immediate influence of the passions excited by the provocation.[1]

PROXIMATE. See CAUSE, 1; DAMAGES; DOMINION.

PROXY. A shortened form of "procuracy:" procuration, agency.

A person empowered to act for another, as, to vote a share or shares of the capital stock of a corporation; also, the authority itself to represent the constituent.[2]

Shareholders cannot vote by proxy without special provision in the charter so to do.[3]

The right of voting by proxy at the meetings of an incorporated company is not a general right, and the party who claims it must show a special authority; but where, rejecting all votes cast by proxy, there is still a majority, the minority are bound.[4]

A shareholder in a national bank may vote by proxy, but no officer or employee of the bank may act as proxy.[5] See TRUST, 2.

PRUDENCE. Varies with the exigencies that require vigilance and attention, conforming in degree to the circumstances under which it is to be exercised.

"Ordinary care and prudence" imports that degree of care and prudence which a careful and prudent man would exercise in the same circumstances.[6] See CARE; DISCRETION.

PSYCHOLOGY. See INSANITY; PRESUMPTION.

PUBLIC.[7] 1, *n.* "The public" are the body of the people at large; the people of the neighborhood; the community at large; the people.

2, *adj.* Belonging to, concerning, of interest or importance to, affecting the people or community at large; for the accommodation or benefit of all persons; also, generally known. Opposed, *private*, q. v.

As in speaking of public or a public — act, administration, agent, assembly, attorney,

[1] United States *v.* Dickson, *ante*.

[2] United States *v.* Cook, 17 Wall. 177 (1872), cases: 1 Ld. Ray. 120; 1 B. & A. 48.

[3] Clark *v.* Lake Shore, &c. R. Co., 94 N. Y. 220 (1883).

[4] Crooke *v.* Slack, 20 Wend. 177 (1838), Nelson, C. J.

[5] United States *v.* Barber, 9 Cranch, 243 (1815); United States *v.* Sheldon, 2 Wheat. 119 (1817).

[6] Atkinson *v.* Gatcher, 23 Ark. 103 (1861).

[7] Mooney *v.* Evans, 6 Ired. Eq. 363 (1849).

[8] Commonwealth *v.* Webster, 5 Cush. 305 (1850), Shaw, C. J.

[9] Williams *v.* Commonwealth, 80 Ky. 316 (1882), Hargis, J.

[10] Honesty *v.* Commonwealth, 81 Va. 298 (1886).

[11] Bonino *v.* Caledonio, 144 Mass. 302 (1887); 2 Greenl. Ev. § 267.

[1] Keiser *v.* Smith, 71 Ala. 481 (1882): 2 Greenl. Ev. § 98; Field, Dam. § 604; 2 Sedg. Dam. 547; 1 Waterm. Treesp. § 266; 1 Sutherl. Dam. 227; 1 Mass. 11; 19 Johns. 319; 17 Iowa, 408; 17 Mo. 537.

[2] See 1 Bl. Com. 168, 478; 1 Paige, 590.

[3] Brown *v.* Commonwealth, 3 Grant, 209 (1856).

[4] Craig *v.* First Presby. Church, 88 Pa. 47 (1878): 2 Kent, 294; Angell & Ames, Corp. §§ 127, 131, 498.

[5] R. S. § 5144.

[6] Fassett *v.* Roxbury, 55 Vt. 555–56 (1883), Rowell, J.: 28 *id.* 180; 86 *id.* 580; 51 *id.* 131.

[7] L. *publicus*, belonging to the people.

auction, blockade, boundary, bridge, building, charity, conveyance, corporation, document, domain, easement, enemy, entertainment, exhibition, grant, health, highway, holiday, house or inn, indecency, land, law, notice, nuisance, office or officer, peace, place, policy, property, prosecutor, record, river, sale, school, seal, statute, stocks, trial, use, verdict, vessel, war, water, welfare, wrong, *qq. v.*

"Public" and "general" are sometimes used as synonymous, meaning merely that which concerns a multitude of persons; but in other connections "public" refers to that which concerns all the citizens, and every member of the state, while "general" refers to a lesser, though still a large, proportion of the community.[1] Compare GENERAL.

The word "public" is used variously, its specific meaning depending upon the subjects to which it is applied. This is illustrated in the different uses of the word as applied to law, statutes, debts, securities, and taxes.[2]

The word sometimes describes the use to which property is applied; at other times, the character in which it is held. If the use is of such a nature as concerns the public, and the right to its enjoyment is open to the public upon equal terms, the use will be public, whether compensation be exacted or not.[3]

PUBLICATION. 1. Making a thing known to the public; proclaiming to general hearing; exposing to general view.

As, putting forth a law in some printed form; exhibiting a deposition taken in chancery; inserting a summons or other order in a newspaper as an advertisement; the uttering of words in slander, and the declaring by pictures, signs, etc., in libel; a testator's statement that a designated writing is his will. See those general subjects.

2. Something, as, a book or print, which has been published — made public or known to the world. A writing as well as a printing may be "published." What constitutes a publication or a making public may be a question, and must generally depend upon the circumstances of each case.

But a private letter sent in a sealed envelope cannot be considered a publication within the statute against mailing indecent publications.[4] See OBSCENE.

The office of an "order of publication" is to notify parties, who are properly such, of the proceeding, and of the object sought; it is a substitute for a subpœna.[5]

It is a rule, without qualification or exception, that when it is sought to conclude a party by constructive "service by publication" there must be a strict compliance with the requirements of the statute: nothing can be taken by intendment; every fact necessary to the exercise of jurisdiction, based on the service, must affirmatively appear in the mode of service.[1]

An "award" is published when made and notice given to the parties.[2]

In "slander," words are published although spoken to one person, who knows them to be false.[3] See SLANDER.

But sending a letter containing a "libel" to the person defamed, where no third party hears or reads it, will not support an action for damages.[4] See LIBEL, 5.

As to publication by "statutes" and "ordinances," see PRESCRIPTION, 1; PROCLAMATION, 2; PROMULGATE. See also COPYRIGHT.

The publication of a "will" is the act of declaring or making known to the witnesses that the testator understands and intends the instrument subscribed by him to be his last will.[5]

Republication. A re-publishing; in particular, the revival of a will previously revoked or changed by the addition of one or more codicils.

PUBLICIST. A writer upon international law — the laws of nations, public law in its comprehensive sense.

PUBLISHER. One who by himself or his agent makes a thing publicly known; one engaged in the circulation of books, pamphlets, and other papers.[6] See EDITOR; MANUFACTURER; NEWSPAPER; PRINTER; UTTER, 2.

PUEBLO. In its original signification, people or population, but is now used in the sense of "town." It has the indefiniteness of that word, and, like it, is sometimes applied to a mere collection of individuals residing at a particular place, a settlement or village, as well as to a regularly organized municipality.[7]

[1] [1 Greenl. Ev. § 128.

[2] Morgan *v.* Cree, 46 Vt. 786 (1861), Peck, J.

[3] Gerke *v.* Purcell, 25 Ohio St. 241 (1874), White, J.

[4] United States *v.* Loftis, 8 Saw. 197 (1882), Deady, J.: s. c. 12 F. R. 673. See United States *v.* Gaylord, 17 F. R. 438 (1883), Drummond, J.

[5] Savary *v.* Da Camara, 60 Md. 148 (1882).

[1] Cissell *v.* Pulaski County, 3 McCrary, 449 (1881), cases; Hartley *v.* Boynton, 17 F. R. 876 (1883).

[2] Knowlton *v.* Homer, 30 Me. 556 (1849); 9 Bing. 605; 5 B. & Ad. 518; 1 N. J. L. 415.

[3] Marble *v.* Chapin, 132 Mass. 225 (1882).

[4] Spalts *v.* Poundstone, 87 Ind. 524-25 (1882), cases; 1 Am. L. Cas. 114.

[5] Lewis *v.* Lewis, 13 Barb. 23 (1852), Brown, J.; Watson *v.* Pipes, 32 Miss. 466 (1856): 2 Greenl. Ev. § 561.

[6] Leroy *v.* Jamison, 3 Saw. 377 (1875): Bouvier's Law Dict.

[7] Trenouth *v.* San Francisco, 100 U. S. 251 (1879).

At the time of the conquest of California, July 7, 1846, there was a Mexican pueblo at the site of the present city of San Francisco.[1]

Ownership of the lands in the pueblos could not in strictness be affirmed. It amounted to little more than a restricted and qualified right to alienate portions to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes. This right of disposition and use was, in all particulars, subject to the control of the government of the country. The right appears to have been common to the cities and towns of Spain from an early period in her history, and was recognized in the laws governing her colonies on this continent.[2]

Upon the conquest, the United States succeeded to the rights and authority of the Mexican government, subject only to their obligations under the treaty of Guadaloupe Hidalgo. Before the estate of the pueblo could become absolute and indefeasible, some action was required on the part of the United States. This action was taken by act of July 1, 1864. Down to that time, the city of San Francisco held under its original imperfect Mexican title only. Afterward, it was possessed of the fee "for the uses, and purposes specified" in the Van Ness ordinance. The State statute of limitations began to run, as to this title, July 1, 1864.[3]

The pueblo Indians in New Mexico held their lands by a right superior to that of the United States. Their title dates back to grants made by Spain before the Mexican revolution, fully recognized by the Mexican government, and protected by it in the treaty of Guadaloupe Hidalgo, by which the country and the allegiance of its inhabitants were transferred to the United States. "For centuries the pueblo Indians have lived in villages, with municipal government. They adopted the Spanish language, and the Christian religion as taught them by Spanish Catholic missionaries. They are a peaceable, industrious, intelligent, honest, and virtuous people. They are Indians only in feature, and in a few habits."[4]

PUFFING. See AUCTION.

PUGILISTS. See PRIZE-FIGHTING.

PUIS. See CONTINUANCE, 1.

PUNCTUATION. Compare GRAMMAR.

When the meaning of a clause in an instrument is doubtful, the court may insert punctuation to show of what construction the words are capable; and if by such aid the court is enabled to see that the language can bear an interpretation which will make the whole instrument rational and self-consistent, it is bound to adopt that interpretation, in preference to another which would attribute to the parties an intention utterly capricious, insensible and absurd.[1]

In the interpretation of written instruments very little consideration is given by the courts to the punctuation, and it is never allowed to interfere with or control the meaning of the language used. The words must be given their common and natural effect regardless of the punctuation or grammatical construction.[2]

When the punctuation is strictly consistent with one of two senses, equally grammatical, and inconsistent with the other, it should be allowed the force of opening the question of construction to receiving aid from the context, and from the purpose in view.[3]

PUNISH.[4] To afflict with pain or loss, with a view to amendment; to impose a penalty for the commission of a crime.

Punishable. Liable to punishment.[5]

May be punished, or liable to be punished.[6]

Not, must be punished, but liable to be punished.[7]

Punishment. Punishments are evils or inconveniences consequent upon crimes and misdemeanors, and inflicted by human laws, in consequence of disobedience or misbehavior in those to regulate whose conduct such laws are made.[8]

In *ex post facto* laws, "punishment" is synonymous with chastisement, correction, loss, or suffering to the party supposed to be punished, and not in the legal sense which signifies a penalty inflicted for the commission of crime. Wharton's definition, "the penalty for transgressing the law," is, perhaps, as comprehensive and accurate as can be given.[9]

The end of punishment is not atonement or expiation, but precaution against future offenses.[10]

The power is exercised through the means which the laws provide.[11]

A statute which describes an act as punishable and imposes a fine creates an offense.[12]

Field, J.; Grisar v. McDowell, 6 Wall. 372 (1867); More v. Steinbach, 127 U. S. 70, 78 (1888), cases.

[1] Trenouth v. San Francisco, *ante*.

[2] Townsend v. Greeley, 5 Wall. 336 (1866), Field, J.

[3] Palmer v. Low, 98 U. S. 16 (1878), Waite, C. J.; San Francisco v. Scott, 111 *id.* 768 (1884).

[4] United States v. Joseph, 94 U. S. 618, 616 (1876), Miller, J.

[1] *Re* Denny's Estate, 8 Irish Eq. 447 (1874), Christian, Ld. J.

[2] O'Brien v. Brice, 21 W. Va. 707 (1883), Snyder, J.

[3] Caston v. Brock, 14 S. C. 107 (1880), Willard, C. J.; Albright v. Payne, 43 Ohio St. 14-15 (1885), cases; 65 Pa. 311; 38 Wis. 434.

[4] F. *punire-, punir:* L. *punire*, to impose a penalty upon.

[5] Commonwealth v. Pemberton, 118 Mass. 42 (1875).

[6] United States v. Watkinds, 7 Saw. 94 (1881).

[7] State v. Neuner, 49 Conn. 233 (1881); 58 Ga. 200.

[8] [4 Bl. Com. 7.

[9] *Exp.* Garland, 4 Wall. 393 (1866), Chase, C. J. See also Matter of Bayard, 25 Hun, 546 (1881).

[10] [4 Bl. Com. 11, 252.

[11] *Exp.* Milligan, 4 Wall. 119 (1866).

[12] *Re* Jackson, 14 Blatch. 245 (1877).

Arbitrary punishment. Such punishment as in degree or kind is left wholly to the discretion of the judge, in distinction from such as is defined by statute.

Capital punishment. Punishment of death: originally, by decapitation.

Abolished in Maine (in 1887), in Rhode Island, and in Wisconsin. Except for treason, never existed in Michigan, until April 9, 1887.[1]

The legislature of New York, by an act approved in April, 1888, substituted electricity, as the means of executing persons sentenced to death, for hanging.

A century ago, in Massachusetts ten and in Delaware twenty crimes were punishable with loss of life.[2]

Corporal punishment. Any kind of corporal privation or suffering which is inflicted by a sentence, directly by way of penalty for an offense.[3] Also, such chastisement inflicted by a teacher.

The reasonableness of the punishment administered by a school teacher to a pupil is a question of fact. The teacher has a right to require obedience to reasonable rules and a proper submission to his authority, and to inflict punishment for disobedience; being governed, as to mode and severity, by the nature of the offense, the age, size, and physical condition of the pupil. And in punishing for a particular offense the teacher may take into consideration habitual disobedience.[4]

Cruel, unusual punishment. "Nor" shall "cruel and unusual punishments" be "inflicted."[5]

The kind and degree of punishment suited to particular offenses is a matter left to the discretion of the legislature, with the qualification above noted.[6]

Twice punished. "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[7]

The punishments in use under the colonial and provincial governments were: imprisonment in the common jail; hard labor in the workhouse or house of correction; the pillory; sitting on the gallows; cropping one or both ears; branding on one or both cheeks, with indelible ink, the letter T for thief, or B for burglar; whipping; sitting in the stocks; in case of larceny, restoration of threefold the value of the property with liability to be sold to service to pay it.[1]

No man can be twice lawfully punished for the same offense.

Although there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bringing the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.

In civil causes, the doctrine is expressed by the maxim that no man shall be "twice vexed" for one and the same cause. It is upon the foundation of this maxim that the plea of a former judgment for the same matter, whether for or against the defendant, is a good bar to an action.

In criminal law, the same principle is expressed thus: No one can be twice punished for the same crime or misdemeanor. Protection against the action of the same court in inflicting punishment twice is as clearly within the maxim as protection from the chances of a second punishment on a second trial. Hence the pleas *autrefois acquit*, *autrefois convict*.

These are principles of the common law, and embodied in all our constitutions. At the time they came into existence almost every offense was punished with death or other punishment touching the person.

A second trial may be had, without violating the principle, when the jury fail to agree and no verdict is rendered, or the verdict is set aside on motion of the accused, or on a writ of error prosecuted by him, or the indictment was found to describe no offense known to the law.

When a court has imposed a fine *and* imprisonment, where the statute only confers power to punish by fine *or* imprisonment, and the fine has been paid, the power of the court to punish further is gone. One judgment only can be pronounced; if that is unwarranted by law, the court cannot modify the judgment and impose a new sentence.[2]

Therefore, sureties on a distiller's bond cannot be subjected to the penalty attached to the commission of an offense, when the principal has effected a compromise with the government, under the sanction of an act of Congress, of prosecutions based upon the same offense and for the same penalty.[3]

The principle is, that one shall not be tried a second time for the same offense, after he has been once convicted or acquitted by a verdict of a jury, and judgment has been rendered against him or in his favor. There is no implication that he shall not be tried a second time if the jury in the first trial were discharged without giving a verdict, or if, having given a verdict, the judgment was arrested or a new trial granted at the request of the accused.[4]

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[1] See North Am. Rev., 1881, p. 557.

[2] 1 McMaster, Hist. Peop. U. S. 100. See 1 Steph. Hist. Cr. L. Eng. 457–58, 472–76.

[3] People *v.* Winchell, 7 Cow. 525 (1827), note.

[4] Sheehan *v.* Sturges, 53 Conn. 483–4 (1885), cases; Deakins *v.* Gose, 85 Mo. 485 (1885), cases: 24 Am. Law Reg. 662, 664–69 (1885), cases.

[5] Constitution, Amd. VIII. See same prohibition in the constitutions of the States.

[6] See Cooley, Const. 296; 18 Am. Law Reg. 681; 70 Cal. 1; 1 N. M. 415; 61 How. Pr. 294. On inequality in punishment, see 5 Cr. Law M. 16–31 (1884).

[7] Constitution, Amd. V. See same provision in the constitutions of the States.

[1] Jones *v.* Robbins, 8 Gray, 348 (1857); 1 McMaster, Hist. Peop. U. S. 100–1.

[2] *Exp.* Lange, 18 Wall. 163, 168–78 (1873), cases, Miller, J.; *Exp.* Gilmore, 71 Cal. 625 (1887).

[3] United States *v.* Chouteau, 102 U. S. 610 (1880).

[4] [2 Story, Const. § 1787. See Cooley, Const. Lim. 397,

A second punishment does not arise if the court had no jurisdiction; nor if the first indictment was clearly insufficient and invalid; nor if by any overruling necessity the jury are discharged without a verdict; nor if the term of the court ends before the trial is finished; nor if the jury was discharged before verdict, by consent of the accused, expressed or implied; nor if the first verdict was set aside on motion of the accused, or on error sued out in his behalf; nor if the judgment was arrested on his motion.[1]

Penalty, fine, and imprisonment are only one punishment for the same offense, although the penalty is recoverable in a civil action and the others are inflicted by criminal prosecution.[2]

See further ASSESS, 2; BURNING; COMMUTATION; JEOPARDY, 2; PEINE; PENAL; PILLORY; QUALIFY, 2; RACK; RETALIATION; SERVITUDE, Penal; VEX; WHIPPING.

PUNITIVE. See DAMAGES, Exemplary.

PUPIL. See PUNISHMENT, Corporal; SCHOOL.

PUR. In Law French, for. Sometimes spelled *pour*.

Pur autre vie. For the life of another. See VIE.

PURCHASE.[3] 1. Acquisition, procuring, suing out: as, the purchase of a writ of error.[4]

2. In a popular and confined sense, acquisition by way of bargain and sale or other valuable consideration.[5]

The transmission of property from one person to another by their voluntary act and agreement, founded on a valuable consideration. In judgment of law, the acquisition of land by any lawful act of the party, in contradistinction to acquisition by operation of law, and includes title by deed, by matter of record, and by devise.[6]

As to the purchase of negotiables, see DISCOUNT, 2.

3. In the law of real property, originally, any method of acquiring an estate otherwise than by descent.[7]

The possession of lands and tenements which a man has by his own act and agreement, and not by descent from any of his ancestors or kindred.[8]

In its technical sense, includes all modes of acquisition other than that by descent. But generally, in statutes as in common use, the non-technical sense is employed — acquisition by contract between the parties.[1]

The purchase of an estate includes every lawful method of coming to an estate by the act of the party, as opposed to the act of the law. It includes titles obtained by sale of personal property on execution by the sheriff, or by levy, or in execution of the right of eminent domain.[2] See OCCUPANCY; REDEEM.

Purchase-money. The consideration money paid or agreed to be paid to the vendor by the vendee of realty.[3]

Treated as a lien on the land sold, when the vendor has taken no separate security. The vendee ought not, in conscience, to be allowed to keep the estate without paying the consideration.[4]

The vendor, though he has made an absolute conveyance by deed, and though the consideration is in the instrument expressed to be paid, has an equitable lien for the unpaid purchase money, unless there has been an express or implied waiver. The lien is not affected by the vendor's taking the vendee's bond or bill single, or a negotiable promissory note, or a check, if not presented or if unpaid, or any instrument involving merely personal liability. Taking a note with a surety is a presumption, rebuttable, however, of an intent to rely exclusively upon the personal security, The lien will be enforced in equity against the vendee and all persons holding under him, except a *bona fide* purchaser without notice.[5]

The vendee's estate is equitable, and alienable as real estate held by a legal title. Any security for the purchase-money is personalty. The vendee cannot dispute the title of his vendor.[6] See further LIE Vendor's.

Purchaser. A vendee: a buyer.

The original word, *perquisitor*, meant one who acquired an estate by sale, gift, or other method than by descent. The expression "first purchaser" is still used in this sense.[7] See ANCESTOR; DESCENT.

In registry acts, a complete purchaser, a purchaser clothed with a legal title.[8]

May include one who buys at a judicial sale, as in the recording acts of Illinois.[9]

A purchaser of land for a valuable consideration is one who pays a fair value, or something approaching a fair value, for the premises.[10] See FAITH, Good.

[1] Coleman *v.* Tennessee, 97 U. S. 520 (1878), cases, Clifford, J., dissenting. See Smith *v.* State, 41 N. J. L. 598 (1879), cases.

[2] *Re* Leszynsky, 16 Blatch. 9, 18–20 (1879), cases.

[3] F. *purchacer*, to pursue eagerly, acquire.

[4] See 3 Bl. Com. 273.

[5] 2 Bl. Com. 241.

[6] 4 Kent, 509. See also 2 Washb. R. P. 401; 7 Tex. 135.

[7] 1 Bl. Com. 241; 2 *id.* 180, 181.

[8] 2 Bl. Com. 241: Litt. § 12; 96 Ill. 585; 20 Wend. 356; 34 Me. 572.

[1] Kohl *v.* United States, 91 U. S. 374 (1875), Strong, J.; 16 Op. Att.-Gen. 328.

[2] Burt *v.* Merchants' Ins. Co., 106 Mass. 364 (1871), Chapman, C. J.

[3] See 37 Ill. 441; 38 Md. 279; 15 Barb. 572.

[4] Chilton *v.* Braiden, 2 Black, 460 (1862), Grier, J.

[5] Cordova *v.* Hood, 17 Wall. 5–6 (1872) cases, Strong, J.; Mackrith *v.* Simmons, 1 Lead. Cas. Eq., H. & W., 235.

[6] Lewis *v.* Hawkins, 23 Wall. 125 (1874), cases, Swayne, J.; 2 Story, Eq. § 1212.

[7] See 2 Bl. Com. 220; 5 Pa. 166; 23 *id.* 207.

[8] Steele *v.* Spencer, 1 Pet. *559 (1828).

[9] McNitt *v.* Turner, 16 Wall. 361 (1872).

[10] Clark *v.* Troy, 20 Cal. 228 (1862).

Words of purchase. When, in a will, the limitation of a remainder is to a "son" or "sons," "children" or "issue," "heir" or "heirs" of the life tenant, if the word is a *descriptio personæ*, the descendant takes as a purchaser; if intended to comprehend a class to take by inheritance, the word is a term of "limitation," within the rule in Shelley's case. "Child" and "children" are always regarded as words of purchase, unless the testator unmistakably used them as descriptive of the extent of the estate given, and not to designate the donees, in which case they are words of limitation.[1]

"Children" is as certainly a word of purchase as "heirs of the body" are words of limitation. This is the rule, but a testator may evince a different intent.[2]

See further CHILD; HEIR; ISSUE, 5; LIMITATION, 2; SHELLEY'S CASE.

PURGE. To clear of a charge by one's own oath:[3] as, to the satisfaction of a court that by a certain act no contempt was intended. See CONTEMPT.

PURPART. See PART, 1.

PURPORT. The substance or general import of language.

The "purport" of a communication is its substance, as stated in any other than the identical words in which it was originally expressed. In libel, the exact words are required to be set out.

The substance of an instrument as it appears on the face of it to every eye that reads it. "Tenor" (*q.v.*) imports an exact copy.[4]

PURPOSE. End; view; design; intention, *q. v.*

"Purposely" means intentionally, designedly; as, to purposely commit a homicide.[5]

"For other purposes," added to the title of an act, covers every possible subject of legislation.[6]

To all intents and purposes, see INTENT.

Power to borrow money for any "public purpose" gives authority to a municipal corporation to borrow money to aid a railroad company making its road as a way for public travel and transportation, and it may issue bonds for the loan. As against *bona fide* holders of the bonds for value, the corporation is estopped from denying that the power was properly executed.[7]

Money borrowed in the service of such a power, for the construction of a plank road which leads from, extends to, or passes through the limits of the corporation, is borrowed for a "public purpose."[8]

Any legitimate expenditure of a State necessary to be provided for by a State tax, is a "State purpose."[1] See AID, Municipal.

See CITY; CORPORATE; LITERARY.

PURPRESTURE.[2] A close or enclosure; that is, when one encroaches or makes that several to himself which ought to be common to many.[3]

In old law-writers, an encroachment upon the king or his subjects. In common acceptation, now an encroachment upon the king, upon his demesne lands, or upon rights and easements held by him for the public, as, upon highways, public rivers, forts, streets, squares, bridges, quays, and the like.[3]

Where a house is erected or an enclosure made upon any part of the king's demesnes, or of a highway or common street, or public water, or such like public things.[4]

Any encroachment, however slight, upon public property, whether in highways, navigable streams, or streets, is a purpresture, which is in the nature of a trespass upon public property by an individual.[5]

Any erection upon navigable soil, without license, is an encroachment upon the public property of the sovereign,—a purpresture, which he may remove at pleasure, whether it tend to obstruct navigation or not.[6]

The term imports an enclosure made by a private party of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large—as of part of a public common, or of a highway by land or on water. Unlike a public nuisance, a purpresture may exist without putting the public to any inconvenience.[7]

PURSE. See BET; PRIZE, 1.

PURSUE. 1. To follow, in order to overtake or obtain.

Following immediately with intent to reclaim or recapture goods being carried off by a thief, or an escaping animal, is making "fresh pursuit."[8]

2. To use measures to obtain; to prosecute; to continue: as, to pursue a remedy. Compare SUIT, 1. See HAPPINESS.

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[1] 2 Washb. R. P 273-74, cases.

[2] Oyster *v.* Oyster, 100 Pa. 540 (1882); Haldeman *v.* Haldeman, 40 Pa. 35 (1861); 2 Jarman, Wills, 368.

[3] [4 Bl. Com. 287.

[4] Fogg *v.* State, 9 Yerg. 394 (1836), Reese, J. See also Commonwealth *v.* Wright, 1 Cush. 65 (1848); Myers *v.* State, 101 Ind. 381 (1884); Thomas *v.* State, 103 *id.* 426 (1885); 26 Iowa, 407; 29 Minn. 175; 68 Mo. 286; 2 Bish. Cr. Proc. § 413.

[5] Fahnestock *v.* State, 23 Ind. 262 (1864); 17 *id.* 307.

[6] Hadden *v.* The Collector, 5 Wall. 111 (1866).

[7] Rogers *v.* Burlington, 3 Wall. 654 (1865), Clifford, J.

[8] Mitchell *v.* Burlington, 4 Wall. 270 (1866).

[1] People *ex rel.* Thomas *v.* Scott, 9 Col. 422, 430 (1886).

[2] F. *pourpris*, a taking without authority; an enclosure,—4 Bl. Com. 167.

[3] [2 Story, Eq. 921, cases.

[4] [4 Bl. Com. 167.

[5] Wood, Nuisances, § 604.

[6] Weber *v.* Harbor Commissioners, 18 Wall. 65 (1873): Angell. Tid. W. 198.

[7] Attorney-General *v.* Evart Booming Co., 34 Mich. 472-73 (1876), Cooley, C. J. See also Wood, Nuis. § 604; 2 Ct. Cl. 401; 30 Ga. 512; 31 Minn. 302; 2 Johns. Ch. 381; 7 Barb. 548; 28 N. Y. 397; 2 Abb. N. Cas. 215.

[8] See 4 Bl. Com. 363; 3 *id.* 4.

PURVIEW.[1] The enacting part of a statute, in contradistinction to the preamble.[2] See ACT, 3; PROVISO; STATUTE.

PUT. 1, *v.* "To put one's self upon the country:" to express a readiness to submit the truth of an issue of fact to a jury; to request a jury trial in a civil action. See under COUNTRY, 2.

Put in fear. See ROBBERY.

2, *n.* The privilege, for a nominal consideration, of delivering personalty within a certain time at a specified price.[3]

A "call" is the privilege of calling or not calling for the subject-matter of the contract.

"Puts" and "calls" are merely options to sell or buy.[4]

The true idea of an option is embraced in what is called a "put" and "call,"—the former being the privilege of delivering or not delivering the thing sold; the latter, the privilege of calling or not calling for the thing bought.[5]

See STRADDLE; WAGER, 2.

PUTATIVE.[6] Supposed; reported; reputed: as, a putative—father, wife, marriage.[7] See BASTARD.

Q.

Q. As an abbreviation, commonly denotes *quare*, queen, *qui*, or *quod*.

Q. B. Queen's bench.

Q. B. D. Queen's Bench Division.

Q. C. Queen's counsel.

Q. c. f. *Quare clausum fregit*, why he broke the close. See CLOSE, 3.

Q. e. n. *Quare executionem non*, why execution should not (issue).

Q. S. Quarter sessions. See SESSION, 1.

Q. t. *Qui tam.* See ACTION, 2.

Q. v. *Quod videas*, which (word, title, subject) see. Plural *qq. v.*, which words, etc., see, consult, compare.

QUA. See QUI.

QUADROON. See WHITE.

QUÆRE. L. To question, inquire: query, inquiry.

Denotes that a point of law is not fully considered, and is deemed doubtful.

QUÆSTIO. L. An inquiry; question.

Ad quæstionem facti non respondent judices; ad quæstionem legis non respondent juratores. To a question of fact the judges do not respond; to a question of law the jurors do not respond. See JURY.

Cadit quæstio. The question falls: discussion is at an end; there is no room for argument.

Vexata quæstio. A mooted matter; a disputed point.

QUALIFY. 1. To make fit or capable; to be made or become fit or capable. Opposed, **disqualify.** See INTEREST, 2 (1).

2. To prepare one's self for the discharge of a duty, or the duties of an office.

To qualify as executor is to take an oath to discharge the duties of that trust.[1]

Qualification. The endowment or acquirement which renders eligible to place or position.[2]

"Qualifications" and "qualified," in the constitution of Kentucky, have their most comprehensive sense, referring not only to circumstances that render a citizen eligible to office, or entitle him to vote, but also to those that exempt him from all legal disqualifications for either purpose.[3]

Qualification relates to fitness or capacity for a particular pursuit or purpose. Webster defines it as "any natural endowment or any acquirement which fits a person for a place, office, or employment, or enables him to sustain any character with success."[4]

Disqualification from the pursuit of a particular vocation, from positions of trust, from the privilege of appearing in the courts, or of acting as an executor, administrator, or guardian, has been and, perhaps, may still be imposed as punishment.

Jurors in the Federal courts must have the qualifications required for jurors by the law of the State of which they are citizens to serve in her highest courts. Exceptions are made of certain officials, followers of some vocations, persons over a designated age, and persons infirm, or infamous.[5] "Qualifications" here refers to general qualifications as to age, citizenship, etc., not to bias, interest, and the like, which do not disqualify generally, but only at the instance of a party.[6] Conformity to State law is all that is required.[7]

3. To limit, restrict; to modify.

Predicated of one section of a statute in its operation upon another section; of an indorsement (*q. v.*)

[1] F. *pourvu*, provision.

[2] Payne *v.* Conner, 3 Bibb, 181 (1813).

[3] [*Exp.* Young, 6 Biss. 53-67 (1874), cases; 8 *id.* 218.

[4] See Pixley *v.* Boynton, 79 Ill. 353 (1875).

[5] Pearce *v.* Foote, 113 Ill. 234 (1885), Scott, J.

[6] L. *putativus: putare*, to think.

[7] Gaines *v.* Hennen, 24 How. 602, 554 (1860).

[1] See Hale *v.* Salter, 25 La. An. 324 (1873), Morgan, J.

[2] Hyde *v.* State, 52 Miss. 672 (1876), Chambers, J.

[3] [Hall *v.* Hostetter, 17 B. Mon. 785 (1856); Commonwealth *v.* Jones, 10 Bush, 744 (1874); 64 Mo. 102.

[4] [Cummings *v.* Missouri, 4 Wall. 319-20 (1866), Field, Justice.

[5] See R. S. § 800.

[6] United States *v.* Williams, 1 Dill. 495 (1871).

[7] United States *v.* Collins, 1 Woods, 502 (1873).

of a bill or note which restrains or enlarges liability as ordinarily understood; of a limited right of ownership in property (*q. v.*); of a base fee (*q. v.*).

Qualified. (1) Fitted by endowment or acquirement; capacitated; prepared; entitled.

Qualified elector. A person legally qualified to vote.[1]

A "legal voter" is a qualified elector who in fact votes.[1]

Qualified for office. Imports that the person has complied with the law, as, by giving a bond and taking the oath of office.[2]

"Qualified," in the expression "duly qualified," may refer to the condition or status of the officer or to the act of taking the oath.[3] See VACANCY.

Qualified voter. A person qualified to vote generally.[4]

In Colorado, a woman, not being such an elector, cannot, under the constitution, be appointed a notary.[4]

In the constitution of Mississippi, one qualified or entitled to vote, and actually voting.[5]

A voter is one who votes, not one merely qualified to vote.[6]

(2) Limited, restricted; modified: as, a qualified — indorsement, fee, property, *qq. v.* See also PROVIDED. Compare ABSOLUTE.

QUALITY. See CAVEAT, Emptor; DESCRIPTION, 1.

QUANDO. See ACCIDERE.

QUANTI. See QUANTUM, 1.

QUANTITY. See ABOUT, 2; DESCRIPTION, 1; DIVERS; ESTIMATE; MORE OR LESS; QUANTUM.

QUANTUM. L. 1. How much; as much as; so much; whatever.

Quanti minoris. Of how much less: what reduction.

In Louisiana, an action for an allowance on the price of property on account of a defect discovered after sale.[6]

Quantum damnificatus. How much he has been injured. See under DAMNUM.

Quantum meruit. Whatever he deserved.[7]

Quantum valebat. Whatever it was worth — work, labor, goods, etc. See COUNT, 4 (1), Common.

[1] [Sanford *v.* Prentice, 28 Wis. 362 (1871), Dixon, C. J.
[2] State *v.* Niebling, 6 Ohio St. 44 (1856), Bartley, C. J.
[3] [People *v.* Crissey, 91 N. Y. 636 (1883), Finch, J.; 77 Va. 300, 271.
[4] Notaries Public, 9 Col. 629 (1886).
[5] Carroll County *v.* Smith, 111 U. S. 565 (1884), Matthews, J.; 97 N. C. 233.
[6] Millandon *v.* Soubercase, 3 Mart. 297 (1825).
[7] See generally 20 Cent. Law J. 326-30 (1885), cases.

2. Amount; quantity: as, the *quantum* of consideration, damages, evidence.

QUARANTINE.[1] 1. The period of forty days.

The time during which a widow may remain in her husband's chief "mansion-house" after his death, and until her dower is assigned her.[2]

This right was allowed, of dowable lands, by Magna Charta. In most of the States the period has been lengthened, as, to one whole year, or is of indefinite duration.[3]

2. The days during which persons arriving from an infected country must wait before they may land.[4]

The forty days probation by ships coming from infected countries, required by 26 Geo. II (1753), c. 26, and 29 Geo. II, c. 8.[5]

At present, the period varies with the exigencies of the case.

That power to establish quarantine regulations rests with the States, and has not been surrendered to the general government, was settled in the case of *Gibbons* v. *Ogden*.[6] The source of the power lies in the general right of a State to provide for the health of its people; and, although the power, when exercised, may, in a greater or less degree, affect commerce, yet quarantine laws are not enacted for that purpose, but solely for preserving the public health. If they injuriously affect commerce, Congress, under the power to regulate it, may control them. Of necessity, they operate on vessels engaged in commerce, and may produce delay or inconvenience, but they are still lawful when not opposed to the Constitution or any act of Congress.[7]

Beyond what is absolutely necessary for self-preservation, a State cannot establish quarantine regulations which interfere with transportation into or through its territory.[8]

The act of Congress of April 29, 1878, provides that no vessel or vehicle coming from a foreign port where any contagious or infectious disease may exist, or with infected passengers, merchandise, or animals, shall enter any port of the United States or pass the boundary line between the United States and any foreign country, contrary to the quarantine law of any State, except as prescribed in said act.[9]

The system of quarantine laws established by statutes in Louisiana is a rightful exercise of the police

[1] F. *quarantine* or *-taine*, forty days: *quarante:* L. *quadraginta*, forty.
[2] [2 Bl. Com. 135; 1 Steph. Com. 271.
[3] See 4 Kent, 62; 1 Washb. R. P. 222; 16 Ala. 148; 29 *id.* 662; 5 Conn. 462; 2 Mo. 163; 5 T. B. Mon. 561; 7 *id.* 337.
[4] [2 Bl. Com. 135.
[5] 4 Bl. Com. 161.
[6] 9 Wheat. 203 (1824).
[7] Peete *v.* Morgan, 19 Wall. 582-83 (1873), Davis, J.
[8] Hannibal, &c. R. Co. *v.* Husen, 95 U. S. 465 (1877).
[9] 20 St. L. 37: 1 Sup. R. S. p. 313.

power for the protection of health. While some of the rules may amount to regulations of commerce, though not so designed, they belong to that class which the States may establish until Congress acts in the matter by covering the same ground or forbidding State legislation. The requirement that each vessel passing a quarantine station shall pay a fee for examination as to her sanitary condition and the ports from which she came is a part of all quarantine systems; the fee is a compensation for services rendered to the vessel, not a tonnage tax. Nor does it give a preference for a port of one State over those of another: that provision (section nine of Article one) in the Constitution being a restraint upon the powers of the general government. Since the government was first organized, Congress has passed no law to protect the people against the invasion of contagious or infectious diseases from abroad, notwithstanding that yellow fever and the cholera have at times been epidemic. The reason is, no doubt, that Congress has believed that the power to do this belonged to the States, or that what ought to be done could be more efficiently done by local authorities familiar with the matter.[1]

See COMMERCE; HEALTH; POLICE, 2.

QUARE. See Q.

QUARRY. See LAND; MINES; WASTE, 2.

In the Latin of the later ages, *quadratarius* was a stone-squarer. The French *quarriere*, the original of quarry, meant the place where stone is cut into squares — a stone pit, referring to a place upon or above, not under, ground.[2]

When land is leased with an *open* quarry, the lessee, unless restrained by the contract, may remove the stone; but he has no right to open a *new* quarry.[3]

QUARTER. See COIN; SESSIONS; TREASON.

QUARTO. See DIES, Quarto.

QUASH.[4] To make void or abate;[5] to overthrow, annul.[6]

A plea in abatement prays that the writ or declaration be quashed — *cassetur breve*.[6]

The ground for exercising the summary power of quashing writs is to clear the record of irregular, void, or defective proceedings.[6]

When an indictment is so defective that a valid judgment cannot be given upon it, should the accused be convicted, the court, upon application, may quash it; or the accused may assign the defect as ground for an arrest of judgment.[7]

Not being a matter of right, but of privilege, the motion will not be received when presented at an unreasonable time, as, after issue joined on a plea of not guilty.[1]

QUASI. L. As if; like, corresponding to. Marks resemblance, yet supposes difference, between objects.[2]

Thus, one may become a *quasi* accomplice;[3] bank-notes are *quasi* cash;[4] a common carrier is a *quasi* public officer;[5] and the postmaster-general is a *quasi* common carrier.[6] There may be a *quasi* deposit, as, in finding; and a *quasi* derelict.[7] The right of stoppage *in transitu* constitutes a *quasi* lien.[8] The decisions of administrative commissioners are of *quasi* judicial character.[9] A bill of lading is only *quasi* negotiable.[10] Acts of *quasi* ownership of realty include all acts short of taking possession.[11] Fixtures, chattels real, and leases for years are *quasi* personalty; heirlooms, and title deeds, *quasi* realty.[12] A surety is a *quasi* party, subject to jurisdiction.[13]

Quasi contract. An unassented-to obligation in the nature of a contract.

As, the liability of an heir under his ancestor's covenant respecting realty, or of an executor or administrator for the debt of the decedent.

Quasi corporation. A body which exercises certain functions of a corporate character, but which has not been created a corporation by any statute.[14] See further CORPORATION, Quasi.

Quasi crimes. Offenses not crimes or misdemeanors, but in that nature — a class of offenses against the public which have not been declared crimes.[15]

In Louisiana, certain offenses are termed *quasi* offenses. Thus, what is an offense in a servant is a *quasi* offense in the employer.[16]

Quasi records. The books of a distiller, required to be kept by the revenue laws, are an example.[17]

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[1] Morgan *v.* Louisiana, 118 U. S. 455, 466 (1886), Miller, J.

[2] [Bell *v.* Wilson, L. R., 1 Ch. Ap. Cas. *309 (1866), Turner, L. J.

[3] See Bainbridge, Mines, 2.

[4] F. *quasser*, to break: L. *quassare*, to shatter.

[5] [3 Bl. Com. 308.

[6] Crawford *v.* Stewart, 33 Pa. 86 (1860); United States *v.* Rosenburgh, 7 Wall. 583 (1868).

[7] Commonwealth *v.* Eastman 1 Cush. 214 (1848).

[1] Richards *v.* Commonwealth, 81 Va. 114-15 (1885), cases.

[2] See People *v.* Bradley, 60 Ill. 402 (1871).

[3] 1 Greenl. Ev. § 382.

[4] 2 Chitty, Bl. Com. 384.

[5] 3 Pars. Contr. 357 c.

[6] 3 Pars. Contr. 249.

[7] The Nicholaus, 1 Newb. 449 (1853).

[8] 1 Pars. Contr. 599.

[9] Clinkenbeard *v.* United States, 21 Wall. 70 (1874).

[10] Nat. Bank *v.* Merchants' Bank, 91 U. S. 98 (1875).

[11] 3 Pars. Contr. 394.

[12] Wharton's Law Dict.

[13] Blossom *v.* Milwaukee, &c. R. Co., 1 Wall. 656 (1863).

[14] School District *v.* Insurance Co., 103 U. S. 708 (1880), Miller, J.; 91 *id.* 552; 2 Wall. 508.

[15] Wiggins *v.* City of Chicago, 68 Ill. 375 (1873), Walker, J.; 29 Minn. 133, 452.

[16] Case *v.* Citizens' Bank, 100 U. S. 450 (1879).

[17] United States *v.* Myers, 1 Hughes, 534 (1875); R. S. § 3308.

QUAY. Is a space of ground appropriated to public use: such use as the convenience of commerce requires.[1]

QUE ESTATE. See PRESCRIPTION, 8.

QUEEN. See BENCH; KING.

QUERELA. See AUDIRE, Audita.

QUERY. See QUÆRE.

QUESTION. Interrogation; inquiry; examination. Compare QUÆSTIO.

1. An interrogation addressed to a witness, requesting him to state his personal knowledge as to a fact.

Categorical questions. A series of questions presented in a logical or systematized order; as, the questions propounded in an application for a contract of life insurance.

General question. Requests witness to state all he knows, without directing his attention to a particular matter, as is done in a leading question.

Leading question. A suggestive interrogation.

Puts into a witness's mouth words to be echoed back; plainly suggests the answer desired.[2]

Suggests to the witness the answer he is expected to make, and leads him to make such answer.[3]

A question is also objectionable as leading which embodies a material fact, and admits of answer by a simple affirmative or negative.[4]

Leading questions are not allowed, except: on cross-examination; on a matter introductory to a material part of the inquiry; when the witness appears hostile to the party calling him, is unwilling to testify, or, from want of recollection which a suggestion may assist, makes an omission in his testimony; and in cases where the mind cannot be directed to the subject without particularization. Allowing leading questions is a matter wholly within the discretion of the court.[5]

2. Subject of inquiry; a matter under examination or discussion.

May be of pure fact, of pure law, or of both fact and law; in the last case constituting a **mixed question.** See JURY; RESERVE, 6.

Federal question. See COURTS, p. 277.

[1] New Orleans *v.* United States, 10 Pet. *715 (1836), McLean, J.

[2] [People *v.* Mather, 4 Wend. 247 (1830): 1 Stark. Ev. 124.

[3] Harvey *v.* Osborn, 55 Ind. 544 (1877), Howk, J.

[4] [1 Greenl. Ev. § 434; 31 N. H. 488.

[5] See 1 Greenl. Ev. §§ 434-35; 1 Whart. Ev. §§ 449-504, 927; 3 Wash. 580; 11 F. R. 39; 4 Del. Ch. 311; 26 Miss. 159; 40 N. H. 47, 63; 6 Binn. 483; 23 Pa. 143, 440.

QUI; QUID; QUOD. L. Who, he who; which, that which; what; that.

Other inflections: *Cui*, to whom; *cuicunque*, to whomsoever; *cuilibet*, to any one; *cujus*, of what one, whose. *Quem*, which (objective); *quicquid*, whatever.

Qua. On which side; as far as; in so far as; considered as; as.

Freight *qua* freight;[1] a party *qua* party;[2] a judgment *qua* a judgment;[3] *qua* a contract; *qua* a regulation.[4]

Qui. He who; whoever.

Qui approbat. See APPROBARE.

Qui facit. See FACERE.

Qui hæret. See LITERA.

Qui non habet. See DARE.

Qui non prohibere. See PROHIBERE.

Qui prior tempore. See TEMPUS.

Qui sentit commodum. See COMMODUM.

Qui tacet. See CONSENSUS.

Qui tam. See ACTION, 2.

Quid. What.

Quid pro quo. What for what; one thing for another thing; also, an equivalent, a consideration — implied in every sale or exchange.[5] See CONSIDERATION, 2.

Quo. In what, with what, by what. See QUOAD; QUOUSQUE.

A quo. From which. Correlative, *ad quem*, to which.

Designate, respectively, the court or judge from which, and to which, a cause has been removed; also, the day from which (*dies a quo*) and the day to which (*dies ad quem*) a period is to be computed; and also, the limit from which, the starting point (*terminus a quo*), and the limit to which, the end (*terminus ad quem*) — as, the beginning and ending of a way, of a risk in marine insurance, of the descent of a title.

In quo. In which. See LOCUS; STATUS.

Quo animo. With what motive. See ANIMUS.

Quo jure. By what right. See JUS.

Quo warranto. By what authority. See at length WARRANTUM.

Quod. (1) What; that which.

Quod non apparet. See APPARERE.

Quod populus jussit. See REPEAL.

(2) That; to the end that.

Quod computet. See COMPUTARE.

Quod partitio fiat. See PARTITIO.

[1] 2 Allen, 90.

[2] 1 T. & H. (Pa.) § 577.

[3] 43 Pa. 409.

[4] 19 F. R. 711.

[5] 1 Bl. Com. 494; 2 *id.* 446.

Quod recuperet. See RECUPERARE.

Quorum. Of whom.

As a substantive, the number of members of a body whose presence is necessary to the transaction of business. See MAJORITY.

The commission of oyer and terminer was originally directed to the judges of the courts of Westminster, and several others, but the judges or serjeants at law only are of the *quorum*, so that the rest cannot act without the presence of one of them. The words of the commission ran "*quorum aliquem vestrum unum esse volumus*" — of whom we wish some one of you to be present. The justices referred to were eminent for their skill and discretion.[1]

QUIA. L. Because.

Quia emptores. Because purchasers. The initial words of 18 Edw. I (1291), c. 1, statute of Westminster 3, regulating sales of lands and tenements. See FEUD, Subinfeudation.

Quia timet. Because he fears. A bill in equity in the nature of a writ of prevention to accomplish the ends of precautionary justice.[2]

Ordinarily, prevents anticipated mischief, and is not merely to redress it when done. The party seeks the aid of the court "because he fears" some future probable injury to his rights and interests. The manner in which this aid is given depends upon circumstances. The court may appoint a receiver to collect income; order a fund to be paid into court, or that security be given, or that money be paid over; or issue an injunction or other remedial process,— whether the right of enjoyment is present, or future and contingent.[3]

Is always used as a preventive process before a suit is actually instituted. A *bill of peace*, although sometimes brought before any suit is instituted to try a right, is generally brought after the right has been tried at law.[3] See QUIET, 2; PEACE, 1, Bill of.

QUICK. See DISPATCH; QUICKENING.

QUICKENING. See ABORTION; PREGNANCY.

Takes place about the sixteenth week from conception, yet may vary from the tenth to the twenty-fifth week.[4]

A woman is "quick with child" from the period of conception and the commencement of gestation; and she is "pregnant with a quick child" when the child has become quickened in the womb.[5]

QUIET. 1, *adj.* Peaceable, undisturbed, unmolested: as, quiet — enjoyment, possession, *qq. v.*

2, *v.* To settle the ownership or validity of, by ending disputes or litigation: as, to "quiet a title" to real estate.

The ground of bringing a suit to quiet title is, that the disturber, while asserting a claim which is a cloud on plaintiff's title, refuses to carry it to the test of a trial in court, and because he refuses to do this a court of equity stops his mouth.[1]

The decree operates by way of estoppel as to all parties and ends all litigation between them. Those only who have a clear, legal and equitable title to land connected with possession have any right to claim the interference of a court of equity to give them peace or dissipate a cloud.[2]

The defendant is forbidden, under contempt of court, to assert his title in conflict with complainant's title.[3]

See further CLOUD; PEACE, 1, Bill of.

QUIT. To abandon, relinquish, surrender, *qq. v.*

To quit a service is to abandon it, not to leave it expecting to return the next day.[4]

Referring to a *notice* to a tenant to give up possession of premises, has no technical meaning.

Is generally necessary where the relation of landlord and tenant exists, and no definite period is fixed for the termination of the estate. Where a lease is to expire at a certain time, the notice is not necessary, because to hold over would be a wrong.[5] See LEASE; MONTH; NOTIFY.

Quitclaim. *v.* To give up one's claim of title.

n. A deed in the nature of a release, containing words of release and of grant.[6]

Conveys such interest as the grantor may have, without covenants of title; but covenants against incumbrances imposed by him are usually added. The operative words are "remise, release, and forever quitclaim." The term presupposes a previous or precedent conveyance or a subsisting estate and possession.[7]

In Massachusetts, a deed of quitclaim passes all the estate which the grantor could convey by deed of bargain and sale. If he has in fact a good title, his

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[1] 4 Bl. Com. 270; 1 *id.* 357.

[2] [2 Story, Eq. §§ 826–27; 1 *id.* § 780.

[3] 2 Story, Eq. § 852; 1 Pomeroy, Eq. §§ 246–51; 3 *id.* § 1394; Holland *v.* Challen, 110 U. S. 20 (1884), cases; United States *v.* Wilson, 118 *id.* 87, 89 (1886); 7 Wall. 15; 3 Ala. 169.

[4] Denman, Midw. 129; 1 Leg. Gaz. R. 183

[5] Evans *v.* People, 49 N. Y. 89 (1872); 8 C. & P. 262; State *v.* Emerich, 18 Mo. Ap. 492 (1883).

[1] Wright *v.* Mattison, 18 How. 56–59 (1855), cases, Daniel, J.

[2] Orton *v.* Smith, 18 How. 265 (1855), Grier, J.; Frost *v.* Spitley, 121 U. S. 556 (1887), cases.

[3] *Re* Chiles, 22 Wall. 167 (1874).

[4] Heber *v.* United States Flax Manuf. Co., 13 R. I 305 (1881).

[5] Gregg *v.* Von Phul, 1 Wall. 281–82 (1863), Davis, J; Harland *v.* Eastman, 119 Ill. 26 (1886).

[6] See Nathans *v.* Arkwright, 66 Ga. 186 (1880).

[7] See Ely *v.* Stannard, 44 Conn. 533 (1877), Park, C. J.; Hoyt *v.* Ketcham, 54 *id.* 63 (1886); Thornton, Conv. 44; 2 Washb. R. P. 606.

deed conveys his estate as effectually as a deed of warranty.[1]

To charge a purchaser with notice of an unrecorded instrument, a secret lien or equity, his deed must purport to convey and quitclaim no more than the right, title or interest of the grantor. If the grantor conveys no more than his title, the presumption is that he had doubt as to his rights and notice of some opposing claim; and he expresses that doubt upon the face of a quitclaim deed. The use of "give, grant, bargain and sell," in addition to "remise, release, and forever quitclaim" the right of the grantor, such as it may be, will not change the character of the conveyance. A "release" is in most States equivalent to the word "quitclaim."[2]

The settled law of the Supreme Court is that one who takes by simply a quitclaim deed is not a *bona fide* purchaser without notice.[3]

Quit-rent. A rent paid by a freeholder in consideration of which he went free from all other services.[4]

QUO. See QUI; WARRANTUM.

QUOAD. L. As to; as regards; concerning.

A prohibition *quoad* is as to a particular thing among others.

A shareholder in a national bank, who, apprehending a failure of the bank, transfers his stock to an irresponsible person, will still be held as a shareholder *quoad* the creditors.[5]

Quoad hoc. As to this; as respects the matter in question.[6]

A purchaser or bidder at a master's sale subjects himself *quoad hoc* to the jurisdiction of the court as a party to the suit.[7]

QUOD. See QUI.

QUONDAM. L. Formerly; former: as, a person *quondam* infant.[8]

QUORUM. See QUI.

QUOTA. L. The feminine form of *quotus:* which or what in number, or order; of what number; how many; what part or portion. Apportionment.

The proportion or share of a common burden which belongs to several persons or places.[1]

QUOTATION. See ABRIDGE, 1; REVIEW, 3.

QUOTIES IN VERBIS. See AMBIGUITY.

QUOUSQUE. L. Until such time as; until: temporary or temporarily.

An execution *quousque* has force till the defendant does a thing required of him. Such, for example, is a *capias ad satisfaciendum*.

A prohibition *quousque* has effect until some act be performed, some event happen, or a certain time elapse, or otherwise, as is specified in the order.[2]

R.

R. As an abbreviation, may denote railroad, railway, real, *regina*, repeal, report, review, revision, *rex*, rolls, Roman.

R. L. Revised Laws; Roman Law.

R. S. Revised Statutes. See REVISE.

RACE. See CITIZEN, Amendment, XIV; COLOR, 1; SLAVERY.

RACES. See BETTING; GAME, 2.

RACEWAY. An artificial canal dug in the earth; a channel cut in the ground.[3] See AQUA, Currit, etc.

RACK. An engine of torture, consisting of a large frame upon which the body of a person could be gradually stretched until the joints became dislocated.[4]

Was used for extorting confessions from convicts and suspected persons.[4]

Trial by rack is unknown to the law of England. Certain ministers of Henry IV, as a beginning to the introduction of the civil law into the kingdom, erected a rack of torture in the Tower of London; and this was used as an engine of state, not of law, more than once in the reign of Elizabeth. When, however, upon the assassination of Villiers by Felton, it was proposed to put the assassin to the rack to discover who his accomplices were, the judges decided that the proceeding was not allowable.[5]

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[1] Kyle *v.* Kavanagh, 103 Mass. 359 (1869); Rawle, Cov. Titles, 36. Compare Cutler *v.* James, 64 Wis. 177–78 (1885), cases, holding that a quitclaim deed is a "conveyance."

[2] Richardson *v.* Levi, 67 Tex. 364, 367 (1887), cases, Willie, C. J.

[3] Oliver *v.* Piatt, 3 How. 410 (1845); May *v.* Le Claire, 11 Wall. 232 (1870); Villa *v.* Rodriguez, 12 *id.* 338 (1870); Dickerson *v.* Colgrove, 100 U. S. 584 (1879); Hastings *v.* Nissen, 31 F. R. 600 (1887). See generally 12 Cent. Law J. 127–30 (1881), cases; 33 Alb. Law J. 244–45 (1886), cases.

[4] [2 Bl. Com. 42.

[5] Bowden *v.* Johnson, 107 U. S. 261 (1882).

[6] See 1 Bl. Com. 91, 257, 430.

[7] Blossom *v.* Milwaukee, &c. R. Co., 1 Wall. 656 (1863); Minnesota Co. *v.* St. Paul Co., 2 *id.* 634 (1864).

[8] Eureka Company *v.* Edwards, 71 Ala. 256 (1881).

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[1] [Bridgewater *v.* Plymouth, 97 Mass. 390 (1867), Foster, J.

[2] See 1 Steph. Com. 637.

[3] Wilder *v.* De Cou, 26 Minn. 17 (1879).

[4] Webster's Dict.

[5] 4 Bl. Com. 326. See Penny Mag., vol. 1, pp. 53–54 (1832).

RADIUS. Within a radius of ten miles from a particular village means within ten miles from its center.[1]

RAFFLE. See GAME, 2; LOTTERY.

RAILROAD. "Railroad" and "railway" are as nearly exact synonyms as any two words in the language.[2]

May refer to the road-bed and track, with the superstructure — all that forms part of the completed road.[3]

A charter authorizing the construction of a road with one or more tracks, with warehouses, works, and other appendages for the convenient use of the road, confers the right to construct sidings, turnouts, stations, engine-houses, and all other works and appendages usual in the convenient operation of a road.[4]

Switches and side-tracks are essential to the use of "a road." Power to construct them need not be expressed in words; and the spot where they shall be located rests in the discretion of the company.[5]

There is no rule of law to restrict railroad companies as to the curves it shall use in its stations and yards, where the safety of passengers and of the public is not involved. The engineering question as to the curves proper in such places is not a question to be left to a jury to determine.[6]

"Railroad" *ex vi termini* includes sidings, branches, and like accessories.[7]

"Road" or "railroad" will include the principal road and all adjuncts.[8]

For the purpose of constructing a "railway" the company may construct such stations and other works as it deems proper.[9]

The right to construct sidings to private establishments may be granted by the legislature, because therewith the public interests are subserved.[10]

An extension of the main line may be a "branch."[11]

A "branch" is a section of a road. It may be an offshoot from the main road, or a direct extension from the terminus. The necessity for such branches, and their direction, rests in the judgment of the officers of the company.[12]

[1] Cook *v.* Johnson, 47 Conn. 177 (1879).

[2] State *v.* Brin, 30 Minn. 524 (1883).

[3] Beardsley *v.* Ontario Bank, 31 Barb. 624 (1859).

[4] Philad'a, W. & B. R. Co. *v.* Williams, 54 Pa. 103 (1867).

[5] Cleveland & Pittsburgh R. Co. *v.* Speer, 56 Pa. 325 (1867). See also Pfaff *v.* Terre Haute, &c. R. Co., 108 Ind. 144 (1886), as to the meaning of "track."

[6] Tuttle *v.* Detroit, &c. R. Co., 122 U. S. 189 (1887).

[7] Black *v.* Philadelphia & R. R. Co., 58 Pa. 252 (1868).

[8] St. John *v.* Erie R. Co., 22 Wall. 148 (1874).

[9] Lake Superior, &c. R. Co. *v.* United States, 12 Ct. Cl. 54 (1876): 93 U. S. 442; United States *v.* Chaplin, 31 F. R. 895 (1887). As to incidents, see 25 Am. Law Reg. 848-51 (1886), cases.

[10] Getz's Appeal, 10 W. N. C. 453 (1881).

[11] Howard County *v.* Boonville Central Nat. Bank, 108 U. S. 314 (1883).

[12] McAboy's Appeal, 107 Pa. 548, 558 (1884); Western Penn. R. Co.'s Appeal, 99 *id.* 155, 161 (1881).

Whether the word includes a horse or street rail road, or is to be confined to roads run by steam, depends upon the context and intent. In a general law authorizing consolidation of roads, held to include narrow-gauge roads and horse or street roads.[1]

"Road," referring to a street railway, is not a technical word, requiring explanation by experts. Under a contract that "the road, rolling and live stock" of a company should be exempt from taxation, stables, shops, and like conveniences were held not exempt.[2]

"Railroad" frequently means "railroad company."[3]

May mean all the land, not exceeding a certain amount in width, taken and included in the location — the surface of the land within the limits of the location.[4]

The "road-bed" is the bed or foundation upon which the superstructure of the railroad rests. The "roadway" includes all that and whatever ground the company is allowed on which to construct its road-bed and lay its track. As applied to common roads, the two words ordinarily mean the same thing.[5]

The track on which the steam-cars now transport the traveler or his property is called a road, sometimes, perhaps generally, a railroad. The term "road" is applied to it because in some sense it is used for the same purpose that roads had been used. But until the thing was made and seen no imagination could have pictured it from any previous use of the word road. So the inclosure in which the passengers travel is less like a "coach" than several other vehicles rarely if ever called coaches. It does not, therefore, follow that when a word was used in a statute or a contract seventy years since, it must be held to include everything to which the same word is applied at the present day. The structure over a stream for a railroad is called a "bridge," yet it is not like the bridge of olden time.[6]

When, in an act of Congress, a railroad is referred to in its character as a road, as a permanent structure, and designated and required to be a public highway, the term "railroad" cannot be extended to embrace the rolling stock or other personalty of the company. The reference in such case is to the immovable structure stretching across the country, graded and railed for the use of the locomotive and its train of cars. That such road shall be a "public highway," "for the use of the government, free of toll," etc., means that the road shall be open to the use of the public with their own vehicles, and that the government shall have

[1] Hestonville, &c. R. Co. *v.* Philadelphia, 89 Pa. 219-20 (1879); Chicago *v.* Evans, 24 Ill. 55 (1860); Johnson *v.* Louisville, &c. R. Co., 10 Bush, 232 (1874); 2 Duv. 175.

[2] Atlanta Street R'y Co. *v.* Atlanta, 66 Ga. 107-9 (1880).

[3] Calhoun *v.* Memphis, &c. R. Co., 2 Flip. 445 (1879).

[4] Commonwealth *v.* Haverhill, 7 Allen, 524 (1863); Worcester *v.* Western R. Co., 4 Metc. 567 (1842).

[5] San Francisco *v.* Central Pacific R. Co., 63 Cal. 469 (1883), Thornton, J.; 60 *id.* 34; 32 *id.* 499: 118 U. S. 413 (1886). See also Pfaff *v.* Terre Haute, &c. R. Co., 108 Ind. 144 (1886), cases.

[6] Bridge Proprietors *v.* Hoboken Co., 1 Wall. 147 48 (1863), Miller, J.; Omaha Horse R. Co. *v.* Cable Co., 30 F. R. 329 (1887).

the right to use the road, not to require its transportation to be performed by the railroad company.[1]

In theory, railroads are public highways. In practice, they are operated by the companies that own them, or by those with whom they have permanent arrangements for the purpose. These companies have a practical, if not a legal, monopoly of their use. In some States, as in Massachusetts, where railroads were originally declared public highways, the right of the public to use them has been expressly abrogated.[1] See WAY.

Railroad corporations are *quasi* public corporations dedicated to the public use. It is upon this idea that they have been invested with the power of eminent domain, and that they exercise the functions of common carriers. Their duties and liabilities are defined by law. In accepting their charters they necessarily accept them with all the duties and liabilities annexed. That is to say, they undertake to construct the roads contemplated by their several charters; to keep them in good condition; equip them with suitable rolling stock and safe machinery; employ skilled and trustworthy laborers; provide suitable means of access to and egress from their trains; erect depots and designate stopping-places whenever the public necessities require them; supply, to the extent of their resources, necessary and adequate facilities for the transaction of all the business offered; deal fairly and impartially with their patrons; keep pace with improvements in machinery; and adapt their service to the varying necessities and improved methods of doing business.[2]

A state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or inter-State commerce. This power of regulation is a power of government, and if it can be bargained away at all it can only be by words of positive grant or something which is equivalent in law. If there is a reasonable doubt, it must be resolved in favor of the existence of the power.[3]

Railroads are not natural highways of trade and commerce. They are artificial creations; constructed within the territorial limits of the State, by authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precautions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns, and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.[1]

See ACCIDENT; ALONG; AGENT; BOND; CARRIER; COMMERCE; COMPENSATION, 3; CONNECTION, 1; CONSOLIDATE; CORPORATION, Public; COUPON; DAMAGES; DEPOT; DOMAIN, 1; ENTRY, I, 3; EXTEND; EXPRESS, 2; FENCE; FERRY; FIXTURE; FRANCHISE, 1; FREIGHT; INTERSECT; LAND, Public; MAINTAIN, 1; MASTER, 2; MORTGAGE; NEGLIGENCE; OBSTRUCT, 1, 2; OVER, 1; PASSENGER; PERISHABLE; POOL; RECEIVER, 2; STATION, 2; STOCK, 2; STRUCTURE; TAKE, 8; TAX, 2; TELEGRAPH; TICKET; TIME-TABLE; TOLL, 2; TORPEDO; TORT, 2.

RAISE. To create; to call or bring into existence; to infer as the result of construction.

Raise a check, note, etc. To increase, by fraudulent means, the face amount or value of a check, promissory note, or other piece of commercial paper. See further NOTE, 2, Raised.

Raise a child. A child is "raised" when it attains twenty-one.[2]

Raise an issue. To produce an issue between parties pleading.

The plea of not guilty is said to "raise the general issue."

Raise portions. Settling realty upon an eldest son, and charging him with the payment of sums to his brothers and sisters.

Raise a presumption. A fact or circumstance, admitted or proven, is said to "raise a presumption" that some other fact, also in issue but not directly established, is or is not as alleged.

[1] Lake Superior, &c. R. Co. *v.* United States, 93 U. S. 442, 449-51 (1876), Bradley, J. See also Rogers *v.* Burlington, 3 Wall. 663 (1865); Pittsburgh, &c. R. Co. *v.* Baltimore, &c. R. Co., 38 Ohio St. 629 (1883); Hale *v.* County Commissioners, 137 Mass. 114 (1884).

[2] M'Coy *v.* Cincinnati, Indianapolis, &c. R. Co., 13 F. R. 7 (1882), Baxter, C. J. See also Munn *v.* Illinois, 94 U. S. 126-34 (1876), cases; Pierce *v.* Commonwealth, 104 Pa. 155 (1883), cases.

[3] Railroad Commission Cases, 116 U. S. 325, 334 (1886), cases, Waite, C. J.; Dow *v.* Beidelman, 125 *id.* 686 (1888); Georgia Railr. & Banking Co. *v.* Smith, 128 *id.* 179 (1888).

[1] Smith *v.* Alabama, 124 U. S. 481 (1888), Matthews, J.

[2] Shoemaker *v.* Stobaugh, 59 Ind. 598 (1877).

Raise a promise. To infer a promise made, as a matter of justice: as when it is said that the law will or will not "raise a promise" or "an *assumpsit*" from a transaction. See ASSUMPSIT.

Raise revenue. To bring revenue together; to collect revenue; not necessarily to increase the amount.

This is the meaning in the declaration that a bill "to raise revenue" shall originate in the popular house.[1] See REVENUE.

Raise a use. To call a use into existence; to infer a use to exist, by construction.

In this sense is the saying that equity will "raise a use" from a conveyance in fee without consideration.

RANK. Frequently expresses something different from office; is a designation or title of honor, dignity, or distinction conferred upon an officer to fix his position with reference to other officers in matters of privilege, precedence, and sometimes of command, or by which to determine his pay or emoluments.[2] See GRADE, 2; TITLE, 5.

RANSOM. 1. In old English law, money paid for the pardon of some great offense, or to redeem the person from imprisonment; the redemption of a corporal punishment.[3]

2. Redemption; repurchase.

A friendly belligerent may ransom the property of a neutral after capture.

A bill of exchange given as collateral security for the payment of the ransom of a vessel was held to be a contract on which an action could be sustained in a court of common law. Duress, arising from a threat to destroy vessel and cargo, will not avoid the contract, where the capture was justified by probable cause. A ransom is in the nature of a repurchase of the actual right of the captor as a prize-court would adjudicate it.[4]

RAPE.[5] The carnal knowledge of a woman forcibly and against her will.[6]

"It is not easy to express in one definition all the refinements of the decisions upon this subject, especially as statutory definitions differ, and peculiar cases may be stated which are punishable as rape in some jurisdictions while not in others." By the current of authorities, and by statutes, proof of penetration is all that is required; actual violence is not now necessary. If the act was committed without consent,—as where the woman is stupefied by drugs or liquors, or is deceived as to the nature of the act, or is overcome by duress or threats of murder,—the case may be rape, although there was no actual, continued resistance. A girl under ten is not competent to consent[1] (see SEDUCTION), nor is an older female of insane mind. Marriage gives permanent, irrevocable consent.[2]

A male child under fourteen is not conclusively presumed to be incapable of committing the crime.[3]

An assault with intent to commit rape is generally punishable as a distinct offense.

"Ravish" or "ravished" is indispensable in an indictment.[4]

It is a felony to force even a concubine or harlot: she may have forsaken her evil ways. . . The party ravished may give evidence, but the credibility of her testimony must be left to the jury. If she be of good fame, presently disclosed the offense, and made search for the offender who has fled: these and like circumstances give greater probability to her testimony. But, if she be of evil fame, unsupported in her testimony by others, concealed the injury a considerable time, and might have been heard, yet made no outcry: these and like circumstances create a strong but not a conclusive presumption that her testimony is not to be believed.[5]

The punishment varies in different jurisdictions. When the crime is committed on the high seas, or in ports, arsenals, etc., within the exclusive jurisdiction of the United States, it is punishable with death.[6]

See INDICTMENT; PROSTITUTE; WILL, 1.

RASURE. See ALTERATION, 2.

RATE.[7] 1. Rank, standard; proportion; value, price, amount: as, in rate or rates of fares, rate of exchange (*q. v.*), rating of vessels.

Rate means price, value. "Going rate" as to freight means an established price for the time.[8]

2. A sum assessed as a tax; in England, a local tax: as, the county, the borough, the poor rate.

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[1] Perry County v. Selma, &c. R. Co., 58 Ala. 557 (1877).

[2] [Wood v. United States, 15 Ct. Cl. 159 (1879), Richardson, J.

[3] See 4 Bl. Com. 380; Litt. 127.

[4] Maissonnaire v. Keating, 2 Gall. 325, 337-38 (1815), Story, J.

[5] Mid. Eng. *rape*, haste, hurry: seizure by force. A popular etymology connects it with L. *rapere*, to seize hastily,— Skeat.

[6] 4 Bl. Com. 210; Commonwealth v. Fogerty, 8 Gray, 490 (1857); 143 Mass. 37; 105 *id.* 376; 11 Ark. 409; 9 Fla. 183; 52 Ind. 187; 25 Mich. 359; 29 *id.* 284; 14 Neb. 207; 11 Nev. 257; 20 Tex. Ap. 155; 22 Wis. 445; 64 *id.* 474; 67 *id.* 552.

[1] See generally Commonwealth v. Roosnell, 143 Mass. 37-40 (1887).

[2] Abbott, Bouvier, Law Dicts.; 50 Conn. 579; 77 Mo. 157; 50 Wis. 518; 2 Bish. Cr. L. §§ 1107-36; 2 Whart. Cr. L. §§ 550-77.

[3] State v. Jones, 39 La. An. 935 (1887), cases.

[4] Davis v. State, 42 Tex. 228 (1875); 50 Barb. 182. 12 S. & R. 69; 8 Gray, 490; 3 Ind. 330.

[5] 4 Bl. Com. 213.

[6] R. S. §§ 5345, 5339.

[7] L. *rata (pars)*: *ratus*, reckoned, calculated. Compare PRO RATA.

[8] Barrett v. The Wacousta, 1 Flip. 519 (1870).

May apply to the percentage of taxation, or to the valuation of the property.[1]

Ratable. "Ratable estate," within the meaning of a tax law, is taxable estate.[2]

Rates of postage. See MAIL, 2.

RATIFICATION.[3] Acceptance or adoption of an act performed by another as agent or representative; in particular, confirmation of what has been done without original authority.[4]

An adoption of a contract made on our behalf by some one whom we did not authorize, which relates back to the execution of the contract and renders it obligatory from the outset.[5]

Requires some positive, assertive act. An "estoppel" may be created by silence.[6]

Refers to contracts between private persons, to treaties between states, and to changes proposed in written constitutions.

1. Ratification of the unauthorized act of another operates upon the act ratified as if authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. In other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made.[7]

It is by express consent, or by conduct inconsistent with any other hypothesis than that of approval; but inoperative, if the party sought to be charged was not competent to make the contract when the same was made, nor when the supposed act of ratification was performed, or if the contract was illegal, immoral, or against public policy.[8]

Where fraud is of such a character as to involve a crime, ratification of the act from which it springs is opposed to public policy, and, hence, cannot be permitted; but where the transaction is contrary only to good faith and fair dealing, where it affects individual interest merely, ratification is permitted. Thus, the forgery of an indorsement, being a criminal act, is incapable of ratification.[9]

Any ratification by an adult of his act done in infancy, of a clear and unequivocal character, showing an intention to affirm, will bind him. Mere acquiescence is not therefore enough. But it is not necessary that the act of affirmance be as solemn as the original act itself.[1]

A distinction is recognized between acts necessary to avoid and to confirm an infant's deed. Some assert that the avoidance must be by an act as solemn as the deed; some, that that cannot be done short of an act of entry; others, that it can be done by another deed to a different grantee. But all agree that acts which would not be sufficient to avoid such a deed may amount to an affirmance. Acquiescence, with other circumstances, may establish a ratification. The reason is, a confirmation is an act of a character less solemn than an avoidance, and it may well be effected in a less formal manner.[1]

No new consideration is required; but it is essential that the person sought to be charged have full knowledge of the facts in the case.[2]

If the principal ratifies that which favors him, he ratifies the whole, as far as it is not unlawful.[3]

To have a retrospective effect, as against the interest of a third party, there must be some mutuality between the ratifying principal and such party.[4]

See AFFIRM, 2; KNOWLEDGE, 1; RATIHABITIO; VOID.

2. Ratification of conventions between independent states. See TREATY.

3. Ratification of amendments to constitutions. See AMENDMENT, 2.

RATIHABITIO. L. Approval; ratification, *q. v.*

From *ratum-habere*, to have or to hold firm or established.

Ratihabitio mandato æquiparatur. A ratification is equal to a command.

Abridged from *omnis ratihabitio retrotrahitur et mandato (priori) æquiparatur*, every ratification relates back and is equivalent to a (prior) command. An act of ratification has a retroactive effect, and amounts to previously given authority.

Where the rights of strangers will not be prejudiced, no maxim is better settled in reason and law. In matters of simple contract, it is as applicable to corporations as to natural persons. The rule is, where the principal, upon full knowledge of all the circumstances of the case, deliberately ratifies the acts of his agent, he will be bound thereby as fully as if he had originally given direct authority in the premises to the extent to which such acts reach.[5]

[1] State *v.* Utter, 34 N. J. L. 494 (1869), Van Syckel, J.; Burlington, &c. R. Co. *v.* Lancaster County, 4 Neb. 304 (1876), Lake, C. J.

[2] Marshfield *v.* Middlesex, 55 Vt. 546 (1883), Powers, J.; 115 Mass. 186.

[3] L. L. *ratificare*, to confirm: *ratus*, settled; *facere*, to make.

[4] See Negley *v.* Lindsay, 67 Pa. 228 (1870), cases.

[5] Hare, Contracts, 272 (1887).

[6] Howell *v.* McCrie, 36 Kan. 651 (1887).

[7] Cook *v.* Tullis, 18 Wall. 338 (1873), Field, J.; Marsh *v.* Fulton County, 10 *id.* 684 (1870), cases; Norton *v.* Shelby County, 118 U. S. 451 (1886); 19 Cent. Law J. 482 (1884), cases.

[8] Supervisors *v.* Schenck, 5 Wall. 781-82 (1866), cases, Clifford, J.; United States *v.* Grossmayer, 9 *id.* 72 (1869).

[9] Shisler *v.* Vandike, 92 Pa. 449 (1880), Gordon, J.; Pearsoll *v.* Chapin, 44 *id.* 15 (1863).

[1] Irvine *v.* Irvine, 9 Wall. 627-28 (1869), cases, Strong, J.; Sims *v.* Everhardt, 102 U. S. 312 (1880), cases; Fink *v.* Roe, 70 Cal. 311 (1886), cases.

[2] Drakely *v.* Gregg, 8 Wall. 267 (1868), Davis, J.; Beninghoff *v.* Agricultural Ins. Co., 93 N. Y. 495, 501 (1883), Ruger, C. J.; First Nat. Bank of Ft. Scott *v.* Drake, 29 Kan. 324 (1883), cases; Bohart *v.* Oberne, 36 *id.* 291 (1887).

[3] Gaines *v.* Miller, 111 U. S. 398 (1884), cases.

[4] Johnson *v.* Johnson, 31 F. R. 703 (1887), cases.

[5] Story, Agency, § 239; Whitney *v.* Wyman, 101 U. S.

A legislature may ratify any act which it might have authorized.[1] See RETROSPECTIVE.

RATIO. L. Reason, cause; nature, character.

Cessante ratione, cessat ipsa lex. The reason ceasing, the law itself ceases. When the reason, which is the soul of a law, ceases to exist, the law itself should lose its operative effect.

Thus, the essence of a contract being assent, there is no contract where assent is wanting. A right of way of necessity terminates with the necessity which gave rise to it. A litigant, or a witness, is privileged from arrest only while going to, remaining at, and returning from, the place of trial. If a corporation, made a grantee of land, be afterward dissolved, the grantor may re-enter; for the cause of the grant has ceased.[2]

But a custom may be good though no reason for it can be assigned.[3]

The maxim means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances.[4] Compare REPEAL.

Ratio decidendi. Reason for deciding; the logic of a ruling.[5]

Ratione materiæ. From the nature of the subject or subject-matter.[6]

Ratione personæ. From the character of the person.[7]

Ratione privilegii. By reason of privilege; by virtue of a franchise or prerogative.[8]

Ratione soli. By reason of the soil; by virtue of ownership in the land.[8]

Ratione tenuræ. By reason of possession or tenure.

Ubi eadem ratio, ibi eadem jus. Where the reason is the same, the law is the same. "Like reason maketh like law."

Eadem ratio, eadem lex. The same reason, the same law.

Contrariorum contraria ratio. The reason for things which differ is different.

Dissimilium dissimilis ratio. For unlike things the rule is unlike.[1]

RAVISH. See RAPE.

RE. 1. In the matter of. See RES, Re.

2. The Latin inseparable particle, *re, red*, again, against.

In compounds, denotes a turning backward, restoration to a former condition, transition into the opposite state; opposition; return, repetition, iteration. See words following.

READING. See INFLUENCE.

1. A deed should be read whenever any party to it desires it. If he can, he should read it himself; if he is blind, or illiterate, another should read it to him. If it is read falsely, it will be void.[2]

If a party who can read will not read a deed placed before him for execution, or if, being unable to read, he will not demand to have it read or explained to him, he is guilty of supine negligence, which is not the subject of protection, in equity or in law.[3]

If a party who can read and write signs a contract without reading the contents, he will be bound by the contract, in the absence of fraud or coercion in procuring his signature.[4]

It is no defense that the defendant was misled as to the contents and effect of the writing, unless it also appears that by reason of some disability he was incapable of reading and comprehending the writing for himself, or that he was imposed upon by some fraudulent device, as, the substitution of one writing for another.[5]

If an applicant for life insurance is required to answer questions relating to material facts in writing, and to subscribe his name thereto, it is his duty to read the answers beforehand, and it will be presumed that he read them.[6]

It is not necessary for a devisee to prove that the will was read to the testator in the presence of the witnesses. In general, this is to be presumed; but if the testator was blind, or incapable of reading, or if a reasonable ground be laid for believing that it was not read to him, or that there was fraud in the transaction,—it is necessary for the devisee to satisfy the

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396-97 (1879); Bird *v.* Brown, 4 Ex. *799 (1850); 132 Mass. 331; 44 N. H. 407; 37 Pa. 104; 52 *id.* 479; 57 *id.* 438; 80 *id.* 406.

[1] Mattingly *v.* District of Columbia, 97 U. S. 690 (1878); Thomson *v.* Lee County, 3 Wall. 331 (1865); Beloit *v.* Morgan, 7 *id.* 624 (1868); Spaulding *v.* Nourse, 143 Mass. 492-94 (1887), cases.

[2] See 2 Bl. Com. 15, 26, 60, 256, 337, 390; 3 *id.* 219; 4 *id.* 336; 1 *id.* 476, 484.

[3] Smith, Contr. 77.

[4] Beardsley *v.* City of Hartford, 50 Conn. 542 (1883), Loomis, J. See also 8 Cranch, 249; 106 U. S. 3; 30 Kan. 238; 143 Mass. 489; 44 N. J. L. 96; 60 Pa. 515; 66 *id.* 338; 67 *id.* 203; 79 *id.* 505; 18 R. I. 594; 67 Wis. 112.

[5] 114 U. S. 288.

[6] 17 F. R. 612, 613; 34 La. An. 784.

[7] 4 Hughes, 343.

[8] 108 E. C. L. 870.

[1] 34 La. An. 94, 117.

[2] 2 Bl. Com. 304.

[3] Greenfield's Estate, 14 Pa. 496 (1850), Gibson, C. J.; Pennsylvania R. Co. *v.* Shay, 82 *id.* 203 (1876); Pacific Guano Co. *v.* Anglin, 82 Ala. 496 (1887).

[4] Illinois Central R. Co. *v.* Jonte, 13 Bradw. 430 (1885).

[5] Taylor *v.* Fleckenstein, 20 F. R. 100 (1887), cases; 17 Alb. Law J. 7-10 (1883) — Irish Law Times.

[6] New York Life Ins. Co. *v.* Fletcher, 117 U. S. 532-33 (1886), Field, J.

jury that the will was so read, or that the contents were known to the testator.[1]

2. In ancient pleading, see OYER.

REAL.[2] 1. Actual; neither nominal nor formal: as, a real party. See PARTY, 2.

2. Concerning land; relating to one's interest, ownership or title in land; landed. Opposed to *personal*.[3] As, real or a real — action, asset, chattel, contract, covenant, estate, privilege, property, representative, security, *qq. v.*

Realty. Real estate, real property, *q. v.*

REALIZE. To receive money or value.

An owner of land who agrees to pay a percentage in the event of his realizing a specified sum of money for the land, becomes bound to pay the percentage the moment a responsible person in good faith offers that amount for the land.[4] See BROKER.

RE-APPRAISER. See APPRAISER.

REAR. "In the rear of" a messuage does not necessarily mean directly behind the messuage.[5]

RE-ARGUE. See ARGUMENT.

RE-ARREST. See ARREST, 2.

REASON. Presents no meaning peculiar to jurisprudence.

Reasonable. Agreeable to sound reason, just, rational; also, conformable to the requirements of law, sufficient, proper: as, reasonable — care, diligence, skill; reasonable — cause, doubt, notice, part, time, *qq. v.*

Compare RATIO; SANE.

REASSURANCE. See INSURANCE.

REBATE. Reduction in the amount of money due in consideration of prompt payment; discount. Compare ABATE.

REBEL; REBELLION. See AMNESTY; BLOCKADE; ENEMY; GOVERNMENT, De facto; MONEY, Lawful; TENDER, 2, Legal; TREASON; WAR.

REBUILD. See REPAIR, 1.

REBUT.[6] To contradict, oppose, do away with; to adduce counter testimony or proof.

Rebut an equity. To impose a construction upon an instrument at variance with the superficial tenor.[7]

[1] Harrison v. Rowan, 3 Wash. 584 (1820), Washington, J. See also Patton v. Hope, 97 N. J. E. 527-98 (1883).

[2] L. *res*, a thing. See RES.

[3] On the use of "real" and "personal" in English law, see 4 Law Quar. Rev. 394-408 (1888).

[4] Lorillard v. Silver, 25 Barb. 132 (1861). See also Stanford v. Greene County, 18 Iowa, 220 (1865).

[5] Read v. Clarke, 109 Mass. 83 (1871).

[6] F. *rebouter*, to repulse, repel.

[7] [1 Whart. Ev. § 973, cases.

Rebuttal. As a briefer expression than "rebutting evidence," and also as referring to the time for introducing such evidence, has gained general recognition. Whence "as rebuttal," "on rebuttal," "in rebuttal."

Rebutter. In pleading, defendant's answer to a sur-rejoinder.

Sur-rebutter. Plaintiff's answer to a rebutter.[1]

Rebutting. Referring to evidence, sometimes means contradictory only, at other times conclusive or overcoming.[2]

Rebutting evidence is evidence adduced to rebut a presumption of fact or of law, that is, to avoid its effect; also, any evidence adduced to destroy the effect of prior evidence, whether by explanation or direct denial.[3]

RECALL. See CALL; REVOKE.

RECAPTION. See CAPTION, 1; REPRISAL.

RECAPTURE. See CAPTURE.

RECEIPT. 1. Taking or accepting a thing delivered, usually money, but may be any personalty. *Receipts:* moneys received. See EARNINGS.

2. Such written acknowledgment by one person of his having received money from another as will be *prima facie* evidence of that fact in a court of law.[4]

An acknowledgment of payment or delivery.

May contain a contract to perform something in relation to the thing delivered.[5]

Receipt in full. A payment of money, or a delivery of other property, in complete discharge of a demand.

Receipt on account. A payment or delivery of money or other property in part fulfillment of a contract.

Simple receipt. A bare acknowledgment of the payment of money, or of the delivery of personal property of any kind, to the person who signs the receipt.

A receipt in full operates to defeat any further claim for a debt, unless it was obtained under such circumstances of mistake, accident, surprise, or fraud as would authorize a court of equity to set it aside.[6]

A receipt which simply acknowledges a payment or delivery is *prima facie*, not conclusive, evidence of the

[1] [3 Bl. Com. 310.

[2] Fain v. Cornett, 25 Ga. 186 (1858).

[3] [3 Steph. Com. 539; People v. Page, 1 Idaho, 194 (1868).

[4] Kegg v. State, 10 Ohio, 79 (1840), Grimke, J.

[5] The Missouri v. Webb, 9 Mo. 194 (1845).

[6] Aborn v. Rathbone, 54 Conn. 446 (1887).

fact. But if it contains the terms of a contract, it cannot be contradicted or varied by parol,[1] *q. v.*

Receiptor. 1. He who receives anything delivered by another; he who gives a writing certifying that he has received money or personal property.

See ACCEPTANCE, 1; DEED, 2; DISCHARGE; ESTOPPEL; INTERIM; WAREHOUSEMAN.

2. A person, other than the execution-debtor, who gives a receipt for property attached, engaging, as surety to the officer who makes the levy, that the property will be forthcoming to answer any final judgment the plaintiff may recover.[2]

RECEIVER. One who receives anything belonging to another or others.

1. One who receives stolen goods. See further STEAL.

2. A person appointed by a court of equity to take charge of property in dispute.

"An indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in court, pending the suit, where it does not seem reasonable to the court that either of the parties should receive it."[3]

He is an officer of the court; his appointment is provisional — for the benefit of all the parties who may establish rights in the cause. He is but the creature of the court. He has such powers only as are conferred upon him by the order of his appointment and the course and practice of the court.[4]

The order appointing him is in the nature of an injunction or writ of sequestration, preventing any disposition of or interference with the property without the consent of the court.[5]

To authorize a *partner* to demand the appointment of a receiver, he must show such a case of gross abuse and misconduct in his co-partner that a dissolution ought to be decreed and the business wound up.[6]

When a debtor is insolvent, and his mortgaged property is an insufficient security for the debt, and there is reason to believe that it will be wasted or deteriorated in his hands, as by cutting timber, suffering dilapidation, etc., a court or equity may take charge of the property by means of a receiver, and preserve not only the corpus of the property, but the rents and profits, for the satisfaction of the debt.[1]

He is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession. Hence, the appointment has been called an "equitable execution." He is virtually a representative of the court, and of all the parties in interest. He is required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties in litigation. The property in his hands is in the custody of the law. The court gives consent to sue him touching the property, or for malfeasance, and will not permit his possession to be disturbed by force, nor violence to be offered his person. Property claimed by another may be tried by an issue at law, by reference to a master, or otherwise, as the court may direct. . . In the progress of equity jurisdiction it has become usual to clothe such officers with much larger powers than were formerly conferred. In some States they, by statute, settle the affairs of certain insolvent corporations, and sue in their own names. It is not unusual for courts of equity to put them in charge of *railroads* financially embarrassed, and to require them to operate such roads until the difficulties are removed or until the roads can be sold with the least sacrifice of the interests of those concerned. In all such cases the receiver is the right arm of the jurisdiction invoked. A court of equity may, perhaps, accomplish all the results intended by such legislation.[2]

Whether a receiver of the property of a railroad company shall be appointed is a matter within the discretion of the court, which discretion is to be exercised sparingly, and with caution, and with reference to the circumstances of each case.[3]

Very little discretion is allowed him. He must apply to the court for liberty to sue, to let the estate, or to lay out money on repairs. Where there are tenants, the court is virtually the landlord.[4]

The practice is to ask the court for permission to sue him, as to the property. An unauthorized suit would be a contempt of court.[5] This rule likewise applies to suits for a money demand, or damages.[6]

Without previous consent of court he may not incur any expense on account of the property beyond what

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[1] 1 Greenl. Ev. §§ 305, 212; Bishop, Contr. § 176, cases; 2 Story, Contr. § 1338, cases; 2 Whart. Contr. §§ 938-41, cases; 7 Wait, Actions & Def. 444-50, cases; 53 Ind. 574; 59 Iowa, 367; 16 N. H. 489.

[2] See Story, Bailm. § 124; Stevens *v.* Bailey, 58 N. H. 564 (1879); Hunter *v.* Peaks, 74 Me. 363 (1883).

[3] Booth *v.* Clark, 17 How. 331 (1854), Wayne, J., citing Wyatt's Prac. Reg. 355.

[4] Thornton *v.* Washington Savings Bank, 76 Va. 433 (1882).

[5] Story, Partn. §§ 228, 231; 2 Bates, Partn. §§ 993-1008, cases; 2 Lindley, Partn. *545-55, cases. See also Hanna *v.* Hanna, 89 N. C. 68 (1883).

[1] Kountze *v.* Omaha Hotel Co., 107 U. S. 395 (1882), Bradley, J.

[2] Davis *v.* Gray, 16 Wall. 217-22 (1872), cases, Swayne, J. See 14 W. N. C. 521 (1884), cases.

[3] Sage *v.* Memphis, &c. R. Co., 125 U. S. 376 (1888), Harlan, J.

[4] Booth *v.* Clark, 17 How. 331 (1854), cases.

[5] People's Bank of Belville *v.* Calhoun, 102 U. S. 256 (1880).

[6] Barton *v.* Barbour, 104 U. S. 126-36 (1881), cases. Actions by and against him, 25 Am. Law Reg. 289-304 (1886), cases; against him, for a personal wrong, Missouri Pacific R. Co. *v.* Texas Pacific R. Co., 30 F. R. 167, 169 (1887), cases.

is absolutely necessary to its preservation and use, as contemplated by his appointment.[1]

He has no extra-territorial power of official action. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it.[2]

Receiver's certificate. A non-negotiable evidence of debt, or debenture, issued by authority of a court of chancery, as a first lien upon the property of a debtor corporation in the hands of a receiver.[3]

The power in a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot at this day be seriously disputed. It is a part of that jurisdiction by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution; and, if possible, with the consent or acquiescence of the parties interested in the fund.[4]

Many circumstances may exist to make it necessary for the receiver to pay pre-existing debts of certain classes out of the earnings of the receivership, or even out of the corpus of the property, with a priority of lien. Yet the discretion allowing this should be exercised with great care.[5]

The court, in order to preserve the road, and, perhaps, to complete inconsiderable portions of it, and put it into a condition for the transaction of business, may make money borrowed on certificates a lien on the property superior to that of the first mortgage.[6]

But, in order to complete an unfinished road, except under extraordinary circumstances, the power of the court ought not to be exercised to enable the trustee to borrow money on certificates and create a paramount lien therefor. It is better to reorganize the enterprise on the basis of existing mortgages as stock, or an equivalent, and by a new mortgage, with a lien superior to the old, raise the money required without asking the court to engage in railroad building.[7]

Where receivers issue and dispose of certificates contrary to orders, the certificates are invalid, even in the hands of a subsequent *bona fide* taker for value.[1]

RECESSION. See CEDE.

RECIPROCITY. See COMITY; EXTRADITION; TREATY.

RECITE. To set forth in writing facts explanatory of a transaction,— its nature, or the reasons for it.

In pleading, "reciting a statute" is quoting or stating its contents.[2]

Recital. The statement, in a deed or other instrument, of the reason for executing it, or of its relation to other instruments.

Misrecital. An erroneous recital.

Constitutes part of the premises of a deed. Usually begins with "whereas," and sets forth such other deeds, agreements, or matters of fact as are necessary to explain the reasons upon which the present transaction is founded.[3]

Particular recitals in a deed may operate as an estoppel upon the parties thereto, and their privies; not so *general recitals*. But no recital can bind innocent third parties. A recital of purchase-money is always open to dispute.[4]

It is laid down generally that a recital of one deed in another binds the parties, and those who claim under them. Technically speaking, it operates as an estoppel, and binds parties and privies,— privies in blood, privies in estate, and privies in law. But it does not bind mere strangers, or those who claim by title paramount to the deed; nor persons claiming by an adverse title or from the parties by title anterior to the date of the reciting deed. But there are cases in which such a recital may be used as evidence even against strangers. If, for instance, there be a recital of a lease in a deed of release, and in a suit against a stranger the title under the release comes in question, there the recital is not *per se* evidence of the existence of the lease. But if the existence and loss of the lease be established by other evidence, the recital is admissible as secondary proof, in the absence of more perfect evidence, to establish the contents of the lease; and if the transaction be ancient, and possession has long been held under such release, and is not otherwise to be accounted for, the recital will of itself materially fortify the presumption, from lapse of time

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[1] Cowdrey *v.* Galveston, &c. R. Co., 93 U. S. 354 (1876).

[2] Booth *v.* Clark, 17 How. 338-39 (1854), cases. On suing in foreign jurisdictions without leave of the appointing court, see 21 Am. Law Rev. 551-70 (1887), cases.

[3] Beach, Receivers, § 879; *ib.* 880-402, cases. See also, generally, High, Rec., §§ 398 *c-g*, cases; 3 Wood, Railw. Law, 1675-77, cases.

[4] Wallace *v.* Loomis, 97 U. S. 162 (1877), Bradley, J. Quoted, 106 *id.* 310, *infra*.

[5] Miltenberger *v.* Logansport R. Co., 106 U. S. 311 (1882), Blatchford, J.

[6] Stanton *v.* Alabama, &c. R. Co., 2 Woods, 506 (1875); Kennedy *v.* St. Paul, &c. R. Co., 2 Dill. 448 (1873).

[7] Shaw *v.* Little Rock, &c. R. Co., 100 U. S. 605, 612 (1879), Waite, C. J. In foreclosing mortgages, see 26 Cent. Law J. 543-46 (1888), cases; points of practice, 19 Am. Law Rev. 400-23 (1885), cases; his compensation, Central Trust Co. *v.* Wabash, &c. R. Co., 32 F. R. 187 (1887).

See generally Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434 (1886), Blatchford, J.; 23 Cent. Law J. 340 (1886), cases; 3 Law Quar. Rev. 429-45 (1887), cases; 100 U. S. 153; 3 Woods, 316, 514, 527, 691; 5 Dill. 519, 476; 60 Ala. 331; 16 Wend. 421; 71 N. Y. 401; 12 R. I. 497; 11 Heisk. 210, 412.

[1] Stanton *v.* Alabama, &c. R. Co., 31 F. R. 585 (1887). Same *v.* Same, 2 Woods, 512 (1875), cases.

[2] Gould, Pl., 4 ed., p. 46, note; 6 W. Va. 648.

[3] [2 Bl. Com. 298.

[4] 2 Whart. Ev. §§ 1039-43; 1 Greenl. Ev. §§ 28, 26; 3 Devlin, Deeds, §§ 992-1009.

and length of possession, of the original existence of the lease.[1]

Compare INDUCEMENT; PREAMBLE. See BOND, Municipal; COUPON; ESTOPPEL.

RECKLESS. See CARE; NEGLIGENCE; WANTON.

RECLAIM. 1. To demand back what was formerly parted with: as, in suing for money advanced upon goods which were never delivered.

2. To domesticate, tame: as, to reclaim an animal (*q. v.*) of a wild nature; to cultivate, till: as, to reclaim wild or waste lands.

RECOGNITION. See ACQUIESCENCE; RATIFICATION.

RECOGNIZANCE.[2] An obligation of record, entered into before a court of record or a magistrate duly authorized, with condition to do some particular act; as, to appear at court, to keep the peace, to pay a debt.[3]

Is commonly applied to all forms of security for the appearance of the accused in criminal proceedings, whether in the form of a common-law recognizance or of a common bond; and so of appeals from probate courts. "Bond" is not unfrequently used as a general term, including "recognizance," which is but one kind of a bond. The difference in some States is now largely one of form; and the terms are often interchanged.[4]

In most respects a recognizance is like any other bond; the difference being chiefly that a "bond" is the creation of a fresh debt or obligation *de novo;* a recognizance is an acknowledgment of a former debt upon record. The cognizor (or conusor), the person who enters into it, acknowledges to owe the cognizee, the party to whom it is given (perhaps the commonwealth or government), a specified sum of money, with the condition to be void on performance of the thing stipulated. This, being either certified or taken by the officer of a court, is witnessed only by the record of that court, and not by the party's seal; so that it is not in strict propriety a deed, though the effects of it are greater than a common obligation, being allowed a priority in point of payment, and binding the lands of the cognizor, from the time of enrollment on record.[3]

The provision that the cognizor shall not depart without leave of court has often been held to be distinct from those which bind him to answer the specified charge, or all matters which may be alleged against him, or to abide the final order of the court.[1]

Recognize. To bind by a recognizance: as, to recognize a witness for his appearance.[2]

Recognizee. He in whose favor a recognizance is executed; a cognizee.

Recognizor; recognitor. He who executes a recognizance; a cognizor.

Recognizances are also required by courts as security for the due administration of trust property.

A person accused of crime may be "discharged upon his own recognizance" when the evidence against him is slight and the time for trial distant.

A recognizance is a matter of record, in the nature of a judgment. The process upon it, whether a *scire facias* or a summons, is intended to carry it into execution, and is judicial; it is an original suit in the sense that the defendant may plead to it. When final judgment is given, the whole of the proceedings constitutes one record.[3]

A recognizance is a debt of record, in the nature of a conditional judgment, which a recorded default makes absolute. It is subject only to such matters of legal avoidance as may be shown by the plea, or to such matters of relief as may induce the court to remit or mitigate the forfeiture. The object of a *scire facias* is to notify the cognizor to appear and show cause why execution should not issue for the sum acknowledged.[4]

See BAIL, 2; ONUS, Exoneretur.

RECOMMENDATION. See LETTER, 3, page 613.

RECOMPENSE. See COMPENSATION.

RECONSTRUCT. See REFORM; REPUBLICAN, Form, etc.

RECONVENTION. In civil law, a species of cross-bill; an action by defendant against plaintiff, before the same judge.[5]

The defendant does not render unavailable his allegation that the contract in suit is unlawful by a further defense in "reconvention;" as, by claiming damages for a non-fulfillment of the contract, if valid, on the part of the plaintiff.[6]

RECONVEYANCE. See CONVEYANCE.

RECORD. 1, *v.* To preserve the memory of, by committing to writing or printing or by inscription; to write or enter in official

[1] Carver *v.* Astor, 4 Pet. *83 (1830), Story, J.; Sabariego *v.* Maverick, 124 U. S. 283 (1888), cases, Matthews, J. As to variance in recitals, see 24 Cent. Law J. 55 (1887) — Irish Law Times.

[2] Re-kŏg'-ni-zans, or -kŏn'. In legal usage the verb is re-kog'-nize.

[3] [2 Bl. Com. 341, 465.

[4] *Re* Brown, 35 Minn. 308 (1886), Mitchell, J.

[1] Commonwealth *v.* Teevens, 143 Mass. 215-16 (1887), cases.

[2] [1 Greenl. Ev. § 313.

[3] Respublica *v.* Cobbett, 3 Dall. *475 (1798).

[4] State *v.* Warren, 17 Tex. 288 (1856). As to discharge and forfeiture, see 18 Cent. Law J. 245-49 (1884), cases. See also 9 Pet. 329, 356; 15 W. N. C. 229; 30 Cal. 629; 58 Ill. 436; 33 Ind. 219; 12 Kan. 465; 73 Me. 554; 43 Md. 306; 121 Mass. 84; 25 Miss. 54; 56 N. H. 178; 6 Wend. 330; 26 Barb. 433; 2 Oreg. 316; 37 Pa. 181.

[5] Story, Eq. Pl. § 403; 4 Mart., La., 439; 7 *id.* 283; 8 *id.* 516.

[6] Coppell *v.* Hall, 7 Wall. 542 (1868); Barras *v.* Bidwell, 3 Woods, 9 (1876); 14 How. 368.

books for authentic evidence; to transcribe, in permanent form, for reference.

2, *n.* A memorial of what has been done; a writing or document preserved as evidence; authentic written evidence, considered as either public or private, but usually public. See WRITING, Public; RECORDUM.

The acts and judicial proceedings of a court of record are enrolled in parchment for a perpetual memorial and testimony; and the rolls are called the "records" of the court.[1] See COURT, Of record.

Judicial record. An official record of proceedings in a court of justice.

Usage, in England, has made parchment the material for perpetual memorials. In the United States, records are kept in bound books of linen paper, parchment, as the material, no longer entering into the definition.

In many expressions, referring to proceedings before courts of review, what is really meant is a *copy* of the record; as, in the expressions "defect in the record," "diminution of the record," "show error by the record," "error apparent upon the face" or "in the record," "the record shows" or "does not show," "remit the record."

A record, or judicial record, is a precise history of a suit from its commencement to its termination, including the conclusion of the law thereon, drawn up by the proper officer, for the purpose of perpetuating the exact state of the facts. In the language of Lord Coke, "records are memorials or remembrancers, in rolls of parchment, of the proceedings and acts of a court of justice, which hath power to hold plea according to the course of the common law."[2]

Matter of record. Any judicial proceeding entered upon the records of the court in which it originates, or to which it is carried for review.

Thus, the pleadings in an action being entered upon the records of the proper court and filed with its officer as the authentic history of the suit, are thence termed a matter or matters of record. Opposed, "matter in deed," *q. v.*

Of record. On record; recorded. Opposed, **not of record:** unrecorded; not legally recorded.

Contracts of record. Express contracts evidenced by some matter on record in a court; as, a judgment, or a charge in that nature.

Merges any other contract or ground of action; is, in effect, an estoppel, *q. v.*; requires no consideration; binds the debtor's realty; is avoided by fraud or illegality; and is discharged by satisfaction entered on the record itself.

Affidavits, depositions, and other matters of evidence, though appearing in the transcript of the proceedings of a common-law court, do not form *part of the record*, unless made so by an agreed statement of the facts, a bill of exceptions, a special verdict, or a demurrer to the evidence. They must be made a part by some regular proceeding at the time of trial and before the rendition of judgment.[3]

Nul tiel record. No such record. A plea that there is no such matter of record in existence as the opposite party alleges.[4]

Puts in issue only that fact; and is met by the production of the record itself, valid upon its face, or an exemplification duly authenticated. A defense which requires evidence to contradict the record admits its existence and seeks to avoid its effect — by special plea, as at common law, or by an equivalent. Defects on the face of the record may be taken advantage of upon production, but defects which require extrinsic evidence to make them apparent must be formally alleged before they can be proven.[5] See APPEARER, De non, etc.

Denial of a record of a foreign court is tried by a jury, because the existence of the record to be inspected must first be proven.[6]

Judicial records are "of such incontrolable credit and verity that they admit no averment, plea, or proof to the contrary; and if such record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself."[6] This is called *trial by record*, and is by bare inspection whether there is any such record or not; otherwise, there would be no end to disputes.[6] See INSPECTION, 2.

The records of the domestic courts of England and of some of the States are held to import absolute verity, as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But the rule has no extra-territorial force.[7] See JURISDICTION, 2.

If there appears any material mistake of the clerk in making up a record the court will direct him to amend it.[8] Courts of record may at any time, of their own motion, without notice, correct the mistake of a recording officer so as to make the record conform to

[1] 3 Bl. Com. 24.

[2] Davidson *v.* Murphy, 13 Conn. 217 (1839), Williams, C J.; Coke, Litt. 260 *a*. See also 18 F. R. 609; 2 Ark. 33; 11 *id.* 355; 34 Cal. 423; 44 Conn. 53; 2 Dak. 470; 49 Me. 345; 4 Metc., Mass., 423; 51 Miss. 656; 6 Ohio, 427; 18 *id.* 469; 7 Baxt. 56.

[3] Baltimore, &c. R. Co. *v.* Trustees, 91 U. S. 130 (1875), cases, Clifford, J. See also Roanoke Land, &c. Co. *v.* Hickson, 80 Va. 591 (1885), cases.

[4] 3 Bl. Com. 331.

[5] Hill *v.* Mendenhall, 21 Wall. 455 (1874), cases, Waite, C. J.; Clark *v.* Melton, 19 S. C. 506 (1883).

[6] Basset *v.* United States, 9 Wall. 40 (1869), cases.

[6] Coke, Litt. 260 *a*; 13 Conn. *218.

[6] 3 Bl. Com. 24, 331.

[7] Thompson *v.* Whitman, 18 Wall. 468 (1873), Bradley, J.; State *v.* Vest, 21 W. Va. 800 (1883), cases.

[8] 3 Bl. Com. 24.

the truth. They are the exclusive judges of the propriety and of the proof.[1] See ERROR, 2 (1); MISPRISION, 2; NUNC PRO TUNC.

The old notion that a record remains in the breast of the court only till the end of the term has yielded to necessity, convenience, and common sense.[2] See TERM, 4.

Recorder. 1. An officer charged with the preparation and custody of records, especially records of deeds of all descriptions; a register, *q. v.*

2. An officer, in cities of a few States, who exercises original jurisdiction in determining some of the more common criminal complaints, and adjudicates matters of a limited, civil nature.

Anciently, one who recited or testified on recollection, as occasion required, what had previously passed in court, and this was the duty of the judges, thence called *recordeurs*.[3]

In England, he is often a person learned in the law whom the magistrate of a city, by virtue of the king's grant, associates with himself for his direction in judicial proceedings. The recorder of the city of London is practically the judge in the Lord Mayor's court of the city.[4]

Recording. Copying an instrument into the public records, in a book kept for that purpose, by or under the superintendence of the officer appointed therefor.[5]

Recording Acts. Statutes which regulate the official recording of conveyances, mortgages, bills of sale, hypothecations, assignments for the benefit of creditors, articles of agreement, and other sealed instruments, for the purpose of informing the public, creditors and purchasers, of transactions affecting the ownership of property and the pecuniary responsibility of individual persons.

Also, statutes which regulate the registration of vessels. Compare REGISTRY.

Public records, by construction of law, are notice to all persons of what they contain. Their contents are matters of public knowledge, because the law requires them to be kept, authorizes them to be used, and secures to all persons access to them that knowledge of them may be public; and thence imputes to all interested persons that knowledge the opportunity to acquire which it has provided. The law assumes the fulfillment and not the defeat of its own ends. It will not permit its policy to be gainsaid, not even by a plea of personal ignorance of its existence or extent. It would defeat that purpose not to presume with conclusive force that the notice, which it was their office to communicate, had reached the party interested in receiving it.[1]

See ACKNOWLEDGMENT, 2; AUTHENTICATION; DELIVERY, 4; DIMINUTION; ERROR, 2 (3); EVIDENCE; EXEMPLIFICATION; FACE, 1; FAITH, Full, etc.; FALSIFY, 2; INDEX; JUDGMENT; LODGE, 1 (2); LOST, 2; NOTICE, 1; QUASI; REMIT; SATISFACTION, 1.

RECORDARI. L. To be recorded.

Recordari facias loquelam. That you cause the plaint to be recorded. A writ formerly in use to remove a suit in replevin from a county court to a superior court.[2]

In North Carolina the writ of *recordari* secures a new trial of a case heard before a justice of the peace, and a reversal of a judgment erroneously rendered by him.[3]

Recordum. A record; a judicial record. *Prout patet per recordum.* As appears by the record. Abridged *prout patet*, and *prout.* A formula for reference to a record.

A writing either admitted or rejected as evidence, and excepted to, should appear in the bill of exceptions by a *prout*.[4]

RECOUP.[5] To cut out a part: to keep back, withhold part of a sum demanded.

Recoupment. Reduction of a demand.

"Recoupe" is synonymous with defalk or discount. "Recoupment" is keeping back something alleged to be due, because there is an equitable reason for withholding it.[6]

For example, in an action for damages due on a contract, the defendant may recoup the damages he has sustained from the imperfect execution of the work.[7]

Arises where there is an action upon a contract, or some obligation arising out of it, and there has been a breach of a divisible part of it or of such obligation.[8]

Means a cutting back on the plaintiff's claim by the defendant. Properly applicable to a case where the same contract imposes mutual duties and obligations, and one party seeks a remedy for the breach of the

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[1] Gilman *v.* Libbey, 4 Cliff. 454, 460 (1878), cases, Clifford, J.; Blanchard *v.* Ferdinand, 132 Mass. 390 (1882); Hovey *v.* McDonald, 109 U. S. 157 (1883).

[2] Rhoads *v.* Commonwealth, 15 Pa. 276 (1850).

[3] Stephen, Plead. App. xix, note 11.

[4] Cowell's Law Dict.; 1 Steph. Hist.Cr. Law Eng. 117; Respublica *v.* Dallas, 3 Yeates, 315 (1801).

[5] [Sawyer *v.* Adams, 8 Vt. 175 (1836), Williams, C. J.

[1] Nealing *v.* Wells, 104 U. S. 433-41 (1881), cases, Matthews, J.; Moore *v.* Simonds, 100 *id.* 145 (1875); 1 Greenl. Ev. § 484; 1 Story, Eq. §§ 403-4; 4 Wheat. 487.

[2] See 3 Bl. Com. 34, 37, 195.

[3] Weaver *v.* Mining Co., 89 N. C. 189 (1883), cases.

[4] Wilson *v.* Horner, 59 Pa. 155 (1868); 10 Me. 134; 1 Chitty, Plead. 356.

[5] F. *recoupe*, a shred: *recouper*, to cut again. Compare COUPON.

[6] [Ives *v.* Van Epps, 23 Wend. 156 (1839): Tomlins' Law Dict.

[7] Dermott *v.* Jones, 23 How. 235 (1859).

[8] Merrill *v.* Everett, 38 Conn. 48 (1871), Butler, C. J.

duty by the second, and the second meets the demand by a claim for a breach of duty by the first.[1]

It is the right to set off unliquidated damages. "Set-off" comprehends only liquidated demands, or demands which are capable of being ascertained by calculation.[2]

Anciently, it was applied to the right of deduction from the damages claimed by the plaintiff on account of part-payment, depreciation or failure of consideration, or some analogous act. The right is now recognised under the name of deduction or reduction of damages; while the meaning of recoupment has been greatly enlarged and changed — extended to cross-demands existing in favor of the defendant, and arising out of the same contract or transaction upon which the plaintiff founds his action.[3]

See DEFALCATION; SET-OFF.

RECOURSE.[4] A going back; resort.

Without recourse. By the use of these words the holder of negotiable paper may transfer title without incurring the responsibility of an indorser.[5] See INDORSEMENT, Qualified.

RECOVER. To obtain by judicial action or proceeding.

Referring to a note: to collect or obtain the amount, possibly by a suit at law.[6]

Applied to debt and demands generally intends action by process and course of law.[7] See RECUPERARE.

Recovery. Obtaining by legal process or proceeding; restoration of a right by judicial award.

The actual possession of anything or its value, by judgment of a legal tribunal.[8]

Implies adjudication, and receipt of the thing.[9]

As to "recover" is to obtain by course of law, "recovery" is obtaining a thing by judgment of a court, as the result of an action brought for the purpose.[10]

Common recovery. A mode of transferring title to land.

Abolished in England by 3 and 4 Wm. IV (1834), c. 74. In the United States, either expressly abrogated or fallen into disuse.

Consisted of a suit, actual or fictitious, invented to elude the statute of mortmain and to unfetter inheritances. The land was recovered against the tenant of the freehold. This recovery, as a supposed adjudication of the right, bound all persons, and vested an absolute fee-simple estate in the recoverer.[1]

A religious house, for example, set up a fictitious title. The tenant, by collusion, making no defense, judgment was given for the plaintiff. This was a recovery by sentence of law upon a supposed prior title. In time, the procedure became a common assurance, and a legal mode of conveyance by which a *tenant in tail* could dispose of his land and tenement.[2] Compare FINE, 1.

Former recovery. Previous adjudication; former judgment.

Upon a question directly involved, a former recovery is conclusive in another suit.[3]

A plea of former recovery, whether it be by confession, verdict, or demurrer, is a bar to any new action of the same or the like nature for the same cause. There must be at least one decision on the *right*. The reason of the rule is, there must be an end to litigation after the merits of a cause have been determined.[4] See further ADJUDICATION.

RECRIMINATION. See CRIME, Criminate.

RECTIFIER. In the internal revenue laws, any one who rectifies or purifies spirits in any manner whatever, or who makes any mixture of spirits with any thing else, and sells it under any name.[5] See DISTILLER.

RECTUS. See CURIA, Rectus.

RECUPERARE. L. To recover; literally, to get again — *re-capere*.

Quod recuperet. That he may recover. The ordinary form of a judgment at law for the plaintiff. See RECOVER.

RED TAPE. 1. Tape used for tying up documents.

[1] Davenport *v.* Hubbard, 46 Vt. 207, 206 (1873), Ross, J., citing 2 Pars. Contr. 247, 28 Vt. 414; Roberts *v.* Donovan, 70 Cal. 113 (1886).

[2] [Parker *v.* Hart, 32 N. J. E. 220 (1880): Batterman *v.* Pierce, 3 Hill, 174 (1842), Bronson, J.

[3] Emery *v.* St. Louis, &c. R. Co., 77 Mo. 345 (1883), cases, Martin, C. See also 7 Am. Law Rev. 389-416 (1873), cases; 27 Ala. 574; 17 Ark. 270; 95 Ill. 476; 9 Ind. 470; 39 Me. 382; 4 Mich. 619; 54 Miss. 563; 49 Mo. 572; 2 N. Y. 236; 13 *id.* 151; 6 Barb. 391; 28 Vt. 413; 4 Wis. 440; 2 Pars. Contr. 760.

[4] Re-course'.

[5] See Byles, Bills, 154, note by Sharswood; 100 U. S. 714; 18 Iowa, 202; 12 Mass. 14; 2 Allen, 434; 18 Ohio St. 515; 8 Pa. 468.

[6] See Douglass *v.* Reynolds, 7 Pet. *128 (1833), Story, J.

[7] [Jones *v.* Walker, 2 Paine, 719 (1790?), Jay, C. J.

[8] Strohecker *v.* Farmers' Bank, 6 Pa. 45 (1847).

[9] [Lapham *v.* Almy, 13 Allen, 305 (1866), Gray, J.; 1 Wheat. 468.

[10] [Keiny *v.* Ingraham, 66 Barb. 257 (1873): Burrill's Law Dict. See also Norton *v.* Winter, 1 Oreg. 48 (1853); Hoover *v.* Clark, 3 Murphey, 171 (1819): Coke, Litt. 154.

[1] [2 Bl. Com. 357.

[2] 2 Bl. Com. 271, 117. See Lyle *v.* Richards, 9 S. & R. 364 (1823); Martin *v.* Strachan, 5 T. R. 108, n. (1793); 4 Kent, 487; 8 Mass. *34.

[3] Russell *v.* Place, 94 U. S. 606 (1876), cases; Cromwell *v.* County of Sac, *id.* 351 (1876), cases; Coleman *v.* Tennessee, 97 *id.* 525-40 (1878), cases; 101 *id.* 539.

[4] Haldeman *v.* United States, 91 U. S. 585 (1875), Davis, J.

[5] Quantity of Distilled Spirits, 3 Bened. 73 (1868), Act 13 July, 1866, § 9: 14 St. L. 117; United States *v.* Tenbrook, 1 Pet. C. C. 180 (1545).

2. Extreme official formality.[1]

Order carried to fastidious excess — system run out into trivial extremes.[2]

REDDERE. L. To give back: to return, render, restore.

Reddendo singula singulis. Referring the several things to distinct persons: construing distributively — the particular things enumerated among the different persons designated.[3]

Reddendum. Rendering; yielding: yielding and paying. See DEED, 2; YIELDING.

Redditus; reditus. Something given back; return; rent, *q. v.*

REDEEM.[4] To buy back; to repurchase.

Redeemable. Obtainable again by purchase. Opposed, *irredeemable.*

Redemption. Purchasing a thing which the buyer formerly owned; repurchase.

Used of the payment of a mortgage debt — whereupon the absolute title to the property becomes revested in the mortgagor; also, by analogy, of the act by which a pledgor pays his debt and receives back the article bailed.

Equity of redemption. The privilege in a mortgagor to redeem his property forfeited by default in payment.

At common law, when the condition was broken, the estate in the mortgagee became indefeasible. At an early period equity let the mortgagor, within a reasonable time, extendible once or oftener, redeem upon payment of the amount due — the debt being regarded as the principal thing. This equity is a distinct estate from that vested in the mortgagee before or after condition broken, and is descendible, devisable, and alienable like other interests in realty. As a right, it is jealously protected; any limitation is contrary to public policy, and void. Proceedings to foreclose the equity are regulated by statute, and the regulations are part of the mortgage contract.[5] See further MORTGAGE.

Stock may be pledged for the redemption of certificates of debt with interest, and foreclosure decreed upon non-payment of any installment.[6]

RE-DIRECT. See EXAMINATION, 9.

RE-DISCOUNT. See DISCOUNT, 2.

[1] See Webster's Dict.

[2] Webster *v.* Thompson, 55 Ga. 484 (1875), Bleckley, J.

[3] See 12 Pick. 291; 18 *id.* 298; 143 Mass. 562; 37 N. J. E. 2; 14 Ves. 490.

[4] L. *redimere*, to buy back.

[5] Clark *v.* Reyburn, 8 Wall. 321-22 (1868), cases, Swayne, J. See also Pough *v.* Davis, 96 U. S. 337 (1877); 40 Cal. 296; 24 Me. 198; 9 Oreg. 351; 44 Vt. 612; 4 Kent, 159.

[6] Swasey *v.* North Carolina R. Co., 1 Hughes, 1 (1874), Waite, C. J.; 71 N. C. 571; 22 Wall. 405.

REDRESS.[1] A setting right; reparation; relief against wrong; satisfaction for an injury done; remedy.

The more effectually to accomplish the redress of private injuries, courts of justice are instituted to protect the weak from the insults of the strong, enforcing those laws by which rights are defined and wrongs prohibited. This remedy is had by application to the courts, that is, by civil suit or action. But private injuries may also be redressed: (1) by the act of the injured party, as in defense of self, child or parent; by the reception of goods; by entry upon realty; by abating nuisances; by distraining animals doing damage; (2) by the joint act of the injured and the injuring parties, as in accord, and arbitration; (3) by operation of law, as in retainer, and remitter.[2]

See RELIEF, 2; REMEDY; DAMAGES.

REDUCE. See POSSESSION; RECOUP.

REDUNDANCY. Matter inserted in a writing foreign to its purpose; superfluous statement; surplusage.

A material distinction is made between redundancy in allegations and redundancy in the proof. In the former case, a variance between the allegations and the proof will be fatal, if the redundant allegations are descriptive of that which is essential. But in the latter case, redundancy cannot vitiate, merely because more is proved than is alleged, unless the matter superfluously proved goes to contradict some essential part of the allegation.[3] See SURPLUSAGE.

RE-ENACT. See ACT, 3.

RE-EXAMINE. See EXAMINATION, 9.

REEVE. Steward; officer.

The original Anglo-Saxon was *geréfa*, distinguished, famous.[4] The word is preserved in a few proper names and in port-reeve, sea-reeve, sheriff, *qq. v.*

REFER. 1. To send to a person specially selected, for examination and report, a question or issue raised in a pending suit.

Referee. The person so designated: an auditor, master, register in bankruptcy, or like officer.

As used in Rev. St. § 894, which allows a docket fee to be taxed on a trial "before referees," — a class of officers who are appointed in pursuance of State statutes, to hear and determine all or a portion of the issues that arise on the final hearing of a cause. It does not refer to or include masters in chancery, however they may hold their places.[5]

Reference. The act, order, or paper by which a matter is committed to one or more persons for investigation and report.

Refer back; reference back. Import a sec-

[1] Re-dress'.

[2] 3 Bl. Com. 3-19.

[3] 1 Greenl. Ev. § 67; 1 Whart. Ev. §§ 945, 1004.

[4] See 1 Bl. Com. 116.

[5] Central Trust Co. *v.* Wabash, &c. R. Co., 32 F. R. 695-96 (1887), cases, Thayer, J.

ond or new return of a matter to the referee (auditor, master, etc.) for an additional or amended report.

When a case is referred, not by a submission *in pais*, but by a rule of court, the referee derives his authority from the court, not from the consent of the parties. The case remains in court subject to its power, and a judgment must be entered by the court. The procedure is a substitute for a trial by jury.[1]

See ARBITRATION; AUDIT; AWARD, 2; FINDING, Special; MASTER, 4; REPORT, 1 (1).

2. A reference in one instrument to another incorporates the latter. See further VERBUM, Verba illata, etc.

REFLECTION. See DELIBERATION; PREMEDITATE.

REFORM. To rectify; to make an instrument what it ought to be; to reconstruct according to the intention of all parties.

If through fraud, ignorance, or mistake an obligation does not express the meaning of the parties, it will be reformed so as to conform to it; as, where it is joint, or several, or joint and several, by an oversight.[2]

Where an agreement as reduced to writing omits or contains terms or stipulations contrary to the common intent of the parties, the instrument will be corrected so as to make it conform to the real intent. The parties will be placed as they would have stood if the mistake had not occurred. The party alleging mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these faults. The mistake must be mutual, common to both parties; it must appear that both have done what neither intended. Mistake on one side may be ground for a rescission, *q. v.* Where the minds have not met there is no contract, and hence none to be corrected.[3]

Where an instrument is executed that professes or is intended to carry into execution an agreement, in writing or by parol, previously made between the parties, but which by mistake of the draftsman, as to fact or law, does not fulfill or which violates the manifest intention, equity will correct the mistake so as to produce a conformity of the instrument to the agreement. The reason is, the execution of agreements fairly and legally made is one of the peculiar branches of equity jurisdiction, and if the instrument intended to execute the agreement be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if the party had refused altogether to comply with his agreement, and a court of equity will afford relief in the one case as much as in the other, by compelling the delinquent party to perform his undertaking according to its terms and the manifest intention of the parties. At the same time, equity has no power to make agreements for parties.[4] See JOINT.

The burden of overcoming the strong presumption arising from the terms of a written instrument rests upon the moving party. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties.[5]

Parol proof, in all cases, is to be received with great caution, and, where the mistake is denied, should never be made the foundation of a decree, variant from the written contract, except the proof be of the clearest and most satisfactory character. Nor should relief be granted where the party seeking it has unreasonably delayed application for redress, or where the circumstances raise the presumption that he acquiesced in the written agreement after becoming aware of the mistake.[6]

There are many precedents for reforming policies of insurance in cases where the insured has held the policy until after a loss, in silence and ignorance of the necessity for reformation.[7]

REFORMATORY, *n.* Includes every institution and place in which efforts are made to cultivate the intellect, instruct the conscience, or improve the conduct; any place in which persons voluntarily assemble, receive instruction, and submit to discipline, or are detained therein for either of these purposes by force.[8]

REFRESH. To "refresh the memory" means to consult letters, diaries, or other memoranda in order to be enabled to recall the details of a past event. After that, the witness is regarded as speaking from memory.

A witness may refresh with memoranda not in themselves admissible. He need not remember the

[1] Seavey *v.* Beckler, 132 Mass. 204 (1882), Morton, C. J. On compulsory references, see 21 Cent. Law J. 284-88 (1885), cases.

[2] Pickersgill *v.* Lahens, 15 Wall. 144 (1872), Davis, J.

[3] Hearne *v.* New England Mut. Mar. Ins. Co., 20 Wall. 490-91 (1874), cases, Swayne, J.; 4 Cliff. 196.

[4] Hunt *v.* Rousmaniere, 1 Pet. *13-14 (1828), Washington, J.; Same *v.* Same, 8 Wheat. 211 (1823); Walden *v.* Skinner, 101 U. S. 583 (1879); 1 Story, Eq. §§ 151-80; 2 Pomeroy, Eq. §§ 845-71.

[5] Howland *v.* Blake, 97 U. S. 626 (1878), cases, Hunt, J.; Maxwell Land-Grant Case, 121 *id.* 381 (1887), cases; 4 Cliff. 582; 76 N. Y. 458; 1 Story, Eq. § 152.

[6] Snell *v.* Atlantic Fire & Mar. Ins. Co., 98 U. S. 89-90 (1878), cases, Harlan, J. See also Elliott *v.* Sackett, 108 *id.* 142 (1882); Leaver *v.* Dennett, 109 *id.* 90 (1883); Baltzer *v.* Raleigh, &c. R. Co., 115 *id.* 645 (1885), cases; Coyle *v.* Davis, 116 *id.* 108 (1885); Reed *v.* Root, 59 Iowa, 359 (1882); Fessenden *v.* Ockington, 74 Me. 125 (1882), cases; Clark *v.* Higgins, 132 Mass. 589-90 (1882), cases.

[7] Palmer *v.* Hartford Fire Ins. Co., 54 Conn. 501-9 (1886), cases.

[8] [Hughes *v.* Daly, 49 Conn. 34 (1882), Pardee, J.

independent facts. The notes must be primary, but need not have been made by the witness, as, a deposition. If the notes fail to refresh the witness's memory, the opposing party is not entitled to inspect them.[1]

It is well settled that memoranda are not admissible unless reduced to writing at or shortly after the time of the transaction, while it must have been fresh in the memory of the witness.[2]

The opposite party may inspect a memorandum and cross-examine in regard to it; and it may be shown to the jury to prove that it could not properly refresh the memory.[3]

There are cases which declare that, unless prepared in the discharge of some public duty, or of some duty arising out of the business relations of the witness with others, or in the regular course of his own business, or with the concurrence of the party to be charged and for the purpose of charging him, a private memorandum cannot under any circumstances be admitted as evidence. There are other cases to the effect that where the witness states, under oath, that the memorandum was made by him presently after the transaction to which it relates, for the purpose of perpetuating his recollection of the facts, and that he knows that it was correct when prepared, although he cannot recall the circumstances so as to state them from memory alone, the paper may be received as the best evidence of which the case admits.[4]

The writing is used to *aid* the memory. As the facts must finally be stated from personal recollection, if the witness has an independent recollection there is no propriety in his inspecting any note or writing.[5]

Refresher. In England, a fee paid to a barrister in a case unexpectedly prolonged and laborious, either for re-perusal of briefs, or by way of reviving interest in the litigation.

Refreshment. See ENTERTAINMENT.

REFUND. To return money which should not have been paid.

Refunding bond. An obligation to return money if found to have been prematurely or erroneously paid, as, money paid to a legatee or to the creditors of an estate.

Refunds. In customs and duties laws: (1) moneys paid back on account of goods destroyed by accident; (2) excess of deposits for unascertained duties; (3) duties paid under protest; (4) proceeds of property seized for violation of the laws.

In internal revenue laws: taxes illegally assessed, or erroneously paid; the cash value of stamps spoiled, unused, useless, etc.; duties on spirits destroyed by accident, fire, or other casualty; excess of taxes paid by national banks; drawbacks on exports; moneys paid for lands sold for taxes, and the purchase-money on public lands erroneously sold.[1]

REGICIDE. See HOMICIDE.

REGINA. See KING.

REGISTER. 1, *v.* To enter officially in proper form, or in the appropriate book or books.

2, *n.* A book kept by public authority; a record.

3, *n.* A keeper of records; a recorder; a registrar: as, a register in bankruptcy, of public lands, of vessels, of wills.

Registrant. A person who complies with a law requiring a registration; as, of a trade-mark, *q. v.*

Registration. Recording, in full or in substance, and in due form of law, in an official book or register.

The act of making a list, catalogue, schedule, or register.[2]

May not intend a literal copying or recording, but entering in a book a statement or memorandum of facts to serve as memorials or evidence; as, in a statute requiring the certificate of a transfer of stock to be registered on the books of the company which issued the stock.[3]

Registry. 1. The act of recording; registration.

2. The system of recording transactions as required by law; also, the place where recorded documents are kept.

Registry of deeds. The object is to impart to parties dealing with property information respecting its transfers and incumbrances, and thus to protect them from prior secret conveyances and liens.

It is to the registry, therefore, that purchasers, or others desiring to ascertain the condition of the property, must look; and, if not otherwise informed, they can rely upon the knowledge there obtained. But if they have notice of the existence of an unregistered conveyance, they cannot complain that they are prejudiced by the want of registry. The general doctrine is that knowledge of an existing conveyance or

[1] 1 Whart. Ev. §§ 516-26, cases; 1 Greenl. Ev. §§ 436-39, cases.

[2] Maxwell *v.* Wilkinson, 113 U. S. 658 (1885), cases, Gray, J.

[3] Commonwealth *v.* Haley, 13 Allen, 587 (1866), Hoar, J. See also, generally, Commonwealth *v.* Jeffs, 132 Mass. 6 (1882), cases; Bigelow *v.* Hall, 91 N. Y. 145 (1883).

[4] Vicksburg, &c. R. Co. *v.* O'Brien, 119 U. S. 102 (1886), cases, Harlan, J.

[5] State *v.* Baldwin, 36 Kan. 15 (1886). See 26 Cent. Law J. 311-17 (1888), cases; 28 *id.* 53 (1888), cases.

[1] See R. S., and St. L., Index, "Refunds."

[2] Appointment of Supervisors of Election, 1 F. R. 5-6 (1880), Bradford, J.

[3] Fisher *v.* Jones, 82 Ala. 129 (1886), cases.

mortgage, in legal effect, is equivalent to notice by the registry.[1]

Registry of vessels. The purpose is to declare the nationality of vessels engaged in trade with foreign countries, and to enable these vessels to assert that nationality.

The purpose of an "enrollment" is to evidence the national character of vessels engaged in the coasting trade or home traffic and to enable them to procure a coasting license. Neither "registry" nor "record" is usually applied to an enrollment. This distriction is observed throughout the legislation of Congress. The general statute on the subject of registry is the act of December 31, 1792; the general statute on enrollment, the act of February 18, 1793.[2]

Registry of voters. In statutes relating to elections, "registered voters" uniformly refers to persons whose names are placed upon the registration books provided by law as the sole record or memorial of the duly qualified voters.[3]

"Registration," in its ordinary, generic sense, when applied to voters, means any list, register, or schedule containing names, the being on which list, register, or schedule constitutes a prerequisite to voting.[4]

See RECORD; TRADE-MARK.

REGNAL YEARS. See KING.

REGRATING. By statute 5 and 6 Edw. VI (1552), c. 14, buying corn [grain] or other "dead victual," and selling it again in or within four miles of the same market.

An offense against public trade; because, by the practice, the price of provisions advanced with each change of ownership.[5]

Compare ENGROSSING; FORESTALLING.

REGRESS. See INGRESS.

REGULA. See REGULAR; EXCEPTIO, Probat, etc.; SECUNDUM, Regulam.

REGULAR.[6] 1. Following the rule; according to rule or law; observing the prescribed course: as, a regular — deposit, judgment, process or other proceeding.

2. Usual; general; not special: as, a regular — election, session.[7]

In the expression "regular navigation," "regular" may be used in contradistinction to "occasional" and refer to vessels which constitute lines, rather than to vessels which are regular in the sense of being properly documented.[1]

Irregular. Not in compliance with the rule; regardless of rule or law; also, exceptional, special.

"Irregular process" is usually applied to process not issued in strict conformity with the law, whether the defect renders the process absolutely void or only voidable.[2]

Irregularity. Non-adherence to the prescribed rule or proceeding; as, by omitting something necessary for the due and orderly conducting of a suit, or by ordering it in an unseasonable time or improper manner.[3]

See ERRONEOUS; VOID; PRESUMPTION.

Regularly. "Regularly employed" in a trade does not mean continuously so employed.[4]

Regulate. To lay down the rule by which a thing shall be done; to prescribe the rule by which a business or trade shall be conducted.

Power "to regulate commerce" is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions.[5]

"To regulate the practice" of a court by rules means to prescribe the manner of conducting proceedings, the time for pleadings, etc.[6]

Power to regulate the use of the streets of a city implies power to prohibit their use under proper circumstances.[7]

Power to regulate the sale of liquor may embrace entire prohibition of sales to certain classes, such as minors.[8] See further PROHIBITION.

Regulation. In an act of Congress, "regulations" of a department means general rules relating to the subject upon which the department acts, made by the head thereof under some act giving the regulations the force of law.[9]

General power to enact "sanitary regulations" includes power to prohibit sales of adulterated milk.[10]

See RULES AND REGULATIONS; TEMPORARY.

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[1] Patterson *v.* De la Ronde, 8 Wall. 300 (1868), Field, J. In English law, 2 Law Quar. Rev. 324–46 (1886); Roman Dutch law, *ib.* 347 (1886).

[2] R. S. §§ 4131, 4312: The Mohawk, 3 Wall. 571 (1865), Miller, J.; Gibbons *v.* Ogden, 9 Wheat. 214 (1824).

[3] Chalmers *v.* Funk, 76 Va. 719 (1882), Staples, J.

[4] Appointment of Supervisors, *ante.* See generally 35 Am. Law Reg. 641–43 (1886), cases.

[5] 4 Bl. Com. 158; 1 Russ. Cr. 169.

[6] L. *regula*, a rule.

[7] See State *v.* Conrades, 45 Mo. 47 (1869); Bethel *v.* Commissioners, 60 Me. 538 (1872); 72 N. C. 163.

[1] The Steamer Smidt, 16 Op. Att.-Gen. 277 (1879).

[2] Doe *dem.* Cooper *v.* Harter, 2 Ind. 253 (1850): Woodcock *v.* Bennett, 1 Cow. 735 (1823).

[3] Bowman *v.* Tallman, 2 Robt. 634 (1864): 1 Tidd's Pr. 512; Baldw. 246; 31 Cal. 625; 43 Mo. 317; 40 Wis. 365; 3 Chitty, Gen. Pr. 509.

[4] Wilson *v.* Gray, 127 Mass. 99 (1879).

[5] Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 203 (1885), Field, J.

[6] Vanatta *v.* Anderson, 3 Binn. 423 (1811).

[7] Attorney-General *v.* Boston, 142 Mass. 206 (1886).

[8] Williams *v.* State, 43 Ind. 308 (1874).

[9] Harvey *v.* United States, 3 Ct. Cl. 43 (1867), Loring, J.

[10] Polinsky *v.* People, 73 N. Y. 65 (1878).

REHABILITATE.[1] To restore to the ability or capacity formerly possessed, but of which the person has been deprived by judgment of a court.

Reversal of judgment and pardon (*q. v.*) rehabilitate a felon to competency as a witness.[2]

REHEARING. See HEARING.

REIMBURSE. To pay back again.

This, the primary, meaning is to be imputed where not controlled by contract stipulations.[3] Compare DISBURSEMENT.

REINSTATE. To restore to former position with reference to other persons or things.

When the President is authorized by law to reinstate a discharged army officer, as by act of March 8, 1879 (20 St. L. 484), he may do so without the advice and consent of the Senate; and the right of such officer to pay for the period he was out of the service depends upon the will of Congress as expressed in the enactment.[4]

RE-INSTRUCT. See INSTRUCT.

RE-ISSUE. See ISSUE, 1.

REJOIN. To answer a replication.

Rejoining gratis. For defendant to rejoin without putting the plaintiff to the necessity of obtaining a rule.[5] See JOINDER.

RELATION.[6] 1. The principle by which an act done at one time is viewed, by a fiction of law, as done at an antecedent period.

Applies where several proceedings are essential to complete a particular transaction, as, the execution of a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect as of the day when the first proceeding was had.[7]

Thus, as between the parties to an application for a patent for land, when the title is consummated by all the necessary forms it relates back to the day when the patent was ordered; but not so when third persons, who are not parties, will be prejudiced thereby.[8]

The doctrine is applied to subserve the ends of justice, and to protect parties deriving their interests from the claimant pending proceedings for the confirmation of his title. Effect is given to the confirmation as of the day when the proceedings were instituted.[1]

Other illustrations: an instrument delivered as a deed, but previously held as an escrow, bears the date of the delivery of the escrow; an assignment in bankruptcy transfers the debtor's title as it existed at the date of the filing of the petition; an act may give character to a prior act and make a case of trespass *ab initio;* the judgment of a court has been held to be rendered as of the first day of the term.[2]

2. A narrative; information: as, in speaking of the suit of the State "at the relation" of (*ex relatione*, or *ex rel.*) A. B. *v.* C. D.

Relator. An informant: the plaintiff in proceedings by *quo warranto.* See WARRANTUM.

The feminine form **relatrix** designates the complaint in bastardy proceedings.[3]

8. (1) The connection or tie between persons in a social status, as of husband and wife, parent and child, guardian and ward, master and servant.

(2) A person connected with another by consanguinity or affinity.

The more common use expresses kindred of blood or affinity, though properly only the former is embraced. Hence, in strict technical sense, does not include husband and wife.

May include any and every relation that exists in social life. If literally taken, would have so wide a range as to be liable to objection as indefinite or vague. To avoid this, it has long been settled that a bequest to "relations" applies to those who, by virtue of the statute of distributions, would take the property as next of kin.[4]

"'Relation' might better be confined to the connection or tie, and 'relative' to an individual person."

RELATIVE. See ABSOLUTE; RELATION, 3; RIGHT, 2.

RELEASE. The act or writing by which some claim or interest is surrendered to another person.

As, the instrument, or act, by which a creditor relinquishes a demand or all demands whatsoever to his debtor; the instrument or action by which a trustee or witness is discharged from liability, or by which a part of one's property is relieved of the lien of a mortgage or other incumbrance.

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[1] L. *re-habilitare*, to have again.

[2] White *v.* Hart, 13 Wall. 648 (1871); Knote *v.* United States, 95 U. S. 153 (1877); 48 Pa. 223.

[3] Philadelphia Trust, &c. Co. *v.* Audenreid, 83 Pa. 264 (1877), Woodward, J. See also Fuller *v.* Atwood, 13 R. I. 316 (1881).

[4] Collins *v.* United States, 15 Ct. Cl. 22 (1879), Richardson, J.; Kilburn's Case, *ib.* 41 (1879); Collins's Case, 16 Op. Att.-Gen. 624 (1879).

[5] Adkins *v.* Anderson, 10 M. & W. *14 (1842).

[6] L. *re-latum*, borne back, carried back.

[7] Gibson *v.* Chouteau, 13 Wall. 100 (1871), Field, J.

[8] Heath *v.* Ross, 12 Johns. *141 (1815).

[1] Lynch *v.* Bernal, 9 Wall. 325 (1869), cases, Field, J.

[2] See 15 Am. Dec. 246-55, cases; 15 Johns. 309; 3 Kent, 83.

[3] See Volkedorf *v.* People, 12 Bradw. 534 (1882).

[4] Esty *v.* Clark, 101 Mass. 38-39 (1869), cases, Ames, J.; Handley *v.* Wrightson, 60 Md. 206 (1883), cases, Bigelow, C. J.

Releasee. He to whom a release is given.

Releasor. He by whom a release is executed.

In the law of real property, a release is a discharge or a conveyance of a man's right in lands or tenements to another that has some former estate in possession.[1]

This may be by way: of enlarging an estate, of passing an estate, of passing a right, of entry and feoffment, or of extinguishment.[1]

While at common law a release conveyed to a person in possession the title of the releasor, it may now be used to convey a title to one who has no previous right in the land. In most States it is equivalent to a "quitclaim" conveyance.[2]

Compare CONFIRMATION, 2; EXTINGUISHMENT; SURRENDER. See LEASE.

RELEVANCY.[3] That which conduces to the proof of a pertinent hypothesis.[4]

Relevant. As applied to testimony, that which directly touches upon the issue made by the pleadings, so as "to assist" in getting at the truth of it.[5]

Relevant means that any two facts to which it is applied are so related to each other, that, according to the common course of events, one, taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other.[6]

Irrelevant. Not pertinent; inapplicable.

In pleading, said of a fact or allegation which has no bearing upon the subject-matter and cannot affect the decision of the court.[7]

Testimony cannot be excluded as irrelevant which would have a tendency, however remote, to establish the probability of the fact in controversy.[8]

A statement not material to the decision of the case is irrelevant; as, an answer which does not form or tender a material issue.[1]

A pleading is irrelevant which has no substantial relation to the controversy between the parties to the suit. "Irrelative" is, perhaps, more appropriate. In parliamentary debate in England, "irrelevant" means "unassisting, unrelieving."[2]

Facts, in an answer to a bill in equity, not material to the decision are "impertinent." The test is whether the subject of the allegation could be put in issue, and would be matter proper to be given in evidence between the parties.[3] See IMPERTINENCE.

In the law of evidence, collateral, disconnected facts are generally irrelevant. But from one part similar qualities of another part may be inferred. Evidence of prior ignitions is admissible against a railroad company charged with the negligent use of fire.[4]

Evidence is admissible which "tends" to prove the issue, or constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it.[5] See TEND.

RELICT. The survivor of a married couple, whether husband or wife; the survivor of the union, not simply of the decedent individual.[6]

RELICTION. See ALLUVION; DERELICT.

RELIEF.[7] 1. In feudal law, a fine or composition paid to the lord of a fee for taking up an estate which had lapsed or fallen by the death of the last tenant. It "raised up" and re-established the inheritance in the hands of the heir.[8]

2. In practice, redress provided by law for deprivation of a right; such enforcement of an alleged right as is invoked in a suit.

To bar equitable relief the legal remedy must be equally effectual with the equitable remedy, as to all the rights of the complainant. Where the remedy at law is not "as practical and efficient to the ends of justice and its prompt administration," the aid of equity may be invoked; but if, on the other hand, "it is plain, adequate, and complete," the legal remedy must be pursued.[9]

Under a prayer for general relief, the plaintiff is entitled to such relief as is agreeable to the case made in the bill, though different from the specific relief prayed for.[10]

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[1] 2 Bl. Com. 324; Field *v.* Columbert, 4 Saw. 527 (1864); Palmer *v.* Bates, 22 Minn. 534 (1876).

[2] Richardson *v.* Levi, 67 Tex. 367 (1887), Willie, C. J.; Ely *v.* Stannard, 44 Conn. 583 (1887); 1 Devlin, Deeds, § 16, cases.

[3] F. *relevant: relever*, to assist, help, be of use: L. *re-levare*, to raise again,—58 Cal. 168; 78 N. Y. 95; 6 How. Pr. 314.

[4] State *v.* Witham, 72 Me. 537 (1881): 1 Whart. Ev. Ch. II, § 20. See also Seller *v.* Jenkins, 97 Ind. 438 (1884).

[5] Platner *v.* Platner, 78 N. Y. 95 (1879), Folger, J.; Hagerty *v.* Andrews, 94 *id.* 199 (1883).

[6] Lamprey *v.* Donacour, 58 N. H. 377 (1878), Foster, J.; Steph. Dig. Ev. (May's Am. ed.) 36; 52 N. H. 405; 58 *id.* 96.

[7] Scofield *v.* State Nat. Bank of Lincoln, 9 Neb. 321 (1879), Maxwell, C. J.

[8] Trull *v.* True, 33 Me. 367 (1851).

[1] [People *v.* McCumber, 18 N. Y. 321 (1858).

[2] Seward *v.* Miller, 6 How. Pr. 313-14 (1852), Strong, J.; Morton *v.* Jackson, 2 Minn. 222 (1858).

[3] Woods *v.* Morrell, 1 Johns. Ch. *106 (1814), Kent, Ch.

[4] 1 Whart. Ev. Ch. II.

[5] 1 Greenl. Ev. § 51 *a*.

[6] [Spitler *v.* Heeter, 42 Ohio St. 101 (1884).

[7] F. *relever:* L. *re-levare*, to raise up again.

[8] 2 Bl. Com. 66, 56; Williams, R. P. 120.

[9] Lewis *v.* Cocks, 23 Wall. 470 (1874), Swayne, J.; Boyce *v.* Grundy, 3 Pet. 215 (1830).

[10] Slemmer's Appeal, 58 Pa. 167 (1868); Hiern *v.* Mi 13 Ves. *119 (1806); 13 Pa. 70.

That a bill contains a prayer with a "double aspect" forms no objection to the bill. "You may ask the court to come to a conclusion on the facts which you have disclosed, having stated everything that will enable the court to form a proper judgment. You may ask the judgment of the court on two alternatives." [1]

The complainant, if not certain as to the specific relief to which he is entitled, may frame his prayer in the alternative, so that if one kind of relief is denied another may be granted; the relief, of each kind, being consistent with the case made by the bill.[2]

See COMPENSATION, 4; EQUITY, Bill in; INJURY; PRAYER; REDRESS; REMEDY.

RELIGION. In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property nor infringe personal rights, is conceded to all. The law knows no heresy, is committed to the support of no dogma, the establishment of no sect.[3]

Laws are made for the government of *actions;* and, while they cannot interfere with mere religious belief and opinions, they may with practices. Thus, they prevent human sacrifices, burning alive on the funeral pile, plural marriages, and the like. To permit such practices would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Under such circumstances government could exist in name only.[4]

The words "religion" and "religious," although used, are not defined in the national Constitution. Article VI, cl. 3, provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." And the first sentence of the first Amendment, ratified in 1791, declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." To ascertain the meaning of these provisions, reference must be made to the history of the times in which they originated.

Before the adoption of the Constitution, attempts had been made to legislate with respect not only to an establishment of religion, but also as to religious precepts. The people were taxed for the support of sects to whose tenets they could not subscribe, and punishments were prescribed for non-attendance upon public worship and even for entertaining heretical opinions. The controversy upon the general subject culminated in Virginia. There, in 1784, the legislature had under consideration "a bill establishing provision for teachers of the Christian religion." Action on this bill was postponed one session; and, during the interval, strenuous opposition to the bill was developed. A remonstrance by Mr. Madison, widely circulated and numerously signed, declared "that religion, or the duty we owe the Creator," was not within the cognizance of civil government. At the ensuing session, not only was the proposed bill defeated, but another bill "for establishing religious freedom," drafted by Mr. Jefferson, was passed. This act (12 Herr. St. 84) recites "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill-tendency, is a dangerous fallacy which at once destroys all religious liberty; — that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." Therein lies the true distinction between the domains of church and state.

About a year later the convention which framed the Federal Constitution met. The instrument as proposed and as adopted contained no declaration expressly insuring freedom of religion. New Hampshire, New York, Virginia, and North Carolina suggested such a declaration as an amendment. Accordingly, at the first session of the first Congress, the First Amendment was proposed by Mr. Madison. That amendment deprives Congress of all legislative power over mere opinion, but leaves it free to reach all actions which are in violation of social duties or subversive of good order. "The Amendment," said Mr. Jefferson "builds a wall of separation between church and state." [1]

The real object of the Amendment was to exclude rivalry among Christian sects, and prevent any national ecclesiastical establishment which would give to a hierarchy the exclusive patronage of the national government. It thus cuts off the means of religious persecution.[2]

The general if not the universal sentiment was that *Christianity* ought to receive encouragement from the state so far as not incompatible with the private rights of conscience and freedom of religious worship. Any attempt to level all religions, to make it a matter of state policy to hold all in indifference, would have created universal disapprobation, if not universal indignation.[3]

The Amendment prohibits any laws which shall recognize, found, confirm, or patronize any particular religion or form of religion, permanent or temporary, present or future.[4]

But it is a restriction placed upon the legislative power of the United States government alone. The Constitution makes no provisions for protecting the

[1] Wilhelm's Appeal, 79 Pa. 140 (1875), Sharswood, J.: Rawlings v. Lambert, 1 Johns. & H. 466 (1860).

[2] Hardin v. Boyd, 113 U. S. 763 (1885), cases, Harlan, Justice.

[3] Watson v. Jones, 13 Wall. 728 (1871), Miller, J.; United States v. Bennett, 16 Blatch. 359-60 (1879), Blatchford, J.

[4] Reynolds v. United States, 98 U. S. 166 (1878), Waite, C. J. See also Guiteau's Case, 10 F. R. 175 (1882).

[1] Reynolds v. United States, 98 U. S. 162-64 (1878) 1 Jefferson's Works, 45; 8 *id.* 113; 2 Howis., Va., 298.

[2] 2 Story, Const. §§ 1877, 622-23.

[3] 2 Story, Const. § 1874.

[4] 1 Story, Const. § 454; 1 Tuck. Bl. Com. Ap. 296.

citizens of the respective States in the exercise of religious liberty. That is left wholly to the constitution and laws of each State.[1]

The provision against "religious tests" was intended to cut off every pretense of alliance between church and state, and prevent any sect from securing a monopoly of the offices of government.[2]

Likewise, the constitutions of the States forbid the establishment of any particular religion. Those of California, New York, and Pennsylvania may be taken as declaring the sentiment of the people of the other States upon the general subject of the natural rights of conscience and freedom of worship. They provide as follows:

"The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed [guaranteed] in this State to all mankind; and no person shall be rendered incompetent to be a witness [or juror] on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[3]

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support any place of worship or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishment or modes of worship."[4]

As early as December 7, 1682, it was enacted by William Penn and the deputies, "That no person, now or at any time hereafter Living in this Province, who shall confess and acknowledge one Almighty God to be Creator, Upholder and Ruler of the World, And who professes him or herself Obliged in Conscience to Live peaceably and quietly under the civil government, shall in any case be molested or prejudiced for his or her Conscientious persuasion or practice. Nor shall he or she at any time be compelled to frequent or maintain any religious worship, place or Ministry whatever, Contrary to his or her mind, but shall freely and fully enjoy his or her Christian liberty in that respect, without any Interruption or reflection. And if any person shall abuse or deride any other, for his or her different persuasion and practice in matters of religion, such person shall be looked upon as a Disturber of the peace, and be punished accordingly."[1]

"Religion" in the constitution of Ohio, in the declaration that "religion, morality, and knowledge are essential to good government" refers to the religion of mankind, not of any class of men. There is no such thing as "religion of state."[2]

But "religion," "religious," and equivalent words and phrases, have often been held to refer to the Christian religion, in its most comprehensive acceptation. Thus, in a will, "religious books" will denote such publications as tend to promote the religion taught by the Christian dispensation, unless associated words or circumstances show a reference to another mode of worship.[3]

Though the constitution of New York has discarded religious establishments it does not forbid judicial cognizance of those offenses against religion and morality which have no reference to any such establishment, or to any particular form of government, but are punishable because they strike at the root of moral obligation, and weaken the security of social ties.[4]

"The separation of church and state is not so complete that the state is indifferent to the welfare and prosperity of the church. This is a Christian commonwealth. . . Religion lies at the basis of morality. For the purpose of securing the best and most thoroughly extended morality, it is fitting that religion and the church be recognized."[5]

"The criminal laws of every country are shaped in greater or less degree by the prevailing public sentiment as to what is right, proper, and decorous, or the reverse; and they punish as crimes acts which disturb the peace and order or tend to shock the moral sense or sense of propriety and decency of the community. The moral sense is largely regulated and controlled by the religious belief; and therefore it is that those things which, estimated by a Christian standard, are profane and blasphemous, are properly punished as crimes against society, since they are offensive in the highest degree to the general public sense and have a direct tendency to undermine the moral support of the laws and to corrupt the community."[6]

See ASSEMBLY; BLASPHEMY; CAMP-MEETING; CHARITY; CHURCH; CONSCIENCE; HOLIDAY; MASSES; MORTMAIN; OATH; PROFANITY; SCHOOL; SUNDAY; WORSHIP.

[1] Barron v. Mayor of Baltimore, 7 Pet. 247 (1833), Marshall, C. J.; Permoli v. First Municipality, 3 How. 609 (1845); Reynolds v. United States, 98 U. S. 162 (1878).

[2] 2 Story, Const. §§ 1847, 1849.

[3] New York Constitution of 1846, Art. 1, sec. 3. The California constitution of 1879, Art. 1, sec. 4, is the same except as to the words inclosed by brackets.

[4] Pennsylvania Constitution of 1874, Art. I, sec. 3. See Vidal v. Girard, 2 How. 198 (1844), Story, J.; Bush v. Commonwealth, 80 Ky. 249 (1882); Cooley, Const. 206; Strong, Civ. Law and Church Polity, 11-27 (1875).

See constitutions of other States as follows: Ala. I, 4; Ark. II, 24; Col. II, 4; Conn. I, 34, VII, 1, 2; Del. Pre. I, 1; Fla. D. R. 5, 23; Ga. I, 6, 12; Ill. II, 3; Ind. I, 2-4, 7; Iowa, I, 3, 4; Kan. B. R. 7; Ky. XIII, 5, 6; La. 12; Me. I, 3; Md. D. R. 36; Mass. II, 1, 2, Amd. 11; Mich. IV, 39, 41; Minn. I, 16, 17; Miss. I, 23; Mo. II, 5-7; Neb. I, 4; Nev. I, 4; N. H. I, 4-6; N. J. I, 3, 4; N. Y. I, 3; N. C. I, 26; Ohio, I, 7; Oreg. I, 2, 3, 6, 7; R. I. I, 3; S. C. I, 2, 10; Tenn. I, 3; Texas, I, 6; Va. I, 18; Vt. I, 3, II, 14; W. Va. III, 15; Wis. I, 18, 19.

[1] "The Great Law" of the Prov. of Penn.; Linn, 107, 478.

[2] Board of Education v. Minor, 23 Ohio St. 243 (1872), Welch, J.

[3] Simpson v. Welcome, 72 Me. 499 (1881).

[4] People v. Ruggles, 8 Johns. *296 (1811), Kent, C. J.

[5] Commissioners of Wyandotte County v. Presbyterian Church, 30 Kan. 637 (1883), Brewer, J.

[6] Cooley, Const. Lim. 568. On apostacy at common law, see 2 Law Quar. Rev. 153 (1886).

RELINQUISH. See ABANDON; DERELICT; DISCHARGE; QUIT; RELEASE; REMIT, 2, 8; RENOUNCE; WAIVE.

REM. See RES.

REMAINDER. An estate limited to take effect and be enjoyed after another estate is determined.[1]

As, in the case of a grant of lands to A for twenty years, and, after the determination of that term, to B and his heirs forever. Here A is tenant for years, remainder to B in fee.[1]

A remnant of an estate in land, depending on a particular prior estate, created at the same time, and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it.[2]

Generally used of landed property, but there may be a remainder in personalty.[3]

Remainder-man. The owner or tenant of an estate in remainder.

There must be a "particular" estate precedent to the estate in remainder; and the remainder itself must commence or pass out of the grantor at the time of the creation of the particular estate, and vest in the grantee during the continuance of such estate or the instant it determines.[4]

Contingent remainder. Where the estate is limited to take effect as to a dubious and uncertain person or upon a dubious and uncertain event; so that the particular estate may chance to be determined and the remainder never take effect. Called also an *executory remainder*, for by it no present interest passes. **Vested remainder.** Where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. Called also a *remainder executed*, since by it the present interest which passes is to be enjoyed in the future.[5]

Cross-remainder. Where a devise is of black-acre to A and of white-acre to B in tail, and, if both die without issue, to C in fee,—A and B have "cross-remainders" by implication, and on the failure of either's issue, the other or his issue will take the whole; and C's remainder over is postponed till the issue of both shall fail.[6]

A cross-remainder cannot arise in deeds without express limitation.[1]

It is the uncertainty of the *right* of enjoyment, not of its actual enjoyment, which renders a remainder "contingent." The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues.[2]

A remainder is "vested" when there is a person in being who would have an immediate right to the possession upon the ceasing of the intermediate particular estate. It is an estate grantable by any of the conveyances operating by force of the Statute of Uses. A remainder limited upon an estate-tail is a vested remainder. A remainder is never held to be contingent when, consistently with the intention, it can be held to be vested.[3]

A contingent remainder, amounting to a freehold, cannot be limited to an estate less than freehold. It may be defeated by the determination or destruction of the particular estate before the contingency happens. Hence, trustees are appointed to preserve such remainders.[4]

The law will not construe a limitation in a will an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested. The rule is, an estate vests at the earliest possible period, unless there is a clear manifestation of the intention of the testator to the contrary.[4]

"Where," "there," "after," "from," and other adverbs of time, used in a devise of a remainder, are construed to relate to the time of the enjoyment of the estate, not to the time of the vesting in interest. Where there is a devise to a class of persons to take effect at a future period, the estate vests in the persons as they come *in esse*, subject to open and let in others as they are born afterward. An estate once vested will not be devested unless the intent to devest clearly appears.[4] See THEN; WHEN.

Words directing that land be conveyed or divided among remainder-men, after the termination of a particular estate, are always presumed, unless clearly controlled by other provisions of the will, to relate to the beginning of enjoyment by the remainder-men, and not to the vesting of a title in them.[4]

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[1] 2 Bl. Com. 163.

[2] 4 Kent, 197; Bennett *v.* Garlock, 10 Hun, 337 (1877).

[3] In Connecticut, may be of realty or personalty, Bristol *v.* Bristol, 53 Conn. 278 (1885).

[4] 2 Bl. Com. 165–69.

[5] [2 Bl. Com. 168–69; Doe's Case, 6 Wall., *post*.

[6] 2 Bl. Com. 381; Cowp. 777, 797; 4 T. R. 710; 5 *id.* 481, 521, 2 East, 36.

[1] 2 Bl. Com. 381; Hall *v.* Priest, 6 Gray, 18 (1856), Bigelow, J.; 2 Washb. R. P. 233; 4 Kent, 201; 1 Prest. Est. 94.

[2] 4 Kent, 202–6.

[3] Croxall *v.* Shererd, 5 Wall. 287–88 (1866), cases, Swayne, J. See also Scott *v.* West, 63 Wis. 529, 564–65 (1885), cases; Mercantile Bank of New York *v.* Ballard, 83 Ky. 487–88 (1885); Farnam *v.* Farnam, 53 Conn. 278–83 (1885), cases.

[4] Doe *v.* Considine, 6 Wall. 474–78 (1867), cases, Swayne, J. See also Cropley *v.* Cooper, 19 Wall. 176 (1873), cases; McArthur *v.* Scott, 113 U. S. 379–80 (1885), cases; 8 Conn. *359; 66 Ga. 472–73; 26 N. J. L. 540; 5 Paige, 466; 26 Barb. 224; 37 Pa. 28; 75 *id.* 220; 83 *id.* 488.

[5] McArthur *v.* Scott, 113 U. S. 380 (1885), cases, Gray, J.

When the income of property is devised to A during his life, remainder to B, the interest of B becomes vested at the death of the testator, even though A should have died before the testator.[1]

If a remainder created by will cannot take effect, the property, according to circumstances, will either fall into the residuum or remain undisposed of. If an executory devise cannot take effect, the estate, ordinarily, unless the will directs otherwise, will continue in the first taker.[2]

See ABEYANCE; DEVISE, Executory; REVERSION; SHELLEY'S CASE; WASTE, 2.

REMAND. 1. When an accused person, after a partial hearing, is sent back to prison to await further proceedings, as, the collection of testimony, the magistrate is said to remand him, and the order of recommitment is called the remand.[3]

2. An order sending back a cause improperly removed into an appellate tribunal; as, a cause taken to the circuit court of the United States from a State court. See REMOVE, 2.

REMANET.[4] A cause held over from a former term of court; a continued or postponed case. Plural, remanets.

REMEDIAL. See REMEDY.

REMEDIUM. L. Redress, relief, remedy; reparation.

Ubi jus, ibi remedium. Where there is a right, there is a remedy. For every legal right the law provides a remedy.[5] See DAMNUM, Absque, etc.

REMEDY. A mode prescribed by law to enforce a duty or redress a wrong; not, an obligation to guarantee a right or to indemnify against a wrong.[6]

The remedy for every species of wrong is "the being put in possession of that right whereof the party injured is deprived. The instruments whereby this remedy is obtained are a diversity of suits and actions."[7]

"A judicial means of enforcing a right or redressing a wrong."[1]

In saying that, while a contract right may not be impaired, the remedy may be modified without impairing the obligation of the contract, the word "remedy" pertains to the modes of procedure and pleading which lead up to and end in the judgment.[2] See IMPAIR.

Remedial. Affording a remedy; supplying defects in the common or statutory law: as, remedial statutes, legislation.[3]

The remedial part of the law is that whereby a method is pointed out to recover private rights, or redress private wrongs. See further STATUTE.

Adequate remedy. May mean complete satisfaction of such judgment as may be recovered without restriction.[4] See ADEQUATE, 2.

Civil remedy. Redress afforded by a civil court for a private injury.

Cumulative remedy. A remedy, created by statute, additional to the other remedy or remedies already existing.

Where a statute creates a new right or liability and at the same time gives a remedy, such remedy is exclusive; but when the right or remedy was not created by the statute, but would have existed without the statute, the statutory remedy is cumulative.[5]

Whenever a statute gives a new right without creating a special remedy for its enforcement, it may be enforced by any appropriate common-law action. So where a right is to be enforced by a common-law action, it is immaterial whether the right has been conferred by statute or common law.[6]

Equitable remedy. Redress afforded by a court exercising equity powers. **Legal remedy.** Redress afforded by a court exercising purely common-law powers.

Extraordinary remedy. Relief furnished by a court of chancery exercising its extraordinary jurisdiction.

Judicial or legal remedy. "Judicial remedy," in its largest sense, comprehends more than a direct proceeding against a party to a contract to compel him to perform its stipulations. It comprises, also, judicial

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[1] Robison v. Female Orphan Asylum, 128 U. S. 706-9 (1887), cases, Matthews, J.; 26 Cent. Law J. 552-54 (1888), cases.

[2] Medley v. Medley, 81 Va. 270 (1886); Jackson v. Noble, 2 Keen, *596 (1838); Barnitz's Lessee v. Casey, 7 Cranch, 464 (1813). See generally, as to remainderman and life tenant, 38 Alb. Law J. 404, 424, 444 (1888), cases; 34 *id.* 144 (1886), cases.

[3] See 3 Bl. Com. 21.

[4] Rem'-a-net. L. *remanet*, it remains, is left.

[5] Broom, Max. 192; 7 Gray, 197; 1 Sm. L. C. 472.

[6] [United States v. Lyman, 1 Mas. 500 (1818), Story, J.; State v. Poulterer, 16 Cal. 528 (1860).

[7] Cohens v. Virginia, 6 Wheat. 407 (1821); 3 Bl. Com. 118.

[1] Stratton v. European, &c. R. Co., 74 Me. 428 (1883), Danforth, J.

[2] Johnson v. Fletcher, 54 Miss. 631 (1877), Chalmers, J.

[3] [1 Bl. Com. 86.

[4] [United States v. New Orleans, 17 F. R. 491 (1883), Billings, J.

[5] Godding v. Pierce, 13 R. I. 534 (1882); 11 *id.* 526; 9 *id.* 544; 8 Cush. 93; 15 Gray, 221; 1 Chitty, Pl. 112.

[6] Union R. & Transit Co. v. Shacklett, 119 Ill. 239 (1886); Train v. Boston Disinfecting Co., 144 Mass. 523 (1887).

protection against invasion by others of the rights vested by the contract. Any means in the hands of the party aggrieved, or of any other person, though not a court, for enforcing performance of a contract,— any mode agreed upon, if permitted by the law, is a "legal remedy."[1]

Remedy over. A remedy against another as a third person.

Thus, when an indorser has a "remedy over" he must be given notice of non-payment.[2]

See ELECTION, 3; REDRESS; RELIEF, 2; SUIT, 3.

REMISE. To release, *q. v.*

REMISSNESS. In sending and delivering a message, implies a sending in a tardy, negligent or careless manner.[3]

REMIT. 1. To send back, as, a record to an inferior court.

2. To release, as, a debt; to discharge, as, a penalty; to pardon, as, an offense.

3. To relinquish, give up, as, damages awarded.

The right of the trial court, in the exercise of a sound discretion, when it deems a verdict excessive, the result of ignorance, passion or prejudice on the part of the jury, to refuse a new trial, upon condition that the prevailing party remit such a sum as shall leave the recovery not excessive, has often been exercised.[4] See REMITTITUR, 1.

Remitter. At common law, a redress by operation of law: where one who has right to lands, but is out of possession, has afterward the freehold cast upon him by some subsequent defective title, and enters by virtue of that title.[5]

The law sends him back to his ancient, more certain title.[6]

REMITTERE. L. To send back: to release; to remit.

Remittit. He releases; he surrenders.

Remittitur. It is sent back; also, it is released.

1. Relinquishment of a part of the damages found by a jury.

Remittitur damnum. The damage is released. ***Remittitur damna.*** It is released as to damages. ***Remittit damna.*** He releases damages.

Where an award of damages is excessive, the court may give the plaintiff the alternative of entering a *remittitur* as to the excess, and recovering a judgment upon the verdict as reduced, or of taking his chances under a new trial.[1]

Where, after judgment for a sum of money, a *remittitur* is entered as to a part, the *remittitur* does not bind the party making it, if the judgment be vacated or set aside.[2]

2. Returning a record from the court of review to the lower court for proceedings as specified, as, for execution, or a new trial.

REMOTE. See DAMAGES; DOMINION.

REMOVE. To change or cause to change place or position.

1. To go from one place to another; to change place of residence.[3]

2. To deprive of office by the lawful act of a superior,— another officer of the legislature.

Removal for cause. Imports that a reason exists, personal to the individual, which the law and sound public opinion recognize as a good cause for his no longer occupying the place.[4]

Implies some dereliction or general neglect of duty, some incapacity to perform the duties of the post, or some delinquency affecting the incumbent's general character and fitness for the office.[5]

The power to remove an officer "for cause" can be exerted only for just cause, after he has had an opportunity to defend.[6]

3. To carry away something that pertains to land; as, in a statute against removing any tree, timber, stone, or other article which would pass by a sale of the land.[7]

4. To transfer a cause from a State court to the circuit court of the United States.

The act of March 3, 1875, § 2, provides that any suit of a civil nature pending in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred [now two thousand] dollars, and in which there shall be a controversy between citizens of different States, either party may remove said suit into the circuit court for the proper district.[8]

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[1] State *v.* Young, 29 Minn. 534 (1881), Gilfillan, C. J.

[2] Brown *v.* Maffey, 15 East, 216 (1812).

[3] Baldwin *v.* United States Telegraph Co., 6 Abb. Pr. 423 (1867).

[4] Craig *v.* Cook, 28 Minn. 237 (1881), cases; North. Pacific R. Co. *v.* Herbert, 116 U. S. 646 (1886), cases; 3 Mas. 107; 36 Cal. 462; 3 Col. 571; 4 Conn. 311; 74 Ill. 399; 35 Iowa, 432; 28 Me. 97; 97 Mass. 213; 49 N. H. 358; 54 N. Y. 295.

[5] [3 Bl. Com. 19, 190; 30 Hun, 190.

[1] Pollitz *v.* Schell, 30 F. R. 422 (1887); Phelps *v.* Cogswell, 70 Cal. 204 (1886).

[2] Planters' Bank *v.* Union Bank, 16 Wall. 497 (1873).

[3] Society *v.* Platt, 12 Conn. *187 (1837).

[4] People *v.* Nichols, 19 Hun, 448 (1879).

[5] People *ex rel.* Munday *v.* Fire Commissioners, 72 N. Y. 449 (1878), Allen, J.

[6] Haight *v.* Love, 39 N. J. L. 14 (1876): Rex *v.* Richardson, 1 Burr. 517 (1758).

[7] Bates *v.* State, 31 Ind. 75 (1869).

[8] 18 St. L. 470; R. S. § 643. See this subject, as to

This means that when the controversy is between citizens of one or more States on one side, and citizens of other States on the other side, either party may remove the suit without regard to their position as plaintiffs or defendants. For the purpose, the matter in dispute may be ascertained, and, according to the facts, the parties arranged on the opposite sides. If in such arrangement it appears that those on one side, being all citizens of different States from those on the other, desire a removal, the suit may be removed.[1]

To bar removal, it must appear that the trial in the State court was actually in progress in the orderly course of proceeding when the application was made. The case must be actually on trial by the court, all parties acting in good faith, before the right is gone. A party may not experiment in the State court, and, meeting unexpected difficulties, stop the proceedings and take his suit to another tribunal.[2]

That is, a party must make an election before he goes to trial or hearing on the merits.[3]

The act of 1875 also requires that the petition be filed in the State court at or before the term at which the suit "could be first tried" and before the trial. This refers to the term at which, under the legislation of the State and the rules of practice pursuant thereto, the cause is first triable, that is, subject to be tried on the merits.[3]

An application to remove a case, made pending trial, is made "before trial thereof," although there may have been several mistrials.[4]

The act means that when there is a controversy wholly between citizens of different States, which can be fully determined as between them, one or more on either side actually interested may effect the removal. The right depends upon the case disclosed by the pleading, when the petition is filed. It does not matter that a defendant who is a citizen of the State of a plaintiff may be a proper but not an indispensable party. The removal of a separable controversy operates to transfer the whole suit — which was not the case under the act of 1868.[5]

Congress has not provided for the removal of a suit in which the controversy is not wholly between citizens of different States, and to the final determination of which an indispensable party on the side seeking the removal is a citizen of the State of one or more of the parties against whom the removal is asked.[6]

The right, as indicated, being statutory, a party must show that his case is within the statute. The petition becomes part of the record, and must state facts which, with such as already appear, entitle the party to a transfer.[1]

By the act of 1875, § 5, if it appears to the circuit court that the suit does not really and substantially involve a controversy within its jurisdiction, the court may remand the cause back, and the order be reviewed by the Supreme Court "on writ of error or appeal, as the case may be." Previously, the order was not such a final judgment or decree as gave jurisdiction for review; but a *mandamus* issued to compel the circuit court to hear and decide. Congress substituted appeal and writ of error for *mandamus*. Such remanding order is not a final judgment or decree; it simply fixes the court in which the parties shall litigate. The review by the Supreme Court is not limited by the value in dispute.[8]

A removal cannot be had upon an affidavit made, under Rev. St., § 639, by the attorney, agent, or other person, for a natural person.[9]

See DISPUTE; HEARING.

REMUNERATION. See COMPENSATION.

RENDER.[4] 1. To give up, yield, return.

2. To pay: as, to render rent, *q. v.*

3. To make up, furnish: as, to render an account. See ACCOUNT, 1.

4. To determine upon, declare, announce: as, to render a verdict, or a judgment.

Rendering a judgment is announcing or declaring the decision of the court.[5]

When a judgment is formed in the mind of a justice of the peace and then publicly announced by him it is rendered. "Entered" and "rendered" may be synonymous.[6]

RENEW. A common meaning is to make again; as, to renew — a treaty, a covenant, an objection or exception.

The written declaration "I hereby renew the within note," imports a promise anew to pay the amount of the note, not merely an admission that the old note is unpaid.[7]

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changes made by act of March 3, 1887, under COURT, United States Circuit, p. 281.

[1] Removal Cases, 100 U. S. 468, 473 (1879), cases, Waite, C. J. Approved, Bank of Mayville *v.* Claypool, 120 *id.* 269–70 (1887).

[2] Jifkins *v.* Sweetzer, 102 U. S. 179 (1880), Waite, Chief Justice.

[3] McLean *v.* St. Paul, &c. R. Co., 17 Blatch. 366 (1879), cases, Blatchford, J.

[4] Fisk *v.* Henarie, 32 F. R. 425–27 (1887) cases.

[5] Barney *v.* Latham, 103 U. S. 205, 212–16 (1880), Harlan, J.; Anderson *v.* Appleton, 32 F. R. 859 (1887), cases; Weller *v.* Pace Tobacco Co., *ib.* 862 (1887), cases.

[6] Blake *v.* McKim, 103 U. S. 339 (1880), Harlan, J. See Seldon *v.* Keokuk Packet Co., 9 Biss. 318–19 (1885), cases.

[1] Phœnix Ins. Co. *v.* Pechner, 95 U. S. 185 (1877), Waite, C. J.

[2] Babbitt *v.* Clark, 103 U. S. 610–12 (1880), Waite, C. J. See also Fraser *v.* Jennison, 106 U. S. 194 (1882); King *v.* Cornell, *ib.* 395 (1882); Myers *v.* Swann, 107 *id.* 546 (1882); Shainwald *v.* Lewis, 108 *id.* 158 (1883); St. Paul, &c. R. Co. *v.* McLean, *ib.* 212 (1883); Houston, &c. R. Co. *v.* Shirley, 111 *id.* 358 (1884), Mansfield, &c. R. Co. *v.* Swan, *ib.* 379 (1884); Edrington *v.* Jefferson, *ib.* 779 (1884).

[3] Duff *v.* Duff, 31 F. R. 772 (1887), Sawyer, J.

[4] F. *rendre:* L. *red-dare*, to give back.

[5] [Fleet *v.* Youngs, 11 Wend. *528 (1833).

[6] Conwell *v.* Kuykendall, 29 Kan. 710 (1883), Horton, C. J.; Haseltine *v.* Simpson, 61 Wis. 431 (1884).

[7] Daggett *v.* Daggett, 124 Mass. 151 (1878), Morton, J.

To renew a charter is to give new existence to a charter which has been forfeited or has lost validity by lapse of time.[1]

Renewal. Imparting continued or new force or effect to; the substitution of a new right or obligation for another of the same nature; also, that which is renewed, extended, or substituted.

As, the renewal of bail, of a lease, of a patent. "Renewals" is often used, particularly of renewal notes and premiums.

The "renewal" of a bill of exchange does not necessarily import that some new and additional bill or bills must be drawn or accepted. It is not a word of art; it has no legal or technical signification; and though, in common parlance, it might appear, *prima facie*, to apply to something new, yet there is nothing forced or absurd in giving it a different meaning.[2]

Renewal premiums upon policies of insurance are not debts due to the insurer.[3]

The "renewal" of a patent is often synonymous with the "extension" of the patent.[4]

Where a mortgage was given to secure the payment of promissory notes, made by the mortgagee for the accommodation of the mortgagor, and the renewals thereof until the whole sum was paid, it was held that it was not necessary, in order to constitute notes subsequently used "renewals" of such original notes, that they should have been issued for the same amounts, at the same periods, and that each successive note should have been applied to take up its immediate predecessor.[5] See USURY.

RENOUNCE. To disclaim, disavow; to give up, forego, resign, relinquish.

Renunciation. Disclaimer, rejection, relinquishment; as, of a right or privilege.

A person named for executor in a will may renounce his right to administer the estate — sometimes called "renouncing probate" — by declining to take upon himself the burden of that office;[6] and a widow who declines appointment to settle the estate of her deceased husband is said to renounce or to file her renunciation of the office of administratrix.

Compare ABANDON; DERELICT; DISCLAIMER.

RENT.[7] A compensation or return, in the nature of an acknowledgment, given for the possession of some corporeal inheritance.

A certain profit issuing yearly out of lands and tenements corporeal.[1]

The compensation to be paid for the occupation of land by a tenant, whether he holds under a written lease, at will, or at sufferance, and whether the amount to be paid has or has not been defined by the parties.[2]

Its original is found in the returns in service, grain, cattle, money, etc., made by inferior tenants to their chief feudatories, to enable the latter to perform their military duties without distraction.[3]

It is part of the land or thing itself; issues from some inheritance to which the owner or grantee of the rent may have recourse to distrain; is an incorporeal hereditament; and need not issue every successive year, nor be for a sum of money.[4]

A sum of money payable periodically for the use of a chattel is not a rent in any legal sense. Rent issues only out of *land*, and must be fixed, definite, and certain in amount, whether payable in money, chattels, or labor.[5]

It is a misnomer to call that "rent" which is the agreed price at which goods are to become the property of the person to whom they are bailed.[6]

The ordinary definition of rent, as a profit issuing yearly out of lands and tenements corporeal, does not include all the cases; as, where a furnished house or a stocked farm is leased. In every such case the personal property is a part of the consideration, so that it is only by a fictitious accommodation of the case to the defective definition that we can say that the rent issues exclusively out of the *land*. A rent may issue out of lands and tenements corporeal, or out of them and their furniture.[7]

"Rented," in common use, refers as well to the act of the lessee as to that of the lessor.[8]

Rental. 1. A rent-roll: a list of tenants, lands let, rents, etc.

2. Moneys received or due as rent.

At common law, there were three principal kinds of rent: rent-charge, rent-seck, and rent-service — the original kind. (See *post.*)

Ground rent. A rent reserved to himself and his heirs, by the grantor and lessor of land, out of the land itself.

Our ground-rent is not granted like an annuity or rent-charge, but is reserved out of a conveyance of

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[1] Moers *v.* City of Reading, 21 Pa. 201 (1853), Black, Chief Justice.

[2] Russell *v.* Phillips, 68 E. C. L. 900 (1850), Patterson, Judge.

[3] Manning *v.* Hancock Mut. Life Ins. Co., 100 U. S. 697 (1879).

[4] Wilson *v.* Rousseau, 4 How. 697 (1846); Goodyear *v.* Cary, 4 Blatch. 303 (1859); Pitts *v.* Hall, 3 *id.* 204 (1854).

[5] Gault *v.* McGrath, 32 Pa. 392 (1859).

[6] [*Re* Application of Maxwell, 3 N. J. E. 614 (1832), Ewing, C. J.

[7] F. *rente;* L. L. *rendita;* nasalized form of L. *reddita: reddere*, to give back, return: *red-dare*. Compare RENDER.

[1] 2 Bl. Com. 41: Coke, Litt. 144.

[2] [Kites *v.* Church, 142 Mass. 589 (1886), Field, J.; Rice *v.* Loomis, 139 *id.* 303 (1885).

[3] 2 Bl. Com. 57, 299; 3 *id.* 231.

[4] 2 Bl. Com. 41.

[5] Commonwealth *v.* Contner, 18 Pa. 447 (1852), Black, Chief Justice.

[6] Bailey *v.* Hervey, 135 Mass. 174 (1883).

[7] Mickle *v.* Miles, 31 Pa. 21 (1856), Lowrie, J.

[8] Gray *v.* La Fayette Co., 65 Wis. 569 (1886). See also 4 Mich. 577; 51 Miss. 480; 41 N. Y. 483; 14 Barb. 655; 4 Pa. 147; 43 *id.* 410; 37 Wis. 426; L. R., 10 Ex. 177. As to present law of rent generally, see 23 Cent. Law J. 507 (1886), cases.

the land in fee. Where the reservation is attended by a clause of distress, the land is the debtor. Our ground rent is an ordinary *rent-service*.[1, 2]

The right of distress is an incident by force of express power reserved in the deed.[3]

But covenant and distress may be cumulative. All assignees may be joined for arrears accrued after the assignment.[4]

The lien of a judgment for arrears relates back to the date of the deed.[5]

Rent-charge. Where the owner of the rent has no future interest or reversion expectant in the land.[6]

As, when a man by deed makes over to another his whole estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress that if the rent be arrere it shall be lawful to distrain for the same. Thus the land is charged with a distress for the payment of the rent.[6]

Rent-seck. Barren rent — *reditus siccus*. In effect, a rent reserved by deed, but without any clause of distress.[6]

Rent-service. Where a tenant held land by fealty, homage, or other service, and a certain material return or rent, delivery of which was enforceable by distress.[7]

Quit rent. See QUIT.

White rent; black rent. See BLACKMAIL, 1.

See generally ANNUITY; DISTRESS; EVICTION; FARM; INCOME; LANDLORD; LEASE.

RENUNCIATION. See RENOUNCE.

RE-OPEN. See OPEN, 1.

REPAIR. 1. To replace a building as it was, or to restore it after injury or dilapidation; not, to enlarge or elevate it by raising it a story or by extending its sides.[8]

A covenant to repair may involve an obligation to rebuild.[9]

2. Not, to make a new thing, but to refit, make good or restore an existing thing; as, to repair a highway.[10]

To restore to sound or good condition, after injury or partial destruction; as, to repair a street from curb to curb.[1]

Includes the substitution of new curbstones and gutters for old ones;[2] but not of a new and different kind of pavement.[3]

Referring to a sewer, may mean to keep it large enough to carry off all the water naturally flowing into it.[4]

See COVENANT; ERECT, 1; LANDLORD; LIEN; NECESSARY; PROFIT; RECEIVER; RES, Perit; RESTITUTIO; ROAD; SIDEWALK; STREET; WALL.

REPARATION. See DAMAGES; REDRESS; REMEDY.

REPEAL.[5] The revocation or abrogation of one written law by another.

May be used of a statute, an ordinance, a rule of court, or a constitution.

Express repeal. When the later enactment directs that the earlier shall be repealed.

Implied repeal. When the later is irreconcilably inconsistent with the earlier enactment.

The latest expression of the legislature prevails.[6]

When the common law and a statute differ, the common law gives place to the statute, and an old statute to a new one: upon the principle of universal law that *leges posteriores priores contrarias abrogant* (or, as expressed in the Twelve Tables, *quod populus postremum jussit, id jus ratum esto*). But this is the rule only when the later statute is couched in negative terms, or when its matter is so clearly repugnant that it implies a negative. If both statutes be merely affirmative, and their substance such that both may stand together, the latter does not repeal the former,—they have a concurrent efficacy. If a statute that repeals another is itself afterward repealed, the first is thereby revived, without formal words for that purpose.[7]

"Whenever an act is repealed, which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided."[8] A repealed statute is treated as remaining in force for the purpose of sustaining action for the enforcement of any penalty, forfeiture, or liability incurred thereunder.[9]

A repeal by implication must be by necessary implication. It is not sufficient to establish that the subsequent law or laws cover some or even all of the cases provided for by

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[1] Bosler *v.* Kuhn, 8 W. & S. 185 (1844), Gibson, C. J.
[2] Wallace *v.* Harmstad, 44 Pa. 495 (1863).
[3] Hannen *v.* Ewalt, 18 Pa. 9 (1851).
[4] Fassitt *v.* Middleton, 47 Pa. 214 (1864). See generally 8 Am. Law Reg. 577-90 (1854), Pa. cases.
[5] 2 Bl. Com. 42. See also 18 F. R. 499; 23 Barb. 216; 21 id. 648; 44 P 495-97; 28 Vt. 265.
[6] 2 Bl. Com. 42. See 44 Pa. 495-97, *supra*.
[7] See 2 Washb. R. P. 272; Smith, Landl. & T. *89; Wallace *v.* Harmstad, 44 Pa. 493 (1863).
[8] Douglass *v.* Commonwealth, 2 Rawle, 264 (1830); Stevens *v.* Milnor, 24 N. J. E. 373 (1874).
[9] Beach *v.* Crain, 2 N. Y. 93 (1848); McIntosh *v.* Lown, 49 Barb. 554, (1867); Hoy *v.* Holt, 91 Pa. 90 (1879); Dermott *v.* Jones, 2 Wall. 7 (1864).
[10] Todd *v.* Stowley, 8 Allen, 58 (1864), Bigelow, C. J.

[1] Passenger Ry. Co. *v.* City of Pittsburgh, 80 Pa. 76 (1875).
[2] People *v.* City of Brooklyn, 21 Barb. 488 (1856).
[3] *Re* Fulton Street, 29 How. Pr. 430 (1865).
[4] Blood *v.* City of Bangor, 66 Me. 156 (1877).
[5] F. *rapeler*, to call back, recall, revoke.
[6] Hogaboon *v.* Highgate, 55 Vt. 414 (1883), cases.
[7] 1 Bl. Com. 90.
[8] R. S. § 12.
[9] R. S. § 13.

it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy.[1]

Statutes which apparently conflict with each other are to be reconciled as far as may be, on any fair hypothesis, and effect given to each if it can be, and especially if necessary to preserve titles to property.[2]

Where there are two acts on the same subject the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.[3]

That, undoubtedly, is a sound exposition of the law. The doctrine asserts no more than that the former statute is impliedly repealed, so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new provisions, is plainly intended as a substitute. Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed.[4]

A special or local statute, providing for a particular case or class of cases, is not repealed by a subsequent statute, general in its terms, provisions and application, unless the intent to repeal or alter is manifest, although the terms of the general act are broad enough to include the cases embraced in the special law.[5]

The same rule applies as between a treaty and an act of Congress; as, for example, between the Chinese Immigration Treaty of May 9, 1881, and the Restriction Act of May 6, 1882, as amended July 5, 1884. Since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputed to Congress an intention to disregard the plighted faith of the government; consequently, the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty.[6]

But clauses of a statute which have been repealed may still be considered in construing the provisions which remain in force.[1]

See REVISED, Statute; RIGHT, 2 (3), Vested.

REPLEAD. See PLEADING.

REPLENISH. To fill again; to fill up.

To replenish a stock of goods means to fill up the stock as reduced by sales. The word necessarily implies exhaustion, reduction or diminution in quantity.[2]

REPLEVIN.[3] 1. When a person distrained upon applies to the sheriff, and has the distress returned into his own possession, upon giving security to try the right of taking it in a suit at law, and, if that be determined against him, to return the goods once more to the distrainor[4]—or, where the goods are of a perishable nature, to return a pecuniary equivalent.[5]

In modern practice, a remedy for any unlawful detention of personalty, the same being delivered to the claimant upon security given either to make out the injustice of the detention or to return the property.[6]

Replevy. To obtain possession of personalty by an action of replevin.

Repleviable; replevisable. Obtainable by replevin. Opposed, *irrepleviable; irreplevisable.*

Replevisor. The plaintiff in replevin.

There must be a tortious taking or detention of the property; not a mere breach of a contract.[7]

Replevin lies wherever trespass lies for taking the plaintiff's goods — with this difference: trespass will lie upon possession alone, while replevin requires property in the plaintiff. All that is necessary to support the action is property in the plaintiff, either general or special, and a wrongful taking from his possession, actual or constructive. The idea suggested by Blackstone that replevin lies only for goods taken by "distress" has no foundation. The complaint is, that the defendant took and unjustly detains the plaintiff's goods, not that he took them for any particular purpose.[8]

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[1] Wood *v.* United States, 16 Pet. 362 (1842), Story, J. To the same effect, Adams Express Co. *v.* Lexington, 83 Ky. 661 (1886); The Gulf, &c. R. Co. *v.* Rambolt, 67 Tex. 657 (1887), cases.

[2] Beals *v.* Hale, 4 How. 51 (1846), Woodbury, J.

[3] United States *v.* Tynen, 11 Wall. 92 (1870), cases, Field, J.

[4] Henderson's Tobacco, 11 Wall. 657 (1870), Strong, J. See also King *v.* Cornell, 106 U. S. 396 (1882).

[5] McKenna *v.* Edmundstone, 91 N. Y. 233 (1883), cases. That repeals are not presumed, see Ryan *v.* Commonwealth, 80 Va. 337 (1885).

[6] Chew Heong *v.* United States, 112 U. S. 549 (1884), Harlan, J.

[1] *Exp.* Crow Dog, 109 U. S. 561 (1883), cases.

See also, generally, State *v.* Stoll, 17 Wall. 451 (1873), cases; King *v.* Cornell, 106 U. S. 396 (1882); Red Rock *v.* Henry, *ib.* 601 (1882); Cook County Nat. Bank *v.* United States, 107 *id.* 451 (1882); Bowlus *v.* Brier, 87 Ind. 396 (1882); Hogaboon *v.* Highgate, 55 Vt. 414 (1883).

[2] Bynum *v.* Miller, 89 N. C. 395 (1883), Ashe, J.

[3] F. *re*, again, *plevir*, to be surety,—Skeat. L. L. *replegiare*, to take back the pledge,—3 Bl. Com. 13.

[4] [3 Bl. Com. 13.

[5] [3 Bl. Com. 9, 146.

[6] See Taylor *v.* The Royal Saxon, 1 Wall. Jr. 336–22 (1859).

[7] Mead *v.* Johnson, 54 Conn. 319 (1886).

[8] Williamson *v.* Ringgold, 4 Cranch, C. C. 41 (1830), Cranch, C. J.

The action is a special one, entirely regulated by statute, its whole object being to place the plaintiff in possession of personal property, which he claims to be his either by a general or special title, with a right of immediate possession. The requirements of the statute must, therefore, be strictly complied with before the plaintiff can avail himself of its aid.[1]

The better doctrine is that before an action can be brought, a demand of possession of the property must be made when necessary to terminate the defendant's right of possession or to confer that right on the plaintiff; but when both parties claim the ownership and the right of possession as an incident, no demand is necessary.[2]

The security which the plaintiff furnishes, as a substitute for the property, is called a **replevin bond**, claim-property bond, property bond, or, simply, the claimant's bond.

No one account of the course of proceedings, everywhere applicable, can be given. The term is unknown to equity and admiralty jurisprudence, and under codes of reformed procedure the action has been replaced by "claim and delivery," a provisional remedy ancillary to a civil action to try the title to goods; the word "replevin" being used as if interchangeable with such action.[3]

See AVOWRY; CAPERE, Cepit; DETAINER; DISTRESS; ELOIGN; RETORNUM.

2. A writ formerly used for liberating a man from prison or private custody, upon security given that he would be forthcoming to answer the charges.

Otherwise known as the writ *de homine replegiando*, for replevying a man.[4] See HABERE, Habeas corpus.

REPLICATION. Plaintiff's answer to defendant's plea or answer.[5]

Reply. To respond to a plea or an answer.

At law, the replication denies the allegation in the plea, alleges new matter in contradiction of it, or confesses and avoids it.[6]

In equity, it puts in issue all matters well alleged in the answer. If none is filed, the answer will be taken as true, and no evidence be received to contradict anything so alleged.[7]

A general replication denies every allegation in the answer not responsive to the bill.[8]

Replication de injuria. Replication of the wrong; denial of a matter of excuse in an action of tort.

Puts in issue the material averments of the plea; throws on the defendant the burden of proving as much of the plea as constitutes a defense to the action. Numerous decisions hold that it is good only where the plea sets up matter of excuse, and not matter of justification.[1] See TRAVERSE.

See ANSWER, 3; DEPARTURE, 3.

REPORT. 1. (1) An official statement of the facts, or of the facts, proceedings, and law, in a case: as, the report of — an auditor, a commissioner, a master, a receiver, or viewers, *qq. v.*

(2) A published volume of judicial decisions; a volume of reported cases; a judicial report.

Official report. A report prepared and published under the authority of law, and by direction of the judge or judges of a court.

Unofficial report. A report published by an uncommissioned person.

In most of the States, statutes have been passed providing for the selection of the cases, the size of volume, the printing by contract, the sale, etc., of the authorized reports.

Reports may be of cases upon every branch of jurisprudence, or illustrative of the law of a particular subject. The expression **State reports** is contrasted with **Federal** or **United States reports.** Particular series take their names from the name of the court or courts; as, *Supreme Court reports, Court of Appeals reports, Circuit and District Court reports.* They are sometimes spoken of as the *higher* and the *lower reports;* and, from the grade of the court, as *law reports* and *equity reports*, the former, too, being either *civil or criminal reports*, or of the nature of both species. *Side reports* is occasionally used in contradistinction to the *regular* or *official reports* of a State. While **foreign reports** are designated by the name of the country in which they originate, or from which they come, as, *English, Irish, Scotch*, or *Canadian*, the reports of all countries, and of each of our States,— of any separate or special jurisdiction, are very frequently cited by the name of the person under whose special supervision they are, or have been, collated, indexed, and otherwise prepared. Again, some volumes or series of volumes have also been named after the name of the

[1] Spencer *v.* Bidwell, 49 Com. 63 (1881), Granger, J. See also 81 Pa. 488.

[2] Lamping *v.* Keenan, 9 Col. 393 (1886), cases, Beck, Chief Justice.

[3] See as to value Washington Ice Co. *v.* Webster, 125 U. S. 426–47 (1888), cases.

[4] [3 Bl. Com. 129; 32 Me. 560; 34 *id.* 186.

[5] [3 Bl. Com. 309.

[6] 3 Bl. Com. 309–10, 443.

[7] Brown *v.* Pierce, 7 Wall. 212 (1868), cases.

[8] Hume *v.* Scruggs, 94 U. S. 22 (1876).

[1] Crogate's Case, 8 Coke, 132 (1609): 2 Sm. L. C., H. & W., 247; Taylor *v.* Cole, 1 *id.* 262, 267–73, cases; Erskine *v.* Hohnbach, 14 Wall. 618–20 (1871), cases.

judge whose opinions they preserve, chiefly or exclusively.

A reported case comprises a summary of the points decided, called the *syllabus* or head-note; a statement of the essential facts in the case, and of the arguments of counsel; and the opinion of the court.

Nothing can be so various, as respects grade of merit, as the English reports prior to 1775. Anterior to 1800, there were but two or three American reports.[1]

In the absence of express legislation to the contrary, the reporter of court decisions is entitled to a copyright on his volumes for whatever is the work of his own mind and hand.[2]

The decisions of the court are public property, and may be published freely by any person whatever.[3] See MANUSCRIPT.

The decisions of the courts are the authorized expositions of the laws — unwritten and statutory. Every citizen, being bound to know the law, should have free access to the opinions; and it is against public policy to withhold the earliest knowledge of them, as it would be of the statutes. The opinions, after delivery, belong to the public.[4]

The judge who writes an opinion is not an "author" or "proprietor" within Rev. St. § 4952, so that the State can become his assignee and take out a copyright.[5]

Reporter. (1) A person who prepares decisions for publication.

State reporter. An official who edits and publishes the decisions of the highest court of a State.

(2) A periodical devoted to the publication of reports, perhaps with annotations from other cases.

(3) A person who stenographs a witness's testimony or the charge of a judge. See STENOGRAPHER.

Unreported. Said of a decision either not printed in any law publication or else not officially so published.

See AUTHORITY, 3; CASE, 2; DECISION; PRECEDENT, 2.

2. As to reporting news, see NEWSPAPER.

REPOSE. See LIMITATION, 3.

REPRESENTATION. 1. A statement regarding a fact.

False representation. Not necessarily, although often, a statement of fact known to be untrue.

Misrepresentation. A statement of fact not true in some particular, and misleading another to his injury.

In alleging a tort in the sale of an article, it is necessary to use "falsely represented," or an equivalent phrase implying fraud.[1]

(1) Fraud consists in falsely representing a thing as a fact, or in the deceitful concealment of an existing fact.[2]

Where a party, by words or deeds, intentionally misrepresents a material fact, or produces a false impression, in order to mislead or to obtain an undue advantage of another, he is chargeable with positive fraud. The misrepresentation must be (1) of something material, constituting the inducement or motive to the act or omission of the other, and by which he is actually misled to his injury; and (2) as to something as to which one party places a known confidence in the other — not of a matter of opinion, equally open to both for examination and inquiry, and where neither party is presumed to trust to the other, but to rely upon his own judgment.[3]

The misrepresentation which will vitiate a contract of *sale* must relate not only to a material matter constituting an inducement to the contract, but also to a matter respecting which the complaining party did not possess at hand the means of knowledge; and must be a misrepresentation on which he relied, and by which he was actually misled to his injury.[4]

In some cases the falsity of the representation, not the *bona fides*, is the determining inquiry.[5] See KNOWLEDGE, 1.

(2) *a.* In the law of fire insurance, the statement of something as a fact which is untrue, and which the assured, knowing it to be not true, states with an intent to deceive the underwriter, or which he, without knowing it to be true, states positively as true, and which has a tendency to mislead, the fact being material to the risk.[6]

As a representation to obtain insurance must always influence the judgment of the underwriter in regard to the risk, it must be substantially correct. It

[1] See "The Reporters," &c., 1 South. Law R. 86, 223, 497 (1875); 3 *id.* 268 (1877); 5 *id.* 53 (1879); 25 Alb. Law J. 264 (1880); History of the Law Reports, 1 Law Quar. Rev. 136–49, 287–97 (1885).

[2] Myers *v.* Callaghan, 10 Biss. 139, 150 (1881), cases.

[3] Banks *v.* West Publishing Co., 27 F. R. 56 (1886), cases, Brewer, J.; Banks *v.* Manchester, 23 *id.* 143 (1885); 24 Am. Law Rev. 524–27 (1885), cases; 3 Kan. Law J. 242 (1886), cases.

[4] Nash *v.* Lathrop, 142 Mass. 35–39 (1886), cases; State *v.* Gould, 56 Conn. — (1888).

[5] Bates *v.* Manchester, 128 U. S. 244 (1888); *id.* 617.

[1] Cooper *v.* Landon, 102 Mass. 60 (1869).

[2] [Grove *v.* Hodges, 55 Pa. 519 (1867).

[3] Smith *v.* Richards, 13 Pet. 36–37 (1839), cases, Barbour, J.; Mason Lumber Co. *v.* Buchtel, 101 U. S. 637 (1879); Buckner *v.* Street, 15 F. R. 868 (1883).

[4] Slaughter *v.* Gerson, 13 Wall. 383–85 (1871), cases, Field, J. See generally Weis *v.* Rhodius, 97 Ind. 12 (1883); Potts *v.* Chapin, 133 Mass. 282–83 (1882); Clark *v.* Edgar, 12 Mo. Ap. 351 (1882); Cooper *v.* Schlesinger, 111 U. S. 152 (1884).

[5] Lynch *v.* Mercantile Trust Co., 18 F. R. 496 (1883), cases; Redgave *v.* Hurd, L. R., 20 C. D. 12 (1881); Re London, &c. Fire Ins. Co., 24 *id.* 158 (1883).

[6] [Daniels *v.* Hudson River Fire Ins. Co., 12 Cush. 426 (1853), Shaw, C. J.

differs from an express "warranty," as that always constitutes a part of the policy, and must be strictly and literally performed.[1]

It is the duty of the assured to communicate every material fact; he cannot urge as an excuse for his omission that a fact was known to the underwriter, unless the latter's knowledge was as full and particular as his own.[2]

Where a policy contains contradictory provisions, or leaves it doubtful whether the exact truth should be a condition precedent, that the statements constitute a warranty is not to be favored. The policy will be construed against the insured, who prepares it.[3]

An "affirmative" representation is an affirmation of a fact existing when the contract begins; a "promissory" representation, a promise to be performed after the contract has come into existence.[4]

A representation on information derived from others, reported truly and as resting on information, does not avoid the policy, if the information proves incorrect.[5]

b. In the law of marine insurance, an explicit affirmation or denial of a fact, or such an allegation as irresistibly leads the mind to the same conclusion.[6]

c. In the law of life insurance, all statements must be true when the materiality is removed from the consideration of a court or jury by an agreement that the statements are absolutely true, and that, if untrue in any respect, the policy shall be void.[7]

Where there is no express condition that the statements and declarations made in the application are in all respects true, as far as affects the interests of the insurer, every statement and declaration must be true. . . There is no place for the argument that a false statement was not material to the risk, or that it was a positive advantage to the insurer to be deceived by it. The statement need not come up to the degree of a warranty, nor be a representation even, if that conveys an idea of an affirmation having any technical character; as, where the insured, being "married," stated that he was "single." At the same time, there are many cases to the effect that where false answers are made to inquiries which do not relate to the risk, the policy is not necessarily avoided unless they influence the mind of the insurer, and that whether they are material is for the determination of a jury.[1]

A false answer, in an application for a policy on a life, as to any fact material to the inquiry, knowingly and willfully made, with intent to deceive the insurer, is fraudulent. If it accomplishes its result, it is a fraud effected; if it fails, it is a fraud attempted.[2]

See CONCEAL, 5; CONDITION; DECEIT; ESTOPPEL; FRAUD; INSURANCE; PRETENSE, False; VALUE; WARRANTY, 3.

2. Standing in the place, acting the part, exercising the right, or taking the share, of another person.[3]

Representative. (1) One who occupies the position another held, succeeding to his rights and liabilities; as, an heir to his ancestor, a devisee to the devisor, an executor to his testator, an administrator to his intestate, an assignee to his assignor, successors in a corporation or partnership to their predecessors, a grantee to his grantor, a lessee to his lessor.

In a statute, "representative" will be interpreted with reference to the subject-matter.[4]

Legal representative. In the broadest sense, one who lawfully represents another in any matter whatever;[5] ordinarily, an executor or administrator, but this meaning, in a will, may be controlled by the context;[6] while, strictly, an executor or administrator, is often used in other senses in statutes, wills, deeds, and contracts.[7]

Thus, it may refer to the heir, next of kin, or descendants.[8] In a will, refers to the artificial representation granted by the probate court, or those who take under the statute of distributions. The words by themselves denote the former; but the context may

[1] Hazard *v.* New England Mar. Ins. Co., 8 Pet. *580 (1834), M'Lean, J. See also 49 Me. 200; 21 Conn. 19; 34 N. J. L. 244; 30 Pa. 315; 48 *id.* 367.

[2] Sun Mutual Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 510 (1882), Matthews, J.

[3] First Nat. Bank of Kansas City *v.* Hartford Fire Ins. Co., 95 U. S. 673 (1877), Harlan, J. Approved, Insurance Co. *v.* Gridley, 100 *id.* 617 (1879).

[4] Kimball *v.* Ætna Fire Ins. Co., 9 Allen, 543 (1865), Gray, J.

[5] Tidmarsh *v.* Washington Fire, &c. Ins. Co., 4 Mas. 443 (1827), Story, J.

[6] [Livingston *v.* Maryland Mar. Ins. Co., 7 Cranch, 541 (1813), Story, J.

[7] Ætna Life Ins. Co. *v.* France, 91 U. S. 512 (1875), Hunt, J.; Knickerbocker Life Ins. Co. *v.* Trefz, 104 *id.* 202 (1881).

[1] Jeffries *v.* Economical Life Ins. Co., 22 Wall. 53, 56 (1874), cases, Hunt, J.

[2] Claflin *v.* Commonwealth Life Ins. Co., 110 U. S. 95 (1884), Mathews, J.; Connecticut Life Ins. Co. *v.* Rogers, 119 Ill. 482–88 (1887), cases; Alabama Gold Life Ins. Co. *v.* Johnson, 80 Ala. 470–75 (1886), cases; Bliss, Life Ins. §§ 33 *et seq.*

[3] Abbott's Law Dict.

[4] Duncan *v.* Walker, 2 Dallas, 205 (1793); Mullanphy *v.* Simpson, 4 Mo. 333 (1836); Wear *v.* Bryant, 5 *id.* 164 (1838); Loos *v.* Hancock Mut. Life Ins. Co., 41 *id.* 541 (1867).

[5] Wear *v.* Bryant, 5 Mo. 164 (1838).

[6] Cox *v.* Curwen, 118 Mass. 200 (1875); Lodge *v.* Weld, 139 *id.* 504 (1885).

[7] Bowman *v.* Long, 89 Ill. 21–23 (1878); Warnecke *v.* Lembca, 71 *id.* 92–93 (1873); Johnson *v.* Van Epps, 110 *id.* 559–60 (1884); Halsey *v.* Peterson, 37 N. J. E. 448 (1883); 34 La. An. 1099.

[8] Warnecke *v.* Lembca, *supra.*

show that the testator meant his next of kin within the statute.[1]

In a land-patent certificate, may embrace the representative of the original grantee, whether made such by grant or by operation of law.[2] In a contract for the use of an invention, may include the successors to a partnership or corporation;[3] in a license for the use of a patent, may include the assigns of the license;[4] in a policy of life insurance, may contemplate the assigns of the assured;[5] and in bankruptcy, will embrace an assignee.[6]

In fine, the designation is broad enough to include all persons who, with respect to another's property, stand in his place, and represent his interests, whether transferred by his act or by operation of law.[8]

Personal representative. An executor or administrator: he represents the person of the deceased as to personal estate.

Real representative. The heir at law: he represents the real estate of his deceased ancestor.

A widow is not a "personal representative;"[7] nor is an agent.[8]

Representatives of a deceased person are "real" or "personal;" the former being his heirs at law, and the latter, ordinarily, his executors or administrators. The term "representative" includes both classes. When the personal representatives alone are intended in a statute they are so named. . . As to personalty, executors and administrators, although the usual, are not the sole, representatives of a deceased party. The next of kin, when they succeed to the personalty, whether through the intervention of the executors or administrators or in any other way, become the representatives *quoad* the effects distributed. In wills and settlements, "representatives" and "legal representatives" are frequently held to mean heirs and next of kin, and not executors or administrators.[9]

The heir at law succeeds to all the rights and responsibilities of the deceased ancestor in respect to realty, and is, in all respects, *pro hac vice*, his representative. The executor or administrator, except in special cases, represents the deceased only as to the personal estate, and, hence, is denominated the "personal" representative.[10] See PRIVY, 2.

[1] Jennings *v.* Gallimore, 3 Ves. Jr. *148 (1796), cases; *ib.* *491; Farnam *v.* Farnam, 53 Conn. 291 (1885).

[2] Hogan *v.* Page, 2 Wall. 605 (1864); Capenter *v.* Rancels, 19 *id.* 145 (1873).

[3] Hammond *v.* Mason, &c. Organ Co., 92 U. S. 724 (1875).

[4] Hamilton *v.* Kingsbury, 15 Blatch. 69 (1878).

[5] New York Mut. Life Ins. Co. *v.* Armstrong, 117 U. S. 597 (1886), Field, J.; New York Life Ins. Co. *v.* Flack, 3 Md. 352 (1852).

[6] Wright *v.* First Nat. Bank of Greensburgh, 8 Biss. 243, 246 (1878).

[7] Hagen *v.* Kean, 3 Dill. 125 (1875).

[8] Jones *v.* Tainter, 15 Minn. 517 (1870).

[9] Lee *v.* Dill, 39 Barb. 520-21 (1863), Allen, J.

[10] Card *v.* Card, 39 N. Y. 323 (1868). See also 22 *id.* 497; 18 *id.* 349; 71 *id.* 91; 89 *id.* 19; 8 Minn. 97.

(2) A member of the popular branch of a State or of the national legislature; a member of the house of representatives. See ASSEMBLY; CONGRESS; PARLIAMENT.

REPRIEVE.[1] Withdrawing a sentence for an interval of time, whereby the execution is suspended.[2]

It is granted *ex arbitrio judicis* (in the discretion of the judge), before or after judgment, for any reason sufficient to the court. It is *ex necessitate legis* (from legal necessity), where the offender becomes insane before or after the award of execution: he may have a reason, which he cannot explain, for non-execution. Where a woman, capitally convicted, pleads pregnancy, execution will be respited till she be delivered.[3]

A reprieve operates only in capital cases, and is granted either by the favor of his majesty himself, or the judge before whom the prisoner was tried, in his behalf, or from the regular operation of law, in circumstances which render an immediate execution inconsistent with humanity or justice.[4] See PARDON; RESPITE.

REPRISAL.[5] Reception: a species of remedy by the act of the party injured.[6] See CAPTIVE; MARQUE AND REPRISAL.

Reprises. Deduction on account of payments or expenses.

The yearly value of an estate *ultra reprises*, beyond all subtractions, is spoken of. In Pennsylvania, realty will not be sold by the sheriff when the rents will pay the judgment, with interest and costs, in seven years, beyond reprises,[7]—unless otherwise agreed to by the debtor.

REPUBLIC. The commonwealth; the state. See RESPUBLICA.

In a republic, all the citizens, as such, are equal, and no one can rightfully exercise authority over another but by virtue of power constitutionally given by the whole community, which authority, when exercised, is in effect the act of the community. Sovereignty resides in the people in their political capacity.[8]

Republican form of government. "The United States shall guarantee to every State in this Union a Republican Form of Government."[9]

[1] F. *re-prendre*, to take back,—4 Bl. Com. 394. The same as *reprove*, but nearer Mid. Eng. *repreven*, to reject, put aside, disallow,—Skeat.

[2] 4 Bl. Com. 394.

[3] 4 Bl. Com. 394-96.

[4] Sterling *v.* Drake, 29 Ohio St. 461 (1876): 3 Chitty, Cr. L. 757.

[5] F. *represaille*, taking or seizing on: L. *re-prehendere*, to seize again. F. *reprise*, to take back.

[6] [3 Bl. Com. 4.

[7] Act 16 June, 1836, § 44: P. L. 769; 1 Purd. Dig. 755.

[8] [Penhallow *v.* Doane, 3 Dallas, 93 (1795), Iredell, J.

[9] Constitution, Art. IV, sec. 4.

No particular government is designated as "republican," neither is the exact form to be guaranteed in any manner especially designated. Here, as in other parts of the Constitution, we are compelled to resort elsewhere to ascertain what was intended. The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all, the people participated to some extent, through representatives elected in the manner especially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is therefore to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was "republican" in form, within the meaning of that term as employed in the Constitution.[1]

Authority to provide for the restoration of State governments, when subverted and overthrown, is derived from this obligation on the United States. Discretion in the choice of means is necessarily allowed. It is essential only that the means be "necessary and proper" for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no act be done, no authority exerted, which is either prohibited or unsanctioned by the Constitution.[2]

It rests with Congress to decide what government is the established one in a State, before it can determine whether it is republican or not.[3]

See GOVERNMENT; STATE, 3; WAR.

REPUBLICATION. See PUBLICATION.

REPUDIATION. See IMPAIR, Obligation, etc.

REPUGNANT.[4] Inconsistent; irreconcilably opposed to, contrary to, or contradictory of each other.

Said of clauses in contracts, wills, statutes; of conditions, *q. v.*; of statements in a pleading militating with statements in a prior pleading.

Words and phrases are often found in different provisions of the same statute, which, if taken literally, without any qualification, would be inconsistent, and sometimes repugnant, when, by a reasonable interpretation, as, by qualifying both, or by restricting one and giving the other a liberal construction, all become harmonious, and the difficulty disappears. In such a case the rule is, that the repugnancy should, if practicable, be avoided, and that, if the natural import of the words contained in the respective provisions tends to establish such a result, the case is one where resort may be had to construction for the purpose of reconciling the inconsistency, unless it appears that the difficulty cannot be overcome without doing violence to the language of the law-maker.[1] See REPEAL.

REPURCHASE. See REDEEM.

REPUTATION. General opinion in the community.

The qualities which a person is supposed to possess.[2]

What the community thinks, believes, or says; not the declarations of a person as to a particular fact not of a public nature.[3]

Evidence of reputation is receivable to prove character, heirship, historical facts, and prescription.

An existing reputation is a fact to which any one may testify who knows it; he knows it because he hears it, and what he hears constitutes reputation.[4]

Unwillingness to believe a man under oath must be based upon two facts: that the witness knows the reputation for veracity among the man's neighbors, and that that reputation is bad.[5]

On the trial of an indictment for murder, the dangerous "character" of the deceased cannot be proved by proof of his "reputation," but notice of that character to the prisoner may be shown by proof of the reputation, in connection with proof that he had the means of knowing that reputation.[6]

See further CHARACTER; EVIDENCE; HEARSAY; PEDIGREE; SLANDER.

Reputed. Commonly reported; generally believed: as, a reputed — marriage, parent, owner. See BASTARDY; OWNER; PUTATIVE.

Reputation is an incident from which, being joined to cohabitation, the married relation may be inferred. It is essential, however, that the reputation of marriage be general. The conduct of the parties must be such as to make almost every one infer that they were married. It is the reputation arising from holding themselves out to the world as occupying that relation, to which the law refers. It is not enough that an opinion may exist that they ought to be married, from their intimacy; it is the belief that they are married which constitutes the reputation of it. Their acts should be inconsistent with any other inference than that of marriage to justify the repute of it, and this repute should be credited by their relatives, neighbors, friends, and acquaintances.[7] See further COHABITATION.

REQUEST; REQUIRE. Usage has given these words (of the same origin) somewhat different meanings, but these meanings

[1] Minor *v.* Happersett, 21 Wall. 175–76 (1874), Waite, Chief Justice.

[2] Texas *v.* White, 7 Wall. 728–29 (1868), Chase, C. J.

[3] Luther *v.* Borden, 7 How. 42 (1849), Taney, C. J. See also 2 Story, Const. §§ 1813–25; North Am. Rev., Ap. 11, 1844, p. 371; Internat. Rev., Jan., 1875; Federalist, No. 43, 44.

[4] L. *re-pugnare*, to fight against, oppose.

[1] New Lamp Chimney Co. *v.* Ansonia Brass & Copper Co., 91 U. S. 663 (1875), Clifford, J.

[2] Andre *v.* State, 5 Iowa, 394 (1857): Webster's Dict.

[3] [Hunnicutt *v.* Peyton, 102 U. S. 363 (1880), Strong, J.

[4] Bathrick *v.* Detroit Post & Tribune Co., 50 Mich. 642 (1883), Cooley, J.

[5] Spies *et al. v.* People, 122 Ill. 206 (1887).

[6] Marts *v.* State, 26 Ohio St. 168 (1875).

[7] Brinckle *v.* Brinckle, 34 Leg. Int. 426 (1877), Biddle, J.,—C. P., Philadelphia.

are really more distinctions in intensity than in effect or substance. "Require" is nearer a command than "request." Neither word may import more than to give notice.[1] Compare MAY; WANT.

In a will, "request" may impose a duty.[2] See PRECATORY.

Generally, when a debt is payable immediately, no request to pay need be made. The necessity for a request may be implied; as, where one retains an article to be paid for at delivery, the buyer must show a request, or an impossibility in the seller to comply, after request made. A request to marry must also be made before action is begun for a breach of a promise to marry. Generally, it is advisable that requests be made in writing. A special request, as provided for in a contract, must be averred in a declaration. See DEMAND, 2; NOTICE, 2; PAYMENT; QUIT, 2.

Requisition. A formal demand or request.

Usually, in writing: as, the request made by the governor of one State on the governor of another State for the extradition of a fugitive from justice. See EXTRADITION.

RES. L. A thing, or things; whatever may be possessed, seized or attached; property; matter, subject-matter.

1. In the Roman law, property was divided in several ways; thus into — (1) *Res divini juris*, for pious uses, including (a) *res sacræ*, for the service of the gods, and (b) *res religiosæ*, for the burial of the dead. (2) *Res humani juris*, for secular uses, (a) *res privatæ*, belonging to individuals and subject to traffic, and (b) *res republicæ*, belonging to the people: *res fisci*, of the treasury, and *res sanctæ*, of inviolable character, as city walls and gates; (c) *res commune omnium*, the common property of all — the air, running water, the sea, etc. Another division was: *res corporales*, objects apprehensible by the senses; and *res incorporales*, objects of thought only. A third division was: *res mobiles*, movables; and *res immobiles*, immovables.[3]

2. In admiralty, all parties who have an interest in the subject of the suit — the *res* — may appear, and each independently propound his interest. The seizure of the *res*, and the publication of the monition to appear, is equivalent to the particular service of process in the courts of law and equity. But the *res* is in no other sense than this the representative of the whole world. To give jurisdiction, there must be a valid seizure and actual control by the marshal.[4]

Jurisdiction of the *res* is obtained by a seizure under process, whereby it is held to abide such order as the court may make concerning it.[5]

The *res* is that which is seized and brought within the jurisdiction of the court. In admiralty and revenue cases the thing condemned is considered the offender or the debtor, is seized in its entirety; and a sale passes the entire title. Not so in many other proceedings *in rem*.[1] See SERVICE, 6, Substituted.

Re, or **in re.** In the matter of. Designates a proceeding to which there is but one party; as, in matters in a court of probate, and in insolvency or bankruptcy courts.

In rem. Against a thing. Used of a proceeding concerning a particular piece of property. Opposed, *in personam*, against the owner of property.

Proceedings *in rem* are instituted to obtain decrees or judgments against property forfeited in admiralty or in the exchequer, and to enforce liens in admiralty. Also included are suits to obtain a sentence, judgment, or decree upon the personal status or relation of a person, such as marriage, divorce, bastardy, settlement, and the like.[2]

In rem is a technical term, taken from the Roman law, where it distinguished an action against the thing from one against the person. An action *in personam* was directed against a specific person; an action *in rem* against a specific thing, and so against whom it might concern — "all the world." A proceeding to determine the status of the particular thing itself, and which is confined to the subject-matter *in specie*, is *in rem*, the judgment also determining the state or condition, and, *ipso facto*, rendering the thing what the judgment declares it to be, while a proceeding which seeks the recovery of a personal judgment is *in personam*.[3]

In the former, process may be served on the thing itself, and by such service, and by making proclamation, the court is authorized to decide upon it without other notice to persons, all the world being parties; while in the latter, to give the court power to adjudge, there must be service upon those whose rights are sought to be affected. As regards rights, the terms signify the antithesis of "available against a particular person," and "available against the world at large." Thus "*jura in personam* are rights primarily available against specific persons, *jura in rem* rights available against the world at large." Beyond this, a judgment or decree is *in rem*, or in the nature of a judgment *in rem*, when it binds third persons, such as the sentence of a court of admiralty on a question of

[1] Prentice *v.* Whitney, 15 N. Y. Supr. 301 (1876), Boardman, J.; 58 N. H. 65; 2 Allen, 85.

[2] Hutton *v.* Hutton, 41 N. J. E. 271 (1886); Colton *v.* Colton, 127 U. S. 319 (1888).

[3] Hadley, Rom. Law, Lect. VII.

[4] Taylor *v.* Carryl, 20 How. 599 (1857), Campbell, J.

[5] Cooper *v.* Reynolds, 10 Wall. 317 (1870), Miller, J.

[1] Day *v.* Micou, 18 Wall. 162 (1873), Strong, J.; City of Norwich, 118 U. S. 503 (1886); 93 *id.* 168; 106 *id.* 307.

[2] 1 Greenl. Ev. §§ 525, 541, cases; 2 Sm. L. C. 662.

[3] Cross *v.* Armstrong, 44 Ohio St. 623-24 (1887), Spear, Judge.

prize, or a decree of other courts upon the personal status or relation of the party, such as a dissolution of a marriage contract, bastardy, etc., a decree admitting a will to probate and record, granting administration, etc., or a decree of a court of a foreign country as to the status of a person domiciled there.[1]

In admiralty, process *in rem* is founded on a right in the thing, and the object of the process is to obtain the thing itself, or a satisfaction out of it, for some claim resting on a real or *quasi* proprietary right in it. Consequently, the court, through its process, arrests the thing, and holds possession of it by its officers, as a means of affording such satisfaction, and in contemplation of law it is the possession of the court itself. Service of process is had upon the property.[2]

Marine torts are in the nature of trespasses upon the person or upon personal property, and they may be prosecuted *in personam* in any district where the offending party resides, or *in rem* wherever the offending thing is found within the jurisdiction of the court issuing the process.[3]

Actions *in rem* are prosecuted to enforce a right to things arrested, to perfect a maritime privilege or lien attached to a vessel or cargo or both, and in which the thing to be made responsible is proceeded against as the real party. Actions *in personam* are those in which an individual is charged personally in respect to some matter of admiralty or maritime jurisdiction. The process, proceedings, and decrees are different.[3]

A proceeding to enforce a debt or demand by attachment of a defendant's property partakes of the character of a suit both *in rem* and *in personam*. If there is personal service of process on the defendant or personal appearance by him, the case is mainly a personal action; but if, in the absence of either, his property is attached and sold, it becomes essentially a proceeding *in rem*, and is governed by the principles applicable to that class of cases. In this class the court cannot proceed without a levy on the property, and the judgment binds the property only. Therefore, seizure under proper process is the foundation of the jurisdiction. A valid writ and levy, judgment, order of sale, sale, and deed, conclude all persons.[4]

Decrees of probate or orphans' courts directing sales for the payment of debts or for distribution are proceedings *in rem*. Sales under attachments, or proceedings to foreclose a mortgage, are at least *quasi* proceedings *in rem*. In none of these cases is anything more sold than the estate of the decedent, or of the debtor, or of the mortgagor, in the thing. The interests of others are not cut off or affected.[5]

The probate of a will is in the nature of a proceeding *in rem*.[6]

In a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property; but, in a larger and more general sense, the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien.[1]

The thing, in admiralty, is to be actually or constructively within reach of the court. An accidental, fraudulent, or improper removal from the custody of the marshal, as, a delivery upon security, does not destroy jurisdiction.[2]

Actions *in rem*, strictly considered, are proceedings against property only, treated as responsible for the claims asserted by the libelants or plaintiffs. The property itself is in such actions with the defendant, and, except in cases arising during war for its hostile character, its forfeiture or sale is sought for the wrong, in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case. There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the State, and actions for the enforcement of mortgages, and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties.[3]

The proceedings may or may not be of ubiquitous obligation.[4] See LIEN; SALVAGE; UBIQUITY, 2.

Jus ad rem; jus in re. See JUS.

Res adjudicata. A matter judicially decided. See further ADJUDICATUS.

Res gesta. A thing done. **Res gestæ.** The things done; the facts of a transaction; circumstances evidentiary of a litigated fact.

The circumstances, facts, and declarations which grow out of the main fact, are con-

[1] Cross *v.* Armstrong, *ante*.

[2] The Propeller Commerce, 1 Black, 580 (1861), cases. Clifford, J.; Averill *v.* Smith, 17 Wall. 95 (1872); 9 *id.* 456-57; 98 U. S. 108.

[3] The Sabine, 101 U. S. 388 (1879), Clifford, J.

[4] Cooper *v.* Reynolds, 10 Wall. 316-21 (1870), Miller, J.

[5] Day *v.* Micou, 18 Wall. 162 (1873), Strong, J.; 2 How. 338; 19 *id.* 89.

[6] Gaines *v.* Fuentes, 92 U. S. 21 (1875).

[1] Pennoyer *v.* Neff, 95 U. S. 734 (1877), Field, J.; Windsor *v.* McVeigh, 93 *id.* 279 (1876); Brigham *v.* Fayerweather, 140 Mass. 413-14 (1886), cases.

[2] The Rio Grande, 23 Wall. 464-65 (1874), cases.

[3] Freeman *v.* Alderson, 119 U. S. 187 (1886), Field, J.

[4] As affected by death, see 21 Cent. Law J. 65-67 (1885), cases.

temporaneous with it, and serve to illustrate its character.[1]

All declarations made at the same time that the main fact under consideration takes place, and so connected with it as to illustrate its character, are admissible as original evidence.[2]

The area of events covered by the term depends upon the circumstances of each case. Included are those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of it. These incidents may be separated from the act by a lapse of time more or less appreciable.[3]

It is not possible to lay down a rule as to what is a part of the *res gestæ* which will be decisive of the question in every case in which it may be presented by the ever-varying phases of human affairs. Included in it are facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its true light and give it its proper effect.[4]

In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. . . Where sickness is the principal fact, the *res gestæ* are the declarations tending to show the reality of its existence, its extent and character. . . Rightfully guarded in its application, there is no principle in the law of evidence more safe in its results. The tendency is to extend the scope of the doctrine.[5]

Where, for example, the fact in question is a loan, the circumstances of the negotiation constitute the *res gestæ*. A draft would be one circumstance; the conversation of the parties another. Evidence why the loan was made in particular funds or securities instead of in cash, is competent where it will tend to elucidate the nature of the transaction, that being the question at issue. . . The manner and form in which an act is done, being one of several acts concurring to the purpose or transaction, indicate, by shades of circumstances often difficult to analyze, what was the character of the act, or the intent and purpose with which it was done.[1] See further ADMISSION, 2.

Res in re. Member in member.

Res integra. A thing yet entire; a matter as yet undetermined by decision.

Res inter alios acta. A thing done between others. More fully, *res inter alios acta alteri nocere non debet*, a thing done between others ought not to injure. A transaction between persons who are "strangers" toward another person cannot affect unfavorably the rights of that person.

Excepted from the rule are proceedings against a *res*, and decisions regarded as precedents.[2]

No person is to be affected by the acts or words of others unless connected with them, personally or by those whom he represents or by whom he is represented.[6] See PRIVITY, Of contract.

Res ipsa loquitur. The thing speaks for itself: the meaning or intent is apparent.

The reservation on the face of an instrument of a higher than the legal rate of interest indicates *per se* usury.[4]

Res judicata. A matter which has been settled; a decided case. See ADJUDICATUS.

Res nova. A new matter,—point or question.

Res nullius. A thing of no one: nobody's property.

In Roman law, an object in which no person could have a property, as, a thing or place consecrated to religious uses; also, property without an owner. See ABANDON, 1.

Res perit domino. The thing perishes for its owner: where a thing of value is destroyed by an act of God or of the public enemy, the loss falls upon the owner, not upon the person in whose custody it has been temporarily placed.

The principle is that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that impossibility of performance arising from the perishing of the person or thing shall excuse the performance. Excuse for performance is implied by law, because from the nature of the contract it is apparent that the

[1] Stirling *v.* Buckingham, 46 Conn. 464 (1878), Loomis, Judge.

[2] McLeod *v.* Ginther, 80 Ky. 403 (1882), Hargis, C. J.; Territory *v.* Yarberry, 2 N. Mex. 453 (1883), Axtell, C. J. See also 76 Ind. 222; 9 Cush. 42; 57 Mo. 93; 32 N. H. 360; 40 N. J. L. 538; 55 Pa. 402.

[3] 1 Whart. Ev. §§ 258-59, cases; 1 Greenl. Ev. §§ 108-23; United States *v.* Noelke, 17 Blatch. 570 (1880); United States *v.* Angell, 11 F. R. 41 (1881), cases.

[4] Beaver *v.* Taylor, 1 Wall. 642 (1863), cases, Swayne, J.; Little Rock, &c. R. Co. *v.* Leverett, 48 Ark. 338-43 (1886); Culverius *v.* Culverius, 81 Va. 813 (1886).

[5] Travelers' Ins. Co. *v.* Mosley, 8 Wall. 408 (1869), Swayne, J.

[1] Nat. Bank of the Metropolis *v.* Kennedy, 17 Wall 24, 26, 19 (1872), Bradley, J. See generally 14 Am. Law Rev. 817-38 (1880), cases; 15 *id.* 1-20, 71-107 (1881), cases; 24 Cent. Law J. 468 (1887), cases; 26 *id.* 207 (1888), cases.

[2] See 2 Best, Ev. § 506; 1 Whart. Ev. §§ 173-76, 760; 2 *id.* § 1041; 1 Wall. 469; 100 U. S. 616; 101 *id.* 351; 3 Curt. 403; 82 Ala. 500; 77 Mo. 281; 57 N. H. 369; 52 Pa. 229, 418; 55 Vt. 576.

[3] State *v.* Beaudet, 53 Conn. 541 (1885); *ib.* 461.

[4] Bank of United States *v.* Waggener, 9 Pet. 399 (1835); Turner *v.* Turner, 80 Va. 331 (1885); 32 F. R. 120.

parties contracted on the basis of the continued existence of the particular person or chattel.[1]

When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time. If, from such destruction, the vendor of a house cannot perform his agreement to convey, he cannot recover or retain any part of the purchase-money.[2]

The rule of the common law is the civil-law rule, that if one is employed in making up the materials or in adding his labor to the property of another, the risk is with the owner of the thing into which the labor is incorporated. . . One who, under a contract, is doing the ornamental woodwork in a building destroyed by fire while under control of the owner, may recover a *quantum meruit* for the work done prior to the fire. An accidental fire is not such act of God or *vis major* as will excuse the performance of a contract.[3]

Where a *res* is seized by judicial process for debt, which carries with it a *jus in re*, as between debtor and creditor the maxim means that the destruction of the seized property, without fault of the debtor, works a payment of the debt to the extent of its value. Where third parties voluntarily join the seizing creditor in his proceeding, and unite, so to speak, in the seizure, also asserting claims which carry with them liens, the destruction of the property without fault of the debtor works a payment of their respective claims, to the extent of the value of the property destroyed, in the order of their priority.[4]

Where a vessel, before she breaks ground, is so injured by fire that the cost of repairs would exceed her value when repaired, and she is rendered incapable of earning freight, a contract of affreightment for the carriage of cotton, evidenced by a bill of lading providing for the payment of freight-money on the delivery of the cotton, is thereby dissolved, so that the shipper is not liable for any part of the money, nor for expenses paid for stowing the cotton.[5]

Ut res magis valeat quam pereat. That the thing may prevail rather than be destroyed: that the subject-matter may have effect, or the end be promoted, rather than be defeated.

The courts aim to uphold, to preserve, not to destroy, written contracts, wills, statutes,—all instruments presented for construction. Within the spirit of the rule is the *cy pres* doctrine,[1] *q. v.*

See other expressions under ALIENATIO; EX NECESSITATE; FORUM; LOCATIO.

RE-SALE. See BID.

RESCISSION.[2] Cutting off; abrogating, canceling, annulling, nullifying, vacating, avoiding.

Rescind. To annul a thing done; to vacate, set aside.

Rescissory.[3] Designed to abrogate, annul, avoid.

Used, in particular, of the refusal of a party to a contract to be bound by it, because of alleged disability, mistake, or fraud operating at the time of the formal making; also, of the decree of a court of equity canceling a contract for cause shown.

The right to rescind a contract of sale proceeds upon the ground that a party has been fraudulently betrayed into making the contract, and, having thus been induced to part with his own property, he may resume possession of it on returning that which he has himself received, thus placing the other party in the position he was in before the contract was made.[4]

Equity will rescind a purchase induced by a material misrepresentation of the vendor, though innocently made.[5]

The cancellation of an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them.[6]

The rule that he who seeks to rescind a contract of sale must first offer to return the property received, and place the other party in the position he formerly occupied, as far as practicable, prevails equally at the civil and the common law. It is a rule founded in natural justice, and requires that the offer shall be made by the purchaser to his vendor upon the discovery of the defect for which the rescission is asked.

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[1] Taylor *v.* Caldwell, 118 E. C. L. *839 (1863), Blackburn, J.; Appleby *v.* Myers, L. R., 2 C. P. *658 (1867).

[2] Wells *v.* Calnan, 107 Mass. 515–18 (1871), cases, Gray, J.; Snow *v.* Alley, 144 *id.* 551 (1887); Broom, Maxims, *228, cases.

[3] Haynes *v.* Second Baptist Church, 12 Mo. Ap. 540–46 (1882), cases, Bakewell, J.

[4] Gill *v.* Packard, 4 Woods, 271 (1883), Billings, J.: s. c. 17 F. R. 400. See also Viterbo *v.* Friedlander, 120 U. S. 712 (1887), cases — leased property; Story, Bailm. § 426; Benj. Sales, § 570; 2 Kent, 591; 2 Add. Contr. *927; Bish. Contr. § 588, cases; Hare, Contr. 89, 434, 690; 12 Allen, 361; 14 *id.* 269.

[5] The Tornado, 108 U. S. 342 (1883), cases, Blatchford, J.; Jones *v.* United States, 96 *id.* 24 (1877).

[1] See 1 Bl. Com. 89; 2 *id.* 380; 95 U. S. 713; 106 *id.* 137; 108 *id.* 461; 109 *id.* 365; 59 Iowa, 325; 100 Mass. 113; 108 *id.* 393; 59 Miss. 96, 108; 89 N. C. 462; 93 N. Y. 345; Broom, Max. 565.

[2] F. *rescinder*, to cancel: L. *re-scindere*, to cut off, annul.

[3] Re-sis'-o-ry.

[4] Snow *v.* Alley, 144 Mass. 551–57 (1887), cases, Devens, J.

[5] Curtiss *v.* Hurd, 30 F. R. 733 (1887), cases.

[6] Atlantic Delaine Co. *v.* James, 94 U. S. 214 (1876), Strong, J.

The vendor may then receive back the property, and be able by proper care and attention to preserve it, or he may have recourse upon other parties, the remedies against whom might be lost by delay. He must be permitted to judge for himself what measures are necessary for his interest and protection, and if the purchaser by delay deprives him of the opportunity of thus protecting himself, he cannot demand a rescission of the contract.[1]

Where a party desires to rescind upon the ground of mistake or fraud, he must, upon discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property which is liable to fluctuations in value. A court of equity is always reluctant to rescind, unless the parties can be put back *in statu quo*. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it.[2]

In order to rescind a contract for the purchase of realty on the ground of fraudulent representation by the seller, it must be established by clear and decisive proof that the representation regarded a material fact; that it was false; that the maker knew that it was false; that he made it in order to have it acted upon; and that it was so acted upon by the other party to his damage, in ignorance of its falsity and with a reasonable belief that it was true.[3]

There must be knowledge of facts which will enable the party to take effectual action. But he may not willfully shut his eyes to what he might readily and ought to have known. When fully advised, he must decide and act with reasonable dispatch. He cannot rest until the rights of third persons are involved and the situation of the wrong-doer is materially changed. Under such circumstances, he loses the right to rescind, and must seek compensation in damages. But the wrong-doer cannot make extreme vigilance and promptitude conditions of rescission. It does not lie in his mouth to complain of delay unaccompanied by acts of ownership, and by which he has not been affected. The election to rescind, or not to rescind, once made, is final and conclusive.[4]

The principle of many cases is, that, where the contract has been induced by fraud, it is not necessary that the party seeking to rescind should absolutely tender what he has received on account of the contract. It is necessary, however, that he should give notice of his intention to rescind, and that at trial he should be in a situation to put the other party in the condition in which he was at the time he discovered the fraud. That the subject-matter has been partially disposed of will not of itself prevent a rescission, unless the greater part has so disappeared.[1]

An application to rescind, like that for specific execution, is addressed to the sound judicial discretion of the court. The maxim that he who seeks equity must do equity emphatically applies. A mistake in law, where there is neither fraud, concealment, nor material mistake in fact, constitutes no ground for rescinding a contract. The complainant must not have done any act which will prevent the respondent from being placed *in statu quo*.[2]

The cases generally hold that where a vendor undertakes to rescind the sale for fraud, he must, before suing for either the goods or their value in money, return or tender to the vendee whatever valuable consideration he has received for them. But the cases which so hold are cases where goods were given for goods, or where the action was replevin to recover the goods sold, *in specie*, and not trover for their value in money. If this rule were not applied, the fraudulent vendee may lose what the vendor has received, and the vendor get justice without doing it. There is no case in which the rule has been applied in an action of trover against the fraudulent vendee, where the vendor has received nothing but money.[3]

See CANCEL; KNOWLEDGE, 1; PERFORMANCE, Specific.

RESCOUS. See RESCUE.

RESCRIPT.[4] 1. In Roman law, *rescripta* were answers returned by the emperor, when consulted on questions of law, either by the parties in some controversy, or, more commonly, by officers charged with the administration of justice.[5]

In succeeding cases these rescripts had the force of laws. Justinian preserved them in his Institutes. Decretal epistles of the popes are also rescripts in the strictest sense.[6]

2. In common law, a counterpart.

In Massachusetts, the statement of the decision of the highest appellate tribunal; also, the brief statement sent to the court *a quo*.

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[1] Andrews *v.* Hensler, 6 Wall. 258 (1867), Field, J. See also Pearsoll *v.* Chapin, 44 Pa. 12 (1862), cases, Lowrie, C. J.

[2] Grymes *v.* Sanders, 93 U. S. 62 (1876), cases, Swayne, Justice.

[3] Southern Development Co. *v.* Silva, 125 U. S. 250 (1888), Lamar, J.

[4] Pence *v.* Langdon, 99 U. S. 581 (1878), Swayne, J. See also Indianapolis Rolling Mill Co. *v.* St. Louis, &c. R. Co. 120 *id.* 260 (1887), cases; Kraus *v.* Thompson, 30 Minn. 67 (1882), cases.

[1] American Wine Co. *v.* Brasher, 4 McCrary, 347 (1882), cases, Hallett, D. J. See also 18 Cent. Law J. 482–87 (1884), cases; 19 *id.* 7–9 (1884), cases; 53 Cal. 46; 68 Ga. 103; 75 Ill. 206; 91 N. Y. 155; 44 Pa. 12, cases; 1 Story, Eq. §§ 692–705; 2 Pomeroy, Eq. §§ 845–71.

[2] Ferry *v.* Clarke, 77 Va. 409, 406–8 (1883), cases, Lacy, J.; Linhart *v.* Foreman, *ib.* 540 (1883); McMullin *v.* Sanders, 79 *id.* 364 (1884), cases.

[3] Warner *v.* Vallity, 18 R. I. 484–87 (1893), cases, Durfee, C. J.

[4] F. *rescript*, a written reply: L. *re-scriptum*, written back.

[5] Hadley, Rom. Law, 7.

[6] 1 Bl. Com. 58–59.

RESCUE. 1. Taking from a distrainor a distress on its way to a pound.

On their way to a pound things distrained may be rescued by the owner in case the distress was taken without cause or contrary to law: as, if no rent be due, if taken upon the highway, and the like. But, once impounded, although unlawfully taken, the distress may not be retaken.[1]

2. Forcibly and knowingly freeing another from an arrest or imprisonment.[2]

The same offense as a voluntary escape (*q. v.*) by a jailor. Not criminal, unless the rescuer knew that the person was held on a charge of crime, or that he was in charge of a public officer.[3]

RESEMBLANCE. See LIKE; QUASI; SIMILITUDE.

RESERVATION; RESERVE.[4] Reserve: to keep or hold back, withhold, as one thing or right out of another — the subject-matter; also, the thing withheld. Reservation: the act of withholding; also the thing itself which is not given up; and also the clause in a writing by which that thing is reserved.

1. An auctioneer sells "without reserve" when no price is prescribed up to which the property must be bid. See AUCTION.

2. When an author wishes to reserve the right to translate or to dramatize his work he must give notice that that is his purpose by printing "Right of translation reserved" or "All rights reserved," below the notice of copyright entry; and the librarian of Congress is thereby notified to record such reservation. See COPYRIGHT.

3. Public land withheld from sale, as, for military posts, for parks, for the use of Indian tribes, or other purposes, is called the "public reservation" or simply the "reservation." In former years, "reserve" seems to have been in vogue, as, in "Western Reserve."

In this sense reservation does not imply an absolute disposition of the land or lands, in all cases, but a withholding for some other disposition, as, sale, or the use of schools.[5]

See PRE-EMPTION, 2; LAND, Public.

The reservation of lands for any specific purpose by the government is but an expression of a desire to use them for that purpose. The same precision in the use of terms is not required as in the case of a conveyance.[1]

4. The creation of a right or interest, which had no prior existence as such, in a thing or part of a thing granted.[2]

By a reservation in a deed a new right is created in the thing granted which did not previously exist, and is reserved to the grantor.[3]

An "exception" is always part of the thing granted, and of the whole of the thing excepted. A reservation may be of a right or interest in the particular part which it affects. The terms are often used in the same sense. Though apt words of reservation be used, they will be continued as an exception, if such was the design of the parties.[2, 3] See EXCEPTION, 1.

5. Many other rights are said to be reserved or not reserved. Thus, the maker of a power of attorney may reserve the right to revoke the power; and a respondent in equity may reserve, in his answer, the advantage to be had from a defect in the structure of the bill.

As to reserved rights under the Constitution, see that title, pp. 237–39.

6. In practice, when, during the course of a trial, the judge decides, for the time being, a point raised, but subject to revision by the court at the hearing of a motion for a new trial, he is said to "reserve a question of law."

The procedure enables the jury to render a verdict on the facts subject to the decision upon the question reserved.

The question must be one of pure law. The facts which are to be agreed upon or else found by the jury, must be stated in the record. The question, moreover, must be such as rules the case: the object of reserving it being to save the necessity for a second trial. An adverse verdict on the facts will, of course, preclude the point from arising. The reservation of subordinate questions tends to complicate the case. A point cannot properly be reserved unless, if it be held one way, the court would be bound to instruct the jury for which of the parties to find.[4]

7. The sum of money which every national bank in the sixteen largest cities must have on hand — an amount equal to at least

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[1] 3 Bl. Com. 12, 170; 43 N. H. 469; 5 Pick. 714; 113 U. S. 111–14, *infra*.

[2] 4 Bl. Com. 131.

[3] See 2 Bish. Cr. Law, § 1065; 1 Hale, P. C. 606; Findley v. McAllister, 113 U. S. 111–14 (1885), cases; 1 Story, 66; 2 Gall. 313.

[4] F. *reserver;* L. *re-servare*, to keep back.

[5] [McConnell v. Wilcox, 2 Ill. 359 (1837), Smith, J.

[1] United States v. Payne, 2 McCrary, 301 (1881); 13 Pet. 266; 92 U. S. 733.

[2] Kister v. Reeser, 98 Pa. 5 (1881), Trunkey, J.

[3] Perkins v. Stockwell, 131 Mass. 530 (1881), cases, Devens, J.; Kimball v. Withington, 141 *id.* 379 (1886). See also 2 McLean, 392; 8 Saw. 99; 16 Conn. 482; 38 *id.* 542; 18 Iowa, 358; 42 Me. 9; 59 *id.* 340; 107 Mass. 322–23; 126 *id.* 196; 129 *id.* 231; 11 N. Y. 321; 41 *id.* 483; 29 Ohio St. 568; 47 Pa. 197; 44 Vt. 416; 22 Wis. 547.

[4] Wilde v. Trainor, 59 Pa. 442 (1868), Sharswood, J.

twenty-five *per centum* of the aggregate of its notes in circulation and its deposits. Fifteen *per centum* is required of all other national banks.

When the reserve falls below this limit, the bank may not increase its liability otherwise than by purchasing sight bills of exchange, nor may it make a dividend. On failure to make the reserve within thirty days after notice from him, the comptroller of the currency, with the concurrence of the secretary of the treasury, may appoint a receiver and wind up the bank.[1]

RESIDE; RESIDENCE; RESIDENT.[2] May import temporary sojourn or permanent domicil. Illustrative cases are given below. The negatives *non-residence* and *non-resident* are in frequent use.

Residence. The legal definitions of the cognate terms "residence" and "domicil" vary with the circumstances of the case and the mental constitution of judges and authors. While "residence" generally imports personal presence, one may have a "domicil" in a place from which he is absent most of the time. "Residence" also implies more than a temporary sojourn.[3]

Non-residence. Actual cessation to dwell within a State for an uncertain period without definite intention as to a time for returning, although a general intention to return may exist.[4]

When a residence has once been established by the concurrence of intention and personal presence, continuous personal presence thereafter is not essential to a continuous residence. *Prima facie*, a man's "home" is where his family lives.[5]

Residence means a fixed and permanent abode or dwelling-place for the time being, as contradistinguished from a mere temporary locality of existence.[6]

Ordinarily, the place of one's permanent domicil, rather than his temporary abode.[7]

In the constitutional requirement that a qualified voter must reside in the district a specified number of days, the same as "domicil" — the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights.[1]

Denotes permanency of occupation, as distinct from lodging, boarding, or other temporary occupation; but does not include as much as "domicil," which requires an intention continued with residence.[2]

May require continuous and voluntary abiding, as, to give jurisdiction; not, temporary boarding, though for a long period.[3]

The precise meaning depends upon the purpose and phraseology of the particular statute. May refer to place of business, domicil, or home.[4]

In a statute defining political rights, synonymous with "domicil" — a permanent rather than a temporary dwelling-place. "Domicil" is never lost until a new one is acquired; but a person may cease to "reside" in one place and have no fixed habitation elsewhere.[5]

A citizen of one State who in good faith gives up his residence there, and takes up a permanent residence in another State, acquires citizenship in the new place of domicil.[6]

The residence of a *corporation* is the place where its principal office is located, or its principal operations carried on. But a railroad corporation resides in the counties through which its road passes, and in which it transacts business; at least as regards suits and taxation.[7]

The proper seat of residence of a foreign corporation is the State which created it and which continues it in existence. Otherwise, the corporation might reside in a multitude of jurisdictions. But legislation may give it status as a resident.[8]

Resident. Literally, one who sits, abides, inhabits, or dwells in a particular place.

A person sojourning (*i. e.*, residing) at a place is *prima facie* residing there, and cannot be a resident

[1] R. S. § 5191.

[2] F. *resider*, to stay: L. *re-sidere*, to remain back.

[3] [On Yuen Hai Co. *v.* Ross, 8 Saw. 392 (1882), Deady, J.

[4] [Weitkamp *v.* Loehr, 58 N. Y. Super. Ct. 83 (1886), cases,— attachment law.

[5] Topsham *v.* Lewiston, 74 Me. 239 (1882); Greenfield *v.* Camden, *ib.* 64-65 (1882).

[6] *Re* Wrigley, 8 Wend. 140 (1831), Walworth, Ch.

[7] [Reeder *v.* Holcomb, 105 Mass. 95 (1870), Chapman, Chief Justice.

[1] Chase *v.* Miller, 41 Pa. 420 (1862), Woodward, J.

[2] [Inhabitants of Jefferson *v.* Inhabitants of Washington, 19 Me. 300-2 (1841), Whitman, C. J.

[3] Charter Oak Bank *v.* Reed, 45 Conn. 395 (1877), Loomis, J.

[4] Tyler *v.* Murray, 57 Md. 441-43 (1881), Irving, J.; 30 *id.* 512; 35 *id.* 169; 15 M. & W. 433; 2 Kent, 430, note.

[5] [Hannon *v.* Grizzard, 89 N. C. 120 (1883), Smith, C. J. See also Fitzgerald *v.* Arel, 68 Iowa, 106 (1884).

[6] Chicago, &c. R. Co. *v.* Ohle, 117 U. S. 127 (1886).

[7] Thorn *v.* Central R. Co., 26 N. J. L. 121 (1856); People *v.* Fredericks, 48 Barb. 176 (1866); Baldwin *v.* Mississippi, &c. R. Co., 5 Iowa, 519 (1857); 8 *id.* 260; 2 How. 497; 5 Cranch, 61; 4 McLean, 192; 5 *id.* 455; 26 Me. 434; 40 Mo. 580; 17 Gratt. 176; 33 How. Pr. 150.

[8] Stafford *v.* American Mills Co., 13 R. I. 311 (1881), Durfee, C. J.

of another place at the same time. This, at least, is the meaning in attachment laws. The word is of narrower significance, then, than "one domiciled in a place;" like inhabitant, it implies bodily presence.[1]

Non-resident is in general use in laws on the subject of attachments, divorce, registration, taxation, and elections. Non-resident administrator, bondholder, debtor, executor, guardian, and trustees, especially are of frequent recurrence.

The act of Congress of March 3, 1875, § 8, provides for summoning as parties to a suit persons who are non-residents of the district, by service of an order of court, as therein provided.[2]

See generally ABODE; CITIZEN; DIVORCE; DOMICIL; DWELLING; FAMILY; HOME; INHABITANT; MINISTER, 3; PERMANENT; TAX, 2.

RESIDUE. That which remains after taking away a part; surplus.

In a will, such portion of the estate as is left after paying the charges, debts, devises, and legacies.[3]

The presumption is that a testator uses it in this sense. A contrary intention must clearly appear.[3]

The "residue" of a man's estate, in testamentary language, means whatever is not specifically devised or bequeathed. The word has this meaning unless the whole will taken together shows clearly that it was not so intended.[4]

The courts incline to extend the word to the *whole estate*, when it is not clear whether the testator meant it to apply to a residue of the whole or only of a particular part.[5]

Residuary. Relating to the residue; as, residuary — clause, legatee, devisee, estate.

A residuary legatee receives the residuum of an estate. Any words indicating that purpose will be sufficient to uphold the bequest.[6]

See LEGACY; RESIDUUM, 2.

RESIDUUM. L. Remainder; residue.

1. In patent law, what is left after a process of separation.

There are as many different residuums of a substance as there are distinct products which may by taken away from it. Showing that all the matter that is in the residuum of the earlier of two patents is also in, and is obtained by separation from, the residuum of the patent of later date, does not make out an infringement on the former. It does not show that the patents are the same. If the rule were otherwise, a prior patent for the same use, of the common source, would cover both.[7]

2. The surplus of an estate after all debts and particular legacies are discharged.[1]

This goes to the residuary legatee; if none is named, then to the next of kin, under the intestate law. Anciently, the residuum was taken by the executor, unless otherwise directed.[1]

If a legacy is not legally disposed of, it falls into the residuum. But where a specific devise of realty is invalid, the realty descends to the heir at law.[2]

RESIGNATION. Of an office: the act of giving it up; surrender, relinquishment, renunciation.

Need not be in writing, unless required by statute; and may be either express or implied. The question is one of intention. Non-user may indicate absolute relinquishment.[3]

At common law, an office was regarded as a burden which the appointee was bound, in the interest of the community and of good government, to bear. From this it followed that after an office was assumed it could not be laid down without the consent of the appointing power. This was required that public interests might suffer no inconvenience for the want of servants to execute the laws. Acceptance may be manifested either by a formal declaration or by the appointment of a successor. In this country, a contrary doctrine may have obtained; but it will be assumed that the common-law rule prevails unless the contrary is shown.[4] See OFFICE, 1.

RESIST. To oppose, meet force with force; to hinder, prevent. Whence resisting, resistance. See DEFENSE, 1.

Resistance to a legal arrest is criminal, though the accused be innocent of the charge.[5]

"Resisting" does not necessarily imply assaulting or beating an officer.[6]

"Every person who knowingly and willfully obstructs, resists, or opposes any officer of the United States in serving, or attempting to serve or execute, any mesne process or warrant, or any rule or order of any court of the United States, or any other legal or judicial writ or process," shall be imprisoned not more than twelve months, and fined not more than three hundred dollars.[7]

The offense is complete when the person refuses to go with the officer.[8]

Resistance to an officer is opposing him by direct, active, and more or less forcible means. It implies something more than hindering, interrupting, preventing, baffling or circumventing. The gist of the offense is personal resistance, that is, personal oppo-

[1] [Collison *v.* Teal, 4 Saw. 243 (1877), cases, Deady, J.

[2] Castello *v.* Castello, 14 F. R. 207, 210 (1882), cases.

[3] [Phelps *v.* Robbins, 40 Conn. 264 (1873), Carpenter, J.

[4] Willard's Appeal, 68 Pa. 332 (1871), Sharswood, J.; 41 Leg. Int. 314.

[5] Carr *v.* Dings, 58 Mo. 406 (1874); Harker *v.* Reilly, 4 Del. Ch. 82 (1871); 2 Redf. Wills, 448.

[6] Laing *v.* Barbour, 119 Mass. 525 (1876), cases; 24 Moak, 297; 2 Williams, Ex. 1014; 4 Kent, 541.

[7] Parsons *v.* Coalgate, 15 F. R. 600 (1882), Wheeler, J.

[1] [2 Bl. Com. 514.

[2] Johnson *v.* Holifield, 82 Ala. 127 (1886).

[3] Barbour *v.* United States, 17 Ct. Cl. 153-54 (1881), cases.

[4] Edwards *v.* United States, 103 U. S. 473-74 (1880), cases, Bradley, J.; State *v.* Clayton, 27 Kan. 445 (1882), cases, Brewer, J.; State *v.* Boecker, 56 Mo. 21 (1874).

[5] Floyd *v.* State, 82 Ala. 23 (1886).

[6] Woodworth *v.* State, 26 Ohio St. 196 (1875).

[7] Act 30 April, 1790: R. S. § 5398, cases.

[8] United States *v.* Lukens, 3 Wash. 335 (1810).

sition to the exercise of official authority or duty, by direct, active, in some degree forcible, means. A person may not resist or obstruct an officer after he has made a seizure of property.[1] See ARREST, 2.

RESOLUTION. See BY-LAW, 2.

RESORT. The highest or last court to which a cause may be carried for review is called the court or tribunal "of last resort." See COURT.

RESOURCES. Money, or property, that can be converted into supplies; means of raising money or supplies; capabilities of producing wealth, or of supplying necessary wants; available means, or capability of any kind.[2]

RESPECTIVE. See SEVERAL.

RESPITE.[3] Temporary suspension of the execution of a sentence; a delay, forbearance, or continuation of time.[4]

RESPOND. To answer — a bill in equity, a libel in admiralty or in divorce, in an appeal taken to a higher court, etc. See RESPONDERE.

Respondent. One who makes or files an answer in a cause; a defendant.

Co-respondent. A co-defendant; one of two or more respondents; in English practice, the paramour as joint-defendant in proceedings in divorce for adultery.

Responsive. Containing or embodying an answer; completely answering.

That an answer in equity must be "responsive" to the allegations in the bill, see ANSWER, 3.

RESPONDERE. L. To answer; respond.

Ad respondendum. See CAPERE, Capias, etc.

Respondeat. Let him answer.

Respondeat ouster. Let him answer over.

The name of a judgment upon a dilatory plea in a civil suit, that defendant answer in some better manner, that is, put in a more substantial plea;[5] also applicable in criminal cases, when a demurrer to an indictment or an information is overruled.[6] See ABATEMENT, 4.

Respondeat superior. Let the principal answer.

The employer is answerable for the act (not wanton) of his servant or agent.[1] See further AGENT; CONTRACTOR; NEGLIGENCE.

Respondentia. Ability to answer: a loan upon the personal obligation of the owner of a cargo on board a ship.

The loan of money upon merchandise laden on board a ship, the repayment whereof is made to depend upon the safe arrival of the merchandise at the destined port.[2]

A loan upon the vessel is called "bottomry." In a loan upon the merchandise, which is for sale or exchange in the course of the voyage, the borrower only is personally bound to answer the contract, and he is said to take up money at *respondentia*.[3]

The money, with maritime interest, is paid to the lender upon the arrival of the merchandise at the port.[4] See BOTTOMRY; HYPOTHECATION; SALVAGE.

Responsa prudentum or prudentium. Answers of the learned — by learned lawyers.

Augustus gave to certain jurists a privilege called *jus respondendi:* the right of making answers, on points of law submitted by judges, which should have the authority of law.

Books of responses, bearing the names of leading jurisconsults, obtained an authority at least equal to that of our reported cases, and constantly modified, extended, limited, or practically overruled provisions of the Decemviral law. These responses were at first opinions interpretative of the written law — explanatory glosses.

Opinions were given upon fictitious or imaginary cases; in which fact Mr. Maine finds an explanation for the thorough scientific development attained by the Roman law. English and American judges confine themselves to the actual cases presented: *obiter dicta* being regarded with disfavor, if not censured.[5]

RESPONSIBLE. Answerable, accountable, amenable; able to answer just expectations; of pecuniary ability. Opposed, *irresponsible.* Compare LIABLE. See CIRCUMSTANCES, 2.

A promise to be "responsible" for the contract of another is a contingent liability, and becomes absolute by showing due and unsuccessful diligence to obtain satisfaction from the principal.[6]

A statute requiring that a writ shall be indorsed by some "responsible person" intends that the person

[1] United States *v.* McDonald, 8 Biss. 439, 448 (1879), Dyer, J.; State *v.* Welch, 37 Wis. 200-3 (1875), Ryan, Chief Justice.

[2] [Ming *v.* Woolfolk, 3 Mont. 386 (1879): Webster's Dict.

[3] F. *respite:* L. *re-spicere*, to look back upon; regard, respect had to proceedings,— Skeat.

[4] Mishler *v.* Commonwealth, 62 Pa. 60 (1869).

[5] 3 Bl. Com. 303, 397.

[6] 4 Bl. Com. 338; R. S. § 1026.

[1] See generally Philadelphia, &c. R. Co. *v.* Derby, 14 How. 485-87 (1852); Chicago City *v.* Robbins, 2 Black, 428 (1862); Hilliard *v.* Richardson, 3 Gray, 350-67 (1855), cases; 5 South. Law Rev. 238-85 (1879), cases; 3 Cent. Law J. 647 (1876) — Solicitors' Journ.; 83 Ky. 661; 2 Mich. 529; 58 N. H. 53.

[2] The Brig Atlantic, 1 Newb. 516 (1855), McCaleb, J.

[3] [2 Bl. Com. 458.

[4] Marsh. Ins. 734. See generally 3 Kent, *353, *et seq.*

[5] Maine, Ancient Law, 32-38; Hadley, Rom. Law, 65-69.

[6] Gilbert *v.* Henck, 30 Pa. 209 (1858); Bickel *v.* Auner, 9 Phila. 499 (1872).

shall possess sufficient pecuniary ability to pay the costs that may be recovered against the plaintiff. Strictly speaking, "responsible" means liable, answerable, rather than able to discharge an obligation.[1]

A testator devised property for founding a school upon condition that within six months after his decease "responsible citizens" should pledge forty thousand dollars to the object. A large number of persons of limited means subscribed small amounts, some conditional. *Held*, that the subscription list was not a pledge by such persons as the testator contemplated.[2]

In deciding upon the responsibility of bidders for the erection of a public building, it is the duty of the proper officials to consider not only the pecuniary ability of the bidders to perform the contract, but also to ascertain which ones, in point of skill, ability, and integrity, will be most likely to do faithful, conscientious work, and to fulfill the contract promptly, according to its letter and spirit.[3]

The "lowest responsible bidder" is one who complies with all the requirements of the law, not merely one whose bid is lowest.[4]

In the Pennsylvania act of May 23, 1874, which directs that contracts for municipal work shall be awarded to the "lowest responsible bidder," "responsible" has been held to refer to pecuniary ability, judgment, and skill. The statute calls for the exercise of duties and powers, in the city authorities, which are deliberative and discretionary; and if they act in good faith, although erroneously or indiscreetly, a *mandamus* will not lie to compel them to change their decision.[5]

RESPUBLICA. L. The common weal: the commonwealth; the state; the government. See INTEREST, 1, Reipublicæ, etc.; REPUBLIC.

REST. 1, *v.* To rely upon, trust to the sufficiency of.

"To rest a case," and for a party "to rest," is to adduce what is thought to be sufficient testimony to make out an apparent case in chief, or to rebut the adversary's *prima facie* case.

2, *n.* (1) A pause made by an accountant in his entries, in order to strike a balance upon which to allow interest.

Spoken of as annual and semi-annual rests; and made by an administrator, executor, guardian, or other trustee.[6]

(2) Peace, quiet. See PEACE, 1; SUNDAY.

RESTAURANT. Has no such definite legal meaning as necessarily excludes its being an inn; as currently understood, an eating-house,[1] *q. v.* See also ENTERTAINMENT; INN; SALOON; TAVERN.

RESTITUTIO. L. Restoration; restitution, *q. v.*

Restitutio in integrum. Restoration to the original (unbroken) state or condition.

1. In civil law, placing a party in the position he occupied before he was induced to enter into a contract by reason of fraud, force, fear, mistake, or incapacity. See RESCISSION.

2. In maritime law, putting a vessel into the condition it was in before a collision.

The owner of a vessel is not liable for loss by collision, occasioned without his privity (*q. v.*) or knowledge, beyond the amount of his interest in the vessel, and her freight pending at the time the collision occurred.[2]

Subject to that provision, the damages recoverable are established in the same manner as in suits for injuries to other personalty, and the claim for compensation may, in certain cases, extend to the loss of the freight, necessary expenses in making repairs, and unavoidable detention.

Restitutio in integrum is the leading maxim as to the measure of damages in such cases. Where repairs are practicable, the rule is, that the damages assessed shall be sufficient to restore the injured vessel to the condition she was in at the time the injury was inflicted.

The rule does not allow deductions, as in insurance cases, for new materials furnished in the place of old because the claim arises on the wrongful act, and the measure of indemnity is not limited by any contract. Such repairs may embrace the value of the vessel. If the vessel is wholly lost, the measure is the market value at the time of her destruction. That she sunk is not evidence of total loss.[3] See COLLISION, 2; DAMAGES; LOSS, 2.

RESTITUTION. Restoration to former condition or position. See RESTITUTIO.

Return of a thing to its owner: the act of making the return, or the proceeding or writ by which directed.

At common law, when the judgment of a lower court is reversed, the court of review may specially order that the plaintiff in error be restored to what-

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[1] Farley *v.* Day, 26 N. H. 531 (1853), Gilchrist, C. J.; N. H. Rev. St. ch. 183, § 17.

[2] Yale College *v.* Runkle, 10 Biss. 309 (1881), Drummond, J.

[3] Hoole *v.* Kinkead, 16 Nev. 221 (1881), Leonard, C. J.; Nev. St. 1861, 59.

[4] Booker *v.* Wabash County, 88 Ind. 267 (1882).

[5] Douglass *v.* Commonwealth, 108 Pa. 563 (1885), Mercur, C. J.; Commonwealth *v.* Mitchell, 82 Pa. 348 (1876); Findley *v.* City of Pittsburgh, *ib.* 353 (1876). See also State *v.* McGrath, 91 Mo. 393-94 (1886), cases.

[6] See Buller *v.* Harrison, 1 Cowp. 566 (1777); Pennypacker's Appeal, 41 Pa. 501 (1862); 53 *id.* 503; Smith, Eq. 205, 320; 3 Pars. Contr. 151.

[1] Lewis *v.* Hitchcock, 10 F. R. 6-7 (1882), cases, Brown, D. J.; s. c. 13 Rep. 300; 1 Hilt. 195; 54 Barb. 311.

[2] Act 3 March, 1851: 9 St. L. 635. See Propeller Niagara *v.* Cordes, 21 How. 25 (1858).

[3] The Baltimore, 8 Wall. 385 (1869), cases, Clifford, J.

ever he has lost in consequence of the erroneous judgment. Any such order is part of the judgment in reversal. The judgment, in form, is, not only that the judgment of the court below be reversed, but that "it is considered, that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid;" and the *writ of restitution* which is issued in pursuance of it, and in which the sheriff is commanded to levy the money of the chattels of the plaintiff below, or to arrest his person, is strictly an execution.[1]

In crimes, at common law, there was no restitution, because the indictment was in the name of the king. But by 21 Hen. VIII (1530), c. 11, on conviction of larceny, the prosecutor was to have restitution of the goods. That act was repealed by 7 and 8 Geo. IV (1827), c. 27, 29, which provides that the court may order restoration to the owner or his representative, from the thief or the receiver from him; but not so, if the thing stolen was a negotiable security, which has come into the possession of a *bona fide* holder, for value, without reasonable cause to suspect that the paper was stolen.[2]

RESTORE. Compare RESTITUTION.

The words "restored to market," in the act of March 3, 1877, § 3,—securing the rights of settlers upon certain railroad lands in Kansas,—signify no more than a withdrawal of the lands from the condition or reservation in which they have been held by reason of the railroad grant.[3]

RESTRAIN. 1. To keep in, hold in; to abridge, confine, regulate.

To restrain and suppress an amusement is to regulate or wholly suppress it, or regulate it by a license.[4] See PROHIBITION, 2.

2. To limit, restrict, hinder, repress: as in saying that contracts in restraint of trade, or of marriage, are void.

A "restraining statute" limits the action of the common law.

See DURESS; IMPRISONMENT; LEGAL, Illegal.

3. To prohibit by judicial order, by injunction; to enjoin: as, to restrain an act, a proceeding, a defendant.

A "restraining order" is of the nature of an injunction. The force of such an order ceases upon the granting of an injunction *pendente lite*.[5]

Restrictive. Limited, to a particular person or purpose: as, a restrictive condition, indorsement, *q. v.* Compare ABSOLUTE.

RESTS. See REST, 2.

RESULTING. See TRUST, 1; USE, 3.

RESURRECTIONIST. See SEPULCHER.

RETAIL. To sell in small quantities.[1]

To sell by small parcels or quantities, and not in the gross; as, to sell half a pint of alcohol at once.[2]

Retail dealer. One who sells by small quantities, to suit customers, articles which are bought in larger amounts.[3]

A "wholesale dealer" sells in gross, not by the small quantity or parcel.[3] See MERCHANT.

To constitute the offense of carrying on the business of a retail liquor dealer without having paid the special tax required by United States law, the accused must have procured the liquor sold with intent to retail it, or, having it on hand, formed the intent to retail it, and carried out that intent by one or more acts.[4]

Gratuitously distributing ardent spirits at a public gaming-table does not constitute the keeper of the table a retailer of spirituous liquors.[5]

RETAINER. 1. The act of engaging an attorney-at-law to prosecute or defend a cause; also, the formal notice given by the lawyer that he has been so retained; and, also, the fee paid — the "retaining fee."

In particular, the fee of a barrister, or advocate, paid before it is earned. The old rule that all fees should be paid in advance, by removing pecuniary interest in the issue of suits, tended to maintain the independence and respectability of the bar.[6] See ATTORNEY.

2. At common law, the right in an executor or administrator to reserve assets enough to pay his own debt, before other creditors of equal degree.

The reason was, he could not sue himself. Now, as a rule, unsecured debts share alike.[7]

RETALIATION. Compare RETORSION.

The *lex talionis*, or law of retaliation, can never be in all cases an adequate or permanent rule of punishment. The difference of persons, place, time, provocation, or other circumstances may enhance or mitigate the offense; and in such cases retaliation can never be a proper measure of justice.[8]

RETIRE. 1. To withdraw from membership: as, to retire from a firm or partnership. Whence *retiring* partner, *q. v.*

2. In its application to bills of exchange, is

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[1] Duncan *v.* Kirkpatrick, 13 S. & R. *294 (1825), Gibson, J.

[2] 4 Bl. Com. 362-63; Chitty, *ib.*

[3] Kansas & Neosho Valley R. Lands, 16 Op. Att.-Gen. 181 (1878).

[4] Smith *v.* City of Madison, 7 Ind. 86 (1855); City of Burlington *v.* Lawrence, 42 Iowa, 681 (1876); 12 Kan. 630.

[5] Cohen *v.* Gray, 70 Cal. 85 (1886).

[1] Commonwealth *v.* Kimball, 7 Metc. 308 (1843).

[2] Bridges *v.* State, 37 Ark. 226 (1881).

[3] State *v.* Lowenhaught, 11 Lea, 15 (1883), Freeman J.; Webb *v.* State, *ib.* 664 (1883).

[4] United States *v.* Bonham, 31 F. R. 908 (1887).

[5] United States *v.* Mickle, 1 Cranch, C. C. 268 (1808).

[6] Forsythe, Hist. Lawyers, 353. See 3 R. I. 206; 60 Iowa, 520; 3 Chitty, Pr. 116, m.

[7] See 3 Bl. Com. 18; 63 Ala. 488; 6 Fla. 29; 9 Ill. 300.

[8] 4 Bl. Com. 12-13. See Woolsey, Int. Law, § 122.

ambiguous. It is ordinarily used of an indorser who takes up a bill by handing the amount to a transferee, after which the indorser holds the instrument with all his remedies intact. But it is sometimes used of an acceptor, by whom, when a bill is taken up or retired at maturity, it is in effect paid, and all the remedies on it extinguished.[1]

Acts of Congress speak of "retiring" from circulation coin or other money of a particular issue or denomination.

RETORNUM. L. Return, *q. v.*

Retorno habendo. For return had; to have a return. A judgment awarding a defendant in replevin the possession and property of the goods or articles; a judgment *de retorno habendo.*[2]

RETORSION.[3] Applying the law of retaliation to another nation,—treating it or its subjects in similar circumstances according to the rule which is set.[4]

RETRACTION. See LIBEL, 5; OFFER, 1.

RETRAXIT. L. He has withdrawn. The act of a plaintiff in voluntarily withdrawing from his suit.

A "non-suit" is negative, a mere default and neglect of the plaintiff, after which, upon paying the costs, he may begin his suit again. A "retraxit" is positive, being an open and voluntary renunciation of his suit in court, and by which his right of action is forever lost.[5]

RETREAT. In the law of homicide, before a person who is assaulted may kill his assailant, he must flee as far as he reasonably can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit.[6]

"Retreating to the wall" means that the party assaulted must avail himself of any apparent and reasonable avenue of escape, by which the danger might be averted, and the necessity of slaying his assailant avoided.[7]

But if the attack is of such a nature, or the weapon of such a character, that to attempt to retreat might increase the danger, the party need not retreat.[7]

If retreat does not apparently place the assailed in greater peril he must resort to it.[8]

Where the master of a vessel assaults a seaman, who futilely endeavors to escape, the latter may protect himself from injury; if the assault is made with a deadly weapon or otherwise dangerously, he may use equivalent force.[1]

RETROSPECTIVE; RETROACTIVE. Retrospective: looking backward; retroactive: acting backward. Affecting what is past; operating upon a past event or transaction. Retrospective is the more common.

Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed "retrospective."[2]

That there exists a general power in the State governments to enact retrospective or retroactive laws, does not admit of question. The only limitation is the provision[3] that the same shall not be such as are technically "*ex post facto*," or as "impair the obligation of contracts."[4]

A legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and, in many cases, thus furnish the rule to govern the courts in transactions which are past, provided that no constitutional right of a party concerned is violated. Congress cannot, under cover of giving a construction to an existing or expired statute, invade private rights, with which it could not interfere by a new or affirmative statute. But where it can exercise a power by passing a new statute, which may be retroactive in its effect, the form of words used cannot be material, if the purpose is clear, and that purpose is within its power.[5]

The settled doctrine of the Supreme Court is that "words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."[6]

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[1] [Byles, Bills, 226.

[2] [3 Bl. Com. 160, 413.

[3] L. *retorquere*, to twist back, retort.

[4] Woolsey, Int. Law, § 118.

[5] [3 Bl. Com. 296; 1 Ala. 47; 31 *id.* 113; 17 Ga. 251; 68 Ind. 310; 8 Pa. 163; 79 Va. 338.

[6] 4 Bl. Com. 185.

[7] People *v.* Iams, 57 Cal. 120 (1880), Morrison, C. J.

[8] Carter *v.* State, 89 Ala. 15 (1886), cases.

[1] United States *v.* Beyer, 31 F. R. 37 (1887).

[2] Society for Propagating the Gospel *v.* Wheeler, 2 Gall. 139 (1814), Story, J. See also Dash *v.* Van Kleeck, 7 Johns. *503-8 (1811), Kent, C. J. Story's definition quoted, Sturges *v.* Carter, 114 U. S. 519 (1885), Woods, J.; Rairden *v.* Holden, 15 Ohio St. 210 (1864), Brinkerhoff, C. J.

[3] Constitution, Art. I, sec. 10.

[4] Baltimore, &c. R. Co. *v.* Nesbit, 10 How. 401-2 (1850), cases, Daniel, J.

[5] Stockdale *v.* The Insurance Companies, 20 Wall. 331-32 (1873), Miller, J.; Koshkonong *v.* Burton, 104 U. S. 679 (1881); Kring *v.* Missouri, 107 U. S. 231 (1882); 23 Wall. 76; 95 U. S. 654-55; 17 Ct. Cl. 171; 2 Story, Const. § 1393.

[6] Chew Heong *v.* United States, 112 U. S. 559 (1884), cases, Harlan, J., quoting United States *v.* Heth, 3 Cranch, 413 (1806), Paterson, J.

If the judge is satisfied that the legislative construction, expressed in a declaratory act, is wrong, he is bound to disregard it. The act will not be given a retrospective operation, so as to deprive a party of a vested right, unless its language is so plain and explicit as to render it impossible to put any other construction upon it.[1]

Retroactive effect will not be given to a statute unless the intention of the law-makers that that is to be the effect is expressed in terms, especially where rights will be taken away or restricted.[2]

See FACTUM, Ex post; IMPAIR; USUS, Utile, etc.

RETURN. 1. To come or go back to the same place; to revisit.[3]

2. For an officer to report to a court what he did toward executing its process; also, the certificate indorsed upon the writ as to what was officially done, and when and where; and, also, by elision for "return day," the day when such report is to be made or actually is made. See RETORNUM.

Whatever the sheriff does in pursuance of the command of a writ he must "return" or certify to the court together with the writ itself.[4]

The day on which a defendant is ordered to appear in court, and on which the sheriff is to bring in the writ and report how far he has observed it, is called the "return" of the writ, or the "return day."[5]

Every process issued by a court must be returned, unless some statute otherwise provides, to the court which issues it. This is essential, that the court may know that its order has been obeyed, and that the record may be complete. The term "return" implies that the process is taken back to the place from which it was issued.[6]

Returns and return days are either *general*, that is, regular, or *special*, that is, conventional, as corresponds with the requirements of statutes and established practice, or, as in particular cases, the convenience of parties, the engagements of counsel and the judge or judges of the court, or the effectual administration of justice, may permit or direct.

Due return. Bringing a process into court, with such indorsements as the law requires — whether they in fact be true or false.[7]

False return. An incorrect statement or report of what was done under a judicial mandate.

Does not necessarily import willful disregard of facts.

Insufficient and *irregular* also are descriptive of *defective* returns.

Returnable. Requiring official report as to what was done by way of execution of a precept.

Said of a summons, citation, *capias*, writ of execution, or other process, to be returned to the court or officer who ordered it to issue and to be served or otherwise executed by a day named in the process itself.

The time within which returns are, in the first instance, directed to be made, may, in cases, be "enlarged" by special order. Where intervening rights will not be adversely affected, a return, as made, may be "amended." And when the law has been flagrantly disregarded, a return will be "set aside."

A return, as made, is conclusive in its statements of facts upon the officer and on a party who does not except to it; it is always construed rigorously against the officer; but it cannot be impeached in a collateral proceeding.[1] When "false," an action for the loss incurred may be maintained against the officer. When the process is void or voidable, the return of service also will be so. There may be an irregular or erroneous return to legal process. This is true, in a special sense, of returns to writs of execution.

See BONA, Nulla; CAPERE, Cepi; ERROR, 2 (3); FIND, 3; NIHIL; SERVICE, 6; VENIRE, Tarde.

3. To make complaint that one is violating a law; to inform against; as, to return a person for selling liquors without license, or for maintaining a nuisance. See INFORMATION, 3.

REUS. L. A defendant in a civil or criminal suit. See COURT; MENS, Rea.

REV. ST. Revised Statutes. See REVISE.

REVE. See REEVE.

REVEL. To behave in a noisy, boisterous manner, like a bacchanal.[2]

REVENDICATION.[3] Demand that a thing be returned or restored; reclamation of a thing sold.

The doctrine of stoppage *in transitu* appears to have been derived from, or to be analogous to, revendication in the civil law: "the right of an unpaid vendor, upon the insolvency of the vendee, to reclaim, *in specie*, such part of the goods as remains in the

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[1] Salters *v.* Tobias, 3 Paige, 344 (1832), Walworth, Ch.

[2] Hill *v.* Duncan, 110 Mass. 240 (1872), cases, Colt, J See also 25 Am. Law Reg. 681-95 (1886), cases; 26 Iowa, 340; 20 Miss. 347; 57 Pa. 433; Barr. Stat. 466; 1 Kent, 455.

[3] Society *v.* Platt, 12 Conn. *187 (1837).

[4] [3 Bl. Com. 278.

[5] [3 Bl. Com. 275. See Steph. Plead. 24.

[6] *Re* Crittenden, 2 Flip. 215 (1878), Ballard, J.

[7] Harman *v.* Childress, 3 Yerg. 329 (1832).

[1] See Von Roy *v.* Blackman, 3 Woods, 100-2 (1877), cases.

[2] Petition of Regan, 12 R. I. 310 (1879).

[3] L. *re*, again; *vindicare*, to lay claim to.

hands of the vendee entire, and without having changed its quality."[1]

REVENUE.[2] The income of a state.[3]

In a statute providing that appeals should be taken directly to the highest court in "cases relating to the revenue," held, that "revenue" was not used in its most extended meaning, but as embracing public revenue, whether State or municipal — all taxes and assessments imposed by public authority.[4]

"All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."[5]

Revenue laws. Laws made for the direct and avowed purpose of creating and securing revenue or public funds for the service of the government.[6]

Used in connection with a reference to the jurisdiction of the United States courts, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue; that is, a law directly traceable to the power granted to Congress "To lay and collect Taxes, Duties, Imposts and Excises."[7]

The lexical definition of "revenue" is very comprehensive: "The income of a nation, derived from its taxes, duties, or other sources, for the payment of the national expenses." "Other sources" would include the proceeds of public lands, the receipts of the patent-office and of the post-office department, in excess of expenditures. The appellative "revenue laws" is applied only to such laws as are made for the purpose of creating revenue or public funds for the service of the government.[8]

Bills for raising revenue are such as impose taxes upon the people, directly or indirectly, or lay duties, imposts or excises, for the use of the government, and give the persons from whom the money is exacted no equivalent in return, unless it be the enjoyment, in common with other citizens, of the benefits of good government. It is this feature which characterizes bills for raising revenue. They draw money from the citizen, giving no direct equivalent in return. In respect to such bills it was reasonable that the Constitution should provide that the immediate representatives of the tax-payers should alone have power to originate them. It is a very strained construction which would regard a bill establishing rates of postage as a bill for raising revenue.[9] See RAISE, Revenue.

Under the revenue system of the United States, the collection of the revenue in the manner prescribed by law cannot be restrained by judicial proceedings. The only remedy for an illegal exaction is payment under protest and suit to recover back the money. The reason is, that as it is necessary that the government should be able to calculate with certainty on its revenues, it is better that the individual should be required to pay what is demanded under the forms of law, and sue to recover back what he pays, than that the government should be embarrassed in its operations by a stay of collection.[1]

Officer of the revenue. In the Revised Statutes, an officer of the revenue from customs; does not therefore include a postmaster.[2]

See DUTIES; REFUNDS; STAMP; TAX, 2.

REVERSE. To set aside, annul, vacate: as, to reverse a judgment.[3]

Reversal. The act or decision of one court in pronouncing erroneous, and therefore annulling, the judgment or decree of a lower court. Opposed, *affirmance*, q. v.

Compare OVERRULE; REVOKE. See OPINION, 3; VENIRE, De novo.

REVERT.[4] For property (usually land) to go back or return to a person who formally owned it but who parted with the possession or title to it, by creating an estate in another which has terminated by his act or by operation of law.

"Revert back to my other heirs" means, simply, to go back to such heirs.[5]

Reversion. The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. "The returning of lands to the grantor or his heirs after the grant is over."[6]

A return of the estate to the original owner, after the limited estate carved out of it has determined.[7]

The fee-simple of land must abide somewhere; and if he who is possessed of the whole carves out of it a smaller estate, and grants it away, whatever is not so granted remains in him. While a "reversion" is never therefore created by a deed, but arises from construction of law, a "remainder" can never be limited except by a deed or a devise. Both are equally transferable, when actually vested, being estates *in præsenti*, though taking effect *in futuro*. A reversion is an incorporeal hereditament.[8]

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[1] Benedict *v.* Schaettle, 12 Ohio St. 520, 518 (1861), Gholson, J., quoting note 2 Nev. & Man. 650. See also 27 E. C. L. 201; L. R., 7 Ap. Cas. 582.

[2] F. *revenir*, to come back.

[3] United States *v.* Bromley, 12 How. 97 (1851), McLean, Judge.

[4] Webster *v.* People, 96 Ill. 347 (1881), Walker, J.; Potwin *v.* Johnson, 106 *id.* 533 (1883).

[5] Constitution, Art. I, sec. 7, cl. 1.

[6] United States *v.* Mayo, 1 Gall. *398 (1813), Story, J.

[7] United States *v.* Hill, 123 U. S. 686 (1887), Waite, C. J.

[8] United States *v.* Norton, 91 U. S. 568-69 (1875), Swayne, J., quoting Worcester's Dict.

[9] United States *v.* James, 13 Blatch. 208 (1875), Johnson, J.; 1 Story, Const. § 880; 4 Blatch. 311; 1 Woolw. 270.

[1] Antoni *v.* Greenhow, 107 U. S. 777 (1882), Waite, C. J.

[2] Campbell *v.* James, 18 Blatch. 196 (1880).

[3] Laithe *v.* McDonald, 7 Kan. 268 (1871), Brewer, J.

[4] L. *re-vertere*, to turn backward.

[5] Beatty *v.* Trustees, 39 N. J. E. 463 (1885).

[6] 2 Bl. Com. 175, quoting 1 Coke, Inst. 142; 26 N. J. L. 540.

[7] 4 Kent, 353-54.

[8] 2 Bl. Com. 175-76; 4 Kent, 353-56; 1 Washb. R. P. 37, 47; 38 N. J. E. 124.

Reversionary. Pertaining to or partaking of the nature of a reversion.

A reversionary interest is the right to enjoy in the future property at present in the possession of another.

Reversioner. A person entitled to an estate in a reversion.

Reverter. Reversion.

See ESTATE, 3; FIXTURE; REMAINDER; TABLE, 4.

REVEST. See VEST.

REVIEW. Viewing again: a second consideration; revisement, reconsideration, re-examination to correct, if necessary, a previous examination.

1. A re-examination for report upon the line of a highway as recommended by a jury of "viewers." The persons who make this second view are called "reviewers," and compose the "jury of review." See VIEW.

2. The revision of a judicial act.

Bill of review. A proceeding in a court of equity by which the defendant may have a decree against him reviewed for error upon its face. A formal mode of rehearing the case, incidental to the original suit.[1]

A bill in the nature of a writ of error; its object is to procure an examination, and alteration or reversal, of a decree made upon a former bill, after such decree has been signed and enrolled.[2]

If the decree is not enrolled, a "bill in the nature of a bill of review," or a "supplemental bill in the nature of a bill in review," is appropriate.[3]

May be had upon error apparent upon the face of the decree; or, by special leave of the court, upon oath made of the discovery of new evidence, which could not possibly be had or used when the decree passed.[3]

Lies for error in point of law apparent upon the record, or for some new matter of fact, relevant to the case, discovered since publication passed, and which could not, with reasonable diligence, have been discovered before. To enable the court to judge of the propriety of granting a rehearing, the petition must state the grounds upon which it is asked. The petitioner must also show that he has performed the decree, especially as regards the payment of money and costs.[4]

"No bill of review shall be admitted unless the party first obeys and performs the decree, and enters into a recognizance with sureties, to satisfy the costs and damages for the delay if it be found against him."[1]

There is no universal and absolute rule which prohibits the court from allowing the introduction of newly-discovered evidence to prove facts which were in issue on the former hearing. The allowance is not a matter of right, but of sound discretion, to be exercised cautiously and sparingly, and only under circumstances which demonstrate that it is indispensable to the merits and justice of the cause.[2]

The bill will be refused, if productive of mischief to innocent parties, or for other cause sufficient to the court.[3]

The only questions open for examination on a bill for error of law appearing upon the record are such as arise on the pleadings, proceedings, and decree, without reference to the evidence in the cause.[4]

A bill must ordinarily be brought within the time limited by statute for taking an appeal from the decree sought to be reviewed, where the review is not founded on matters discovered since the decree.[5]

Court of review. A court whose distinctive function is to pass upon (affirming or reversing) the final decisions of another or other courts.

3. To examine a literary production and express (usually publish) an opinion as to its merits.

A reviewer may fairly cite largely from the original work, if his design is to use the passages for the purpose of fair and reasonable criticism. But if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review, such use will be deemed a piracy.[6]

Where an action of libel respects a comment in a newspaper on a matter of public interest, the case is not one of privilege, properly so called, and it is not necessary, in order to give a cause of action, that actual malice be proved. The question whether the comment is or is not actionable depends upon whether, in the opinion of the jury, it goes beyond the limits of fair criticism. "Whatever is fair and can be reasonably said of the works of an author or of himself as connected with his work, is not actionable, unless it appears that, under the pretext of criticising the

[1] [Bush v. United States, 13 F. R. 628 (1882), Deady, D. J.: s. c. 8 Saw. 326.

[2] Story, Eq. Pl. § 408.

[3] 3 Bl. Com. 454.

[4] Wiser v. Blachly, 2 Johns. Ch. *491 (1817), cases, Kent, Ch.; Ketchum v. Breed, 66 Wis. 94 (1886), cases.

[1] Davis v. Speiden, 104 U. S. 84–86 (1881), cases: Bacon's Law Tracts, 280.

[2] Wood v. Mann, 2 Sumn. 334, 318–35 (1836), cases, Story, J.; Craig v. Smith, 100 U. S. 234 (1879), Waite, Chief Justice.

[3] Story, Eq. Pl. § 417; Purcell v. Miner, 4 Wall. 521 (1866); Ricker v. Powell, 100 U. S. 107 (1879), cases.

[4] Shelton v. Van Kleeck, 106 U. S. 534 (1882), cases. See also Irwin v. Meyrose, 2 McCrary, 244, 250 (1881), cases; Willamet Bridge Co. v. Hatch, 19 F. R. 347 (1884).

[5] Ensminger v. Powers, 108 U. S. 302 (1883), cases; Taylor v. Charter Oak Life Ins. Co., 3 McCrary, 486 (1882), cases: s. c. 17 F. R. 566.

[6] Folsom v. Marsh, 2 Story, 106, 117 (1841), Story, J. See also 8 South. Law Rev. 160–88 (1882), cases.

work, the defendant took an opportunity of attacking the character of the author: then it will be libel."[1] See ABRIDGE, 1; DRAMA.

REVISE. To re-examine and amend: as, to revise a judgment, a code, laws, statutes, reports, accounts. Compare REVIEW, 1.

Revisions of codes and statutes, partial or entire, have been enacted as follows: In Alabama, in 1876, 1887; Arizona, 1887 (compiled laws); Arkansas, 1874; California, 1873; Colorado, 1877, 1883; Connecticut, 1875, 1887; Dakota, 1877, 1887; Delaware, 1874; Florida, 1872; Georgia, 1882; Idaho, 1875, 1887; Illinois, 1874, 1883; Indiana, 1852, 1881; Iowa, 1873, 1880; Kansas, 1868, 1879; Kentucky, 1873, 1887; Louisiana, 1870, 1875, 1882, 1884; Maine, 1871, 1883; Maryland, 1878, 1886, 1888; Massachusetts, 1860, with supplements to 1872, and to 1882; Michigan, 1871; Minnesota, 1866, 1888; Mississippi, 1880; Missouri, 1879; Montana, 1879, 1887; Nebraska, 1881, 1887; Nevada, 1873, 1885; New Hampshire, 1878; New Jersey, 1877, 1887; New Mexico, 1884; New York, 1829, with eight revised editions to 1888; North Carolina, 1883: Ohio, 1880; Oregon, 1872; Pennsylvania, a criminal code in 1863; Rhode Island, 1882; South Carolina, 1882; Tennessee, 1871, 1884; Texas, 1879; Utah, 1876; Vermont, 1880; Virginia, 1873, 1887; Washington, 1881; West Virginia, 1883, 1887; Wisconsin, 1878; Wyoming, 1876, 1887.[2]

Revised Statutes. Statutes which have been amended, re-arranged, and re-enacted.

Where, by a statute, there is a revision of the whole subject-matter of former statutes, the earlier enactments are repealed so far as it appears it was the intention of the legislature to repeal them. The revision repeals by implication so far as it is repugnant to the old law, or when it is evidently intended as a substitute.[3]

A different interpretation is not to be given to revised statutes without some substantial change of phraseology other than what may have been necessary to abbreviate the form of the law.[4]

Where the language is of such doubtful import as to call for a construction, it is usual to refer to the statute or statutes from which the revision was made. But where the language is plain, and leads to no absurd or improbable result, there is no room for construction, and such effect will be given it as is required by the ordinary signification of the words used, regardless of the prior statute or its construction. The rational rule must be to resort to the prior statute to remove, not to raise, doubts.[1]

Revised Statutes of the United States. An act of Congress, passed June 27, 1866, authorized the appointment of three commissioners, learned in the law, to revise, simplify, arrange, and consolidate all the statutes of the United States, of general or permanent nature.[2]

This revision, which embraced statutes in force up to December 1, 1873, went into effect June 22, 1874.

An act of June 20, 1874, directed the secretary of state to cause the head and marginal notes to be completed, referring to the original statutes and to decisions explaining the same; to annex an index and otherwise prepare the work for printing and distribution; and, finally, to certify the completion of the work. This act provided, further, that, after promulgation, the printed volumes should be evidence of the laws and treaties therein contained in all courts.[3]

The revision repeals all acts embraced within it. No presumption of a legislative intent is to be drawn from the arrangement and classification of titles and sections.[4]

Acts of February 18, and March 3, 1875, declared that acts passed since December 1, 1873, are not affected by the revision.[5]

Act of March 2, 1877, authorized the appointment of one commissioner to prepare a *new edition;* the same to be examined and certified by the secretary of state.[6] This second edition was published February 18, 1878.

Act of March 9, 1878, makes the second edition evidence, but not to control or affect acts passed since December 1, 1873.[7]

Act of June 7, 1880, authorized a *supplement* to be prepared and published. The same to be *prima facie* evidence, but not to preclude reference to, nor control in case of discrepancy, the effect of any original act, nor to change or alter any existing law.[8]

The first edition is a transcript of the original work in the state department. It is *prima facie* evidence of the law. The second edition is neither a new revision nor a new enactment, merely a new publication — a compilation containing the original law with certain alterations and amendments made by subsequent legislation, incorporated therein according to the judgment of the editor, who had no direction to correct errors or supply omissions.[9]

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[1] Merivale *v.* Carson, 20 Q. B. D. 275 (1887), cases. The defendant was the editor of a theatrical newspaper called *The Stage*. A criticism of the play called "The Whip Hand," published in his paper, falsely charged, plaintiff alleged, that the play had an immoral tendency.

[2] See Stimson Am. St. Law, IX-XIV; 1 Sup. p. 14, § 1047; Banks & Brothers' Catalogue, 1888. For each State there are one or more Digests, Compilations, or Supplements prepared by private persons, and, therefore, not authoritative.

[3] Bowlus *v.* Brier, 87 Ind. 396 (1882), Black, C.; 41 *id.* 282.

[4] McDonald *v.* Hovey, 110 U. S. 628 (1884), cases, Bradley, J.

[1] Heck *v.* State, 44 Ohio St. 537–88 (1886), cases.

[2] See R. S. for 1878, p. 1069.

[3] R. S. p. 1090.

[4] United States *v.* Jordan, 2 Low. 537, 542 (1876).

[5] R. S. p. 1085; 15 Ct. Cl. 80.

[6] R. S. p. 1092.

[7] 1 Sup. R. S. pp. 308, 52, 285.

[8] 1 Sup. R. S. pp. 582–83.

[9] Wright *v.* United States, 15 Ct. Cl. 86–89 (1879), Richardson, J.

Sections *in pari materia* are to be construed together.[1]

Section 5596 of the revision indicates a belief on the part of Congress that all parts of acts passed prior to December 1, 1873, not contained in the revision, are superseded. That is a recital of belief, not a declaration, and not conclusive. Whether a statute was repealed by a later one is a judicial, not a legislative, question.[2]

The revision is the legislative declaration of the statute law on the subjects embraced on December 1, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning.[3]

The revision as a whole is an act of Congress, approved June 22, 1874. In cases of uncertainty, the previous statutes may be referred to, to elucidate the legislative intent. But where the language is clear, the revision, as expressing the latest will, must govern.[4]

While, in construing the revision, the presumption is against an intention to change the law, yet, where the language cannot possibly bear the same construction as in the repealed act, full effect must be given to the new enactment.[5] See REPEAL; STATUTES, At Large.

REVIVE. To impart new life to, renew: to make operative once more; to restore original force to: as, to revive a debt, a suit, a judgment.

Revival; reviver; revivor. The act or proceeding of giving new life or efficacy to that which has lain dormant, been abated, or has or will become outlawed.

On the revival of debts barred by the statute of limitations, see ACKNOWLEDGMENT, 1; PAYMENT, Part.

Bill of revivor. Sets proceedings in motion again, when a suit has abated by the death of a party,[6] or by the marriage of a female plaintiff.

When, in the progress of a suit in equity, the proceedings are suspended from the want of proper parties, it is necessary to file a bill of revivor.[7]

It is a bill in equity, brought by the personal representative of a deceased party. A "bill of revivor and supplement" seeks to continue an abated suit, and to supply a defect in the original bill, arising from a subsequent event.[1]

REVOKE. To call back one's own act or deed, recall; to cancel, annul, *qq. v.*

Revocable. That which may be annulled by its author. Opposed, *irrevocable:* past recall.

Revocation. The nullification of a person's own act; the extinguishment of a right by the person who created it; the cancellation of an instrument by its maker.

As, to revoke an appointment, a power of attorney, a will, the probate of a will, letters testamentary or of administration, a submission to arbitrators or a referee, the power of a partner to act for the firm.

"To revoke" is to recall what one has done or promised. By a loose use of language, anything which renders a bequest inoperative at the testator's death may be called a "revocation." The "ademption" of a legacy is not usually called revocation. When ademption is not used, the act is called satisfaction, payment, performance or execution.[2]

A revocation is an act done by a testator by which he recalls his will.[3]

Consists in the purpose to destroy or annul the operation of the instrument, manifested by some outward sign or symbol. The question is one of fact and intention.[4]

REVOLT. Under the Crimes Act of April 30, 1790, consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his command to take possession of the vessel by assuming the government and navigation of her, or by transferring obedience from the lawful commander to some other person.[5]

An endeavor to excite the crew of a ship to overthrow the lawful authority and command of the master and officers of the ship. In effect, an endeavor to make a mutiny among the crew or to stir up a general disobedience or resistance to the authority of the officers.[6]

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[1] *Exp.* Karstendick, 93 U. S. 398 (1876), Waite, C. J.

[2] United States *v.* Claflin, 97 U. S. 548 (1878), Strong, Justice.

[3] United States *v.* Bowen, 100 U. S. 513 (1879), Miller, J.; Myer *v.* Western Car Co., 102 *id.* 11 (1880); Cambria Iron Co. *v.* Ashburn, 118 *id.* 57 (1886); 14 Ct. Cl. 2; 7 Rep. 198.

[4] Wright *v.* United States, *ante.*

[5] The Bark Brothers, 10 Bened. 402 (1879), Choate, J.; The Gorgas, *ib.* 470 (1879); *ib.* 170.

[6] [3 Bl. Com. 448.

[7] Kennedy *v.* Georgia State Bank, 8 How. 610 (1850), McLean, J.

[1] Story. Eq. Pl. §§ 354–87. See 2 Paige, 369; 5 Johns. 342; 1 Root, 578.

[2] Langdon *v.* Astor's Executors, 16 N. Y. 40, 39 (1857), Denio, C. J.

[3] [Lathrop *v.* Dunlop, 4 Hun, 215 (1875).

[4] Beauchamp's Will, 4 T. B. Mon. *363 (1827), Bibb, C. J. See also Gay *v.* Gay, 60 Iowa, 420 (1882), cases; Towne *v.* Weston, 133 Mass. 515 (1882); 35 Am. Rep. 35–37, cases.

[5] United States *v.* Kelly, 11 Wheat. 418 (1826), Washington, J.

[6] United States *v.* Smith, 1 Mas. 147 (1816), Story, J.

An open-rebellion or mutiny; an usurpation of the authority and command of the ship, and an overthrow of that of the master or other commanding officer. . . Any act done with intent to accomplish such an object is an endeavor to commit a revolt.[1]

A total refusal to perform any duty on board, until the master has yielded to some illegal demand of the crew, when it has produced *de facto* a compliance, or a suspension of his power of command, is a revolt.[2]

The act of March 3, 1835 (Rev. St. §§ 5359-60), enlarges the act of 1790, by adding distinct offenses to the "endeavor to make a revolt." These statutes do not include every case of simple passive disobedience by one of the crew, but do embrace every case of resistance to the free and lawful exercise of the master's authority, when accompanied by force, fraud, intimidation, violence, a conspiracy among the crew, or concerted action in such resistance or disobedience by one of them. An unlawful confinement of the master is not restricted to a physical confinement of his person.[3]

REVOLUTION. See INDEPENDENCE.

REVOLVER. See WEAPON.

REWARD. Compare PREMIUM; PRIZE.

1. Where a liberal reward was offered for information leading to the apprehension of a fugitive from justice, and a specific sum for his apprehension, it was held that a party giving the information which led to the arrest was entitled to the "reward," but not to the specific sum, unless he, in fact, apprehended the fugitive, or the arrest was made by his agents.[4]

Where an offer of a reward is made by public proclamation, before rights have accrued under it, it may be withdrawn through the channel in which it was made. No contract arises under such an offer until its terms are complied with. That the claimant was ignorant of its withdrawal is immaterial.[4] Compare BOUNTY.

Where an advertisement is published offering a reward for information in respect to or for the return of lost property, an acceptance of the offer by a person who is able to give the information or to return the property creates a valid contract.[1]

2. On the subject of reward for the custody of property, see BAILMENT; DEPOSIT, 2.

REX. See KING.

RHODIAN LAW. See MARITIME LAW.

The Rhodians were the earliest people that created, digested, and promulgated a system of marine law. Their laws concerning navigation were received at Athens, in the islands of the Ægean sea, and throughout the coast of the Mediterranean, as part of the law of nations. One title in the Pandects of the Roman law contains all the fragments extant of the code of the Rhodians; their laws, by recognition of Augustus and Antoninus, becoming rules of decision among the Romans in all maritime cases in which they were not contrary to their own laws.[2]

In these fragments is stated the modern law of jettison, average, and contribution, as distinctly as in any recent text-book. . . The Rhodians possessed a flourishing commerce at least one thousand years before the Christian era. Their laws were probably founded upon usages which were themselves of long standing.[3]

RICE. See GRAIN.

RICHARD ROE. See DOE.

RIDER. A clause added to a bill pending before a legislative body after it has been reported from committee.

Amendments are sometimes made to bills in Parliament after third reading. If a new clause be added it is done by tacking on a separate piece of parchment called a "rider."[4]

RIDICULE. See LIBEL, 5.

RIFLE-SHOOTING. See SCIENCE; SHOOTING MARK.

RIEN. L. F. Nothing.

Rien arrere or en arrere. Nothing back. A plea denying that rent is due.

Rien per descent. Nothing by inheritance; no assets by descent.

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[1] United States v. Hemmer, 4 Mas. 107 (1825), Story, J.; United States v. Haskell, 4 Wash. 405 (1823); *ib.* 529.

[2] United States v. Haines, 5 Mas. 277 (1829), Story, J.

[3] United States v. Huff, 13 F. R. 630, 636-41 (1882), cases, Hammond, D. J. See also United States v. Peterson, 1 Woodb. & M. 309 (1846); United States v. Nye, 2 Curtis, 227 (1855); R. S. §§ 5359-60, cases.

[4] Shuey, Executor of Ste. Marie v. United States, 92 U. S. 76, 75 (1875), cases, Strong, J.

April 20, 1865, the secretary of war offered $25,000 reward "for the apprehension of J. H. Surrat," one of the accomplices of J. Wilkes Booth, and a "liberal reward for any information" leading to his arrest. November 24, 1865, the offer was revoked by public advertisement. In April, 1866, Surrat was a souave in the Papal service in Italy. Ste. Marie, who was also in the same service, made known to our minister at Rome that Surrat had confessed to him participation in the plot against the life of President Lincoln, and kept watch over the fugitive up to November 6, 1866, when he was arrested for extradition. At the moment of leaving prison at Veroli, Surrat escaped from his guard, and fled to Alexandria, where he was re-arrested, Ste. Marie having been sent there to identify him. During all this period, both Ste. Marie and the minister were without information that the offer of a reward had been revoked. The claimant died *pendente lite*. He had been paid $10,000 for the information as to the identity of Surrat, but later filed a petition in the court of claims to recover $15,000, the balance he alleged to be due him on account of the "apprehension."

[1] Pierson v. Morch, 82 N. Y. 503 (1880). See generally Huthsing v. Bousquet, 2 McCrary, 152 (1881); Dunham v. Stockbridge, 133 Mass. 233 (1882); 25 Cent. Law J. 321-24 (1887), Eng. cases; 5 Cr. Law Mag. 665-82 (1888), cases.

[2] 3 Kent, 4-5, 233; 17 F. R. 261.

[3] 1 Parsons, Mar. Law, 6.

[4] 1 Bl. Com. 183.

RIGHT.[1] 1, *adj.* Direct, nearest; lineal; legal.

"Right heirs," in a will, was held to mean children.[2]

A limitation to one and his "right heirs" is the same as to his "heirs" simply; and a limitation directly to the "right heirs" of one carries a fee, without the addition of the words "and his heirs."[3]

To limit an estate to one's "right heir," excepting A, who actually is that heir, is palpably inconsistent.[4]

2, *n.* (1) There can be no more uncertain rule of action than that which is furnished by an intention to do "right." How or by whom is the right to be ascertained? What is right in a particular case? Archbishop Whateley says: "That which is conformable to the supreme will is absolutely right, and is called right simply, without reference to a specific end. The opposite of right is wrong." This announces a standard of right, but it gives no practical aid. What is or what may be right depends upon many circumstances. The principle is impracticable as a rule of action to be administered by the courts. There is no standard known to us by which we are able to say that it is wrong, for example, for a person not to pay a debt from which he has been discharged by decree of a bankrupt court.[5]

Moral right and legal right are not always synonymous.[6]

(2) A right in any valuable sense can only be that which the law secures to its possessor, by requiring others to respect it, and to abstain from its violation. Rights, then, are the offspring of the law; they are born of legal restraints; by these restraints every man may be protected in their enjoyment within the prescribed limits; without them possessions must be obtained and defended by cunning and force.[7]

An enforceable claim or title to any subject-matter whatever: either to possess and enjoy a tangible thing, or to do some act, pursue a course, enjoy a means of happiness, or be exempt from any cause of annoyance; also, one's claim to something out of possession; and, also, a power, prerogative, or privilege, as, when the word is applied to a corporation.[1]

Right, as in "right of trial by jury," is seldom used in the sense of law. It is to be given its primary and natural meaning, unless there is something which clearly indicates its use in a different sense.[2]

The rights of persons that are commended to be observed by the municipal law are such as are due from every citizen, usually called civil "duties;" and, such as belong to him, which is the more popular acceptation of the term "rights." Both may be comprised under the latter division, for all social duties are relative: due from one and to another person.[3]

Those rights which concern and are annexed to the persons of men are called *rights of persons;* such as a man may acquire over external objects, *rights of* (to) *things.*[4]

The primary rights are the rights of personal security, personal liberty, and private property;[5] and, the free exercise and enjoyment of religious profession and belief.[6]

See DUTY, 1; OBLIGATION, 1. Compare DROIT; JUS.

Absolute rights. Such rights as appertain and belong to particular men, merely as individuals or single persons; such rights as would belong to their persons merely in a state of nature [whence called *natural* rights], and which every man is entitled to enjoy, whether out of society or in it. **Relative rights.** Rights incident to individuals as members of society, standing in various relations to each other.[7]

Human municipal laws concern social or relative rights and duties, which result from, and are posterior to, the formation of states and societies: the primary end of this being to maintain and regulate absolute rights, to harmonize them with relative rights and duties. These absolute rights are: personal security, personal liberty, and private property,[7] *qq. v.*

The Constitution does not mean that all persons have an absolute "right to life, liberty, and the enjoyment of the gains of their own industry." Each of these rights is held in subordination to the right of society.[8]

Bill of rights; declaration of rights. The formal declaration of popular rights which accompanies the constitutions of the several States and, in a sense, that of the United States. See MAGNA CHARTA.

Declares and sets forth the restrictions which the people in their sovereign capacity (or, in the case of

[1] A. S. *riht:* L. *rectus*, straight, ruled.
[2] Ballentine *v.* Wood, 42 N. J. E. 557 (1886).
[3] 1 Washb. Real Prop. *57.
[4] Minot *v.* Harris, 132 Mass. 529 (1882); 38 Pa. 431, 438.
[5] Allen *v.* Ferguson, 18 Wall. 4 (1873), Hunt, J.
[6] Commonwealth *v.* McDuffy, 126 Mass. 469 (1879).
[7] Cooley, Princ. Const. Law, 226.

[1] [People *v.* Dikeman, 7 How. Pr. 130 (1856).
[2] State *v.* Worden, 46 Conn. 364 (1878).
[3] 1 Bl. Com. 123.
[4] 1 Bl. Com. 122; 2 *id.* 1.
[5] 1 Bl. Com. 141.
[6] 2 Kent, 34.
[7] 1 Bl. Com. 123-24; 22 Barb. 229.
[8] State *v.* Addington, 12 Mo. Ap. 217 (1882).

the United States, the individual States) have imposed upon their agents — the respective governments. In reality, contains restrictions upon the majorities who choose persons to fill the departments of government. The purpose is to protect the reserved rights. The bill of rights accompanying the national Constitution is found in the amendments thereto,[1] *q. v.*

For the better security of the rights of life, liberty, and property it was deemed essential that the fundamental principles of free government should be set down in a few plain, clear, and intelligible propositions, for the better guidance and control, both of legislators and magistrates. . . The general purpose was to assert and maintain the great rights of English subjects, as they had been maintained by the ancient laws, and the actual enjoyment of civil rights under them.[2]

The purpose of the Declaration of Rights was to announce great and fundamental principles, to govern the actions of those who make and those who administer the law, rather than to establish precise and positive rules of action.[3]

Civil right. (1) A right accorded to every member of a distinct community or nation. **Political right.** A right exercisable in the administration of government.

"Political rights," which consist in the power to participate, directly or indirectly, in the establishment or management of government, are defined by the constitutions. "Civil rights" have no relation to the establishment, support, or management of the government; they consist in the power of acquiring and enjoying property, of exercising paternal and marital powers, and the like. An alien has no political rights, but many, if not all, civil rights.[4]

(2) Such right as belongs to all the citizens of a State or of the United States. As referring to the latter class, these rights were either created or extended by the XIIIth and XIVth Amendments, and secured by the following *Civil Rights Acts:*

Act of April 9, 1866 (14 St. L. 27) provides that "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding," — § 1. The other nine sections of the act, known as the Civil Rights Bill of 1866, provided the means for protecting persons in the enjoyment of the rights conferred by the act.

The act, held to be constitutional,[1] as an appropriate method of exercising the power conferred on Congress by the XIIIth Amendment, was replaced by the first section of the XIVth Amendment, — ratified July 28, 1868. But it was re-enacted, with modifications, in sections 16, 17, 18, of the Enforcement Act, passed May 31, 1870 (16 St. L. 140, c. 114), a statute which is purely corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. The corrective character of this legislation is also preserved in the Revised Statutes — §§ 1977-79, 5510.[2]

Act of March 1, 1875 (18 St. L. 336; 1 Sup. R. S. p. 148: known as Charles Sumner's bill), provides "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude," — § 1.

For denying, aiding or inciting any violation of the foregoing section, the offender shall forfeit five hundred dollars to the aggrieved, be deemed guilty of a misdemeanor, and be finable five hundred to one thousand dollars, with imprisonment from thirty days to one year. The aggrieved may elect to sue for the penalty, or in debt, or proceed under his rights at common law or by State statutes. A judgment for the penalty or upon an indictment bars other remedies, — § 2. Jurisdiction is in the district and circuit courts, — § 3. No person possessing all other qualifications which may be prescribed by law shall be disqualified for service as a grand or petit juror in any court on account of race, color, or previous condition of servitude. . . Any officer charged with selecting or summoning jurors, who shall exclude or fail to summons any citizen for the cause aforesaid, shall be guilty of a misdemeanor, and finable in a sum not exceeding one thousand dollars, — § 4. The Supreme Court may review the case, regardless of the sum in controversy, — § 5.

On the fifteenth day of October, 1883, in deciding five different cases, since known as the *Civil Rights Cases*, and which had been submitted at the October term of 1883, the Supreme Court, speaking by Mr. Justice Bradley (Harlan, J., dissenting), held: That the first and second sections of the act of 1875 are unconstitutional enactments as applied to the States, not being authorised by either the XIIIth or the XIVth Amendment. That the XIVth Amendment is prohibitory upon the States only, and the legislation author-

[1] 1 Shars. Bl. Com. 124-25.

[2] Jones *v.* Robbins, 8 Gray, 343-44 (1857), Shaw, C. J.

[3] Foster *v.* Morse, 132 Mass. 355 (1882), Morton, C. J. See also Orr *v.* Quimby, 54 N. H. 613-14 (1874).

[4] [3 Bouvier's Law Dict. 597.]

[1] United States *v.* Rhodes, 1 Abb. U. S. 29, 37, 56 (1866), Swayne, J. See Civil Rights Cases, 109 U. S. 22 (1883).

[2] Civil Rights Cases, 109 U. S. 16-17 (1883).

ized to be adopted by Congress for enforcing it is not *direct* legislation on the matters respecting which the States are prohibited from making or enforcing certain laws or doing certain acts, but is *corrective* legislation, such as may be "necessary or proper" for counteracting and redressing the effect of such laws or actions. That the XIIIth Amendment relates solely to slavery and involuntary servitude — which it abolished; and, although, by its reflex action, it establishes universal freedom, and although Congress may probably pass laws directly enforcing its provisions, yet such legislative power does not extend beyond the subject of slavery and its incidents; and the denial, by individuals, of equal accommodations in inns, public conveyances, and places of public amusement imposes no badge of slavery or involuntary servitude, but, at most, infringes rights which are protected from State aggression by the XIVth Amendment.[1]

The court, *arguendo*, said that the act of 1875 "steps into the domain of local jurisprudence, and lays down rules for the conduct of *individuals* toward each other, and imposes sanctions for the enforcement of these rules, without referring in any manner to any supposed action of the State or its authorities. . . If the *laws* of a State make any unjust discrimination, amenable to the prohibitions of the XIVth Amendment, Congress has full power to afford a remedy under that Amendment and in accordance with it. . . Civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. . . If the wrongful act of an individual is not sanctioned in some way by the State, the *rights* of the injured party remain in full force, and may presumably be vindicated by resort to the laws of the State for redress."[2]

Some of the States have laws embodying the substance (if not couched in the identical language) of the first and second sections of the act of 1875, as to the subject-matter of which Congress had no legislative power in the first instance, not being legislation corrective of enactments, or actions on the part of a State or States. Thus, for example, the Civil Rights Act of April 9, 1873, of New York provides that: No citizen of this State shall, by reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility or privilege furnished by innkeepers or common carriers, or by owners, managers or lessees of theaters or other places of enjoyment; by teachers and officers of common schools and public institutions of learning, or by cemetery associations. The violation of this section is a misdemeanor punishable by a fine of not less than fifty nor more than five hundred dollars.[3]

See further CITIZEN, Amendments, p. 183; SCHOOL; WOMAN. Compare LIBERTY, Civil.

[1] Civil Rights Cases, 109 U. S. 3, 8–26 (1883). Dissenting opinion by Harlan, J., *ib.* 26–62.

[2] *Ibid.* 14, 17, 25. See also United States *v.* Buntin, 10 F. R. 730, 738 (1882), cases.

[3] See Penn. Act 19 May, 1887 (P. L. 72); 7 Alb. Law J. 355 (1873); 8 *id.* 3 (1873).

Common right. When it is said that a franchise is a privilege which does not belong to individuals by "common right," the meaning is that the privilege is not a right which pertains to the citizens by common law.

"This common law of England is sometimes called right, sometimes common right, and sometimes common justice."[1]

In her own right. Added to the words "femesole owner," merely repeats one of the necessary qualities of ownership. The phrase neither enlarges, abridges, nor qualifies the meaning of the word "owner." There is no greater necessity for its use than for the addition of "absolute" to "fee-simple."[2]

Legal right. A right which is recognized and protected by a court of common law. **Equitable right.** A right recognized and protected by a court of equity.[3]

Petition of right and of right. See under PETITION.

Private and public right. See JUS, Privatum, etc.

Reserved right. Rights withheld from a representative, or from a government; as, the rights retained by the States or the people, at the creation of the national government. See *Bill of Rights;* STATE, 3 (2).

Right of way. See WAY.

Rightful. Possessing right under the law; authorized by law: as, the rightful executor, heir.

Vested right. Something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; a title, legal or equitable, to the present or future enforcement of a demand, or a legal exemption of a demand made by another.[4]

It is only when rights have become vested under laws that the citizen can claim a protection to them as property. Rights do not vest until all the conditions of the law have been fulfilled with exactitude during its continuance, or a direct engagement has been made, limiting legislative power over and producing an obligation.[5]

When a right has arisen upon a contract or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains

[1] Spring Valley Water Works *v.* Schottler, 62 Cal. 107 (1882), Thornton, J., quoting Coke's Inst. 142 *a*.

[2] Dow *v.* Gould, &c. Mining Co., 31 Cal. 649 (1867).

[3] See 1 Story, Eq. § 25.

[4] Cooley, Const. Lim. 445.

[5] State Bank of Ohio *v.* Knoop, 16 How. 408 (1853), Campbell, J.; Morton *v.* Nebraska, 21 Wall. 660, 673 (1874).

to be done by the party asserting it, the repeal of the statute does not affect it or an action for its enforcement. It has become a vested right, which stands independent of the statute.[1]

Writ of right. In case a right of possession is barred by a recovery upon the merits in a possessory action, or by the statute of limitations, a claimant in fee-simple may have a mere writ of right,— the highest writ in the law.[2]

Abolished in England by statute of 3 and 4 Wm. IV (1833), c. 27, and by the Common Law Procedure Act of 1860, § 26.

RING. 1. See SEAL, 1.

2. Persons united with the view of exercising control over political affairs, or over commercial or stock-exchange transactions, for selfish ends; a combination for illegitimate purposes; a clique.[3] See COMBINATION, 2.

RINGING BELLS. See NOISE; NUISANCE.

RINGING UP. This custom, in vogue among brokers and commission merchants, is founded in commercial convenience, and, when not adopted to promote a gambling transaction, is lawful.[4]

RINK. See EXHIBITION.

RIOT.[5] Where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel; as, if they beat a man, or do other unlawful act with force and violence, or even do a lawful act, as, removing a nuisance, in a violent and tumultuous manner.[6]

A tumultuous disturbance of the peace, by three persons or more assembling together of their own authority, with an intent mutually to assist one another, against any one who shall oppose them, in the execution of some enterprise of a private nature, and afterward actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful.[7]

There must be an unlawful assembly; then, whatever act will make a trespass, will constitute a riot.[1]

If persons who have met for a lawful purpose afterward form and execute an unlawful intention, this may be sufficient; and the unlawful act is evidence of the unlawful intent.[2]

Riot Act. Statute of Geo. I (1714), c. 5, for the suppression of riots. Provides that if any twelve persons are unlawfully assembled to the disturbance of the peace, any justice of the peace, sheriff, or mayor of a town may, if he shall think proper, command them by proclamation to disperse. Then, if they contemn his order and continue together for one hour afterward, such contempt shall be a felony.[3]

The Riot Act was passed by reason of the tumult attendant upon the accession of George I to the throne. The act made it a felony to unlawfully assemble and demolish any church or dwelling-house; and provided that the inhabitants of the district should be liable for all damage done. The laws upon the subject were consolidated in 1827, by 7 and 8 of George IV, c. 31. The principle of the original act has been adopted in the legislation of Pennsylvania.[4]

The right to reimbursement for damages caused by a mob or riotous assemblage is not founded upon contract. It is a statutory right, and can be withdrawn or limited at the pleasure of the legislature of a State. Municipal corporations are invested with authority to establish a police to guard against disturbances; and it is their duty to exercise their authority so as to prevent violence from any cause, particularly from mobs and riotous assemblages. It has therefore been generally considered as a just burden to require them to make good any loss sustained from the acts of such assemblages which they should have repressed. The imposition has been supposed to create, in the holders of property liable to taxation, an interest to discourage and prevent movements tending to such violent proceedings. But, however considered, the imposition is simply a measure of legislative policy, in no respect resting upon contract, and subject, like all other measures of policy, to any change the legislature may see fit to make, either in the extent of the liability or in the means of its enforcement.[5]

See ASSEMBLY, Unlawful; CONSPIRACY; MOB; ROUT; TREASON.

RIPARIAN.[6] Relating to the bank of a stream or other water — river, lake, or sea: as, riparian — proprietors, rights, States.

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[1] Pacific Mail Steamship Co. *v.* Joliffe, 2 Wall. 450, 457 (1864), Field, J.

[2] 3 Bl. Com. 193. See Green *v.* Liter, 8 Cranch, 242 (1814).

[3] [Worcester's Dict.

[4] Ward *v.* Vosburgh, 31 F. R. 12 (1887); Clarke *v.* Foss, 7 Biss. 548 (1878).

[5] F. *riote*, a brawling, strife.

[6] 4 Bl. Com. 146. See also Whitley *v.* State, 66 Ga. 656 (1881).

[7] 1 Hawkins, Pl. C., ch. 28, p. 513. See also State *v.* Russel, 47 N. H. 84 (1865).

[1] The Queen *v.* Soley, 11 Mod. *115 (1708), Holt, C. J.

[2] United States *v.* McFarland, 1 Cranch, C. C. 140 (1803). See also, generally, Commonwealth *v.* Daley, 4 Pa. Law J. 150 (1844); Commonwealth *v.* Hare, *ib.* 257 (1844); Charge of King, P. J., *ib.* 29; 2 Clark, 275; People *v.* Judson (Astor Place case), 11 Daly, 1, 17, 83 (1849); State *v.* Jenkins, 14 Richard L. 215 (1867); 94 Am. Dec. 136–38, cases.

[3] [4 Bl. Com. 145.

[4] County of Allegheny *v.* Gibson, 90 Pa. 405 (1879), Paxson, J. Railroad riot of July 21–4, 1877.

[5] Louisiana *v.* Mayor of New Orleans, 109 U. S. 287–88 (1883), Field, J.

[6] L. *ripa*, shore of a river.

Riparian proprietor. An owner of land bounded generally upon a stream of water, and, as such, having a qualified property in the soil to the thread of the stream, with the privileges annexed thereto by law.[1]

Supra riparian. Concerning water-rights higher up the stream than other similar rights.

Where opposite banks of unnavigable streams belong to different persons, the stream and the bed thereof shall be common to both.[2]

The owner of land bounded by a navigable river has certain riparian rights; whether his title extends to the middle of the stream or not. Among them are free access to the navigable part of the stream, and the right to make a landing, wharf, or pier for his own use or for the use of the public. These, being valuable property rights, may be taken by the public after due compensation is made or secured. They are enjoyed subject to such general laws as the legislature may prescribe for the protection of the public right in the river as a navigable stream.[3]

In applying the rule, that the line between opposite shore-owners is the thread of the current, to non-navigable ponds and lakes, because of the practical difficulties encountered, an exception is made, and a grant is held to extend only to the water's edge.[4]

A grant by a government to a private individual of land upon a navigable river is limited to the shore; a grant to a political community extends to the middle of the stream.[5]

See ALLUVION; AQUA, Currit, etc.; FISHERY; ICE; LAKE; MILL, 1; WATER.

RIPRAP. A species of wall; stone laid into a kind of shingling, upon the slope of an embankment, at such points as are likely to be washed by water.[6]

RISK. Danger, hazard, peril; the probability that an insurer may be called upon to pay a loss, and the anticipated cause of that loss. Spoken of as fire, life, and marine risks.

Builder's risk. The danger to an insured subject from work being done by mechanics in building, altering, or repairing; specifically, extraordinary danger incident to material changes in progress.

Where there is no increase of risk, notice to the insurer may not be required.[1]

Risks of navigation. Is more comprehensive than "perils of navigation."[2] See further DANGERS; PERIL.

See also INSURANCE; Loss, 2; CARRIER.

RIVER. A body of flowing water of no specific dimensions — larger than a brook or rivulet, less than a sea; a running stream pent on each side by walls or banks.[3]

A considerable stream of water that has a current of its own flowing from higher level, which constitutes its source, to its mouth where it debouches.[4]

Banks of rivers are the boundaries which contain their waters at their highest flow, making the bed of the river.[5]

Rivers have banks, shores, waters, and a bed. Though naturally navigable, even for boats and rafts, rivers and the smaller streams are often regarded as public rights, subject to legislative control, as the means of creating power for operating mills and machinery, or as furnishing supplies of fish, even where private persons own the banks and soil under the water.[6]

In many States, the public title to the beds and shores of navigable streams is confined to tide-water; in Federal matters, to navigability.[7]

Proprietors bordering upon streams not navigable, unless unrestrained by the terms of their grants, hold to the center of the stream; proprietors on navigable rivers, under titles from the United States, to the stream. If the latter hold to the center line, the public have an easement for purposes of a highway.[8]

See ALONG; AQUA; BED, 1; BOUNDARY; COMMERCE; DANGERS; FISHERY; ICE; LEVEE; MEANDER; NAVIGABLE; PERIL; PROPERTY, Qualified; RIPARIAN; SEA; WATER-MARK.

ROAD. 1. An open way or public passage; ground appropriated for travel. Generically, includes highway, street, lane.[9]

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[1] Bardwell *v.* Ames, 22 Pick. 333 (1839), Shaw, C. J.

[2] R. S. § 2476.

[3] Yates *v.* Milwaukee, 10 Wall. 497, 504-7 (1870), cases, Miller, J. See also Weber *v.* Harbor Commissioners of California, 18 *id.* 65 (1873), Field, J.; Von Dolsen *v.* Mayor, &c. of New York, 17 F. R. 817, 819 (1883), cases; 109 U. S. 682.

[4] State of Indiana *v.* Milk, 11 Biss. 206 (1882), cases, Gresham, J.

[5] Barney *v.* City of Keokuk, 94 U. S. 324, 336 (1876), cases, Bradley, J.

[6] Wood *v.* Vermont Central R. Co., 24 Vt. 610 (1852).

[1] James *v.* Lycoming Fire Ins. Co., 4 Cliff. 275-84 (1874), cases, Clifford, J. On expert evidence as to increase of, see 19 Am. Law Rev. 701-13 (1885), cases.

[2] Pitcher *v.* Hennessey, 48 N. Y. 419 (1872).

[3] Alabama *v.* Georgia, 23 How. 513 (1859), Woolrych, Justice.

[4] The Garden City, 26 F. R. 772 (1886), Brown, J. See also 14 N. H. 477; 2 Ohio, 497; 3 Gratt. 492; 37 U. C., Q. B. 59.

[5] Howard *v.* Ingersoll, 13 How. 415 (1851).

[6] Holyoke Water-power Co. *v.* Lyman, 15 Wall. 506-7 (1872), Clifford, J.

[7] Barney *v.* Keokuk, 94 U. S. 336-43 (1876), cases.

[8] St. Paul, &c. R. Co. *v.* Schurmeir, 7 Wall. 287 (1868); Banks *v.* Ogden, 2 *id.* 68 (1864).

[9] [Manchester *v.* Hartford, 30 Conn. 130 (1867): Webster.

Has never been defined to mean land: it is difficult to find a definition which does not include the sense of "way," though the latter word is more generic, referring to many things besides roads. "Road" is generally applied to a highway, street, or lane, often to a path-way or private way, yet strictly it means only one particular kind of way.[1]

May refer to a traveled place or track, without regard to the nature of the user, or to the question of any right thereto in the public.[2]

By-road. An obscure or neighborhood road, not used to a great extent by the public, yet so far a public road that the public have, of right, free access to it at all times.[3]

Plank-road; turnpike road. See TURNPIKE.

Private road. A road used by private persons only.[4]

A road must be deemed "private" when its control is not under a public officer, and the public are not bound to keep it in order, and where an individual might obstruct its use without being guilty of any public offense.[5]

Public road. A road dedicated to and kept up by the public.[6]

Since "road" and "street" mean ways open to public use, the word "public" is unnecessary, even in an indictment.[7]

Public roads for travel are often established by application to the court of quarter sessions, with view, report, and confirmation. Once established, they pass into the control and supervision of the township, county, or other local authorities, and are kept in repair by local taxation.[8]

By the common law, the fee of the soil remains in the original owner, with the use of the road in the public. If vacated by the public, he resumes exclusive possession of the ground. While used as a highway, he is entitled to the timber and grass upon the surface, and to all minerals below it. He may sue in trespass one who obstructs the road. But the law is otherwise when he absolutely parts with the fee.[9]

Persons authorized to make or improve highways are not answerable for consequential damages, if they act within their jurisdiction and with care and skill. This doctrine is almost universally received. The reason is, the State holds its highways in trust for the public. Improvements made are her acts, and the ultimate responsibility rests upon her. Her refusal to be sued, except as the legislature prescribes, protects her agents. The rule is different as to individuals who for their own benefit make improvements on land.[1]

Properly applied, the principle involved in the rule is a sound one; but many decisions have gone to the limit of allowable constitutional construction.[2]

Road-bed; road-way. See RAILROAD.

Road, law of. The requirement as to the side of a highway which the drivers of vehicles, horsemen, and pedestrians must take in order to make traveling safe and easy.

It is the custom in this country for persons meeting on a highway to pass on the right; but when a horseman or a light vehicle can pass with safety on the left of a heavily laden team, the choice of way is to be given to the latter.[3]

The principle that a footman or horseman cannot compel a teamster, who has a heavy load, to turn out of the beaten track, if there is sufficient room for the former to pass, applies to a light wagon or carriage with a heavy weight.[4]

The fact that a footman crosses a street elsewhere than at the usual crossing is not *per se* contributory negligence which will defeat an action for damages for injuries caused by reckless riding or driving.[5]

See ALONG; DEDICATION, 1; OLD; OPEN, 1 (7); REPAIR, 2; ROUTE; STREET; TRAVEL; VIEW; WAY.

2. Referring to a steam or street railway see RAILROAD.

3. A place where ships may ride at anchor at some distance from the shore. Called also *roadstead*.

"Hampton Roads" implies a place of anchorage, at a distance from shore. There vessels of every class may anchor at will, anywhere within the area laid down and described in the charts of the United States coast survey, as the "usual anchorage-ground," whether within or without the customary track of steamers.[6]

ROBBERY. Open and violent larceny from the person; the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear.[7]

The felonious taking of goods from the person of another, or in his presence, by vio-

[1] Kister *v.* Reeser, 93 Pa. 4 (1881), Turnkey, J. See also Mining Co. *v.* Kennedy, 3 Nev. 373 (1867), Beatty, C. J.; Heiple *v.* East Portland, 13 Oreg. 103 (1885), cases.

[2] Hart *v.* Red Cedar, 63 Wis. 638 (1885).

[3] Wood *v.* Hurd, 34 N. J. L. 89 (1869), Van Syckel, J.; Yeomans *v.* Ridgewood, 46 *id.* 509 (1884).

[4] [Witham *v.* Osburn, 4 Oreg. 324 (1873).

[5] Varner *v.* Martin, 21 W. Va. 562-65 (1883), Green, J.

[6] Mills *v.* State, 20 Ala. 88 (1852); 30 *id.* 531.

[7] Horner *v.* State, 49 Md. 286 (1878): 3 Yeates, 421; 4 S. & R. 106; City of Denver *v.* Clements, 3 Col. 486 (1877).

[8] Ritchie *v.* Franklin County, 22 Wall. 75 (1874).

[9] Barclay *v.* Howell, 6 Pet. *513 (1832), M'Lean, J.

[1] Northern Transportation Co. *v.* Chicago, 99 U. S. 641-44 (1878), cases, Strong, J.

[2] Pumpelly *v.* Green Bay Co., 13 Wall. 180-81 (1871), Swayne, J.

[3] Grier *v.* Sampson, 27 Pa. 192 (1856).

[4] Beach *v.* Parmeter, 23 Pa. 197 (1854). See also Dudley *v.* Bolles, 24 Wend. *465 (1840); Parker *v.* Adams 12 Metc. 417 (1847), cases; Story, Bailm. § 599.

[5] Simons *v.* Gaynor, 89 Ind. 166 (1883).

[6] The Everman, 2 Hughes, 28 (1874); 7 Ex. 784.

[7] 4 Bl. Com. 241.

lence, or by putting him in fear, and against his will.[1]

If the taking is neither directly from the person nor in the presence, it is not robbery. It is immaterial what the value of the thing may be. The taking must be by force or by a previous putting in fear: which distinguishes robbery from other thefts. But the indictment may charge the use of violence only. "Putting in fear" does not imply any great degree of terror or fright: it is enough that so much force or threatening by word or gesture is used as might create an apprehension of danger, or induce a man to part with his property without or against his consent.[2]

Highway robbery. In England, from about 1500 to 1700, robbery upon or near a highway was a capital offense; committed elsewhere, the punishment was less severe.[3]

See LARCENY; INDICTMENT; THREAT.

ROBE. See GOWN.

ROCK OIL. See OIL.

ROE, RICHARD. See DOE.

ROGATORY.[4] See LETTERS, page 613.

ROGUE. See VAGRANT.

ROLL. 1. A sheet of parchment on which proceedings were entered.

A schedule of parchment, which may be rolled up like a *pipe* or *tube*, sheet to sheet, or so tacked together that the whole length might be wound into a *spiral roll*.[5]

When the art of book-binding was little used, economy suggested the adding of one sheet of parchment to another, to form a record-book. The roll on which the issue was entered was called the "issue roll," and the file comprising the papers necessary to support the judgment, when attached in order, was (or still is) called the "judgment roll."

2. The record of a court or office;[6] a record, a register or registry, *qq. v.*

Enroll; inroll. (1) To transcribe, as, a deed, on a roll. See REGISTRY, Of vessels.

(2) To record, as, a decree, a legislative bill.

The legislative practice has been to enroll a bill or joint resolution, for signing by the presiding officers, and for preservation in the office of the secretary of state. The enrolled bill should be regarded as the original act. But it does not follow that enrollment is essential to the validity of a statute.[7]

Master of rolls. The judge, in the English court of chancery, who has the custody of the rolls of all patents and grants which pass by the great seal, and of the records in chancery.

He likewise presides in the Rolls Court, as assistant to the lord chancellor, and is the chief master in chancery.[1]

Under the Judicature Acts he is a judge of the high court, and an *ex-officio* member of the court of appeals.

Strike off the roll. When an attorney is disbarred from practicing before a court, his name is expunged from the list of the members of that court. See ATTORNEY.

ROLLING-STOCK. The movable property of a railroad; such property as in its ordinary use is taken from one part of the line to another, as, cars and locomotives.[2]

Some decisions make the rolling-stock of railroads a fixture, part of the corpus of the road; other decisions make it personalty. In a few States, the precise nature is defined by statute.[3]

ROMAN LAW. The common law of England has been largely influenced by the Roman law, in several respects: 1. Through the ecclesiastical courts, their canon law being founded on the Roman law. 2. Through the court of chancery, all the early chancellors being ecclesiastics, familiar with the canon law, if not with the Roman system. 3. Through the development of commercial law.[4]

The Roman law had great influence upon the early common law, not so much by the copying of text into it as by the spirit and methods of study it introduced, and the disposition it engendered to refer rules to principles. . . Blackstone, Kent, and other great writers, owe much in their arrangement and outline to Roman works.[5]

See special terms, such as CHANCELLOR, 1; EQUITY; FALCIDIAN; FEE, 3; LATIN; OBLIGATION, 1; JUS; PACT; PATER; PATRIA; RESPONSA; USUFRUCTUS; VETO.

RONDS. See GAME, 2.

ROOM. See BURGLARY; HOUSE; TENEMENT.

ROSTER. A corruption of register,—a register, list, catalogue.

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[1] United States *v.* Jones, 3 Wash. 216 (1813), Washington, J. See also Baldw. 93; 5 Blatch. 11; 66 Ga. 165; 1 Idaho, 769; 16 Miss. 401; 1 Ohio St. 495; 7 Ex. 734.

[2] 4 Bl. Com. 241–42; 35 Ind. 460; 58 Mo. 581; 59 *id.* 318; 6 Park. Cr. 642.

[3] See 4 Bl. Com. 243.

[4] Rŏg'-atory.

[5] [Colman *v.* Shattuck, 2 Hun, 502 (1874), Lamont, J. Same case, 62 N. Y. 348.

[6] See 3 Bl. Com. 24.

[7] Koehler *v.* Hill, 60 Iowa, 553–54 (1883).

[1] See 3 Bl. Com. 442, 450; 1 Spence, Eq. J. 100, 357.

[2] Ohio & Miss. R. Co. *v.* Weber, 96 Ill. 448 (1880), Dickey, J.

[3] See generally 4 South. Law Rev. 198–237 (1878), cases; 23 How. 117; 3 Dill. 412; 23 Ill. 300; 54 Me. 263; 25 Barb. 485; 11 Am. R. 751; 53 Mo. 17; 29 N. J. E. 311; 52 N. Y. 521; 54 *id.* 314; 21 Wis. 44; 2 Redf. Railr. 504; Jones, Railr. §§ 146–87, cases.

[4] Hadley, Roman Law, 43–48.

[5] 3 Columbia Jurist, 74 (1886); 1 Pomeroy, Eq. §§ 14, 55; Hare, Contr., Index. See "The Roman Law in Bracton," 1 Law Quar. Rev. 425–41 (1885); "The Roman Bar," 15 Alb. Law J. 405 (1877).

ROUT. Where three or more persons meet to do an unlawful act upon a common quarrel, as, forcibly breaking down fences upon a right claimed of common or of way, and make some advances toward it.[1]

A disturbance of the peace by persons assembling together with an intent to do a thing which, if executed, will make them rioters, and actually making a motion toward the execution thereof.[2]

Compare ASSEMBLY, Unlawful; RIOT.

ROUTE. A way used in going from one place to another.

Power to change the route or location of a railroad does not include power to change the *termini;* they are excluded from the common acceptation of the word.[3]

See ADOPT, 2; ALONG; DIRECT, 1; MAIL-ROUTE; RAILROAD.

ROUTINE. See COURSE, 2.

ROYALTY. A prerogative or superiority of the king; also, the amount due to the lessor of a mine.[4] See MINES.

In modern usage, a sum paid by one who uses the patent of another, at a certain rate for each article manufactured;[5] also, the sum paid per volume by a publisher who prints and sells a book which another has composed and copyrighted.

RULE. 1, *v.* (1) To hold, lay down, decide: as, to rule testimony admissible as evidence, to rule on a proposition of law.

Overrule. To rule against, reject, refuse to allow or receive: as, to overrule a motion, a plea, an exception.

Also, for a court to decide a question of law contrary to a decision in a former case. Whence *overruled case.* Compare REVERSE.

(2) To make or enter a formal order or direction.

2, *n.* Such order or mandate itself. Compare MOTION, 2.

A court, or its officer, grants a rule to show cause, to make a return, to file a declaration or a plea, to make a reference, to strike off an entry, etc.

Peremptory rule. An order which is to be observed promptly and fully, without argument *contra.*

Rule absolute. Said of a rule to show cause which has been heard and a peremptory order therein made that a party do as required in the rule. **Rule nisi** or **rule to show cause.** A direction that a party do, or be permitted to do, a specified act unless (*nisi*) a legal reason be shown or appears for his not doing it.

A day is appointed for hearing a rule to show cause why the thing requested should not be done. At this hearing, after argument, and, perhaps, the consideration of testimony, the rule is either discharged or made absolute, according as the objection is or is not sufficient in law.[1]

Rule of course. A rule granted by an officer of a court, as a matter of routine, and without application being first made to a judge of the court itself. Called also *office rule,* and, formerly, *side-bar rule.*

Rule day. A day designated under a rule of court for the performance of some duty required of a litigant.

Rule of court. An order made by a court of record. (1) A special order in a particular case. See REFERENCE. (2) A general requirement, usually in writing, applicable to all cases of a class.

General rules of court. Standing orders, made by a court, to regulate its general practice.[2]

Express power to establish rules of court has been conferred by statute upon courts of record. At the same time, such courts have an inherent right to make rules to regulate their practice and to expedite the determination of suits and other proceedings, the rules being consistent with the constitution and laws of the State. Otherwise, the public business could not be dispatched.[3]

Regularity, justice, and dispatch are the objects of rules of court. They are indispensable to routine business.[4]

But they cannot abridge a right secured by positive law; as, alter the general law of evidence,[5] or the statutory manner of serving a notice; nor add terms to an arbitration law;[6] nor supersede a special rule

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[1] 4 Bl. Com. 146.

[2] Hawkins, Pl. Cr. ch. 65, § 14.

[3] Attorney-General *v.* West Wisconsin R. Co., 36 Wis. 494 (1874). "*En route,*" see M'Lean *v.* United States, 17 Ct. Cl. 90 (1881).

[4] See 1 Bl. Com. 294.

[5] [Webster's Dict.

[1] See Stearns *v.* Barrett, 1 Mas. 162–63 (1816).

[2] See Owens *v.* Ranstead, 22 Ill. 173 (1859); Deming *v.* Foster, 42 N. H. 178 (1860); Dougherty *v.* Thayer, 78 *id.* 172 (1875).

[3] Vanatta *v.* Anderson, 3 Binn. 423 (1811); Barry *v.* Randolph, *ib.* 277 (1811); Fullerton *v.* Bank of United States, 1 Pet. *613 (1828); Jones *v.* Rittenhouse, 87 Ind. 350 (1882); 43 Cal. 179; 22 Ill. 173; 18 La. An. 708; 12 Md. 463; 5 Pick. 512; 9 Oreg. 121; 25 Pa. 516.

[4] Magill's Appeal, 59 Pa. 430 (1868).

[5] Patterson *v.* Winn, 5 Pet. *274 (1831); 5 W. & S. 175.

[6] Hickernell *v.* First Nat. Bank of Carlisle, 62 Pa. 147 (1869); 11 S. & R. 131; 3 *id.* 250.

where that is contemplated;[1] nor supersede a statute;[2] nor affect jurisdiction.[3] In one case, an imperfection in a statute was remedied by means of a rule.[4]

It is not essential that a rule of practice be established by a written order: it may be by a uniform mode of proceeding.[5]

A rule of court must operate prospectively.[6]

An attorney is bound to know the rules of his own court.[7]

The expediency of a rule is determined by the sound discretion of the court by whose authority it is established. Only where wrong is manifest will that discretion be interfered with.[8]

Discretion in applying a rule to a particular case must be authorized by the rule itself.[9] For the sake of certainty, no departure should be made from a plain, written, express rule.[10]

The court is the best judge of its own rules; an appellate court will not reverse for a construction not palpably erroneous.[11]

Many regulations of practice introduced into England by statute have been the objects of rules of court in this country.[12]

The court of common pleas of Philadelphia had written rules as early as 1788. Collections were published in Western Pennsylvania in 1791, 1796, and 1811.[13]

The Judiciary Act of 1789, § 17, confers authority on the Federal courts to establish all rules necessary for the ordinary conduct of their business, not repugnant to the laws of the United States. The act empowers the Supreme Court to regulate the practice of the district and circuit courts; and empowers those courts themselves to make such regulations of their practice as may be necessary to advance justice and to prevent delays.[14]

Like power is conferred upon the court of claims.[15]

Rules in admiralty are promulgated in accordance with a special statute.[16]

The equity rules prescribed by the Supreme Court bind all the Federal courts.[1]

The rules of the high court of chancery in England are of force as analogies.[2]

But Congress has not empowered the circuit and district courts to make rules touching the mode of taking testimony.[3]

3. A canon; a principle: as, a rule of construction, a case governed by a certain rule, a rule established by or deducible from the decisions or authorities; a rule of law, of practice or procedure, of evidence or of pleading, *qq. v.*

Rule of property. An established principle regulating the ownership and transfer of property.

A decision with respect to the law under which property is held, enjoyed, and transferred, is sometimes said to create or indicate the "rule of property."

Where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the state, by which is meant the rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereof, they are to be treated, by the Federal courts, as the laws of that state.[4]

Rules and regulations. Power "to establish a uniform rule of naturalization," "to make all needful rules and regulations respecting . . property belonging to the United States," "to regulate commerce," gives plenary control over those subjects. But power to make rules and regulations on a particular subject is, in cases, limited to the mode and form, the time and circumstance, and not to the substance.[5] See REGULATE.

RUMOR. Popular report.

In England, and in some of the States, it has been held that in an action of slander, under the general issue, the defendant may prove, in mitigation of damages, that when the words were uttered a general rumor or report existed in the neighborhood that the plaintiff was guilty of the offense charged. In other States, it has been held that such testimony is inadmissible.[6]

Where it appeared that a libelous article was taken from a neighboring sheet as news, with no circumstance of aggravation or malice, it was held that

[1] Ringwalt *v.* Brindle, 59 Pa. 54 (1868); *contra*, Dougherty *v.* Thayer, 78 *id.* 173 (1875).

[2] Cates *v.* Mack, 6 Col. 408 (1882).

[3] The St. Lawrence, 1 Black, 527 (1861).

[4] Cochran *v.* Loring, 17 Ohio, 409 (1848).

[5] Duncan *v.* United States, 7 Pet. *451 (1833); *contra*, Owens *v.* Ranstead, 22 Ill. 173 (1859). See also State *v.* Ensley, 10 Iowa, 150-51 (1859).

[6] Dewey *v.* Humphrey, 5 Pick. 187 (1827); 11 S. & R. 131.

[7] Dearborn *v.* Dearborn, 15 Mass. 319 (1818).

[8] Gannon *v.* Fritz, 79 Pa. 307 (1875); 7 Watts, 64.

[9] Thompson *v.* Hatch, 3 Pick. 516 (1826); 4 *id.* 189; 5 *id.* 187; 22 Ill. 173; 22 Md. 295; 2 Dak. 467.

[10] Alexander *v.* Alexander, 5 Pa. 277 (1847); 56 *id.* 183; 59 *id.* 430; 30 *id.* 272; 18 La. An. 703.

[11] Coleman *v.* Nants, 63 Pa. 178 (1869), cases.

[12] Vanatta *v.* Anderson, 3 Binn. 417 (1811); 35 Pa. 416.

[13] Barry *v.* Randolph, 3 Binn. 277 (1811); 2 Brown, App. 1-14; Wilkins *v.* Anderson, 11 Pa. 399 (1849); Fleming *v.* Beck, 48 *id.* 309 (1864).

[14] R. S. §§ 917-18, cases. See Rules of the Supreme Court, announced Jan. 7, 1884, in 108 U. S. 573-92, index, 625.

[15] R. S. § 1070.

[16] 5 St. L. 518: R. S. § 917; 118 U. S. 619.

[1] M'Donald *v.* Smalley, 1 Pet. *625 (1828); Hornbuckle *v.* Toombs, 18 Wall. 652 (1873).

[2] Rhode Island *v.* Massachusetts, 14 Pet. 256 (1840); Pennsylvania *v.* Wheeling, &c. Bridge Co., 18 How. 460 (1855); Evory *v.* Candee, 17 Blatch. 208 (1879).

[3] Randall *v.* Venable, 17 F. R. 162 (1883). See generally, as to rules of court, 25 Am. Law Reg. 188-90 (1886), cases.

[4] Bucher *v.* Cheshire R. Co., 125 U. S. 00 (1888), Miller, J.

[5] Hamilton *v.* Dillin, 21 Wall. 93 (1874), Bradley, J.

[6] Pease *v.* Shippen, 80 Pa. 514-15 (1876), cases; 58 *id.* 345, 431.

the plaintiff was entitled to compensation for the injury suffered, and the manner of the publication could be considered either in mitigation or aggravation.[1]

RUN. 1. To stroll without restraint or confinement; as, for an animal "to run at large." See AT LARGE.

2. To pass, spread, communicate; as, in a statute providing for the payment of damages by a person who set a fire that "run upon the land" of another.[2]

3. To continue to be valid or binding, to possess legal efficacy: a bond or a lease may "run for a term" of years, and a note for days or months.

4. A covenant "runs with land" when the liability to perform it, or the right to take advantage of it, passes to the assignee or purchaser.[3] See COVENANT, Real.

5. The statute of limitations "begins to run" when the cause of action first becomes subject to its operation.

And when the statute has once begun, it continues to run until its effect is complete.[4] See LIMITATION, 8; TEMPUS, Nullum, etc.

6. Warrants of commitment and indictment "run in the name" of a State when they bear upon their face the name of the proper State as the nominal actor or prosecutor. See further PEOPLE.

Running account. See ACCOUNT, 1.

Running at large. See RUN, 1.

Running days. See WORKING DAYS.

Running policy. See INSURANCE, Policy of.

Running water. See AQUA, Currit.

S.

S. As an abbreviation, is in common use for same, section, select, senate, senior, session or sessions, sheriff, southern, special, State or States, statute, superior, supreme, surrogate:

S. B. Senate bill.

S. C. Same case; select cases; supreme court.

S. D. Southern district. See D, 8.

S. J. Senior judge; special judge.

S. L. Session laws; statute laws.

S. P. Same principle; *supra protest.*

SS. *Scilicet.* See SCIRE, Scilicet.

SABBATH. Sabbath and Sunday are used indiscriminately to denote the Christian Sabbath.[1] See SUNDAY.

SÆVITIA. L. Raging, ferocity: fierceness, savageness, barbarity, cruelty, violence.

In divorce legislation, personal violence inflicted or menaced, and affecting life or health; also, obscene and revolting indecencies.[2]

SAFES. See TOOL.

SAFETY. See POLICE, 2; WELFARE.

SAID; AFORESAID. As employed in legal writings, convey certainty of reference.

When a name, once introduced into a pleading, is repeated, the repetition must be by such a term of reference as will identify the person named in the latter instance as the one before named — as by "said," "aforesaid," or other term of similar import; otherwise the latter description will be ill for uncertainty. But when there are two or more antecedent persons or subjects to which the name may be referred, it is necessary to use "first aforesaid," "last aforesaid," or other term of equivalent import.[3]

"Said," in an entry, is a relative term, and refers to its next [nearest] antecedent.[4]

But, in construing a will, there is no invariable rule which refers "said" to the last antecedent, if to so apply it would be at variance with the context.[5]

In an indictment, "said" will be referred to the next antecedent only when the meaning plainly requires it.[6] See SUCH.

SAIL. A stipulation in a charter-party that the vessel is "now sailed or about to sail with cargo," is a stipulation that she has her cargo on board and is ready to sail.[7]

Sailing. Within the meaning of a charter-party, complete readiness for the sea, with an intention to proceed at once on the voyage.[8]

If a ship quits her moorings and removes, though a short distance, being perfectly ready to proceed upon her voyage, and is detained by some subsequent occur-

[1] Edwards *v.* Kansas City Times Co., 32 F. R. 813 (1887).

[2] Ayer *v.* Starkey, 30 Conn. 306 (1861).

[3] Spencer's Case, 1 Sm. L. C. 137-228, cases: 5 Coke, 16 (1583); Willard *v.* Worsham, 76 Va. 396 (1882); Shaber *v.* St. Paul Water Co., 30 Minn. 182-88 (1883).

[4] Sohn *v.* Waterson, 17 Wall. 596 (1873); Croxall *v.* Sherard, 5 *id.* 269 (1866).

[1] State *v.* Drake, 64 N. C. 591 (1870).

[2] Briggs *v.* Briggs, 24 S. C. 380 (1885).

[3] Gould, Plead. 78, cases.

[4] Ellis *v.* Horine, 1 A. K. Marsh. 418 (1818).

[5] Healy *v.* Healy, 9 Irish Eq. 418 (1875).

[6] Wilkinson *v.* State, 10 Ind. 373 (1858): 2 Kent, 555; 34 La. An. 829; 115 Mass. 544; 132 *id.* 555; 16 Op. Att.-Gen. 236; 10 East, 503.

[7] Davison *v.* Von Lingen, 113 U. S. 49 (1885).

[8] Bowen *v.* Hope Ins. Co., 20 Pick. 278 (1838), Shaw, Chief Justice.

rence, that is a sailing; otherwise, if at the time she quits her moorings and hoists sail she is not in a condition to complete the voyage.[1]

Some progress, though by a tow-boat, may be necessary.[2] See SEA, At sea.

Sailor. See SHIPPING.

SALARY.[3] The *per annum* compensation to men in official and in some other positions.[4]

In Indiana, there have been three modes of making compensation: by a "salary," as defined above; by "wages," which are compensation for services by the day, week, etc., as, of laborers, commissioners, and others; and by "fees," which are compensation for particular acts or services, as, of clerks, sheriffs, lawyers, physicians.[4]

According to the most approved lexicographers, "salary" and "wages" are synonymous. Both mean, "a sum of money periodically paid for services rendered." If there is any difference in the popular sense, it is in the application to more or less honorable services.[5]

See COMPENSATION, 1; EMOLUMENT; FIX, 3; IMPAIR; ONUS, Cum onere.

SALE. 1. A transmutation of property from one man to another in consideration of some price or recompense in value.[6]

Technically, a *transfer* of property in consideration of a price paid therefor in money. But it may not mean this.[7]

A transfer of the absolute or general property is a thing for a price in money.[8]

A transfer of the absolute title to property for a certain agreed price. A contract between two parties, one of whom acquires thereby a property in the thing sold, and the other parts with it for a valuable consideration.[9]

A transfer of property for a fixed price in money or its equivalent.[10]

Property or money may be said to be the price of a service; but it can hardly be said that the service is the price of the property or money, or that the property or money is sold to the person performing the service.[1]

2. A *contract* for the transfer of property from one person to another, for a valuable consideration.[2]

A contract between parties, to give and to pass rights of property for money,— which the buyer pays or promises to pay to the seller for the thing bought and sold.[3]

The essential idea is that of an agreement or meeting of minds by which a title passes from one, and vests in another.[4]

The view which seems to reconcile all uses of the word most satisfactorily is to regard a sale as a contract or agreement for transferring ownership, and not as the very transfer itself. It may then be applied to lands and rights in action, as it daily is, as well as to chattels. This view also supports the convenient expressions "conditional," "executed" and "unexecuted" sales.[5]

To constitute a valid sale there must be: competent parties; mutual assent; a thing, the absolute or general property in which is transferred from the seller to the buyer; and a price in money paid or promised.[6]

A commutation of goods for goods is an "exchange." A transferring of goods for money is a "sale."[7]

In a "barter" the consideration, instead of being paid in money, is paid in goods or merchandise susceptible of a valuation.[8]

When a liquor-dealer furnishes liquor and receives in payment therefor pool-checks, which he has previously sold, worth the price of the liquor, the transaction is not a sale, but a barter.[9]

The difference between a "sale on credit" and a "bailment" may be illustrated thus: If I deposit wheat to be stored and kept for me, the property remains in me. But if I simply leave the grain and authorize the bailee to sell it for his own benefit and not as my agent, he to pay me the value when I demand it, the transaction is a sale on credit.[10]

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[1] Pittegrew *v.* Pringle, 3 Barn. & Ad. 519 (1832), Tenterden, C. J.; Pedersen *v.* Pagenstecher, 32 F. R. 842 (1887), cases.

[2] The Francesco Curro, 4 W. N. C. 416 (1877.)

[3] From *salarium*, which in turn is from *sal*, salt— an article in which Roman soldiers were paid; that is, salt-money.

[4] Cowdin *v.* Huff, 10 Ind. 85 (1857), Perkins, J.

[5] Commonwealth *ex rel.* Wolfe *v.* Butler, 99 Pa. 542 (1882), Sharswood, C. J.

[6] 2 Bl. Com. 446, 9.

[7] [Howard *v.* Harris, 8 Allen, 298 (1864), Bigelow, C. J.

[8] Benjamin, Sales, § 1; 71 N. C. 455.

[9] Story, Sales, § 1; 95 Pa. 158.

[10] Five Per Cent. Cases, 110 U. S. 478 (1884), Gray, J.; 6a. 468.

[1] Five Per Cent. Cases, *ante*.

[2] 2 Kent, 468.

[3] Williamson *v.* Berry, 8 How. 544 (1850), Wayne, J.

[4] Butler *v.* Thomson, 92 U. S. 415 (1875), Hunt, J.

[5] [2 Abbott, Law Dic. 442. See also 13 F. R. 541; 54 Ala. 258; 37 Ark. 418; 26 Conn. 31; 1 Ind. 69; 27 Iowa, 173; 71 *id.* 217; 107 Mass. 550; 10 Mich. 281; 20 Mo. 267; 5 Neb. 269; 33 N. C. 670; 35 N. H. 443; 38 Pa. 398; 85 *id.* 163; 44 Wis. 691.

[6] Benj. Sales, § 1; Gardner *v.* Lane, 12 Allen, 43 (1866), Bigelow, C. J. Transactions resembling sales, 27 Cent. Law J. 136-38 (1888), cases.

[7] 2 Bl. Com. 446.

[8] Commonwealth *v.* Davis, 12 Bush, 241 (1876); Cooper *v.* State, 37 Ark. 418 (1881).

[9] Massey *v.* State, 74 Ind. 368 (1881). See also Marmot *v.* State, 48 *id.* 21 (1874); Rickart *v.* People, 79 Ill. 85 (1875); State *v.* Mercer, 32 Iowa, 405 (1871); Selm *v.* State, 55 Md. 566 (1880); Commonwealth *v.* Smith, 102 Mass. 144 (1869); 8 Allen, 297; 30 Ala. 591.

[10] McCabe *v.* McKinstry, 5 Dill. 515 (1878), Dillon, J. See

Absolute sale. A sale which has been completed or perfected; a sale outright. **Conditional sale.** Takes effect or is to become complete on the performance of a condition.

If the transaction resolves itself into a security, whatever may be its form, it is in equity a "mortgage." If it be not a security, it may be a conditional sale or an absolute purchase, or a lease.[1]

In the case of a conditional sale the vendee has a conveyable and an attachable interest, which can be transformed into an absolute sale by the performance of the condition.[2]

A contract for the sale of personalty, to be delivered at once to the vendee, the title to remain in the vendor until the price is paid, is valid.[3]

It is sometimes difficult to determine whether a contract is itself a sale of personalty so as to pass ownership to the vendee, or a sale on condition to be consummated only when the condition shall be performed, or a mere agreement to sell. Whether the property passes or not is dependent upon the intention of the parties. Following are the rules by which to construe such contracts: 1. When the vendor is to do a thing to the property in order to put it into the state in which the vendee is bound to accept it, the doing of that thing is a condition precedent to the vesting of the property. 2. If a thing is to be done to ascertain the price, as, by weighing, measuring, etc., where the price is to depend upon the quantity or quality, the doing of that thing is also a condition precedent to the transfer, although the individual goods be ascertained. 3. Where the buyer is to do a thing as a consideration on which the passing of the property depends, the property will not pass until the condition is fulfilled, though the goods be delivered into his hands.[4]

In the absence of fraud, an agreement for a conditional sale of personal property accompanied by delivery is valid, as well against third persons as against the parties to the transaction.

A bailee of personal property who receives it under an agreement that he may purchase it on the performance of conditions on his part, cannot convey title to it or subject it to execution for his own debts, until performance of the conditions on which the agreement to sell is made.[5]

Conditional sales were valid by the common law, and their validity was not affected by the Statute of Frauds; but there is much contrariety of reasoning and decision relative to their validity in the different States, and often to some extent in the same State.[1]

See INSTALLMENT; LIEN, Secret; MORTGAGE; PLEDGE; POSSESSION, Fraudulent.

Executed and executory sales. Nothing was required at common law to give validity to a sale of personal property except the mutual assent of the parties. As soon as it was shown that it was agreed that the one should transfer the absolute property in the thing to the other for a money price, the contract was considered as proven, and binding on both parties. If the property passed immediately to the buyer, the contract was deemed a "bargain and sale;" but if it was to remain for a time with the seller, and to pass to the buyer at a time or on conditions inconsistent with immediate transfer, the contract was deemed an "executory agreement."[2]

Where the goods are not specified, the ordinary conclusion is that the parties contemplated an executory agreement. Many cases show that where the goods are clearly specified, and the terms of the sale, including the price, are explicitly given, the property, as between the parties, passes to the buyer even without actual payment or delivery. Standard authorities also show that where there is no manifestation of intention, except such as arises from the terms of the sale, the presumption is, if the thing to be sold is specified and ready for immediate delivery, that the contract is an actual sale, unless there is something in the subject-matter or attendant circumstances to indicate a different intention. Doubt upon that subject cannot be entertained if the terms of bargain and sale, including the price, are explicit. But when the thing is not specified, or if, when specified, something remains to be done by the vendor to put it into a deliverable shape or to ascertain the price, the contract is executory.[3]

The weight of authority is that where the property sold is a part of an ascertained mass of uniform quality and value, separation is not essential, and the title to the part sold will pass to the vendee, if such appears to be the intention of the party.[3]

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also Rahilly *v.* Wilson, 3 *id.* 420 (1873); Austin *v.* Seligman, 18 F. R. 519 (1883).

[1] Flagg *v.* Mann, 2 Sumn. 533 (1837), Story, J.

[2] Vincent *v.* Cornell, 13 Pick. 296 (1832); Day *v.* Bassett, 102 Mass. 447 (1869); Carrier *v.* Knapp, 117 *id.* 324 (1875).

[3] Cooley *v.* Gillan, 54 Conn. 80, 83 (1886).

[4] Elgee Cotton Cases, 22 Wall. 187-96 (1874), cases, Strong, J.; Heryford *v.* Davis, 102 U. S. 246 (1880); Pope *v.* Allis, 115 *id.* 363, 371-72 (1885), cases.

[5] Harkness *v.* Russell, 118 U. S. 663, 667-82 (1886), Bradley, J., reviewing many cases, American and English. Compare Davidson *v.* Davis, 125 *id.* 90, 98 (1888). See generally 23 Cent. Law J. 436 (1886), cases; 25 Am. Law Reg. 813-17 (1886), cases; 27 *id.* 596-608 (1888), cases.

[1] Blackwell *v.* Walker, 2 McCrary, 34-36 (1880), cases; Lewis *v.* McCabe, 49 Conn. 143-54 (1881), cases; Turner *v.* Kerr, 44 Mo. 431 (1869); 7 Cranch, 218; 12 How. 139; 39 Ala. 156; 38 Cal. 326; 41 *id.* 22; 49 Ga. 133; 73 Ill. 156; 80 *id.* 183; 18 Iowa, 504; 19 *id.* 335; 15 La. An. 386; 37 Me. 543; 30 Md. 495; 109 Mass. 130; 21 Minn. 449; 5 Miss. 329; 62 Mo. 202; 8 Nev. 147; 47 Barb. 220; 15 Johns. 205; 50 N. Y. 441; 70 Pa. 434; 71 *id.* 264; 35 Vt. 125; 21 W. Va. 429; 57 Wis. 415.

[2] Hatch *v.* Standard Oil Co., 100 U. S. 130-32 (1879), cases, Clifford, J.

[3] Kingman *v.* Holmquist, 36 Kan. 738-39 (1887), cases.

Things not yet existing, which may be sold, are those which have a potential existence — things which are the natural product or expected increase of something already belonging to the owner. . . Where a railroad company makes a general mortgage of its road, this does not pass after-acquired lands, unless they are used in connection with the actual operations of the road as a part thereof.[1]

Under a contract for supplying labor and materials and making a chattel, no property passes to the vendee till the chattel is completed and delivered or ready to be delivered. This rule prevails in all cases, unless a contrary intent is expressed or clearly implied.[2]

"The courts of this country have not adopted any arbitrary rule of construction as controlling such agreements, but consider the question of intent, open in every case, to be determined upon the terms of the contract, and the circumstances attending the transaction."[3]

Forced sale. A sale made under the process of a court and in the mode prescribed by law.[4]

When the owner of a homestead estate consents to a sale under an execution or other legal process, the sale is not forced, but is as voluntary as when he directly effects the sale and executes the conveyance.[5]

A sale under a power in a mortgage is a voluntary, not a forced, sale.[6]

Fraudulent sale. A sale of either realty or personalty made in fraud of the rights of creditors — usually existing creditors.

To render a sale, for a valuable consideration, of personalty delivered into the actual possession of the vendee, invalid as against the creditors of the vendor, the vendee must have had actual knowledge or belief, or at least actual suspicion, that the sale was being made to defraud the creditors. But where it appears that the vendee was free from guilty knowledge or suspicion, mere negligence in not inquiring into facts known to him which were calculated to put him upon inquiry is not equivalent to a want of good faith, and does not charge him with notice of the fraud.[7] See CONVEYANCE; POSSESSION, Fraudulent.

Judicial sale. A sale made under the process of a court having competent authority to order it, by an officer legally appointed and commissioned to sell.[1]

A sale made by a court of competent jurisdiction in a pending suit, through its authorized agent.[2]

A purchaser at such a sale is protected when the power to sell is expressly given; when he buys on the faith of an order of court which clearly authorizes the act to be done.[3]

He buys the debtor's interest, subject to all outstanding equities.[4]

Should the judgment be reversed, all rights acquired at the sale while the judgment was in force, and which it authorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made and authorized the sale.[5, 6]

The rule of *caveat emptor* applies to judicial sales. After confirmation (*q. v.*), the purchaser will not be entitled to an abatement of the purchase-money.[6]

The policy of the law is to multiply bidders and increase competition, that the interests of both the debtor and creditors may be advanced. For this reason, any attempt in a purchaser to dissuade bidding avoids the sale; for this reason, also, selling in the mass is generally disallowed, but it is not *per se* evidence of fraud in the sale.[7] See BID.

Public sale. A sale made at auction to the highest and best bidder. **Private sale.** A sale not made at public auction.

Private sales are always voluntary; public sales are often compulsory or "forced." Administrators, executors, guardians, and committees of persons *non compos*, are required, as a rule, to first obtain the consent of court to sales of trust property. Unequivocal direction in a will may obviate this necessity. See *Judicial Sale*.

Sale in gross. A sale without regard to quantity.

A "contract of hazard." If there be a mistake in quantity, upon an estimate influencing the price, which, if understood, would probably have prevented the sale, or varied its terms, equity may afford relief.[8] See ESTIMATE; MORE OR LESS.

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[1] Calhoun *v.* Memphis, &c. R. Co., 2 Flip. 447, 442 (1879), cases, Hammond, J.

[2] Williams *v.* Jackman, 16 Gray, 517 (1860), Bigelow, Chief Justice.

[3] Clarkson *v.* Stevens, 106 U. S. 515, 514-15 (1882), cases, Matthews, J. The controversy involved the title to the uncompleted man-of-war "Stevens Battery," on which payments had been made by the secretary of the navy, as the work progressed.

[4] Sampson *v.* Williamson, 6 Tex. 110 (1851), Hemphill, Chief Justice.

[5] Peterson *v.* Hornblower, 33 Cal. 276 (1867).

[6] Patterson *v.* Taylor, 15 Fla. 340 (1875).

[7] Parker *v.* Conner, 93 N. Y. 118, 122 (1883), cases, Rapallo, J. On sales voidable for fraud in the vendee, see 18 Cent. Law J. 405-9 (1885), cases.

[1] Williamson *v.* Berry, 8 How. 547 (1850), cases, Wayne, J. Approved, Lawson *v.* De Bolt, 78 Ind. 564 (1881), Elliott, C. J. And see Sturdevant *v.* Norris, 30 Iowa, 71 (1870).

[2] Terry *v.* Coles' Executor, 80 Va. 701 (1885).

[3] Gray *v.* Brignardello, 1 Wall. 636, 634 (1863), cases, Davis, J.

[4] Osterman *v.* Baldwin, 6 Wall. 122 (1867).

[5] Davis *v.* Gaines, 104 U. S. 391-96, 404-6 (1881), cases.

[6] Boyce *v.* Strother, 76 Va. 862 (1882); Hickson *v.* Rucker, 77 *id.* 135 (1883); 29 Gratt. 351, cases.

[7] Klopp *v.* Witmoyer, 43 Pa. 219 (1862); Yost *v.* Smith, 105 *id.* 631 (1884); Furbush *v.* Greene, 108 *id.* 507 (1886). On setting aside a judicial sale, see Aderholt *v.* Henry, 82 Ala. 542 (1886), cases.

[8] Yost *v.* Mallicate, 77 Va. 610 (1883), cases; Green *v.* Taylor, 3 Hughes, 400 (1879).

Sale on approval or trial; sale or return. In the former case, there is no sale till the approval is given, expressly or by implication resulting from keeping the goods beyond the time allowed for trial. In the latter case, the sale becomes absolute, and the property passes, only after a reasonable time has elapsed, without the return of the goods.[1]

Sale on credit; sale for cash. The idea of a sale on credit is that the vendee is to have the thing sold on his assumption to pay, and before actual payment. In a cash sale, possession is given upon payment.

It may be agreed that the vendor shall retain the subject until the expiration of the credit, as a security for the payment of the sum stipulated. But such an agreement, being special and unusual, will not be presumed.[2] See CASH.

Sale with faults. See FAULT, 2.

Sale, bill of. An instrument evidencing the transfer of title to personalty. Compare INVOICE.

At common law, personalty can be transferred, or incumbered, without the use of a deed. A chattel mortgage (*q. v.*) is a bill of sale with an incorporated defeasance. A seal is not essential to a bill of sale.[3]

Applicable in every case where the thing sold, from its character or situation at the time, is incapable of actual delivery. A ship at sea may be transferred by delivery of a bill of sale, and the cargo, by indorsement and delivery of the bill of lading. Indorsement and delivery of a warehouse receipt is equivalent to delivery of the property itself. Such regulations are necessary for the purpose of commerce.[4]

As fictitious bills of sale are given to protect property from creditors, statutes have very generally been enacted to prevent frauds of that nature. To affect execution-creditors, registration may be essential.

A rule of the maritime courts calls for a written bill of sale of a vessel. And the Revised Statutes direct that in the case of a sale of a registered vessel to a citizen of the United States, there shall be some writing in the nature of a bill of sale, and that this writing shall recite, at length, the certificate of registry; otherwise, the vessel is incapable of re-registry, and is not of the United States merchant marine.[5]

Compare AUCTION; CONVEYANCE, 2; GRANT, 2; PURCHASE; VEND.

See generally ACCOUNT; AGENT; BARGAIN; CAVEAT, Emptor; CONCERN; CONTRACT; DECLARATION, 1; DEED, 2; DELIVERY, 1; DISPARAGEMENT, 2; DISPOSE, 2; DRUMMER; EASEMENT; EXECUTION, 3; FRAUD; LIEN; OFFER, 1; PAYMENT; PERFORMANCE; PERISHABLE; PLACE. Of delivery; POSSESSION; RECORD; RESCISSION; RETAIL; SAMPLE; STOPPAGE; TAX, 2; TRUST, 1; VALID; VALUE; VENDITIO; VOID; WARRANTY, 2.

SALIC or SALIQUE LAW. The code of laws of the Salians, a German tribe who settled in ancient Gaul.

One provision, which has excluded women from inheriting the crown in France and in a few other continental countries, was that males only should succeed to inheritances.[1]

SALOON. Originally, a large public room or parlor; now, usually, a place where intoxicating liquors are sold.[2]

A licensed saloon-keeper is, therefore, a person licensed to sell intoxicating liquors.[3]

Supposed to be a place where persons who call for them are supplied with refreshments.[3]

A pool-table is not necessary to the conduct of the business.[3]

A house or room used for retailing spirituous liquors is sometimes improperly called a saloon, but this use cannot impart to the word any such legal signification.[4]

See CLOSE, 1 (2); KEEP, Open; RESTAURANT; TAVERN.

SALT LAKE. See LAKES.

SALTPETRE. See DRUGS.

SALUS. See LEX, Salus populi, etc.

SALVAGE.[5] 1. Allowance for saving a ship or goods from the danger of the seas, from fire, pirates, or enemies.[6]

The compensation allowed to persons by whose assistance a ship or vessel or the cargo of the same, or the lives of the persons belonging to the ship or vessel, are saved from danger or loss in cases of shipwreck, derelict, capture, or other marine misadventure.[7]

The compensation allowed to persons by whose voluntary assistance a ship at sea, or her cargo, or both, have been saved in whole or in part from impending sea peril, or in re-

[1] 1 Benjamin, Sales, § 911, cases See also Exhaust Ventilating Co. *v.* Chicago, &c. R. Co., 69 Wis. 454 (1887), cases: 13 N. W. Rep. 599.

[2] Nat. Bank of Commerce of Boston *v.* Merchants' Nat. Bank of Memphis, 91 U. S. 95-96 (1875), Strong, J.

[3] Gibson *v.* Warden, 14 Wall. 247 (1871), cases, Swayne, Judge.

[4] Gibson *v.* Stevens, 8 How. 399-400 (1850), cases, Taney, C. J.

[5] See R. S. §§ 4170, 4192; Weston *v.* Penniman, 1 Mas. 317 (1817); Hosey *v.* Buchanan, 16 Pet. 215 (1842). On the English Bills of Sales Acts of 1878, 1882, see 3 Law Quar. Rev. 300 (1887).

[1] See 1 Bl. Com. 194; Maine, Anc. Law, 152.

[2] McDougall *v.* Giacomini, 13 Neb. 434 (1882), Maxwell, J.

[3] Bowser *v.* Birdsell, 49 Mich. 8 (1882), Cooley, J.; Kitson *v.* Mayor of Ann Arbor, 26 *id.* 326 (1873).

[4] State *v.* Mansker, 36 Tex. 365 (1871), Ogden, J. See also 39 Conn. 40; 105 Mass. 40.

[5] F. *salvage:* L. *salvare*, to save.

[6] Weeks *v.* The Maria, 2 Pet. Adm. 425 (1790); Lea *v.* The Alexander, 2 Paine, 469 (1832?), Wayne, J.

[7] The Clarita and The Clara, 23 Wall. 16-19 (1874), cases, Clifford, J.

covering such property from actual peril or loss, as, in cases of shipwreck, derelict, or recapture.[1]

Salvor. A person who renders salvage service. "A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a voluntary adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship."[2]

Elements of a valid claim are: a marine peril, voluntary service not owed to the property as a matter of duty, and success in saving the property, or some portion, from the impending peril;[3] or, again: a marine peril, service voluntarily rendered when not required as an existing duty or from a special contract, and success in whole or in part, or service contributing thereto. Proof of success, to some extent, is as essential as proof of service.[4]

Suit for salvage may be *in rem*, against the property saved or the proceeds thereof, or *in personam*, against the party at whose request and for whose benefit the service was performed. But both proceedings may not be had in one and the same libel.[5]

The allowance of a compensation, which much exceeds the risk encountered and the labor employed, is intended as an inducement to render the services which it is for the public interest and the general interest of humanity, to hold forth to those who navigate the ocean.[6]

Liberal remuneration is allowed — to induce the daring to embark in such enterprises, and to withdraw motive to depredate upon the property. Seamen, pilots, and passengers, who perform extraordinary services out of their duty, are entitled to it; but not, one who places the property in danger.[7]

In determining the amount of the reward, courts of admiralty consider as the main ingredients: the labor expended; the promptitude, skill, and energy displayed; the value of the property employed in rendering the service, and the danger thereto; the risk incurred; the value of the property saved; and the degree of danger from which the property was rescued.

The compensation is not viewed merely as pay, on the principle of *quantum meruit*, or as remuneration *pro opere et labore*, but as a reward for perilous services voluntarily rendered, and as inducement to embark in such undertakings.[8]

Compensation presupposes good faith, meritorious service, complete restoration, and incorruptible vigilance.[1]

Saving a ship in port from imminent danger of destruction by fire is as much a salvage service as saving her from the perils of the seas. The shortness of the time occupied does not lessen the merit of the service. . . A passenger cannot recover for every service which would support a claim by one in nowise connected with the ship; yet, for extraordinary services, and the use of extraordinary means, not furnished by the equipment of the ship herself, by which she is saved from imminent danger, he may have salvage. . . The amount is largely a matter of fact and discretion, which cannot be reduced to precise rules but depends upon a consideration of the circumstances of each case.[2]

See ADMIRALTY; CONSORT, 2; DERELICT, 2; TOWAGE.

2. In the law of insurance, see INSURANCE, Fire.

SAME. Refers to the next antecedent.[3] Does not always mean identical; frequently, of the kind or species, though not the specific thing; is often a substitute for a word used before, and employed as a pronoun.[3]

In the expression "deliver policies and receive premiums on the same," means *them* — the policies.[4]

Same manner. See MANNER.

Same offense. In the Fifth Amendment to the Constitution, an offense which is the same in law and in fact.[5]

Same property. The tenant of a stock farm was to draw out the "same property" he put into the business. *Held*, that the same description of stock, of equivalent value, was meant.[6]

Same v. Same. The same plaintiff against the same defendant; the same case as first cited.

Sameness. See PATENT, 2; TRADE-MARK.

Compare EQUAL; EQUIVALENT; IDEM; IDENTITY; LIKE; SAID.

SAMPLE.[7] In the law of sales, that which is taken out of a large quantity as a representative of the whole; a part shown as a specimen.[8]

The fair import of the exhibition of a sample is that the article to be sold is like that shown as a par-

[1] The Sabine, 101 U. S. 384–91 (1879), cases, Clifford, J. See also Cope *v.* Vallette Dry-Dock Co., 119 *id.* 629 (1887), cases; The Fannie Brown, 30 F. R. 220 (1887).

[2] The Neptune, 1 Hagg. 236 (1824), Ld. Stowell. Approved, The Wave *v.* Hyer, 2 Paine, 189 (1833?); 1 Curtis, 378.

[3] The Clarita and The Clara, *ante*.

[4] The Blaireau, 2 Cranch, 265 (1804), Marshall, C. J. Approved, 31 F. R. 496.

[5] The Blackwall, 10 Wall. 14, 12 (1869), cases, Clifford, J.; The Sabine, *supra*.

[1] The Island City, 1 Black, 130 (1861), Grier, J.

[2] The Connemara, 108 U. S. 357–59 (1883), cases, Gray, J.; The Tornado, 109 *id.* 115 (1883).

See generally The Egypt, 17 F. R. 367–76 (1883), cases; 9 *id.* 53, 480; 10 *id.* 556; 1 Bened. 553, 10 *id.* 73–74; 1 Sumn. 216; 1 Bond, 117, 270; 3 *id.* 375; 1 Cliff. 220; 3 Woods, 149.

[3] 2 Kent, 555: Coke, Litt. 20 *b*, 385 *b*.

[4] Carpo *v.* Brown, 40 Iowa, 493 (1875), Day, J.

[5] United States *v.* Cashiel, 1 Hughes, 560 (1863).

[6] Brockway *v.* Rowley, 66 Ill. 99 (1872).

[7] O. F. *ensample*, a corruption of *example*, *exemple*: L. *exemplum*: *ex-imere* (*emere*), to take out, select.

[8] Webber's Case, 33 Gratt. 904 (1880), Staples, J.

sel. The object is to save the purchaser the trouble of examining the whole quantity.[1]

The rule of *caveat emptor* does not apply, because there is no opportunity for a personal examination of the bulk of the commodity which the sample is said to represent.[2]

A warranty is implied that the bulk corresponds to the sample in nature and quality. But if the sample is fairly drawn from the bulk, and there is a defect in both, unknown and not discoverable by examination, there is no such warranty. A specimen may be shown to enable the purchaser to form an opinion of its probable qualities without any intention in the seller to warrant all the goods to be equal to it. Opportunity to examine the bulk is a strong circumstance against considering the sale a sale by sample.[3]

See CAVEAT, Emptor; WARRANTY, 2.

SAMPLE-ROOM. See INNKEEPER.

SAN FRANCISCO. See PUEBLO.

SANCTION.[4] The vindicatory branch of the law, whereby it is signified what evil or penalty shall be incurred by such as commit any public wrong, and trespass or neglect their duty.[5]

Sanction of an oath. A belief that the Supreme Being will punish falsehood.[6] See OATH.

SANCTUARY.[7] 1. Exemption of a place, consecrated to religious duties, from criminal arrests.[8]

As a plea, introduced at a time when superstitious veneration was paid to consecrated ground. The accused first fled to a church or church yard; within forty days, dressed in sackcloth, he confessed his guilt before the coroner, took an oath to abjure the realm, and went with a cross in his hand to a designated port and embarked. The privilege was abolished in 1624, by 21 James I, c. 28.[9]

2. A place where process of law cannot be executed.

Civil sanctuary. The protection afforded a man by his own house as against the service of civil process. See ASYLUM; HOUSE, 1.

SANE.[1] Whole in mind; healthy in mind; of sound mind.

Insane; nonsane. Not whole, sound, or healthy in mental faculties; unable, from nature or accident, to perform the rational functions common to man.[2]

Sanity. Mental health; soundness of understanding. See at length INSANITY; WILL, 1.

SANITARY REGULATIONS. See COMMERCE; HEALTH; QUARANTINE, 2; POLICE, 2.

SANS. See SINE.

SATISFY.[3] 1. To supply fully, with what is required; to free from doubt or uncertainty; to set the mind at rest; to convince.

"To satisfy fully" is to exclude all doubts, reasonable or otherwise.[4]

"Entirely satisfied" implies a firm and thorough assent of the mind and judgment to the truth of a proposition. This may exist notwithstanding a possibility that the fact may be otherwise.[5]

Satisfactory. As applied to evidence (*q. v.*), that amount of proof which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt.[6]

An action cannot be maintained, for work and labor, upon an agreement to construct a book case "to the satisfaction" of the defendant, by proof that the case was made according to the terms of the agreement, without also proving that it was accepted by the defendant;[7] and the same is true as to a contract to make a "satisfactory suit of clothes."[8]

An agreement to deliver certain notes or "make satisfaction" binds the promisor, for failure to deliver the notes, to make such compensation as the law provides.[9]

A contract to employ one as agent for a year "if he fill the place satisfactorily" may be terminated by

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[1] Bradford *v.* Manly, 13 Mass. *143 (1816), Parker, C. J.

[2] Barnard *v.* Kellogg, 10 Wall. 388 (1870), Davis, J.

[3] Story, Sales, § 376, cases; 2 Benj. Sales, §§ 969-81, cases; 2 Kent, 480, cases; Hare, Contr. 508, cases; Barnard *v.* Kellogg, 10 Wall. 383, 388-94 (1870), cases. In Pennsylvania, until 1887, in the absence of fraud or circumstances fixing the character of a sample as a standard of quality, the sample was a guaranty only that the article to be delivered should follow its kind, and be simply merchantable. Boyd *v.* Wilson, 88 Pa. 324 (1877, Sharswood, J., dissenting); Selser *v.* Roberts, 105 *id.* 242 (1884). The act of April 18, 1887 (P. L. p. 21), provides that unless the parties agree otherwise, there shall be an implied warranty that the property to be delivered is the same in quality as the sample shown.

[4] L. *sanctio; sancire*, to render sacred, inviolable.

[5] 1 Bl. Com. 54, 56.

[6] Blocker *v.* Burness, 2 Ala. 355 (1841).

[7] L. *sanctuarium*, a shrine: *sanctus*, consecrated, holy.

[8] [4 Bl. Com. 365.

[9] 4 Bl. Com. 332; 1 Steph. Hist. Cr. Law Eng. 491.

[1] L. *sanus*, sound in mind.

[2] Den *v.* Van Cleve, 5 N. J. L. 661 (1819), Kirkpatrick, Chief Justice.

[3] L. *satis*, enough; *facere*, to make.

[4] State *v.* Sears, 1 Phil. L. 148 (1867).

[5] People *v.* Phipps, 39 Cal. 335 (1870).

[6] 1 Greenl. Ev. § 2.

[7] McCarran *v.* McNulty, 7 Gray, 141 (1856).

[8] Brown *v.* Foster, 113 Mass. 136 (1873).

[9] Moore *v.* Fleming, 34 Ala. 498 (1859).

the employer when, in his judgment, the agent fails to meet that requirement.[1]

"A contract to make a bust with which the defendant *ought* to be satisfied is one thing; an undertaking to make one with which she *will* be satisfied is quite another thing."[2] The same ruling was made with respect to a portrait not to be paid for "if unsatisfactory."[3]

Where S. refused to accept an elevator, costing $2,300, which had been warranted satisfactory in every respect, it was held, reversing the lower court, that, provided he acted in good faith, S. was the sole judge whether the elevator was satisfactory.[4]

If one orders goods (milk-pans) agreeing to pay for them if satisfied, "he must act honestly, and in accordance with the reasonable expectations of the seller as implied from the contract, its subject-matter, and surrounding circumstances. This dissatisfaction must be actual, not feigned; real, not pretended."[5]

An agreement that the purchaser of an article, sold with warranty, may rescind the sale if the article is not satisfactory, does not preclude him from retaining it, and recouping damages for breach of the warranty, in an action for the price.[6]

2. To comply fully with a demand; to extinguish, as, by payment or performance.

"Satisfied" referring to a note or bond imports that the instrument is paid.[7]

Satisfaction. (1) The settlement or extinguishment of a demand; also, the record-entry to that effect.

The demand may be of the amount of a judgment, mortgage, or other lien, or of a claim not evidenced by a record; but the reference is frequently to matters of record by way of distinction.

Accord and satisfaction. See ACCORD.

Satisfaction piece. An acknowledgment in writing that an incumbrance has been satisfied.

(2) In equity, the donation of a thing, with the intention, expressed or implied, that it is to be an extinguishment of some existing right or claim.[8]

Arises, as a matter of presumption, where a man, being under an obligation to do an act (as, to pay money), does that by will which may be considered as a performance or satisfaction of the act, the thing done being *ejusdem generis* with that which he engaged to perform. The presumption may be rebutted by circumstances. The thing so done must be a substitute or equivalent for the contract, and not intended as a fulfillment of it. In a "performance" the thing is done strictly in pursuance and in fulfillment of the contract. The question may arise where there is a portion, secured by a marriage settlement or given by a will, and an advancement is afterward made to the donee; and in case of a legacy to a creditor.[1]

See ADEMPTION; ADVANCEMENT; ELECTION, 2.

SAVE. 1. To reserve, exempt out of; to preserve.

Statutes allowing summary convictions "save" the right of trial by jury.

A saving totally repugnant to the body of a statute is void.[2]

2. To suspend the operation of; to bar.

The statute of limitations (*q. v.*) is "saved" when some circumstance prevents the statute from being applied to the case in hand.

SAVINGS BANK. See BANK, 2 (2).

SC. See SCIRE; Scilicet.

SCANDAL.[3] 1. In *scandalum magnatum*, words spoken in derogation of a peer, judge, or other high officer of the realm.

Formerly, more reprehensible than defamation of a common or private person.[4]

"Scandal" and "slander" mean the same thing in law. *Escandre* in 3 Edw. I, c. 34, is translated slander in the statute book.[5] See SLANDER.

2. An allegation in a pleading in equity which is expressed in language derogatory to the dignity of the court, or which charges an offense irrelevant to the merits of the cause.

The allegation in a bill in equity of anything which is unbecoming the dignity of the court to hear, or which is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause.[6]

A party may refuse to answer a pleading which contains scandalous matter till the same is expunged in pursuance of the report of a master appointed for the purpose.[7]

But nothing which is positively relevant to the merits of the cause, however harsh or gross the charge, can be treated as scandalous. If, technically, matter

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[1] Tyler *v.* Ames, 6 N. Y. Supr. 280 (1872).

[2] Zaleski *v.* Clark, 44 Conn. 234 (1876).

[3] Gibson *v.* Cranage, 39 Mich. 49 (1878).

[4] Singerly *v.* Thayer, 108 Pa. 296 (1885), cases; 25 Am. Law Reg. 18-21 (1886), cases; Seeley *v.* Welles, 120 Pa. 74 (1888), as to a machine: 27 Am. Law Reg. 578-82 (1888), cases.

[5] Daggett *v.* Johnson, 49 Vt. 349 (1877); 43 *id.* 523.

[6] Shupe *v.* Collender, Sup. Ct. Conn. (1888); 15 Atl. R. 605, cases.

[7] Reynolds *v.* Bird, 1 Root, 306 (1791).

[8] 2 Story, Eq. § 1099. Approved, 49 Ind. 422.

[1] 2 Story, Eq. §§ 1099-1123. See also *Exp.* Pye, 18 Ves. Jr. 140 (1811), Eldon, L. Ch.; *Exp.* Pye (Chancey's Case), 2 W. & T., L. C. Eq. 752-833, cases; 1 Pom. Eq §§ 521, *et seq.*

[2] 1 Bl. Com. 89.

[3] Gr. *scándalon*, a snare; a stumbling-block, an offense.

[4] 3 Bl. Com. 123; 1 *id.* 402; 5 Coke, R. *125.

[5] Sharff *v.* Commonwealth, 2 Bian. *519 (1810).

[6] 1 Daniel, Ch. Pl. § 347.

[7] 3 Bl. Com. 442.

is scandalous, it is also impertinent. A bill may be "referred" for scandal at any time; even upon application of a stranger. Scandal tends to injure by making records the means of perpetuating libelous and malignant slanders.[1] See IMPERTINENCE.

SCHEDULE. Schedules are annexed to constitutions, statutes, answers, depositions, petitions in insolvency, bankruptcy, and probate courts, and to other documents, in order to exhibit in detail matters previously mentioned in general terms. The word is sometimes used instead of inventory, *q. v.*

SCHEME. The "scheme of a statute" means the scope or extent of operation intended for it by the enacting body.[2]

SCHISM. Separation; division.

"In case a schism or division shall take place in a society" means in case a society shall separate, divide, or become partitioned, without reference to its external relations.[3]

SCHOOL. A place for instruction, particularly for the young.

In the constitution of California, "schools" refers to common or public schools, such as are organized for the sole purpose of disseminating knowledge and imparting scholastic instruction.[4]

Common or public schools. Schools supported by general taxation, open to all free of expense, and under the control of agents appointed by the voters.[5]

The phrases are never applied to the higher seminaries of learning, such as incorporated academies and colleges.[6]

All schools established as part of the general system of popular education, and open and free to all children and youth who are of proper age and other qualification.[6]

Does not include private schools supported and managed by individuals.[6]

"Common" denotes that the schools are open and public to all. "Common" and "public" are used interchangeably. "School" does not imply a restriction to the rudiments of an education.[7]

The words "common schools" have in themselves no definite meaning.[8]

School-house. A house for instruction; any building in which a school is kept.[1]

Separate schools. Schools for the education of the children of a sect or race; particularly, schools exclusively for the children of African parents,—sometimes called "colored" schools.

The question as to the constitutionality of laws providing for separate schools does not arise under the clause in the Fourteenth Amendment which prohibits the States from enacting "any law which shall abridge the privileges or immunities of citizens of the United States," since this clause refers exclusively to privileges enjoyed by individuals as citizens of the United States. Education has not been made a matter of national, but of domestic, concern. Unless the constitution of a State directs otherwise, its legislature is not required to adopt any system of public instruction at all; but when it has once established a system, the clause in the Amendment which forbids a State to deny to any person "the equal protection of the laws" controls the exercise of power over the enjoyment of the rights conferred by the system. The weight of authority is that it is still left to the legislatures to provide for the maintenance of separate schools for children of African parentage. The reasoning is that equality does not necessarily imply identity of rights. All decisions, however, hold that the schools, if separate, must afford equal advantages.[2]

A law is unconstitutional which, while taxing whites and blacks alike, directs that only the money collected from the blacks shall be used to sustain their schools, the whites thereby enjoying superior school facilities.[3]

The act of Kentucky of February 23, 1874, establishing a uniform system of common schools for colored children, is unconstitutional, because, by implication, it excludes negro children from a share in the proceeds of the common-school fund set apart by the con-

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[1] Story, Eq. Pl. §§ 269–70.

[2] See 109 U. S. 532, 538, 569; 91 N. Y. 639.

[3] McKinney *v.* Griggs, 5 Bush, 417–18 (1869), Williams, Chief Justice.

[4] Aid Society *v.* Reis, 71 Cal. 631 (1887), Foote, C.

[5] Merrick *v.* Amherst, 12 Allen, 509 (1866), Bigelow, Chief Justice.

[6] Jenkins *v.* Andover, 103 Mass. 98–100 (1869), Chapman, C. J. See also People *v.* Board of Education of Brooklyn, 18 Barb. 400, 410 (1851),— in which a "Roman Catholic Orphan Asylum" was held not to be a common school.

[7] Roach *v.* St. Louis, 77 Mo. 487 (1883), Ray, J.

[8] Collins *v.* Henderson, 11 Bush, 89 (1874), Cofer, J. As to the common-school systems of the States, see 2 Kent, 195–201.

[1] Luthe *v.* Farmers' Mut. Fire Ins. Co., 55 Wis. 546, 548 (1882); — in which insurance placed upon a dwelling-house, converted into a school-house, was held void as upon the school-house, the same not having been continued upon the "school-house" by a majority vote of the members of a town company, as required by law.

[2] See United States *v.* Buntin, 10 F. R. 730 (1882); *id.* 736, note; Bertonner *v.* New Orleans, 3 Woods, 177, 180 (1878); Roberts *v.* Boston, 5 Cush. 198 (1849); Dallas *v.* Fosdick, 40 How. Pr. 249 (1869); County Court *v.* Robinson, 27 Ark. 116 (1871); State *v.* McCann, 21 Ohio St. 198 (1871); People *v.* Easton, 13 Abb. Pr. 159 (1872); State *v.* Duffy, 7 Nev. 342 (1872); Ward *v.* Flood, 48 Cal. 36, 41 (1874); Cory *v.* Carter, 48 Ind. 329 (1874); People *v.* Gallagher (Brooklyn), 93 N. Y. 438 (1883); 95 U. S. 504–6. *Contra*, Clark *v.* Muscatine, 34 Iowa, 270 (1868); Dove *v.* Keokuk, 41 *id.* 689 (1875); People *v.* Detroit, 18 Mich. 400 (1869); Chase *v.* Stephenson, 71 Ill. 383 (1874); Board of Education *v.* Tinnon, 26 Kan. 1 (1881); Kaine *v.* Commonwealth, 101 Pa. 493 (1882): Act 8 June, 1881.

[3] Claybrook *v.* Owensboro, 16 F. R. 297 (1883).

stitution, as well as from the annual tax levied on the property of white persons for school purposes.[1]

Every man is interested in the education of the children of his community: his peace and quiet, his happiness and property, are largely dependent upon the intellectual and moral training which it is the object of public schools to supply. Hence the right to tax for maintenance of schools.[2]

The practice of setting apart section sixteen of every township of public lands, for the maintenance of public schools, is traceable to the Ordinance of 1785, the first enactment for the disposition by sale of the public lands in the western territory. The appropriation for that object became a fundamental principle by the Ordinance of 1787, which settled the terms of compact between the people and the States of the northwestern territory, and the original States. One article affirmed that "religion, morality, and knowledge" are "necessary for good government and the happiness of mankind," and declared "that schools and the means of education, should be forever encouraged." This principle was extended, first by enactment (1 St. L. 550, § 6), and again, in 1802, by the compact between the United States and Georgia, to the southwestern territory. There is a definite purpose declared to consecrate the same central section of every township of every State which might be added to the Federal system to the promotion of these objects. Reservations of minerals were not made out of that section.[3]

On the subject of corporal punishment in schools, see the cases cited to this paragraph,[4] and PUNISHMENT, Corporal.

See ABODE; ALCOHOL; APPENDAGE; BOND; CHARITY, 2; COLLEGE, 2; EDUCATION; LECTURES; SECTARIAN; SEMINARY; TEACHER; TUITION; WORSHIP.

SCI. FA. See SCIRE, Facias.

SCIENCE. In its broadest sense, knowledge; the knowledge of many, methodically digested and arranged, so as to be attainable by many; a body of principles and deductions to explain the nature of some matter.[5]

Depends upon abstract or speculative principles. "Art" relates to practice or performance — is practical skill as directed by theory or science; the mere application of knowledge. Rifle-shooting is not a "science."[6]

"The Congress shall have Power . . to promote the Progress of Science and useful Arts, by securing . . to Authors and Inventors, the exclusive Right to their Writings and Discoveries."[6]

The term "science" cannot, with propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price-current, the subject-matter of which is daily changing, and is of mere temporary use. Prices-current, catalogues of merchandise, a scoring-sheet for games, a chart of patterns for dresses, blank account-books, and the like, are not subjects of the copyright laws passed in execution of the foregoing power.[1]

Scientific works. A medical expert may cite standard authorities as sustaining his views, and then they may be used by the opposite side to discredit him; but they may not be read as evidence or argument.[2]

The reasons for admitting scientific works to prove the statements they contain are, the authors did not write under oath, and their grounds of belief and process of reasoning cannot be tested by cross-examination. But an expert's opinion, formed in part from reading treatises by persons of acknowledged ability, may be given in evidence; and he may refresh his own recollection by reference to such authorities.[3] See further BOOK; EXPERT.

SCIENTER. See SCIRE, Scienter.

SCILICET. See SCIRE, Scilicet.

SCINTILLA. L. A spark, a glimmer; the smallest particle.

Scintilla juris. A spark of right or law; the smallest particle of legal interest.

Designated a fiction resorted to to enable a feoffee to uses to support a contingent use when it should come into existence and thereby effect an execution of the use under the Statute of Uses. In theory a small though sufficient portion of the fee-simple remained in the feoffee, which involved a possibility of future seisin in him.[4] See USE, 3.

Scintilla of evidence. The doctrine that when, on the trial of a cause, there is any evidence, however slight, *tending* to support the issue, the case must be submitted to the jury for a verdict, no longer prevails. See NONSUIT.

SCIRE. L. To be aware of; to learn; to know.

Scire facias. That you cause to be known. A writ for a defendant to appear in court on a day named to show cause why the plaintiff should not have advantage out of a matter of public record. Abbreviated *sci. fa.*, and *s. f.*

Causes execution to issue upon the matter of record, as, a judgment, recognizance, mortgage, tax lien,

[1] Dawson *v.* Lee, 83 Ky. 56 (1885).

[2] Kelly *v.* Pittsburgh, 104 U. S. 82 (1881), Miller, J.

[3] Cooper *v.* Roberts, 18 How. 177–82 (1855); Sherman *v.* Beuick, 93 U. S. 209 (1876).

[4] 22 Cent. Law J. 326–28 (1887), cases; 54 Ga. 281; 79 Ill. 567; 87 *id.* 303; 45 Iowa, 248; 50 *id.* 145; 4 Gray, 36; 12 Allen, 127; 68 N. C. 322; 5 Clark (Pa.), 78; 43 Tex. 167; 35 Wis. 59.

[5] Vredenburg *v.* Behan, 33 La. An. 637 (1881), Todd, Judge.

[6] Constitution, Art. I, sec. 8, cl. 8.

[1] Clayton *v.* Stone, 2 Paine, 392 (1828), Thompson. J. Drury *v.* Ewing, 1 Bond, 540 (1862); Baker *v.* Selden, 101 U. S. 99 (1879), cases.

[2] Huffman *v.* Clirk, 77 N. C. 58–59 (1877), cases; 1 Greenl. Ev. § 498; 1 Whart. Ev. §§ 438, 665–67, cases.

[3] State *v.* Baldwin, 36 Kan. 17–18 (1886), cases; Marshall *v.* Brown, 50 Mich. 148 (1883), cases; Boyle *v.* State 57 Wis. 472, 478 (1883), cases.

[4] See 4 Kent, 238; 2 Washb. R. P. 125; Williams, R. P. 261; 2 Bl. Com. 332.

or letters patent. In so far as it is an original action the defendant may plead to it. It is often of the nature of a declaration.

When founded upon a judgment, the purpose may be to revive the judgment, which from lapse of time (at common law, a year and a day) will soon be presumed to have been satisfied or released. The writ commands the defendant to show cause (1) why the judgment should not be revived, and the lien continued, or (2) why execution should not issue. Again, the purpose may be to make a person a party defendant, who, since the judgment was originally obtained, has become chargeable to an execution, or accountable in law for the assets of the first defendant. In either case the writ serves to continue a former suit to satisfaction.[1]

When founded upon a non-judicial record, as, letters patent for land or an invention, the writ institutes an original action designed to annul or repeal the instrument for some legal cause, as, fraud in the procuring or in the issuing of it. The writ has also been used to enforce the forfeiture of charters of incorporation, and the return of franchises back into the hands of the government.[2]

Scienter. With knowledge, knowingly; the fact of knowledge.

In the Latin forms of pleadings, the emphatic word used to charge knowledge in a defendant. Has also designated the clause in a declaration or indictment which alleges such knowledge.

The intention of the accused must be alleged in every part of the description of the crime where it is necessary to constitute an offense.[3]

It is necessary to allege and prove a *scienter* where there is injury by a domestic animal of mischievous propensity.[4]

The possession of other counterfeit paper by the accused at the time of passing a counterfeit note is evidence of the *scienter*.[5]

The *scienter* may be proved inductively by collateral facts,[6] and from previous offenses.[7]

Scilicet. From *scire licet*, as one may know or learn: to wit; that is to say, namely. Abbreviated *scl.*, *sc.*, *ss.*

[1] On reviving judgments, see generally 94 Am. Dec. 222-46 (1888), cases; on making representative a defendant to suit abated by death, Porlevant *v.* Pendleton, 28 Miss. 36-37 (1851), cases; recognizances, United States *v.* Stevens, 16 F. R. 105 (1883), cases, State *v.* Dowd, 43 N. H. 455 (1862); order for alimony, Chestnut *v.* Chestnut, 77 Ill. 349 (1875), cases; liens, Winder *v.* Coldwell, 14 How. 443 (1852).

[2] As to patent for an invention, see Stearns *v.* Barrett, 1 Mas. 164 (1816); United States *v.* Bell Telephone Co., 128 U. S. 360, 369, 371 (1888).

[3] Commonwealth *v.* Boynton, 12 Cush. 500 (1853), cases; 12 Metc. 448.

[4] Mareau *v.* Vanatta, 88 Ill. 133 (1878).

[5] United States *v.* Mitchell, Baldw. 366 (1831).

[6] 1 Whart. Ev. § 30.

[7] Tarbox *v.* State, 36 Ohio St. 584 (1883), cases.

Videlicet is now more commonly used, with the same meaning and effect. See VIDELICET; WIT.

SCOLD. A troublesome and angry woman, who, by brawling and wrangling among her neighbors, breaks the public peace, increases discord, and becomes a nuisance to the neighborhood.[1]

At common law, a common scold is a public nuisance. The sentence was that she be placed in a trebucket, castigatory, or cucking-stool, that is, in Anglo-Saxon, the scolding stool.[2]

The offense is now punishable, if at all, by fine, or by fine and imprisonment.

In 1824 a woman was convicted of this offense in the city of Philadelphia, and the sentence was, as at common law, that she "be placed in a ducking or cucking-stool, and be plunged three times in the water." This sentence was reversed by the supreme court, which decided that the old common-law punishment had not been adopted in Pennsylvania. The court also said that the punishment was introduced at a time when women were subjected to degradation as slaves; that authorities differ as to what the original punishment was, and how, therefore, it was to be executed upon offenders, if executed at all.[3]

In 1866 the same court, in reviewing the record in another case, said that the law has been considered settled since the decision in the *James Case;* that the penal code of 1860 did not abolish the offense; and that, as to the unreasonableness of punishing *women* alone for a too free use of the tongue "it is enough to say that the common law, which is the expressed wisdom of ages, adjudges that it is not unreasonable. . . . Argument drawn from the indelicacy or unreasonableness of such a prosecution should be addressed, therefore, to the legislature."[4] See PUNISHMENT, Cruel.

SCOT AND LOT. Certain duties paid by those who exercised the elective franchise within cities and boroughs.[5]

A customary contribution laid on subjects according to their ability.[6]

SCRAMBLING. Scrambling possession: a struggle for the possession of land on the land itself.[7]

SCRAWL. See SCROLL.

SCRIBE. See SCRIVENER.

SCRIP.[8] A certificate or schedule. Evidence of the right to obtain shares in a pub-

[1] [United States *v.* Royall, 3 Cranch, C. C. 622 (1829): Jacob's Law Dict.

[2] 4 Bl. Com. 168.

[3] James *v.* Commonwealth, 11 S. & R. 226-36, Duncan, J., Gibson, J., Tilghman, C. J.

[4] Commonwealth *v.* Mohn, 52 Pa. 245-46, Woodward, C. J. See also Whart. Cr. L. 171; 1 Bish. Cr. L. § 147; 1 Russ. Cr. 302; Laws of Prov. of Pa. (1682-1700), Linn, 115, 145; 29 Harper's Weekly, 759-60 (1886).

[5] [McCafferty *v.* Guyer, 59 Pa. 116 (1868).

[6] Cowell's Law Dict.

[7] Spiers *v.* Duane, 54 Cal. 177 (1880).

[8] L. *scribere*, to write.

lic company: a scrip certificate, in distinction from the real title.[1]

Scrip certificate. Entitles the holder to apply for shares in a public company. **Insurance scrip.** Shows that the holder will be entitled to a share in the profits of the company which issued the scrip when they have been realized and declared.[2]

Scrip issued in England by the agent of a government, the holder, on payment of all installments, to receive the definitive bonds, and which, by the usage of dealers in public securities, is transferred by mere delivery, passes by such a delivery to a *bona fide* holder for value without title: that is, such script is itself a negotiable instrument.[3]

State scrip, declaring on its face that it is receivable for "taxes and dues," gives the holder no right to have it received for taxes unless he owes the taxes.[4] See DIVIDEND, 3.

SCRIPT.[5] A writing; an original writing.

In England, a testamentary document of any kind, including even written instructions for drafting the document.

Affidavit of script. An affidavit attached to the paper relied upon in a testamentary cause.[6]

SCRIVENER.[7] A writer for another; a draughtsman; a scribe: as, the scrivener of a will, deed, or other document.

Originally, a person with whom people deposited money to be laid out when he found opportunity; he, meanwhile, having the use of the money. The banker has supplanted him as the depositary of money, and the attorney as the draughtsman of securities. . . To be a scrivener, a man now must carry on the business of being trusted with other people's moneys to lay out for them as occasion offers.[8]

SCROLL. A flourish made with a pen, around "L. S." or "Seal," and intended for a seal.

May consist of a circle, a scalloped curved line, or even of brackets, written opposite the place of signature. See further SEAL, 1.

SCT. See SCIRE, Scilicet.

[1] [Wharton's Law Dict.

[2] [Abbott's Law Dict.

[3] Goodwin *v.* Robarts, L. R., 10 Ex. 337, 352 (1875), Cockburn, C. J.

[4] Hagood *v.* Southern, 117 U. S. 52, 63 (1886), cases.

[5] L. *scribere*, to write.

[6] See Randolph *v.* Hughes, 89 N. C. 428 (1883); Osborne *v.* Leak, *ib.* 433 (1883).

[7] Formerly *scriven:* L. L. *scribanus*, a notary: *scribere*, to write.

[8] Adams *v.* Malkin, 3 Campb. 539-40 (1814), Gibbs, C. J.; Harman *v.* Johnson, 18 E. L. & E. 402 (1852), Campbell, C. J.

SCULPTOR. See STATUARY.

SE. See SUI, Se.

SEA. Includes all waters within the ebb and flow of the tide.[1]

"A sea" may mean a general disturbance of the surface of the water occasioned by a storm, breaking it up into the roll and lift of waves following or menacing each other; or, a particular wave or surge, separate from its fellows.[2]

The main or high seas are part of the realm of England, for thereon the courts of admiralty have jurisdiction; but they are not subject to the common law. This main sea begins at the low-water mark. But between high and low-water marks, where the sea ebbs and flows, the common law and admiralty have *divisum imperium*, an alternate jurisdiction: one upon the water, when it is full sea, the other upon the land, when it is an ebb.[3]

It is now a well-established principle of international law that no nation has any exclusive dominion over the high seas, which are the highway of all nations and subject to the public law of the whole civilized world. But each nation has such dominion over the sea within a certain distance from her shores — usually agreed to be as far as a cannon-shot will reach from the land, or a marine league,[4] *q. v.*

The high sea is free and open to all nations. It cannot be the property or the empire of any particular state. Its destination is clearly for the common benefit of mankind; it is a common pathway, separating and yet binding, intended alike for all. Formerly, portions of the ocean were claimed as a monopoly. Thus, the Portuguese prohibited other nations from sailing to the East Indies; the Spanish claimed the right to exclude all others from the Pacific: the English, in the seventeenth century, claimed property in the seas surrounding Great Britain as far as the coasts of the neighboring countries, and in the eighteenth century only softened down the claim into one of sovereignty; and Russia based an exclusive claim to the Pacific north of the fifty-first degree, upon the ground that this part of the ocean was a passage to shores lying exclusively within her jurisdiction. But this claim was resisted by our government, and withdrawn in the temporary convention of 1824.

Bays of the sea are within the jurisdiction of the states to whose territory the promontories embracing them belong. Thus, Delaware bay was declared in 1793 to belong exclusively to the United States. When, however, the headlands are very remote, there is more doubt in regard to the claim of exclusive control over them; and, for the most part, such claim has not been made. . . . Great Britain has long claimed supremacy in the narrow seas adjoining that island. But the claim, although cheaply satisfied by paying

[1] Waring *v.* Clarke, 5 How. 462 (1847), Wayne, J.

[2] Snowden *v.* Guion, 101 N. Y. 463 (1886), Finch, J.

[3] 1 Bl. Com. 110.

[4] 1 Kent, 30; Church *v.* Hubbart, 2 Cranch, 234 (1804); Vattel, 207.

certain honors to the British flag, has not been uniformly acquiesced in, and it may be said to be falling into desuetude. In 1856 Denmark agreed to give up her claim to dues for navigation over Elsineur sound and the Belts, for thirty-five million rix dollars (at fifty cents of our money to the dollar) — to be divided among the nations interested in proportion to the value of their commerce passing through the straits. In 1857 our government agreed to pay of this sum three hundred and ninety-three thousand dollars. . . By the treaty of Paris, March 30, 1856, "the Black Sea is made neutral. Open to the mercantile marine of all nations, its waters and ports are formally and in perpetuity interdicted to flags of war." The treaty, however, grants to Russia and Turkey the liberty of keeping a small force for coast service.

Where a navigable river forms the boundary between two states both are presumed to have free use of it, and the dividing line will run in the middle of the channel, unless the contrary is shown by long occupancy or agreement of the parties. When a river rises within the bounds of one state and empties into the sea in another, international law allows to the inhabitants of the upper waters only a moral claim or imperfect right to its navigation. . . . But there is now scarcely a river in the Christian portions of the world, the dwellers on whose waters have not the right of free communication with the rest of mankind. The Rhine, the Scheidt, the Danube, the Mississippi, the St. Lawrence, the Amazon, and the La Plata system of rivers, etc., have been made free by treaties.[1]

Arm of the sea. A river, harbor, creek, basin, bay, or other subordinate description of waters, where the tide ebbs and flows.

This is within the jurisdiction of admiralty, but when within the body of a State, the State has concurrent jurisdiction.[2]

At sea. A vessel is at sea when she has actually sailed, and is on her voyage.[3] See SAIL.

Beyond the sea. Out of a State or of the United States, as the case may be.[4]

High sea. The main or high sea begins at low water-mark.[5]

The uninclosed waters of the ocean on the sea coast outside the *fauces terræ*.[6]

A vessel lying in harbor, fast to the shore by cables, communicating with the land by her boats, and not within any inclosed dock or at any pier or wharf, is on the "high seas," outside of low water-mark on the coast.[1]

The words "upon the high seas, or on any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction, and out of the jurisdiction of any particular State," used in Rev. St. § 5346, are limited to the high seas, and to the waters connected immediately with them. That the Lakes are not "high seas" is too clear for argument. These words have been employed from time immemorial to designate the ocean below low water-mark, and have rarely, if ever, been applied to interior or land-locked waters of any description.[2]

Main sea. That part of the sea lying outside of the *fauces terræ* or points on the opposite shore sufficiently near to enable persons standing on one shore to distinctly see with the naked eye what is doing on the opposite shore.[3]

Sea brief; sea-letter. A custom-house document certifying to the citizenship of the owner of a vessel which has been duly registered.

Making or using a forged sea-letter is a penal offense.[4]

The term, in use, is synonymous with "pass-port."[5] The document relates more particularly to the cargo, while "passport" relates rather to the vessel.[6]

The form of the document has been variously given in different commercial treaties. This may explain the different descriptions given by text-writers.[7]

Seaman. One whose business is navigating ships; a sailor; a mariner.

In a broad sense, includes a master or other officer; in a narrow sense, one of the crew. The context and subject-matter determine the scope of the meaning. See CURE, 1; NATURALIZATION, R. S. § 2174; WARDS.

Sea-manure; sea-weed. See BEACH; DRIFT-STUFF.

Sea-shore. The margin of the sea, in its usual and ordinary state; all the ground between the ordinary high-water mark and low-water mark.[8]

By the common law, the land between ordinary high and low-water mark; the

[1] Woolsey, Intern. Law, §§ 59-62. See also 1 Kent, 26-32.

[2] United States v. Grush, 5 Mas. 298-302 (1829), cases; L. R., 2 Q. B. 7.

[3] Union Ins. Co. v. Tysen, 3 Hill, 123-28 (N. Y. 1842), cases; Hubbard v. Hubbard, 8 N. Y. 199 (1853); 20 Pick. 278; 14 Mass. 31; 12 Gray, 501; 6 Whart. 255; 1 Story, 259.

[4] State v. Johnson, 12 Minn. 479 (1867), cases; Davie v. Briggs, 97 U. S. 637-38 (1878), cases, Harlan, J.; 13 F. R. 898.

[5] [1 Bl. Com. 110.

[6] United States v. Grush, 5 Mas. 298 (1829), Story, J.

[1] United States v. Seagrist, 4 Blatch. 422-23 (1860), cases.

[2] *Exp.* Byers, 32 F. R. 406 (1887), Brown, J.

[3] People v. Richmond County, 73 N. Y. 397 (1878), Andrews, J.

[4] R. S. §§ 4190-91.

[5] Arnould, Ins. 623.

[6] 1 Marshall, Ins. 317.

[7] See 1 Kent, 157; Sleght v. Rhinelander, 1 Johns. *203 (1806); Sleght v. Hartshorne, 2 *id.* 531 (1807).

[8] Storer v. Freeman, 6 Mass. *439 (1810), Parsons, C. J.; 17 Ala. 791; 31 Cal. 121; 34 Conn. 494; 40 *id.* 400; 123 Mass. 361; 23 N. J. L. 633; 23 Tex. 358.

land over which the daily tides ebb and flow.[1]

In the absence of evidence to the contrary, it will be presumed that the owner of land bordering on the sea-shore holds only to the ordinary high-water mark, and that the shore between high and low-water mark belongs to the State.[1]

Sea-worthy. Not, capable of going to sea or being navigated on the sea, but sound, stanch, and strong in all respects, and equipped, furnished, and provided with officers, men, provisions, and documents for a certain service. In a policy of insurance for a definite voyage, means "sufficient for such a vessel and voyage."[2]

The hull must be so tight, stanch, and strong as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo.[3]

The hull, tackle, apparel and furniture must be in such condition of strength and soundness as to resist the ordinary action of the sea, wind and waves.[4]

The question is to be determined with reference to the customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. If, by this standard, the ship is found in all respects to have been reasonably fit for the contemplated voyage, the warranty of sea-worthiness is complied with.[4]

The burden of proving unsea-worthiness is on the insurer, there being a *prima facie* presumption of sea-worthiness in favor of the assured.[4]

In the insurance of a vessel by a time-policy, the warranty of sea-worthiness is complied with if the vessel is sea-worthy at the commencement of the risk; the fact that she subsequently sustains damage, and is not properly refitted at an intermediate port, does not discharge the insurer from subsequent risk or loss, provided such loss is not the consequence of the omission. A defect of sea-worthiness, arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the insurer from liability for any loss which is the consequence of such bad faith or want of prudence or diligence; but does not affect the contract as to any other risk or loss covered by the policy, and not caused or increased by such particular defect.[5]

See ADMIRALTY; DANGERS; INSURANCE; MARINE; MARITIME; PIRACY, 1; VESSEL; WHARF; WRECK.

SEAL.[6] 1. An instrument for impressing wax made to adhere to a writing, in attestation of the genuineness of the writing or of the deliberation with which it is executed.

The impression produced with such instrument; also, any device allowed as a substitute for such impression.

The implement originally employed was a seal ring, and the substance wax, wafer, or other ceraceous matter. A substitute was a figured piece of leather or parchment, attached at the end of the document.

At common law, a scroll or scribble, a figure, an impression or other device in or upon the texture of the writing material is not a seal. But now, by enactment, these are almost universally allowed as substitutes. Corporate seals, and the seals of public officials and of notaries, are attached by means of a metallic die, and with or without wax or wafer.[7]

A seal is not necessarily of any particular form or figure; when not of wax nor made by a die, it is usually in the form of a scroll, but "L. S." or "Seal," inclosed in brackets or in some other design, are in common use. It may consist of the outline without any inclosure; it may be in the shape of a circle, an ellipse, a scroll, a rectangle, or an irregular figure; or it may be a simple dash or flourish of the pen. Its precise form cannot be defined; that depends upon taste or fancy. Whether an instrument is under seal or not is a question for the court upon inspection; whether a mark or character shall be held to be a seal depends upon the intention of the executant as shown by the paper.[8]

"In all cases where a seal is necessary by law, to any commission, process, or other instrument provided for by the laws of Congress, it shall be lawful to affix the proper seal by making an impression therewith directly on the paper to which such seal is necessary; which shall be as valid as if made on other adhesive substances."[9]

The use of seals as a mark of authenticity is very

[1] Land and Water Co. *v.* Richardson, 70 Cal. 206 (1886); United States *v.* Pacheco, 2 Wall. 590 (1864), Field, J.

[2] Capen *v.* Washington Ins. Co., 12 Cush. 536 (1853), Shaw, C. J.; 3 Kent, 205.

[3] Dupont *v.* Vance, 19 How. 167 (1856), Curtis, J.; The Little Hamilton, 18 F. R. 329-30 (1883); Hazard *v.* New England Mar. Ins. Co., 8 Pet. *581 (1834).

[4] The Orient, 4 Woods, 256 (1883); s. c. 16 F. R. 918.

[5] The Titania, 19 F. R. 107, 105-7 (1883), cases; Tidmarsh *v.* Washington Ins. Co., 4 Mas. 441 (1827), Story, Justice.

[6] Pickup *v.* Thames Ins. Co., L. R., 3 Q. B. D. 594 (1878); Moores *v.* Louisville Underwriters, 14 F. R. 226 (1882).

[1] Union Ins. Co. *v.* Smith, 124 U. S. 427 (1888), cases, Blatchford, J.

[2] F. *seel*, a signet: L. *sigillum*, a mark, seal.

[3] See 4 Kent, 452; 1 Am. Law Rev. 638-52 (1867), cases; 13 Ga. 162; 13 La. An. 524; 5 Pick. 497; 24 *id.* 417; 10 Allen, 331; 12 *id.* 337; 50 Me. 549; 42 Miss. 304; 5 Mo. 79; 5 N. J. E. 52; 6 N. J. L. 169; 11 *id.* 174; 1 Denio, 377; 5 Johns. 245; 5 Duer, 402; 17 Barb. 309; 3 Hill, 493; 5 Whart. 563; 1 S. & R. 72; 7 Leigh, 301; 5 Wis. 549.

[4] Hacker's Appeal, 121 Pa. — (1888). The testatrix wrote "In witness whereof I have hereunto set my hand and seal. Ellen Waln," placing a dash after her name. In the body of the will she had used a similar dash for a period.

[5] Act of Congress, 13 May, 1864: R. S. § 6.

ancient.[1] . . In the civil law they were the evidence of truth.[2] . . Among the Saxons, seals were little used; their method was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the *cross*. For the same reason the Normans, an illiterate nation, used sealing only; which custom continued after learning had made its way among them. The oldest sealed charter in England, that of Edward the Confessor to Westminster abbey, was witnessed by his seal only. At the Conquest (1066), the Norman lords introduced waxen seals. . . In the reign of Edward I (1272–1307), every freeman, and such of the villians as were fit to be put upon juries, had their individual seals. The impressions of these were a knight on horseback or other device; coats of arms were introduced by Richard I, who brought them from the crusades. . . This neglect of signing remained for a long time; for it was held in all books that sealing alone was sufficient to authenticate a deed: and so the common formula "sealed and delivered" continues to this day.[3]

Whenever a writing was read or exhibited as a person's last will, the praetorian court would not sustain it unless each of the seven witnesses had severally affixed his seal to the outside. This is the first appearance of sealing in the history of jurisprudence, considered as a mode of authentication. The use of seals, however, as mere fastenings, is doubtless of much higher antiquity. With the Romans, seals to wills and other documents of importance did not only attest the presence or assent of the signatary, but were also literally fastenings which had to be *broken* before the writing could be inspected.[4]

Formerly, wax was the most convenient and the only material used to receive the impressions. Hence it was said, *sigillum est cera impressa; quia cera, sine impressione, non est sigillum:*[5] a seal is wax impressed; wax without an impression is not a seal. This is not an allegation that an impression without wax is not a seal. The courts have held that an impression made on wafers or other adhesive substance capable of receiving an impression comes within the definition "*cera impressa*." If then wax be construed to be merely a general term including any substance capable of receiving and retaining the impression of a seal, paper, if it has that quality, may well be included in the category. The machine now used to impress public seals does not require any substance to receive or retain the impression, which is as well defined, as durable — less likely to be defaced than that made on wax. It is the seal which authenticates, not the substance impressed. Identity is all that is desired.[6]

The statute of 29 Charles II (1678) indicated a necessity that transfers of realty should be in writing and *signed*. In early days in England, a deed had to be sealed, whether signed or not.[1]

A seal to an instrument imports a consideration, or renders proof unnecessary. The presumption is that what is executed with so much deliberation (*q. v.*) and solemnity is founded upon sufficient cause.[2]

The present opinion is that parol authority is adequate to authorize an alteration or addition to be made to a sealed instrument.[3]

When a writing must be executed under seal, authority to an agent to execute it must be under seal. But where a seal is not vital to the contract, and the agent, unauthorized, signs with a seal, the instrument will still operate as a simple contract.[4]

Where a joint obligation concludes "witness our hands and seals," and contains but one seal, this will be deemed the seal of each of the signers.[5]

Bond, deed, covenant, conveyance, warrant of attorney, and like terms, import a sealed instrument.

A seal may destroy negotiability, *q. v.*; but not of corporation bonds, *q. v.*

In Missouri, a scroll must be referred to as a seal, in the body of the instrument.[6]

When the seal of a party, required to make an instrument valid, has been omitted by accident or mistake, a court of equity may adjudge the instrument binding.[7]

Common seal; corporate seal. The seal of a corporate body.

At common law, a corporation cannot manifest its intention by any personal act or oral discourse: it therefore acts and speaks only by its common seal. Though the particular members may express their private consent to act, by words or by signing their names, this does not bind the corporation: it is the fixing of the seal which unites the several assents of the individuals and makes one joint assent of the whole.[8]

The rule now is that for a contract of an ordinary every day occurrence a seal is not necessary; and that if such a contract has been executed, and the corporation has had the benefit of it, it must pay the price. The old rule still applies, however, to contracts of an extraordinary nature not within the usual business of the corporation.[9]

A corporation may bind itself by a contract not under its corporate seal, when the law does not re-

[1] 1 Kings, xxi, 8; Esther, viii, 8; Jeremiah, xxxii, 14.

[2] Institutes, 2, 10, 2–3.

[3] 2 Bl. Com. 305–6. See also 4 Kent, 452; Holmes, Com. Law, 272; Hare, Contr. 121; 1 Ves. Jr. 13; 1 Wils. 213.

[4] Maine, Ancient Law, 203–4.

[5] Coke, 3 Inst. 169.

[6] Pillow *v.* Roberts, 13 How. 473–74 (1851), Grier, J. See also Pierce *v.* Indseth, 106 U. S. 548 (1882), Field, J.; Alexander *v.* Jameson, 5 Binn. *241–47 (1812); Miller *v.* ble *et ux.*, 107 Pa. 399–400 (1884); 1 Reeves, Hist. : Law, 164, note.

[1] Miller *v.* Ruble *et ux.*, 107 Pa. 399 (1884); Pa. Act 21 March, 1772.

[2] Storm *v.* United States, 94 U. S. 84 (1876), cases; Bates *v.* Boston, &c. R. Co., 10 Allen, 253–56 (1865), cases; Warren *v.* Lynch, 5 Johns. *244 (1810).

[3] Drury *v.* Foster, 2 Wall. 33 (1864).

[4] Wagoner *v.* Watts, 44 N. J. L. 126 (1882).

[5] Bowman *v.* Robb, 6 Pa. 302 (1847).

[6] Dickens *v.* Miller, 12 Mo. Ap. 403 (1882).

[7] Bernards Township *v.* Stebbins, 109 U. S. 349 (1883), cases.

[8] 1 Bl. Com. 475; 4 Kent, 288.

[9] Clarke *v.* Cuckfield Union, 21 L. J., Q. B. 351 (1852); 4 Man. & G. 860.

quire the contract to be evidenced by a sealed instrument.[1]

The corporate seal is to be affixed to transfers of realty, and to powers to make such transfers.[2] See SPECIALTY.

Great seal; privy seal. Grants or letters-patent first pass by bill. This is then signed at the top with the king's own sign-manual, and sealed with his *privy signet*, which is in the custody of the secretary of state; and then sometimes immediately passes under the great seal. Otherwise the course is to carry an extract to the keeper of the *privy seal*, who makes out a writ or warrant thereupon to the chancery. So that the *sign-manual* is the warrant to the *privy seal*, and the privy seal to the *great seal*. But some grants pass through certain offices, as the admiralty or the treasury, in consequence of the presence of the *sign-manual* without the confirmation of the signet, the great or the privy seal.[3]

The office of lord chancellor (*q. v.*) is created by the mere delivery of the great seal into his custody: he having always had supervision of all such public instruments of the crown as were authenticated in the most solemn manner.[4]

Keeper of the seal. Of the great seal: an officer through whose hands pass all charters, grants, and commissions of the king under the great seal; the lord keeper of the great seal. Of the privy seal: an officer through whose hands pass all charters signed by the king before they come to the great seal; at present, the lord keeper of the privy seal.

To counterfeit the king's great or privy seal was high treason, and a branch of the *crimen falsi* or forgery.[5]

Public seal. A seal belonging to one of the departments of government, in particular of the executory department, and used to attest approval and genuineness — of official acts, of copies of public documents.

Seal, place of. The place on a document where a seal is attached or is to be attached. In Latin, *locus sigilli;* whence "L. S." — usually printed or written with an encircling scroll.

By long usage and general understanding, "L. S." is regarded as representing a seal, in copies of legal precepts.[1]

If incumbent on an officer to give a bond, and he furnishes an instrument having "L. S." instead of a seal, and, upon the strength thereof, assumes the duties of the office, he and his sureties will be held upon the instrument as upon a bond.[2] See NOTARY.

2, *v.* For a trial judge to certify by signing and sealing, or simply by signing, a statement of the exceptions taken to his rulings or charge is called "sealing a bill of exceptions."

It is sufficient, in the practice of the Supreme Court, if the bill is simply signed by the judge.[3] See further EXCEPTIONS, Bill of.

3, *v.* For a jury to write out and seal up their verdict, as, in an envelope, and then separate to meet and publish it in open court, is termed "sealing their verdict," *q. v.*

4. As to sealed letters, see LETTERS, 8; PUBLICATION, 2.

Seals. In Louisiana, the effects of a decedent may be taken into public custody by means of "seals."

If the heir wishes to obtain the benefit of inventory, and delay for deliberation, before committing an act of heirship, he must cause seals to be affixed to the effects by a judge, or a justice of the peace; and, after ten days, petition for the removal of the seals, and that an inventory be taken. The seals are placed on the bureaus and on the doors of the apartments which contain the effects and papers of the deceased, so that they cannot be opened without destroying the seals; and they are "raised," publicly, in the same manner.[4]

5. To make air-tight, usually with wax.

Placing wax upon the top of a cork in a bottle containing a sample of milk for analysis, and not extending the wax over the mouth so as to render the bottle air-tight, is not "sealing" it, within a statute providing for the preservation of alleged adulterated milk for use as evidence.[5]

SEAMAN. See SEA, Seaman.

SEARCH. A careful examination; an examination or inspection authorized by law. It may be (1) of legal records in their proper office, for acts and proceedings affecting title to realty, such as conveyances, mortgages, mechanics' liens, municipal liens, judgments. The *certificate* of such examination is also called a search; and *searcher* describes the person who makes the examination. See NAME, 1.

[1] Gottfried *v.* Miller, 104 U. S. 527 (1881), cases, Woods, J.; Bank of Columbia *v.* Patterson, 7 Cranch, 305-6 (1813), cases.

[2] 1 Whart. Ev. §§ 692-95, 735, cases.

[3] 2 Bl. Com. 347; 1 Steph. Com. 571.

[4] 3 Bl. Com. 46-47.

[5] 4 Bl. Com. 83, 89.

[1] Smith *v.* Butler, 25 N. H. 594 (1852).

[2] Board of Education *v.* Fonda, 77 N. Y. 355 (1879).

[3] Stanton *v.* Embrey, 93 U. S. 555 (1876), cases.

[4] See La. Civ. Code, arts. 1027-28, 1068-71, 1079, 1084.

[5] Commonwealth *v.* Lockhardt, 144 Mass. 182 (1887).

It may be (2) of a man's house, possessions, or person, for the discovery of proof of an offense with which he is charged.

In this sense a search may be for matter unlawfully deposited in the mails; for gambling apparatus; for implements used in counterfeiting; for intoxicating liquors kept for unlawful sale; or for other articles unlawfully concealed; also, for frauds attempted upon the revenue; and for liquors intended for illegal introduction into the Indian country.

Search-warrant. Written authority from a court or magistrate for the examination of a designated house or place for articles alleged to be concealed there contrary to law,—frequently for stolen property.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." [1]

Search for and seizure of stolen or forfeited goods, or goods concealed in order to avoid the payment of duties, are totally different things from a search for and a seizure of a man's private papers for use as evidence against him. In the one case the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws or concealed to avoid paying duties has been authorised by English statutes for two centuries, and by our revenue acts since the commencement of the government, the first act, that of July 31, 1789, being passed by the Congress which proposed the first ten amendments. To ascertain what was meant by "unreasonable searches and seizures," as used in the Fourth Amendment, it is only necessary to recall the controversies had upon the subject.

The practice had obtained in the colonies of issuing writs of assistance to revenue officers, empowering them in their discretion to search suspected places for smuggled goods. This practice had been bitterly denounced, as "placing the liberty of every man in the hands of every petty officer." In England, from 1762, when the *North Briton* was started by John Wilkes, to 1766, when the Commons condemned general warrants for the seizure of persons or papers, a controversy was carried on between the government and Wilkes, he insisting upon the abolition of certain abuses, chief among which was the issuing of general warrants by the secretary of state to search private houses for evidence against alleged libelers of the administration. Several numbers of the *North Briton* being viewed as heinously libelous, Lord Halifax issued a general warrant for the apprehension of the supposed offenders. On the authority of this warrant Wilkes's house was searched in his absence, and all his papers, including even his will, were indiscriminately seized. For the outrage Wilkes recovered a verdict of £1000 against one of the messengers who had made the search, and £4000 against Lord Halifax, who had issued the warrant. Another case, also fresh in memory in 1791, was that of *Entick* v. *Carrington*, for entering the plaintiff's dwelling, breaking open his desks, boxes, etc., and examining his papers. In this case Lord Camden pronounced the judgment of the court (on a special verdict) in 1765, and the law has ever since been regarded as settled, the decision being considered a land-mark in English history. The principles laid down affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense, but rather the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has not been forfeited by conviction for an offense. Any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of the judgment pronounced by Lord Camden.

The "unreasonable searches and seizures" condemned in the Fourth Amendment are most always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," throws light upon the question as to what is an "unreasonable search and seizure." Seizing a man's private books and papers to be used in evidence against him is not different from compelling him to be a witness against himself.[1]

See HEALTH, Boards of; POST-OFFICE; SEIZURE; SUBPŒNA, Duces; TRADE-MARK.

Right of search. The right in a belligerent to stop a neutral vessel on the high seas, to go on board of her, examine her papers, and, it may be, even her cargo — in short, to ascertain by personal inspection whether or not she is conveying hostile or contraband goods.

A war right; applicable to merchant ships alone; to be exercised in such a way as to attain its object, and nothing more. The duty of submitting to the search is well established in international law. Treaties

[1] Constitution, Amd. IV. Ratified Dec. 15, 1791. See provisions to same effect in the constitutions of the States.

[1] Boyd *v.* United States, 116 U. S. 616, 622-30, 633 (1886), Bradley, J. Revenue Act 22 June, 1874: R. S. § 3091.

See Semayne's Case, 5 Coke, 91 (1605); Wilkes's Case, 2 Wils. 150 (1763); Entick's Case, *ib.* 275 (1765); 2 Hale, P. C. 149; 2 Story, Const. § 1902; Cooley, Const. Lim. 300-8, cases; May's Const. Hist. Eng. c. II; 2 Bancroft's Hist. U. S. 414; 1 Sm. L. C. 183.

have been entered into regulating the exercise of the right.[1] See VISIT, 1.

SEAT. See PERMANENT; STOCK-EXCHANGE.

SEATED. Settled; actually occupied. Opposed, **unseated.** Said of land, in earlier legislation.

Residence without cultivation or cultivation without residence constitutes seated land. Temporary suspension of an actual occupation will not render seated land unseated.[2] A tract ceases to be unseated as soon as actually occupied with a view to permanent use.[3] The improvement of a part fixes the character of the whole tract as seated.[4] Land once seated may, by abandonment, become unseated.[5]

SEA-WORTHY. See SEA, Sea-worthy.

SEC. See SECUNDUM.

SECESSION. See GOVERNMENT, De facto.

SECK. See RENT, Rent-seck.

SECOND. See DISTRESS; EXCHANGE, 8; MORTGAGE; PUNISHMENT.

SECONDARY. See CONVEYANCE; EVIDENCE; USE, 3.

SECONDS. See BATTERY; DUEL.

SECRET. See CONCEAL; DISPOSE, 2; EQUITY; LIEN; PARTNER; POSSESSION, Adverse; SECRETE.

SECRETARY. See AGENT; DEPARTMENT; DESCRIPTIO; DIRECTORS.

SECRETE. Applies to any making away with property which puts it unlawfully out of the reach of a creditor.[6]

May be by putting legal impediments in the way by which he is prevented from getting possession in order to effect payment.[6] See BANKRUPTCY.

SECRETS, STATE'S. See COMMUNICATION, Privileged, 1.

SECT. See RELIGION; SECTARIAN.

SECTA. See SUIT, 1.

SECTARIAN. A religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party by holding sentiments or doctrines different from those of other sects or people. In the sense intended by the constitution of Nevada, every sect of that character is "sectarian."[1]

A Roman Catholic orphan asylum is a "sectarian institution," although only Catholic children are taught the principles of the Catholic church, and Protestant children the tenets common to all Christian people.[1] See RELIGION; SCHOOL, Public.

SECTION. See LANDS, Public; PARCEL, 2.

SECUNDUM. L. Following; according to.

Secundum allegata et probata. According to allegations and proofs. See ALLEGARE, Allegata, etc.

Secundum artem. According to the trade or calling.

Secundum legem. Conformably to law.

Secundum regulam. According to rule.

SECURE.[2] 1. To make safe or certain: to protect, insure, save, ascertain.[3]

Congress may secure to authors and inventors the exclusive right to their respective writings and discoveries.[4] The term does not here imply the protection of an acknowledged legal right. Acts passed in the exercise of the power create rights, rather than sanction previously existing rights.[5]

To "secure" a debt may mean to save it.[6]

2. To assure, guarantee, indemnify; to render certain that money will be paid or an obligation performed.

As, for a non-resident plaintiff to be required to secure payment of the costs (*q. v.*) of the suit he has instituted; for a debtor to secure his creditor by giving him a lien upon realty: the creditor being then said to be "secured."

A contract by which a vendor agrees to execute a conveyance as soon as the vendee "secures the payment" of the purchase-money, means, not when he pays it in money, but when he gives something by means of which payment may, at any future time, be procured or compelled.[6]

3. To procure; to perfect.

To "secure" a mechanic's lien means to do such acts as will perfect an incipient lien, that is, make it available.[7]

Security. (1) An instrument which guarantees the certainty of some specific thing, as, payment or performance.

(2) A surety.

Written after the name of one who signs a promissory note, means "surety."[8] See SURETY.

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[1] Woolsey, Int. Law, § 208; 1 Kent, 154; 6 Webster's Works, 329, 335; 11 Edinb. Rev. 9; 35 Foreign Quar. Rev. 211.

[2] 5 Pet. *468; 6 Watts, 209; 55 Pa. 90; 73 *id.* 418; 15 W. N. C. 262.

[3] 7 W. & S. 248.

[4] 2 Watts, 421; 19 Pa. 223; 29 *id.* 106; 34 *id.* 332.

[5] 9 Watts, 156; 4 Pa. 214; 6 *id.* 210; 38 *id.* 40; 56 *id.* 374.

[6] Gault *v.* Dussault, 4 Can. Leg. News, 321 (1881); 3 *id.* 258.

[1] State *v.* Hallock, 16 Nev. 385 (1882), Leonard, C. J.

[2] L. *se-curus*, free from anxiety.

[3] Wheaton *v.* Peters, 8 Pet. *660 (1834), M'Lean, J.

[4] Constitution, Art. I, sec. 8.

[5] Oliver *v.* Sterling, 20 Ohio St. 401 (1870).

[6] Foot *v.* Webb, 59 Barb. 52 (1866).

[7] Boston *v.* Chesapeake, &c. R. Co., 76 Va. 181 (1882).

[8] Favorite *v.* Stidham, 84 Ind. 495 (1882).

(3) Individual safety. See *Personal Security* (2).

Securities. Written assurances for the return or payment of money; evidences of indebtedness.

In popular acceptation, includes bills of exchange, promissory notes, and bonds for the payment of money.[1]

Collateral security. A security side by side with, or in addition to, other security as the primary or principal obligation, or additional to the debtor's own engagement. Thus, when one man covenants with another, and enters into a bond to perform the covenant, the bond is the collateral security.[2] A bond accompanying a mortgage is another example. Such security is frequently termed the "collateral," and the plural "collaterals" is in general use.

A separate obligation, attached to another contract to guarantee its performance; also, a transfer of property, or of another contract, to insure the performance of the principal engagement.[3]

The transfer establishes a privity of contract which invests the creditor with ownership of the securities for the purposes of dominion over the debt assigned.[4]

The creditor must use due diligence to collect a promissory note left with him as collateral security, or suffer the loss of the amount of it.[5] He should give notice of his intention to sell the security, after default of payment, and also of the time and place of sale, in the absence of a contract to sell *ex mero motu*.[6] But he is not bound to apply the collateral before enforcing his direct remedy against the debtor.[7]

The collateral may be redelivered for collection by the debtor as trustee for the pledgee.[8]

It may be regarded as settled in commercial jurisprudence — there being no statutory regulation to the contrary — that where negotiable paper is received in payment of an antecedent debt; or where it is transferred by indorsement as collateral security for a debt created, or a purchase made, at the time of the transfer; or the transfer is to secure a debt, not due, under an agreement expressed or to be clearly implied from the circumstances that the collection of the principal debt is to be postponed or delayed until the collateral matured; or where time is agreed to be given and is actually given upon a debt overdue, in consideration of the transfer of negotiable paper as collateral security therefor; or where the transferred note takes the place of other paper previously pledged as collateral for a debt, either at the time such debt was contracted or before it became due,— in each case the holder who takes the transferred paper before its maturity, and without notice, actual or otherwise, of any defense thereto, is held to have received it in the due course of business, and becomes a holder for value, entitled to enforce payment, without regard to any equity or defense which exists between parties to the paper. . . But there is a conflict of authority where the note is transferred before maturity as collateral security merely, without other circumstances, for a debt previously created. Abundant authority sustains the position that if such paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, that transfer is not an improper use of the paper, and is as much in the usual course of commercial business as is its transfer in payment of such debt. In either case the *bona fide* holder is unaffected by equities or defenses between the prior parties of which he had no notice.[1]

The doctrine as to an antecedent debt does not apply to an instrument conveying property as security in consideration only of pre-existing indebtedness.[2]

The decided weight of authority is that antecedent indebtedness constitutes ample consideration for a new contract.[3]

Counter-security. Security given to a person who has become surety for another.

The condition is that if he who first became surety shall suffer expense or loss, the person accommodated will indemnify him.

Marshal securities. See MARSHAL, 2.

Personal security. (1) Evidence of indebtedness which binds the personalty of the debtor; choses in action or other personal estate pledged to the performance of a contract. Opposed, *real security:* an obligation in the nature of a lien on land.

(2) Security of the person; right of personal security: consisting in a person's legal and uninterrupted enjoyment of his life, limbs, body, health, and reputation,[4] *qq. v.* See also LIBERTY, 1; RIGHT, 2.

[1] Jennings *v.* Davis, 31 Conn. 139-40 (1862).

[2] Chambersburg Ins. Co. *v.* Smith, 11 Pa. 127 (1849), Coulter, J.; Shoemaker *v.* Nat. Mechanics' Bank, 2 Abb. U. S. 423 (1869).

[3] [Lochrane *v.* Solomen, 28 Ga. 292 (1868).

[4] Hanna *v.* Holton, 78 Pa. 334 (1875).

[5] Semple Manuf. Co. *v.* Detwiler, 30 Kan. 398-99 (1883), cases.

[6] Davis *v.* Funk, 39 Pa. 250 (1861); Loomis *v.* Stave, 72 Ill. 628 (1874); 2 Kent, 581-83; Story, Bailm. § 310.

[7] Lewis *v.* United States, 92 U. S. 623 (1875), cases.

[8] White *v.* Platt, 5 Denio, 269 (1848); Clark *v.* Iselin, 21 Wall. 368 (1874).

[1] Brooklyn City & Newton R. Co. *v.* Nat. Bank of the Republic of New York, 102 U. S. 25-28 (1880), cases, Harlan, J. Clifford and Bradley, JJ., filed concurring opinions; Miller and Field, JJ., dissented.

[2] People's Saving Bank *v.* Bates, 120 U. S. 564-67 (1887), cases.

[3] Merchants' Bank *v.* McClelland, 9 Col. 610 (1886), cases.

[4] [1 Bl. Com. 129; Wabash, &c. R. Co. *v.* Shacklet, 105 Ill. 379 (1883).

Public security. The safety or protection of the community. See POLICE, 2.

Public securities. Evidences of indebtedness on the part of the people of a State or of the United States.

May mean securities issued under legislative sanction in furtherance of works deemed promotive of the interests of the public.[1]

Railroad bonds are not "public securities," within the ordinary meaning of those terms.[2] See DEBT, Public.

See generally AVAILABLE; BOND; DEPOSIT, 2; OBLIGATION, 4; TAX, 2.

SECUS. L. Otherwise; to the contrary effect.

SED. L. But.

Sed quære. But examine. **Sed vide.** But see. Expressions which direct attention to a case or authority supporting a doctrine contrary to that laid down. See QUÆRE.

SEDGE FLAT. A tract of land below high-water mark.[3] See MEADOW.

SEDITION.[4] Conduct tending toward treason, but wanting an overt act; attempts made, by meetings or speeches, or by publications, to disturb the tranquillity of the state, which do not amount to treason.[5] Called seditious conspiracies and libels.

A seditious libel tends to excite disaffection with the government, and thus induce a revolutionary spirit.[6]

The act of Congress of July 14, 1798, was called the "sedition law," because its object was to prevent political disturbances. It was limited to a short duration, and expired by limitation; its constitutionality was questioned, but never passed upon by the courts.[7]

See SEARCH-WARRANT.

SEDUCE.[8] "Seduce" and "entice" are often used indifferently in the old, and sometimes in the later, books. A journeyman was said to be seduced when enticed away from his employer's service.[9]

Although a general term, having a variety of meanings according to the subject to which it is applied, when referring to the conduct of a man toward a female is universally understood to mean: an enticement of her on his part to the surrender of her chastity, by means of some art, influence, promise or deception calculated to accomplish that object, and to include yielding of her person to him.[1]

Seduction. The use of some influence, promise, art, or other means on the part of a man by which he induces a woman to surrender her chastity and virtue to his embraces.[2]

While now a crime in most of the States, at common law was not so. An injured husband had an action for criminal "conversation;" but a parent or master had no standing in court unless the female as daughter or domestic owed him service, and, in consequence of the seduction, she was in some degree less able to assist in housewifery work; or, unless there was a trespass upon property. The law, while punishing even with death acts of violence against women, left her chastity exposed to the artifices of the seducer.[3]

An action for seduction grows out of the loss of service in the relation of master and servant. Some service, however trivial, must be shown to have been done and to have been due from the female to the plaintiff.[4]

The consent of a minor daughter is no defense to an action by the father; and he should be allowed compensation for his mental suffering as well as for the loss of services, etc.[5]

But the parent cannot recover damages when, with his knowledge, the defendant and his daughter slept together according to the custom known as "bundling."[6]

The age of consent, in at least twenty States, until recently, was ten years. It has been raised to fourteen in Connecticut, Illinois, Ohio, Wisconsin, and Vermont; to fifteen in Nebraska; to sixteen in Michigan, New Jersey, and Pennsylvania; and to eighteen in Colorado and Kansas. In England, since 1886, it has been sixteen.[7]

See CHASTE; CONVERSATION, 1; DEBAUCH; FORNICATION.

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[1] Hall *v.* Commissioners, 10 Allen, 102 (1865); 46 Vt. 786.

[2] Hale *v.* Commissioners, 137 Mass. 114 (1884). As to watering railroad securities, see 21 Am. Law Rev. 696-704 (1887), cases.

[3] Church *v.* Meeker, 34 Conn. 424 (1867).

[4] L. *seditio*, a going apart, dissension.

[5] Abbott's Law Dict.

[6] Cooley, Const. Lim. 426-30; 2 Steph. Hist. Cr. Law Eng. 377; Queen *v.* O'Brien, 4 Cr. Law Mag. 424 (1883); Whart. St. Tr. 22.

[7] 2 Story, Const. §§ 1292-94.

[8] L. *se-ducere*, to lead aside, astray.

[9] Bigelow, Torts, 139. See Lumley *v.* Gye, 2 El. & B. 216 (1853); Bigelow, Ld. Cas. Torts, 306, 325-28, cases.

[1] State *v.* Bierce, 27 Conn. 320 (1858), Storrs, C. J.

[2] [Croghan *v.* State, 22 Wis. 445 (1868), Cole, J. See also 40 Ark. 482; 77 Ind. 334; 38 Iowa, 224; 106 Mass. 488; 11 Mich. 278; 17 Pa. 126; 100 *id.* 28.

[3] 3 Christian, Bl. Com. *140, 142; 4 Bl. Com. 212; 1 B. & Ald. 722.

[4] Wood *v.* State, 48 Ga. 282 (1873); Kinney *v.* Laughenour, 89 N. C. 367-68 (1883); Wood, Master & S. § 245; Martin *v.* Payne, 9 Johns. 387 (1812): Bigelow, Ld. Cas. Torts, 286, 290-305, cases.

[5] Barbour *v.* Stephenson, 32 F. R. 66 (1887).

[6] Hollis *v.* Wells, 3 Clark, *30 (Pa., 1845).

[7] See generally 3 Cr. Law Mag. 331-47 (1889), cases.

SEED. See GRAIN.

Millet seed, not in its natural state, but having the outer hull removed and used for making soup and for bird food, was found by a jury not to be seed within the meaning of the tariff laws.[1]

SEISIN.[2] The possession of land under a claim, either express or implied by law, of an estate amounting at least to a freehold.[3] See SEISINA.

Ordinarily, a possession in fact by one having or claiming a freehold interest.

This is known as a *seisin in deed;* the right of immediate possession is a *seisin in law.* There may be a *constructive seisin*, which is the equivalent of a seisin in deed.[4]

Originally, seisin was the completion of the feudal investiture; it now means ownership. A "covenant of seisin" and a "covenant of right to convey" are synonymous.[5]

In Missouri, a covenant of seisin is a covenant of indemnity, and runs with the land to the extent that if the covenantee takes any estate, however defeasible, or if possession accompanies the deed, though no title passes, the covenant enures to the subsequent grantee who sustains the loss.[6] See COVENANT, Real.

Livery of seisin. Pure feudal investiture or delivery of corporal possession of land or of a tenement.[7]

Held absolutely necessary to complete a donation.[8] See DELIVERY, 1; DEMESNE.

Disseisin. Ouster or deprivation of a freehold. A wrongful putting of him out of that is seised of a freehold,—is in actual possession.[9]

Where one man invades the possession of another, and by force or surprise turns him out of the occupation of lands: being a deprivation of that actual seisin, or corporal freehold of the lands, which the tenant before enjoyed.[9]

Disseisor. A person who intrudes and ejects another from his possession of an estate of freehold. *Disseisee.* The freeholder so ejected.

The law will not construe a possession to be tortious unless from necessity. It considers every possession lawful, the commencement and continuance of which is not proved to be wrongful Where, then, a naked possession is in proof, unaccompanied by evidence as to its origin, it will be deemed lawful, and co-extensive with the right set up by the party. If he claims only a limited estate, the law will not, contrary to his intentions, enlarge it to a fee. And it is only when he is proved to be in by disseisin that the law will construe it to be a disseisin of the fee, and abridge him of his right to qualify his wrong.[1]

Purchase of the rights of a disseisee (called "buying title") was not permitted at common law: one could not sell a quarrel or lawsuit; and was made an offense by 36 Henry VIII (1545), c. 9. It is generally disallowed in the United States, but not so in Illinois, Missouri, and Pennsylvania.[2] See CHAMPERTY.

SEISINA. L. Actual possession of an estate of freehold; seisin, *q. v.*

Habere facias seisinam. That you cause to obtain seisin. The emphatic words of a writ of execution by which the sheriff delivered possession of a freehold to the demandant.[3]

Seisina facit stipitem. Seisin makes the stock. Actual seisin formerly made a person the root or stock from which inheritance by blood was derived.[4]

Discarded by 3 and 4 Wm. IV (1834), c. 106; and believed to be so in all the States. Descent is now traced from the last "purchaser"—the person last entitled who did not himself inherit.[5] See DESCENT.

SEIZURE. Taking a thing into possession, or custody of the law; caption of property by authority of law; manucaption.

Examples are: taking property under an alleged forfeiture, or by virtue of a right to hold it under an attachment, or to sell it on an execution.

1. The manner, and whether actual or constructive, depends upon the nature of the thing. As applied to objects capable of manual delivery, the term means "caption:" the physical taking into custody.[6] Compare ARREST, 2 (1).

The modes vary; land cannot be seized as a movable may be; actual manucaption cannot be taken of stocks and credits.

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[1] Nordlinger v. Robertson, 33 F. R. 941 (1887).

[2] F. *seisin*, to make to possess or sit upon. See Webster's Dict. "Seize."

[3] Towle v. Ayer, 8 N. H. 59 (1835), Richardson, C. J.

[4] Jenkins v. Fahey, 73 N. Y. 362 (1878); Hart v. Dean, 2 MacAr. 63 (1875).

[5] Cook v. Hammond, 4 Mas. 488 (1827), Story, J.; McNitt v. Turner, 16 Wall. 361 (1872); Ford v. Garner, 49 Ala. 603 (1873), Peters, C. J.; Green v. Liter, 8 Cranch, 242-49 (1814); 4 Kent, 386.

[6] Allen v. Kennedy, 91 Mo. 329 (1886), cases.

[7] [2 Bl. Com. 311; 1 Washb. R. P. 32-35.

[8] [3 Bl. Com. 169.

[9] [3 Bl. Com. 195; 5 Pet. *439; 5 Conn. 257, 518; 58 Ill. 389; 56 Me. 268; 6 Metc. 537, 444; 14 Pick. 294; 2 Wend. 166.

[1] Ricard v. Williams, 7 Wheat. 107 (1822), Story, J.

[2] 3 Washb. R. P. 329. As to seisin of chattels, see 1 Law Quar. Rev. 324 (1885); the mystery of seisin, 2 *id.* 481-96 (1886).

[3] 3 Bl. Com. 412; 2 *id.* 359.

[4] 2 Bl. Com. 209.

[5] See 4 Kent, 388-89; 1 Steph. Com. 367.

[6] Pelham v. Rose, 9 Wall. 106 (1869), Field, J.

Seizures are actual or constructive. Taking part of the goods in a house in the name of the whole may be a good seizure of all. An assertion of control, with a present power and intent to execute it, may be sufficient.[1]

To constitute a valid seizure, so as to entitle the party to the proceeds of a forfeiture, there must be an open, visible possession claimed, and authority exercised under the seizure. A seizure, once voluntarily abandoned, loses its validity.[2] See PROCURE; SUFFER.

Section 3895, Rev. St., does not constitute a postmaster a seizing or detaining officer of suspected letters. It merely directs the disposition to be made of letters "seized or detained for violation of law" under other statutory provisions.[3] See POST-OFFICE; SEARCH.

2. In marine insurance, the taking of a ship by the act of public authority for a violation of the laws of trade, or some rule or regulation instituted as a matter of municipal police, or in consequence of an existing state of war.[4]

See ADMIRALTY; MARSHAL, 1 (2); PROSECUTION, Malicious; RES, 2.

SELECT. See COUNCIL, 2.

Selectman. In several States, management of the public affairs of towns is intrusted to boards of officers called selectmen.

SELF. See DEFENSE, 1; SUI.

SELL. See SALE; RETAIL. Compare DISCOUNT.

SEMBLE.[5] It seems; seemingly. In written decisions, and in notes to cases, indicates that the statement following is an expression of opinion as to what a decision on the particular point would be. Compare DICTUM, 2.

SEMI PROBATIO. See OATH, Suppletory.

SEMINARY. Has no definite legal meaning; is used in a general way to designate institutions for the promotion of learning.[6]

In a statute exempting from taxation "public school-houses, academies, colleges, universities, and all seminaries of learning," was held to denote any and every place of training or institution of learning not already specifically named, and therefore inclusive of a parish school.[7] See SCHOOL.

SEMPER. L. Always; ever.

Semper paratus. Always ready. In common-law practice, a plea that the defendant always has been and still is ready to do what is demanded of him.

Following a tender by the debtor and a refusal by the creditor, will at least save the costs of the suit to the defendant. In French, *tout temps prist.*[1] See TENDER, 2.

SEN. In New York reports, senator.

SENATE. See CONGRESS; HOUSE, 2.

SENILE. See DEMENTIA.

SENIOR. In military usage, "senior" may refer to the person longest in continuous service. Webster defines the adjective as meaning "more advanced in life; older in office or dignity; prior in age or rank; elder;" and the noun as "one older in office, or whose entrance upon an office was anterior to that of another:" which may mean, not one who entered upon his present term of office first, but one who has been longest in the office. On the other hand, the word may refer to the person, as, a judge, who has served longest under his present commission.[2] See JUDGE, Senior; JUNIOR; NAME, 1.

SENSE. Meaning; import. See SENSUS.

In the construction (*q. v.*) of instruments and documents of the various kinds, words are said to be used in their "common," "popular," "ordinary" sense, or else in an "artificial" or "technical" sense.

Insensible. Unintelligible.

A pleading which omits a material word may be "insensible," and therefore bad.[3]

SENSUS. L. Sense; signification.

Malus sensus. The bad sense. *In malo sensu*, or *malo sensu.* In the less favorable acceptation.

Mitior sensus. The milder meaning. *In mitiori sensu.* In the more favorable acceptation.

The old rule was that language alleged to be defamatory was to be interpreted in the sense most favorable to the defendant. In modern practice, that meaning is attributed which the words ordinarily bear under the circumstances in which they were used.[4] See LIBEL, 5; SLANDER.

SENTENCE.[5] A final determination by a criminal court, or (but less frequently) by a court of admiralty.

[1] Miller *v.* United States, 11 Wall. 296 (1870), Strong, J.
[2] The Segunda, 10 Wheat. 325 (1825), Story, J.
[3] Lotteries, 16 Op. Att-Gen. 5 (1878).
[4] Greene *v.* Pacific Mutual Ins. Co., 9 Allen, 222 (1864), Bigelow, C. J.
[5] F. *sembler*, to seem: L. *similis*, like.
[6] Chegaray *v.* Mayor of New York, 13 N. Y. 229 (1855).
[7] County of Hennepin *v.* Grace, 27 Minn. 506 (1881).

[1] See 3 Bl. Com. 303.
[2] State *ex rel.* Belford *v.* Hueston, 44 Ohio St. 6 (1886), Spear, J.
[3] Steph. Plead. 414.
[4] Reeves *v.* Bowden, 97 N. C. 29 (1887).
[5] F. *sentence:* L. *sententia*, way of thinking.

"Judgment" is generally used of a decision in a civil, common-law tribunal; and "decree" of a decision in a court of equity or admiralty.

"Sentence," or judgment, appropriately denotes the action of a court of criminal jurisdiction in declaring the consequences to a convict of the fact of guilt, confessed or ascertained by verdict.[1]

Where, upon the trial of an indictment containing several counts charging distinct misdemeanors, identical in character, a general verdict of guilty is rendered, or a verdict of guilty upon two or more specified counts, the court has no power to impose a sentence or cumulative sentences exceeding in the aggregate what is prescribed as the maximum punishment for an offense of the character charged.[2]

In such case the court *has* power to pass separate sentences exceeding in the aggregate the maxim punishment for the offense. . . One judgment only can be passed upon a single indictment, and each count is, in effect, a distinct indictment.[3]

It is not error to make one term of imprisonment commence when another ends. There is no other mode by which a delinquent may be sentenced on several convictions.[4]

The judgment having been executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offense is at an end.[5] And so, also, as to other offenses as to which sentence was not imposed.[6]

In the absence of express power, the court cannot at a subsequent term alter its sentence.[7]

A court has power to *remand* a convict for sentence for as long a period as may be deemed advantageous to the ends of justice, and in the meantime to receive evidence as to what would be an appropriate sentence, where the court has discretion.[7]

Power to *suspend* sentence is inherent in the court. It is indispensable to the interests of public justice; it rests upon grounds of public policy, or of legal necessity.[8]

The inquiry whether a convicted person has anything to say "why sentence should not be passed" upon him, is supposed to have originated at a time when prisoners were not allowed counsel, in order to enable them to move in arrest of judgment any matter sufficient to stay sentence.

See further CONVICTION; ERROR, 2 (3); JUDGMENT; PARDON; REPRIEVE.

SEPARATE.[1] 1, *v.* To part company. See JURY, p. 585, c. 2.

2, *adj.* Severed or severable; set apart; distinct; existing, belonging to, enjoyed, maintained or maintainable by or for one person or class; entirely one's own, individual; independent, exclusive. Opposed, *common, joint, firm, partnership.*

As, separate — acknowledgment, action, assets, claim, covenant, debt, earnings, estate, examination, maintenance, property, school, trial, *qq. v.* See also PARTNERSHIP.

The separate estate of a married woman is that alone of which she has the exclusive control, independent of her husband, and the proceeds of which she may dispose of as she pleases.[2]

At common law, separate property in a wife is an estate, held in its use and title, for the benefit and advantage of the wife.[3]

"Separate" is the most apt word for creating a trust for the benefit of a married woman; it will of itself exclude the marital rights of her husband.[4]

In the absence of "sole and separate" or equivalent words, or of a provision that excludes the marital rights of the husband, or that gives the wife powers inconsistent with the disabilities of coverture, the rights of the husband will attach.[5] See SOLE.

The English doctrine is that the wife's capacity to dispose of property settled to her separate use is absolute, unless she is expressly restrained by the terms of the settlement; and, generally speaking, the property is bound by her contracts. In the United States the decisions as to her power over her property, and its liability for her engagements, have not been uniform; but the tendency of legislation is to enlarge her power. The American doctrine is that she has no powers except such as are given by the trust instrument, and that these must be strictly pursued. This is the law in Illinois, Mississippi, Ohio, Pennsylvania, Rhode Island, South Carolina (since 1811), Tennessee, and, formerly, in Maryland. The English doctrine has been followed in Alabama, California, Connecticut,

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[1] [Commonwealth *v.* Lockwood, 109 Mass. 325 (1872), Gray, J.

[2] People *ex rel.* Tweed *v.* Liscomb, 60 N. Y. 560 (1875).

[3] Castro ("Tichborne") *v.* The Queen, 43 L. T. 78 (1880). Affirmed in the House of Lords, 44 *id.* 350 (1881), cases. See also *Re* Donnelly, 30 Kan. 494 (1883); Commonwealth *v.* Foster, 122 Mass. 318-19 (1877); *Exp.* Bryan, 76 Mo. 253 (1882); *Re* Haynes, 30 F. R. 769 (1887).

[4] Kite *v.* Commonwealth, 11 Metc. 585 (1846).

[5] *Exp.* Lange, 18 Wall. 176 (1873).

[6] Commonwealth *v.* Foster, 122 Mass. 319 (1877), cases.

[7] Commonwealth *v.* Mayloy, 57 Pa. 291 (1868); State *v.* Addy, 43 N. J. L. 116 (1881).

[8] People *v.* Mueller, 4 Cr. Law Mag. 735-39 (1883), cases,— Cir. Ct. Cook Co., Ill. See also State *v.* Addy, 43 N. J. L. 114 (1881), cases; Commonwealth *v.* Dowdican's Bail, 115 Mass. 136 (1874).

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[1] L. *se-parare*, to set or put apart.

[2] Petty *v.* Malier, 14 B. Mon. 247 (1853), Simpson, J.; Bowen *v.* Sebree, 2 Bush, 115 (1867); Alston *v.* Rowles, 18 Fla. 126 (1870).

[3] George *v.* Ransom, 15 Cal. 324 (1860); Dow *v.* Gould, 31 *id.* 637 (1867).

[4] Lewis *v.* Mathews, L. R., 2 Eq. 179 (1866); Massey *v.* Rowen, L. R., 4 H. L. C. 294 (1869); Christian *v.* Gunn, 80 Va. 372 (1885); Tullett *v.* Armstrong, 1 Beav. 1, 33 (1838).

[5] Vail *v.* Vail, 49 Conn. 52 (1881), cases; Kutcher *v.* Williams, 40 N. J. E. 438 (1885); 133 Mass. 178.

Florida, Georgia, Kentucky, Maryland, Minnesota, Missouri, North Carolina, New Jersey, New York, Virginia, and Vermont, and in the Federal courts. The tendency is toward placing her *legal* and *equitable* separate estates, as far as regards her power over them, upon the same footing.[1]

See ANTICIPATION, 1; HUSBAND; JOINDER; JOINT; RIGHT, 2, In own.

Separation. Cessation of cohabitation between husband and wife, by agreement.[2]

Divorce from bed and board is sometimes called a "separation," leaving the word "divorce" to refer to the dissolution of a valid marriage.[3]

The agreement is usually evidenced by *articles* or a *deed of separation*.

"Voluntary separation," or such as is mutual between the parties, is used in contradistinction to such as is "by sentence of court," that is, "separation *a mensa et thoro*," or "judicial separation."

In some States, the expression "judicial separation" has given way to "divorce *a vinculo*;" in others, it is still in use, being granted for any cause not sufficient to authorize an absolute divorce.

Such separation works no change in the relation of the parties, toward each other or toward third persons, except in authorizing them to live apart until they may choose to live together again. A reconciliation, of its own force, annuls a sentence of separation.

When the terms upon which a voluntary separation takes place are not unreasonable, particularly as regards the rights and claims of the wife, the contract is likely to be upheld as valid.[4]

There are serious objections to voluntary separations between married persons. Nevertheless, contracts for the separate maintenance of the wife, through the intervention of a trustee, have received the sanction of the courts for so long a period that the law must be considered as settled. His covenant to support her, where the consideration is apparent, will be enforced, if it appears that the deed was not made in contemplation of a future possible separation, but in respect to one which was to occur immediately, or for the continuance of one already taken place; especially so, if the separation was occasioned by the misconduct of the husband, and the provision is reasonable, and not more than the court would have decreed as alimony.[5] See DESERTION, 1; DIVORCE; HUSBAND.

SEPULCHER. The place where the body of a human being is buried; a grave.

Violation of sepulcher is the misdemeanor of willfully and unlawfully opening a tomb, vault, or grave, and clandestinely removing the corpse therefrom. The offense has been extended to include the mutilation of gravestones, monuments, fences, shrubbery, etc., in places of interment See BURIAL.

SEQUESTRATION.[2] Separating or setting aside a thing in controversy from the possession of the contending parties.

1. Gathering and taking care of the fruits and profits of a vacant benefice for the benefit of the next incumbent.[3]

Also, an execution against the profits of a benefice to collect the same for the plaintiff till the full sum is realized.[4]

2. A remedy, in equity practice, by which property is taken possession of by a court in order to enforce obedience to a decree, or to preserve it in its integrity during the time that a controversy respecting it is pending.

Issued at common law, when a defendant eluded service of process, and after a commission of rebellion was returned *non est inventus*. It seizes all personalty, and the profits of realty, and detains them subject to order.[5]

It issues either as a mesne process, on the defendant's not appearing or not answering, after the whole process of contempt has been spent against him; or as a judicial process, in pursuance of a decree, and to enforce the specific performance of it.[6]

Where, by the election of a widow to take under the law rather than under her husband's will, a benefit accrues to some legatees and a loss is entailed upon others, the income or annual value of the benefits intended for the widow and the first class of legatees may be sequestered for the purpose of securing compensation to the latter class. As, when, from such election, a residuary legatee is disappointed and a general pecuniary legatee is benefited.[7]

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[1] See 1 Ld. Cas. Eq. 741; Schoul. H. & W. III; Perry, Trusts, § 655; Hill, Trustees, 657; Bisp. Eq. IV; 17 Ala. 805; 26 *id.* 213; 23 Cal. 554; 20 Conn. 175; 4 Fla. 418; 12 Ga. 200; 32 *id.* 604; 41 *id.* 147; 128 U. S. 236; 23 Ill. 209; 61 *id.* 426; 10 B. Mon. 320; 16 *id.* 482, and statute since; 5 Md. 219; 11 *id.* 492; 26 *id.* 5; 12 Minn. 430; 4 N. J. E. 512; 28 *id.* 529; 17 Johns. 548; 18 N. Y. 265; 22 *id.* 456; 14 Ohio St. 519; 1 Rawle, 231; 4 Pa. 93; 65 *id.* 430; 86 *id.* 380; 2 R. I. 355; 3 Desseu. 417; 1 Hill, Ch. 228; 1 Strob. E. 27; 8 Humph. 159; 1 Cold. 461; 2 Leigh, 183; 37 Vt. 78; 13 Blatch. 268; 9 Wall. 119. On executions against her separate estate, see 21 Cent. Law J. 44-49 (1885), cases; as to wife dealing with it, 24 Am. Law Reg. 670-78 (1885), cases.

[2] 2 Bishop, Mar. & D. § 225.

[3] See 1 Bishop, Mar. & D. §§ 550-58, cases.

[1] Walker *v.* Walker, 9 Wall. 750-51 (1869), cases, Davis, J.

[2] L. *sequestrare*, to lay aside, surrender: *sequester*, a mediator, trustee.

[3] See 2 Arch. Pract. 966.

[4] [3 Bl. Com. 418.

[5] [3 Bl. Com. 444.]

[6] Herman, Executions, § 41.

[7] McReynolds *v.* Counts, 9 Gratt. 342, 344 (1852); Firth *v.* Denny, 2 Allen, 468 (1861); Van Dyke's Appeal, 60 Pa. 381 (1869); Sandoe's Appeal, 65 *id.* 314 (1870); Gallagher's Appeal, 87 *id.* 200 (1878); Young's Appeal, 108 *id.* 17 (1885).

Sequestrator. The person who is placed in charge of sequestered property.

The same general rules apply to him as to a receiver,[1] *q. v.*

SERGEANT or SERJEANT.[2] In England, the title of several officers.

Sergeant-at-arms. An executive officer to a legislative body, and to a court of chancery, one of whose duties is to arrest for contempt.[3]

Sergeant-at-law. A barrister of the common-law courts, of high standing.

These sergeants seem to have derived their title from the old knights templars, and have continued as a separate fraternity from an early period. Until 1834 they had the exclusive privilege of practicing in the courts of common pleas.[4]

A species of advocate or counsel, but not qualified to execute the full office of advocate till of sixteen years standing; at which time he may be called to the state and degree of serjeant—*servientes ad legem*. The first king's counsel under this degree was Sir Francis Bacon.[5]

The degree was deprived of its peculiar advantage, audience in the common pleas, by 9 and 10 Vict. (1846), c. 54, which extends to all barristers the privileges of sergeants. In 1839 the court of common pleas had decided that the crown, by a mere order, could not open that court to the bar at large, and thereby deprive the sergeants of the enjoyment of an immemorial office.[6]

Sergeantry. See FEUDAL SYSTEM.

SERIATIM. L. In a series: severally; successively: as, the judges delivered opinions *seriatim;* questions to be answered *seriatim*.

SERIES. See BOND.

SERIOUS. "Serious bodily harm" is synonymous with "great bodily harm."[7]

SERVANT. 1. An assistant about the work of a household; a menial; a domestic; a family servant.

A person hired for wages to work as the employer may direct.[8]

A hireling who makes a part of a man's family, employed for money to assist in the economy of the family or in matters connected with it; a person who, from the nature of the station, must render servile offices within the walls of a house.[1]

One who is engaged not merely in doing work or services for another, but who is in his service, usually upon or about the premises or property of his employer, subject to his direction and control therein, and liable to be dismissed.[2]

A "domestic" servant resides in the house with the master he serves; he is not one whose employment is outside, as, a farm-hand who sleeps and eats outside though he performs chores within the house.[3] See FAMILY.

2. A person employed to assist another in any vocation, but without the powers of an "agent."

3. An employee, in the broadest sense, and inclusive of "agent."

Co-servants; fellow-servants. Such servants as are employed in the same or a common service and subject to the same general control.[4]

Master and servant. Describes the relation of employer and employee.

The relation which arises out of the contract of hiring; the relation in private life, founded in convenience, whereby a man calls in the assistance of others, when his own skill and labor is not sufficient to answer the cares incumbent upon him.[6]

Servants are menials or domestics, apprentices, laborers; also, stewards, factors, and bailiffs.[6]

The duty of a father to educate and maintain his minor son entitles him to the son's services, and creates the relation of master and servant between them.[7]

The master acquires a property in his servant's labor, and may therefore recover damages for any detaining or beating, whereby he loses the labor.[8]

All servants, except apprentices, become entitled to wages according to agreement or custom. What notice, if any, shall be given of an intention to quit a service depends upon the nature of the service. If a servant leaves before the end of the term agreed upon, without good cause, or is dismissed for just cause, he loses his right to wages for the whole period served.[9]

The hiring of clerks, if general, is construed to be

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[1] 2 Story, Eq. § 833. See Steam Stone Cutter Co. *v.* Sears, 20 Blatch. 29 (1881); Tompkins *v.* Little Rock, &c. R. Co., 15 F. R. 11 (1 82).

[2] Sär-, or sör-. M. E. *sergeant:* F. *sergant, serjant:* L. *serviens*, an officer.

[3] [3 Bl. Com. 444.]

[4] Brown's Law Dict.

[5] 3 Bl. Com. 26–27.

[6] The Sergeants' Case, 27 E. C. L. 338 (1839); *Ø.* 360 (1840).

[7] Lawlor *v.* People, 74 Ill. 230–31 (1874).

[8] Morgan *v.* Bowman, 22 Mo. 548 (1856), Leonard, J.

[1] [Boniface *v.* Scott, 3 S. & R. *354 (1817), Gibson, J. See also Lockett *v.* Pittman, 72 Ga. 817 (1884).

[2] Heygood *v.* State, 59 Ala. 51 (1877), Manning, J. See also Lang *v.* Simmons, 64 Wis. 529–30 (1885); 49 Barb. 298; 3 Robt. 315; 25 Ohio St. 168, 6 Q. B. D. 530, 673; 9 Hare, 551; 1 M. & K. 560.

[3] Waterhouse *v.* State, 21 Tex. Ap. 663 (1886).

[4] Gravelle *v.* Minneapolis, &c. R. Co., 11 F. R. 873 (1882); 59 Ala. 249; 57 Cal. 81; 32 Md. 418.

[5] 1 Bl. Com. 423. See 22 Popular Science Monthly, 803 (April, 1883).

[6] 1 Bl. Com. 425–28.

[7] Louisville, &c. R. Co. *v.* Willis, 83 Ky. 60 (1885).

[8] 3 Bl. Com. 142.

[9] 2 Kent, 258. As to discharge for drunkenness, see Bass Furnace Co. *v.* Glasscock, 82 Cal. 454 (1886), cases.

for a year at a time; not so, however, as to a commercial traveler, paid by commissions.[1] See SERVICE, 1, Constructive.

For all acts done by a servant in obedience to the express order of the master, or in execution of the master's business, within the scope of his employment, and for an act in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instruction given, and the circumstances under which the act is done, the master is responsible. For acts not done within these conditions the servant is responsible.[2]

A servant assumes all risks from negligent acts of his fellows and the ordinary risks incident to the employment, but not the risks of the master's negligence.

One who contracts with a competent person to do certain work, giving him entire charge, is not responsible for his negligence or that of his subordinates.

See further AGENT; CONTRACTOR; EMPLOYEE; LABORER; NEGLIGENCE; SERVICE, 1.

SERVICE. 1. The duty which a servant or employee owes to his employer. See SERVANT.

Common service. Employment of the same general kind; the same general service.

Constructive service. The theory that, when a person is wrongfully discharged before the end of the period for which his services were engaged, his continued readiness to render the services should be viewed as equivalent to performance.

The weight of authority is against the soundness of the doctrine, and in favor of the view that the employee has no action for the worth of his services as if in fact rendered, but that he may have an action for damages for the breach of the contract, the measure being the loss occasioned by such breach; and, further, that there can be but one recovery upon the claim.[3]

"Eight hours shall constitute a day's work for all laborers, workmen, and mechanics who may be employed by or in behalf of the government of the United States."[4]

That act is in the nature of a direction by the government to its agents that eight hours are to be deemed a day's labor. It is but a contract between it and the laborers that eight hours are a day's work. The act does not prevent an agreement by which labor may be more or less than eight hours, nor prescribe the amount of compensation for that or any other number of hours of labor.[5]

[1] Beeston *v.* Collyer, 13 E. C. L. 517 (1827); Nayler *v.* Yearsley, 2 F. & F. 41 (1860); Clay Commercial Tel. Co. *v.* Root, 17 W. N. C. 200 (1886).

[2] Stone *v.* Hills, 45 Conn. 47 (1877), cases.

[3] James *v.* Allen County, 44 Ohio St. 231–36 (1886), cases *pro* and *con*. See also, same and other cases, 25 Am. Law Reg. 529–31 (1886).

[4] Act 25 June, 1868; R. S. § 3738.

[5] United States *v.* Martin, 94 U. S. 402–4 (1876), Hunt, J.; 10 Ct. Cl. 276.

2. Useful work, including skilled or professional exertion: as, the services of counsel, of an expert, of a trustee; professional, skilled, official services. See PERFORMANCE, Specific.

3. Duty performed or to be performed in a public office; employment under government: as, the public service, the civil service, secret services.

The **civil service act** of January 16, 1883 (known as the Pendleton bill), designed to regulate and improve the civil service of the government of the United States, provides as follows:

That the President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as Civil Service Commissioners, and said three commissioners shall constitute the United States Civil Service Commission. Said commissioners shall hold no other official place under the United States.

The President may remove any commissioner; and any vacancy in the position of commissioner shall be so filled by the President, by and with the advice and consent of the Senate, as to conform to said conditions for the first selection of commissioners.

The commissioners shall each receive a salary of three thousand five hundred dollars a year. And each of said commissioners shall be paid his necessary traveling expenses incurred in the discharge of his duty as a commissioner.

Sec. 2. That it shall be the duty of said commissioners:

FIRST. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rule may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect.

SECOND. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

Second, that all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.

Third, appointments to the public service aforesaid in the departments at Washington shall be apportioned among the several States and Territories and the Dis-

trict of Columbia upon the basis of population as ascertained at the last preceding census. Every application for an examination shall contain, among other things, a statement, under oath, setting forth his or her [the applicant's] actual *bona fide* residence at the time of making the application, as well as how long he or she has been a resident of such place.

Fourth, there shall be a period of probation before any absolute appointment or employment aforesaid.

Fifth, that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Sixth, that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body.

Seventh, there shall be non-competitive examinations in all proper cases before the commission, when competent persons do not compete, after notice has been given of the existence of the vacancy, under such rules as may be prescribed by the commissioners as to the manner of giving notice.

Eighth, that notice shall be given in writing by the appointing power to said commission of the persons selected for appointment or employment from among those who have been examined, of the place of residence of such persons, of the rejection of any such persons after probation, of transfers, resignations, and removals, and of the date thereof, and a record of the same shall be kept by said commission. And any necessary exceptions from said eight fundamental provisions of the rules shall be set forth in connection with such rules, and the reasons therefor shall be stated in the annual reports of the commission.

THIRD. Said commission shall, subject to the rules that may be made by the President, make regulations for, and have control of, such examinations, and, through its members or the examiners, it shall supervise and preserve the records of the same; and said commission shall keep minutes of its own proceedings.

FOURTH. Said commission may make investigations concerning the facts, and may report upon all matters touching the enforcement and effects of said rules and regulations, and concerning the action of any examiner or board of examiners hereinafter provided for, and its own subordinates, and those in the public service, in respect to the execution of this act.

FIFTH. Said commission shall make an annual report to the President for transmission to Congress, showing its own action, the rules and regulations and exceptions thereto in force, the practical effects thereof, and any suggestions it may approve for the more effectual accomplishment of the purposes of this act.

Sec. 3. That said commission is authorized to employ a chief examiner, a part of whose duty it shall be, under its direction, to act with the examining boards, so far as practicable, whether at Washington or elsewhere, and to secure accuracy, uniformity, and justice in all their proceedings, which shall be at all times open to him. The chief examiner shall be entitled to receive a salary at the rate of three thousand dollars a year and he shall be paid his necessary traveling expenses incurred in the discharge of his duty. The commission shall have a secretary, to be appointed by the President, who shall receive a salary of one thousand six hundred dollars per annum. It may, when necessary, employ a stenographer, and a messenger, who shall be paid, when employed, the former at the rate of one thousand six hundred dollars a year, and the latter at the rate of six hundred dollars a year. The commission shall, at Washington, and in one or more places in each State and Territory where examinations are to take place, designate and select a suitable number of persons, not less than three, in the official service of the United States, residing in said State or Territory, after consulting the head of the department or office in which such persons serve, to be members of boards of examiners, and may at any time substitute any other person in said service living in such State or Territory in the place of any one so selected. Such boards of examiners shall be so located as to make it reasonably convenient and inexpensive for applicants to attend before them; and where there are persons to be examined in any State or Territory, examinations shall be held therein at least twice in each year. It shall be the duty of the collector, postmaster, and other officers of the United States, at any place outside of the District of Columbia where examinations are directed by the President or by such board to be held, to allow the reasonable use of the public buildings for holding such examinations, and in all proper ways to facilitate the same.

Sec. 4. That it shall be the duty of the secretary of the interior to cause suitable and convenient rooms and accommodations to be assigned or provided, and to be furnished, heated, and lighted, at the city of Washington, for carrying on the work of said commission and said examinations, and to cause the necessary stationery and other articles to be supplied, and the necessary printing to be done for said commission.

Sec. 5. That any said commissioner, examiner, copyist, or messenger, or any person in the public service who shall willfully and corruptly, by himself or in co-operation with one or more other persons, defeat, deceive, or obstruct any person in respect of his or her right of examination according to any such rules or regulations, or who shall willfully, corruptly, and falsely mark, grade, estimate, or report upon the examination or proper standing of any person examined hereunder, or aid in so doing, or who shall willfully and corruptly make any false representations concerning the same or concerning the person examined, or who shall willfully and corruptly furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person so examined, or to be examined, being appointed, employed, or promoted, shall for each such offense be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars, or by imprisonment not less than ten days, nor more than one year, or by both such fine and imprisonment.

Sec. 6. That within sixty days after the passage of this act it shall be the duty of the secretary of the

treasury, in as near conformity as may be to the classification of certain clerks now existing under § 168 of the Revised Statutes, to arrange in classes the several clerks and persons employed by the collector, naval officer, surveyor, and appraisers, or either of them, or being in the public service, at their respective offices in each customs district where the whole number of said clerks and persons shall be altogether as many as fifty. And thereafter, from time to time, on direction of the President, said secretary shall make the like classification or arrangement of clerks and persons so employed, in connection with any said office or offices, in any other customs district. And, upon like request, and for the purposes of this act, said secretary shall arrange in one or more of said classes, or of existing classes, any other clerks, agents, or persons employed under his department in any said district not now classified; and every such arrangement and classification upon being made shall be reported to the President.

Second. Within said sixty days it shall be the duty of the postmaster-general, in general conformity to said one hundred and sixty-third section, to separately arrange in classes the several clerks and persons employed, or in the public service, at each post-office, or under any postmaster of the United States, where the whole number of said clerks and persons shall together amount to as many as fifty. And thereafter from time to time, on direction of the President, it shall be the duty of the postmaster-general to arrange in like classes the clerks and persons so employed in the postal service in connection with any other post-office; and every such arrangement and classification upon being made shall be reported to the President.

Third. That from time to time said secretary, the postmaster-general, and each of the heads of departments mentioned in § 158 of the Revised Statutes, and each head of an office, shall, on the direction of the President, and for facilitating the execution of this act, respectively revise any then existing classification or arrangement of those in their respective departments and offices, and shall, for the purposes of the examination herein provided for, include in one or more of such classes, so far as practicable, subordinate places, clerks, and officers in the public service pertaining to their respective departments not before classified for examination.

Sec. 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by § 1754 of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by § 1753 of said Statutes; nor shall any officer not in the executive branch of the government, or any person merely employed as a laborer or workman, be required to be classified hereunder; nor, unless by direction of the President, shall any person who has been nominated for confirmation by the Senate be required to be classified or to pass an examination.

Sec. 8. That no person habitually using intoxicating beverages to excess shall be appointed to, or retained in, any office, appointment, or employment to which the provisions of this act are applicable.

Sec. 9. That whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to any of said grades.

Sec. 10. That no recommendation of any person who shall apply for office or place under the provisions of this act which may be given by any Senator or Representative, except as to the character or residence of the applicant, shall be received or considered by any person concerned in making any examination or appointment under this act.

Sec. 11. That no Senator, or Representative, or Territorial Delegate of the Congress, or Senator, Representative, or Delegate elect, or any officer or employee of either of said houses, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the treasury of the United States.

Sec. 12. That no person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in this act, or in any navy-yard, fort, or arsenal, solicit in any manner whatever, or receive any contribution of money or any other thing of value for any political purpose whatever.

Sec. 13. No officer or employee of the United States mentioned in this act shall discharge, or promote, or degrade, or in [any] manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.

Sec. 14. That no officer, clerk, or other person in the service of the United States, shall, directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Representative, or Territorial Delegate, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.

Sec. 15. That any person who shall be guilty of violating any provision of the four foregoing sections shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding five thousand dollars, or by imprisonment for a term not exceeding three years, or by such fine and imprisonment both, in the discretion of the court.[1]

[1] 22 St. L. 403. See also R. S. §§ 1753-54.

In May 1887, President Cleveland approved rules which apply the competitive principle to promotions.

No officer, clerk, or employee of the United States government employ shall at any time solicit contributions from other officers, clerks or employees in the government service for a gift or present to those in a superior official position; nor shall any such officials or clerical superiors receive any gift or present offered or presented to them as a contribution from persons in government employ receiving a less salary than themselves; nor shall any officer or clerk make any donation as a gift or present to any official superior. Every person who violates this section shall be summarily discharged from the government employ.[1]

All executive officers or employees of the United States not appointed by the President and the Senate, are prohibited from requesting, giving to, or receiving from, any other officer or employee of the government, any money or property or other thing of value for political purposes; and every offender shall be at once discharged from service, and be deemed guilty of a misdemeanor, and on conviction, be fined in a sum not exceeding five hundred dollars.[2]

That act, designed to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service, forbids contribution between the persons named. All such enactments are plainly constitutional. The act does not apply to persons out of the employment of the United States; only to those in its service, against exactions through fear of personal loss. Otherwise, the government could be made to pay the expenses of keeping a party in power by increasing the compensation of employees.[3]

4. In the law of easements, a *real* service is the right of doing something or having a privilege in one man's estate for the advantage and convenience of the owner of another estate.[4] A servitude, *q. v.*

5. In feudal law, the duty which a tenant owed to his lord. See FEUD.

6. In practice, the execution of an order, writ, or other process; also, the communication of a notice required by law: as, the service of an attachment, a rule, subpœna, summons.

Whence "to accept service," "service accepted:" certifying to notice or information received. Opposed, *non-service*.

Service of a writ. Serving the defendant with a copy of the process, and showing him the original if he desires it.[5]

Service of a paper. The judicial delivery or communication of papers; execution of process. The delivery or communication of a pleading, notice, or other paper in a suit, to the opposite party, so as to charge him with the receipt of it, and subject him to its legal effect.[1]

Personal service. Delivery of an original writ, notice, or other paper, or a copy thereof with oral information as to the contents, to the person who is to be affected by the service.

When a statute requires service on a person it means personal service, unless some other mode is indicated.[2]

Service by attorney or upon attorney. Notification given to a party's counsel, personally or at his office, as prescribed by statute or rule of court.

Service by publication, *q. v.* By publishing the writ or notice as an advertisement in a designated newspaper, in cases where the party to be served is either a non-resident or else is evading service, and, perhaps, also, by mailing a copy of the paper to his last known address.

An affidavit for an order for service by this method must contain evidence tending to prove that the defendant could not be found in the State after due diligence.[3]

Substituted service. Any mode, provided by statute, instead of personal service, where that is impracticable and service by publication inappropriate.

In English practice, service upon another than he upon whom it is primarily to be made, in cases where the latter is impossible.[4]

Sometimes refers to service by publication.

Substituted service, by publication, is not allowed in the Federal courts in a purely personal action; only where some claim or lien is to be enforced.[5]

Substituted service, where property is once brought under control of the court, may be in any manner sufficient to inform a party of the object of the proceedings. The property is assumed to be in the possession of its owner, in person or by agent, and seizure will inform him of the nature of the proceedings. It suffices in all proceedings *in rem*. But where the object is to determine personal rights and obligations, that is, where the suit is merely *in personam*, such constructive service is ineffectual for any purpose.

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[1] Act 1 Feb. 1870: R. S. § 1784.

[2] Act 15 Aug. 1876, § 1: 1 Sup. R. S. 245.

[3] *Exp.* Curtis, 106 U. S. 371 (1882), Waite, C. J.; Louthan *v.* Commonwealth, 79 Va. 202-4 (1884).

[4] [Karmuller *v.* Krotz, 18 Iowa, 357 (1865), Dillon, J.; Morgan *v.* Mason, 20 Ohio, 409 (1851).

[5] Goggs *v.* Huntingtower, 12 M. & W. *504 (1844), Alderson, B.; 16 How. Pr. 152.

[1] Walker *v.* State, 52 Ala. 198 (1875).

[2] Rathburn *v.* Acker, 18 Barb. 375 (1854).

[3] McDonald *v.* Cooper, 32 F. R. 748-50 (1887), cases.

[4] See Lush, Prac. 867.

[5] R. S. § 738; New York Life Ins. Co. *v.* Bangs, 103 U. S. 439 (1880).

Thus, as process from a tribunal of one State cannot run into another State and summon a non-resident to respond to proceedings, so publication of process, in that case, cannot create a greater obligation to appear.[1]

See further RETURN, 2.

SERVIENT. See EASEMENT.

SERVITUDE. 1. The condition of a person who is bound to the performance of services.

Involuntary servitude. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[2]

There is no reference here to servitudes attached to property. That a *personal servitude* was meant is proved by the use of the word "involuntary," which can only be applied to human beings. The exception as a punishment gives an idea of the class meant.

"Servitude" is of larger meaning than "slavery," as the latter is popularly understood. The purpose was to forbid all shades and conditions of African slavery.[3]

The committee on the details of the original Constitution used "servitude" as referring to an engagement to labor for a term of years. The committee on revision unanimously substituted "service" for it, servitude being thought to express the condition of slaves, service an obligation of free persons.[4] See SLAVERY.

The act of June 23, 1874, protects persons of foreign birth against forcible constraint or involuntary servitude.[5] Under this act it was decided that an intention in a defendant in bringing a child to the United States to employ him as a beggar, or as a street musician, for his own profit, if such employment would be injurious to the morals of the child and inconsistent with its proper care and education, according to its condition, is an intention to hold to involuntary servitude, although the child (in Italy) consented to the employment and did not afterward dissent.[6] See KIDNAPING; PERSUADE.

Penal servitude. In England, a punishment introduced by 16 and 17 Vict. (1853), c. 99, in lieu of transportation. A convict subjected to this punishment may be kept in any place of confinement in the kingdom, or in any river, port, or harbor thereof, or in some place in her majesty's dominions beyond the seas, appointed therefor by order in council, according as the secretary of the state may direct; and may be kept at hard labor, and be otherwise dealt with, as was a person transported. Statute 20 and 21 Vict. (1857), c. 3, abolished transportation; and 27 and 28 Vict. (1864), c. 47, sec. 2, forbids sentence to penal servitude for a shorter period than five years.[1] See TICKET, Of leave.

2. Metaphorically, a charge upon one estate for the benefit of another. An incorporeal right, derived from the civil law, and answering to the easement (*q. v.*) of the common law.

An example is the right to fasten joists in another's wall.[2] See SUPPORT, 1.

The Roman law admitted and provided for rights in the property of others, *jura in re aliena*, or, as they were usually called, *jura in re*. The oldest of these rights were called *servitutes*, servitudes, subjections — the subjection of one estate to another, the liability of one estate to be used for the advantage of another. The relation was not affected by a change of owners. Among the most important were servitudes of way, drive, road, water-draining. These were known as the "praedial" servitudes. There were also "personal" servitudes, in which the right of use vested in a particular individual, and terminated with his life. The most important of this class was the *usufructus* (q. v.) the right to use and enjoy some property of another.[3]

SESSION.[4] A sitting; an actual sitting: a term of a court or of a legislative body.

1. The time during which a court sits for the transaction of business.[5]

The whole term, which is construed as but one day, and that the first day of the term.[6] See TERM, 4.

Quarter sessions, or **court of quarter sessions of the peace.** A court held in each county, every quarter of a year, for the trial of the smaller misdemeanors, especially of offenses relating to the highways, bastards, the settlement and provision of the poor, vagrants, apprentices, game, etc.[7]

Some of these offenses are proceeded upon by indictment, and others in a summary way by motion and order thereon. Capital felonies are remitted to the court of oyer and terminer.[7]

Sessions, court of. In the State of New York, a court composed of the county judge, and two associates, all elected, and styled *justices of the sessions*. The jurisdiction extends to the trial of misdemeanors — all criminal matters formerly cognizable by the court of general sessions of the peace of the county.

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[1] Pennoyer *v.* Neff, 95 U. S. 727 (1877). Field, J.

[2] Constitution, Amd. XIII. Ratified Dec. 18, 1865.

[3] Slaughter-House Cases, 16 Wall. 69 (1872), Miller, J. See also Civil Rights Cases, 109 U. S. 21 (1883).

[4] 2 Bancroft, Const. 211.

[5] 18 St. L. 251: 1 Sup. R. S. 103.

[6] United States *v.* Aucarola, 17 Blatch. 423, 430-31 (1880).

[1] See 4 Steph. Com. 449-52; 1 Steph. Hist. Cr. Law Eng. 482, 480-88.

[2] 3 Kent, 435; Nellis *v.* Munson, 24 Hun, 576 (1881).

[3] Hadley, Rom. Law, 182, 183, 190.

[4] L. *sessio: sedere*, to sit.

[5] See People *v.* Auditor of Public Accounts, 64 Ill. 96 (1872); MacNaughton *v.* South Pac. C. R. Co., 19 F. R. 882 (1884).

[6] Dew *v.* The Judges, 3 Hen. & M. 27 (Va., 1808).

[7] [4 Bl. Com. 271-73; 3 Steph. Com. 43-44.

In the county of New York, a court of *special sessions*,— a court held by any three police justices, with exclusive jurisdiction over misdemeanors, unless the accused elects, on his examination before the committing magistrate, to be tried in the court of *general sessions*, which is held by a single judge — the recorder of the county, the city judge, or the judge of general sessions,— and has jurisdiction over all crimes, capital or otherwise, including review of proceedings in special sessions.[1]

2. A meeting of the members of a legislative body as such.

Sessions of Congress. "The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day."[2]

Each Congress ordinarily holds two sessions, known as the *first session* and the *second session*. *Extra* or *special sessions* may be called by the President in pursuance of the provision "he may, on extraordinary Occasions, convene both Houses, or either of them."[3]

The requirements that all Representatives and one-third of the Senators shall be chosen every second year and that Congress shall assemble at least once each year limit "a Congress" to two years continuance, of two regular meetings for purposes of legislation, and suggested calling the first and second years the "first" and the "second" sessions respectively.[4] See STATUTES AT LARGE.

Sessions of the State legislatures. The constitutions of the States provide for these, as *regular* and *extra sessions*. In Rhode Island, a regular session is held twice a year; in Massachusetts, New Jersey, New York, and South Carolina, once a year; in the other States and in the Territories, generally, once every two years — a *biennial session*, with *adjourned sessions* sometimes held in the intervening year, except in Pennsylvania, where such sessions are prohibited.

Extra sessions, on extraordinary occasions, may be convened by the governor. While the length of a session varies in the different States, from forty to ninety days, in most of the States it is sixty days, with provision for continuance a certain number of days upon concurrence of three-fifths or two-thirds of the members of both houses.[1]

SET. 1, *n.* All of several duplicates considered together: as, a set of exchange, *q. v.*

A lease of mines has been called a "mining set."

2, *v.* In conjunction with other words, has received judicial interpretation:

Set aside. To annul, vacate, make void;[2] "to defeat the effect or operation of:"[3] as, to set aside — an award, a verdict, report, judgment, writ, the service of a writ, a fraudulent conveyance, *qq. v.* Compare CANCEL.

Set down. To place upon the appropriate docket or record: as, to set down a case for argument or hearing.

Set on fire. A statute allowing damages against one who shall set on fire the property of another does not apply to an accidental firing by a locomotive engine, without negligence.[4]

Set out. To aver, allege: as, to set out a writing in its own words; to set out in an indictment the facts which constitute the elements of the offense charged.[5]

Set up. To propose as legally sufficient, by way of explanation or exoneration: as, to set up a defense or a matter in defense.

SET-OFF. 1. In law, when the defendant acknowledges the justice of the plaintiff's demand on the one hand, but, on the other, sets up a demand of his own, to counterbalance that of the plaintiff, either in whole or in part.[6]

The subtraction or taking away of one demand from another opposite or cross-demand, so as to extinguish the smaller demand and reduce the greater by the amount of the less, or, if the opposite demands are equal, to extinguish both.[7]

Formerly, sometimes called "stoppage," because the amount sought to be set off was stopped or deducted from the cross-demand.[7]

Obtains where the defendant has a debt against the plaintiff arising out of a transaction *independent* of the contract on which the plaintiff sues, and desires to avail him-

[1] See N. Y. Crim. Code; 1 Abbott's Law Dict. 317; People *v.* Powel, 14 Abb. Pr. 93 (1862).

[2] Constitution, Art. I, sec. 4, cl. 2.

[3] Constitution, Art. II, sec. 3.

[4] The first and second sessions of the Ist Congress were held at the City of New York, March 4 to Sept. 29, 1789, and Jan. 4 to Aug. 12, 1790; and the third session at the City of Philadelphia, Dec. 6, 1790, to March 3, 1791. The sessions of the IId to the Vth Congress were held at Philadephia, also the first session of the VIth, closing May 14, 1800. The second session of the VIth began at the City of Washington, Nov. 17, 1800.

[1] See Stimson, Am. Stat. Law, § 270.

[2] State *v.* Primm, 61 Mo. 171 (1875).

[3] Swalley *v.* People, 116 Ill. 250 (1886).

[4] Missouri, &c. R. Co. *v.* Davidson, 14 Kan. 351 (1875).

[5] See United States *v.* Watkins, 3 Cranch, C. C. 477 (1829).

[6] 3 Bl. Com. 304.

[7] Byles, Bills, 365.

self of that debt in the existing suit, either to reduce the plaintiff's recovery or to defeat it altogether; and, as the case may be, to recover a judgment in his own favor for the balance.[1]

The defendant's case must be made out in the same manner as if he sought to maintain a separate action upon it.[2]

At common law, the right was not recognized: the defendant had his cross-action. To obviate this circuity of action, 2 Geo. II (1729), c. 22, § 13, allowed mutual debts to be set one against the other, and the matter to be given in evidence under the general issue, or to be pleaded in bar, notice of the particular debt being given beforehand. And 8 Geo. II (1735), c. 24, § 4, enacted that said § 13 should apply to all mutual debts of a different nature except debts accruing as a penalty, which were to be pleaded in bar.[3]

The substance of those statutes has been re-enacted in the States generally, and the principle extended.

Antecedently, equity, under peculiar circumstances of right, would compel a plaintiff to submit to a set-off; but, to obtain this relief, the defendant had to file a separate bill in equity.

When the government is plaintiff, no set-off will be allowed, unless Congress has authorized it.[4]

"Offset" has been used, to a limited extent, for set-off.[5]

2. In equity, that right which exists between two persons, each of whom, under an independent contract, owes an ascertained amount to the other, to set off their mutual debts by way of deduction, so that in an action brought for the larger debt, the residue only, after such deduction, shall be recovered.[6]

The mere existence of cross-demands will not be sufficient to justify a set-off in equity. Indeed, a set-off is there ordinarily allowed only when the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand.[7]

But set-off is not allowed of a joint debt as against a separate debt, nor *vice versa;* that is, more generally stated, it is not allowed of debts accruing in different rights — except under special circumstances, as, where fraud has been practiced.[8]

Since the statutes of set-off of mutual debts and credits, courts of equity have generally followed the course adopted in the construction of the statutes by courts of law, and have applied the doctrine to equitable debts. They have rarely, if ever, broken in upon the decisions at law, unless some other equity intervened, which justified them in granting relief beyond the rules of law. On the other hand, courts of law sometimes set off equitable against legal debts.[1]

In Pennsylvania, set-off is permitted of claims which are not mutual, but this is not in accordance with the general rules of equity.[2] In Kansas, set-off is allowed for unliquidated damages.[3]

Compare DEFALCATION, 1; RECOUPMENT.

SETTLE. 1. To set or determine the form of; as, to settle — a bill of exceptions, interrogatories, an issue. See under EXCEPTION, 4.

2. (1) To reside; to gain a right to maintenance: as, for a pauper to be settled or to acquire a settlement in a particular township or county.[4] See BELONG.

The right is obtained by birth, parentage, marriage, continued residence, payment of taxes, exercise of a public office, hiring and service, serving an apprenticeship, etc., as local statutes provide.[5]

(2) To establish one's self upon; to occupy, reside upon: as, to settle land.

Settler. Within the meaning of pre-emption laws, one who actually resides upon the land in question.[6] See further PRE-EMPTION, 2.

3. Sometimes, to pay; sometimes, to account together and strike a balance by computation; at other times, to adjust matters in controversy, and strike a balance by agreement.[7]

"Settle" implies the mutual adjustment of accounts, and an agreement upon the balance.[8]

An admission that a money demand has been "settled" is evidence tending to show payment.[9]

The settlement of an account between parties, resulting in a fixed balance, takes the case out of the

[1] Avery *v.* Brown, 31 Conn. 401 (1863), Sanford, J.

[2] Gorham *v.* Bulkley, 49 Conn. 91 (1881). See also Cook *v.* Mills, 5 Allen, 37 (1862), Bigelow, C. J.; 54 Miss. 563; 49 Mo. 572.

[3] See 3 Bl. Com. 305; 2 Story, Eq. §§ 1431–33; Adams, Eq. 222; Chitty, Contr. 1267; United States *v.* Eckford, 6 Wall. 488 (1867).

[4] United States *v.* Robeson, 9 Pet. *324 (1835); 9 Cranch, 236; 39 Cal. 389.

[5] Mandeville *v.* Union Bank, 9 Cranch, 11 (1815).

[6] Adams, Equity, 222.

[7] 2 Story, Eq. § 1436; Quick *v.* Lemon, 105 Ill. 586 (1883).

[8] 2 Story, Eq. § 1437; Gray *v.* Rollo, 18 Wall. 632 (1873); Blake *v.* Langdon, 19 Vt. 493 (1847).

[1] Greene *v.* Darling, 5 Mas. 212 (1828), Story, J.; Howe *v.* Sheppard, 2 Sumn. 414–16 (1836); Gordon *v.* Lewis, *ib.* 633–34 (1837); Hendrickson *v.* Hinckley, 17 How. 447 (1854); Wulschner *v.* Sells, 87 Ind. 75 (1882), cases.

[2] Gray *v.* Rollo, 18 Wall. 632 (1873).

[3] St. Louis, &c. R. Co. *v.* Chenault, 36 Kan. 55 (1886), cases.

[4] See Jefferson *v.* Washington, 19 Me. 300 (1841), Whitman, C. J.

[5] 1 Bl. Com. 363–64; 132 Mass. 499.

[6] See Peterson *v.* St. Paul, &c. R. Co., 27 Minn. 222 (1880); 3 Op. Att.-Gen. 126; 3 *id.* 182; 16 *id.* 88, 183; 1 Oreg. 166.

[7] See Moore *v.* Hyman, 13 Ired. L. 274 (1852).

[8] Baxter *v.* State, 9 Wis. *44 (1859); 8 Wend. 600; 4 Denio, 235; 9 Barb. 371.

[9] Applegate *v.* Baxley, 98 Ind. 149 (1883).

statute of limitations, without an express promise to pay the balance.[1]

A settled account is only *prima facie* evidence of correctness. It may be impeached by proof of unfairness or mistake, in law or in fact. If it be confined to particular items it concludes nothing in relation to other items not stated.[2]

Where an account is settled by the parties with all the facts equally known to both, and no unfairness is practiced, the adjustment is conclusive.[3]

Settle up. Referring to the estate of a decedent or an insolvent, means to collect the assets, pay the debts, and distribute the balance, if any, according to law. Compare ADMINISTER, 4.

Final settlement. May refer to the payment of the final balance of cash ascertained to be in the hands of an executor or administrator, so as to leave nothing to be done to complete the execution of his trust.[4]

Partial settlement. When founded on regular proceedings is only *prima facie* evidence of its own correctness.[5]

A "final settlement" is a conclusive determination of all the past administration.[6]

When an executor or administrator presents his account, purporting to charge himself with everything received and to credit himself with everything disbursed, and showing a balance for distribution, and the court, after due notice to parties interested, approves and allows the account, that is a "final settlement" though there is outlying property which may yet come into the accountant's possession for administration. As to the subject-matter on which it operates the settlement is final.[6]

4. To transfer property, real or personal, for the benefit of another.

Whence *settlor* or *settler*, and *settlement:* ante-nuptial, post-nuptial, or marriage settlement, articles or deed of settlement, lawful and fraudulent settlements.

Deed of settlement. An instrument by which the use of property is settled upon one or more persons (the beneficiaries), with directions as to the mode and time of holding, enjoying, and disposing of the *corpus* of the property.

The beneficiary is the settlor's wife or intended wife, wife and children, near relative, or creditors.

A promise to settle property on an intended wife is void, under the Statute of Frauds; and, made after marriage, is void for want of a consideration.

The old doctrine that if the settlor is in debt his deed is void has been generally abandoned. The rule now is that prior indebtedness is presumptive, not conclusive, proof of fraud. Where there is no fraud there will be no infirmity in the deed. Every case depends upon its own circumstances. The vital question is the good faith of the transaction: there is no other test.[1]

The right of a husband to settle a portion of his property upon his wife, and thus provide against the vicissitudes of fortune, when this can be done without impairing existing claims of creditors, is indisputable. Its exercise tends to the future comfort of wife and children. The right arises from the absolute power he possesses over his own property, by which he can make any disposition which does not interfere with the existing rights of others. The transfer, moreover, may be directly to her: the technical reasons of the common law for conveying through a trustee having long since ceased to exist. A power reserved to revoke or to appoint to other uses does not impair the efficacy of the transfer; nor will such power pass to an assignee in bankruptcy.[2]

An ante-nuptial settlement, though made with a fraudulent design on the part of the husband, should not be annulled without the clearest proof of the wife's participation in the intended fraud; for, upon its annulment, there can follow no dissolution of the marriage,—the consideration of the settlement.[3] See CONVEYANCE, 2, Fraudulent.

A post-nuptial settlement will be presumed to have been "voluntary." The burden of proof that there was a valid consideration rests upon one claiming a benefit under such settlement.[4]

Equity of settlement. The right of a wife to have a portion of her equitable estate settled upon herself and her children. Termed the "wife's equity" and her "equity to a settlement."

By marriage, at common law, the husband acquires an absolute property in all his wife's personalty which is capable of immediate possession, and a qualified right in such property as he may, by legal measures, reduce to possession. But, inasmuch as he cannot reach his interest in her equitable rights (as, for example, in an estate vested in a trustee), which interest is even less than a qualified one, without application to a court of equity, in which she must join, that court will not aid him, unless he agrees to "do equity,"

[1] Johns *v.* Lantz, 63 Pa. 326 (1869); McClelland *v.* West, 70 *id.* 187 (1871).

[2] Perkins *v.* Hart, 11 Wheat. 256 (1826).

[3] Hager *v.* Thomson, 1 Black. 93 (1861).

[4] Dufour *v.* Dufour, 28 Ind. 424 (1867), Frazer, C. J.; Stevens *v.* Tucker, 87 *id.* 114-15 (1882), cases.

[5] Sims *v.* Waters, 65 Ala. 445 (1880).

[6] Pomeroy *v.* Mills, 37 N. J. E. 580 (1883), cases, Dixon, J.

[1] Lloyd *v.* Fulton, 91 U. S. 485 (1875), cases, Swayne, Justice.

[2] Jones *v.* Clifton, 101 U. S. 227-30 (1879), cases, Field, J.; Clark *v.* Killian, 103 *id.* 766 (1880); Wallace *v.* Penfield, 106 *id.* 260 (1882): 59 Mo. 158; Moore *v.* Page, 111 U. S. 118 (1884), cases; Bean *v.* Patterson, 122 *id.* 499 (1887), cases.

[3] Prewit *v.* Wilson, 103 U. S. 25, 24 (1880), cases.

[4] Perry *v.* Ruby, 81 Va. 317, 326 (1886), cases; Adams *v.* Edgerton, 48 Ark. 494 (1886), cases.

by making suitable provision for her out of that or other property in the event of her surviving him. The rule applies, also, as against his assignee; and, also, when she as plaintiff seeks like relief against her husband or his assignee.[1]

Strict settlement. A settlement by which land was limited to a parent for life, and, after his death, to his son, sons, or children in tail, with one or more trustees interposed to preserve contingent remainders.[2]

In substance, a limitation first to the use of the settlor himself until a contemplated marriage took place, then to the use of the husband and wife for life, with remainder to the use of their first or other sons in tail; this being as far as a limitation could go without the intervention of a trustee.[3] See PERPETUITY.

The object was to put it out of the power of parents to deal with the corpus of an estate to the prejudice of their issue.

SEVER. To separate, divide, disjoin.

Co-defendants may either all plead jointly the same defense, or each may plead a separate defense. The latter course is termed "severing" and "severance."

Severable. Susceptible of separation; admitting of distinct division, or of independent existence or maintenance: as, a severable — consideration, covenant, contract, *q. v.*

As to severing crops from realty, see CROP; EMBLEMENT; FRUCTUS.

Several. (1) Separated, separate; distinct; individual: as, a several — action, covenant or obligation, fishery, plea. Opposed, *joint*, q. v. Compare SEPARATE, 2; DIVERS.

A testator directed that his property should be divided after the "several" deaths of persons named. *Held*, that several was not synonymous with "respective;" that the division was to be postponed until all the persons had died.[4]

(2) More than two, but not many.

In a case in Alabama, six to seven hundred was held included in "several" hundred dollars — the recommended limit of credit to a retailer of groceries.[5]

May mean all, as, "my several children," used in a will.[6]

Severalty. He that holds lands in severalty, or is sole occupant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. . . Also termed a "several tenancy."[7]

Unless expressly declared otherwise, all estates are supposed to be of this sort.[1] Compare ENTIRETY. See PARTITION.

SEWER. Will apply to an underground structure for conducting the water of a natural stream, as well as to a structure used exclusively for surface flow.[2]

The duties of municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a *quasi* judicial nature, involving the exercise of deliberate judgment and large discretion, depending upon considerations affecting the public health and general convenience throughout an extensive territory. The exercise of such judgment and discretion, in the selection and adoption of the general plan or system of drainage, is not subject to revision by a court or jury in a private action for not properly draining a sufficient lot of land. But the construction and repair of sewers, according to the general plan so adopted, are simply ministerial duties; and for negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured.[3]

See DRAINAGE; NEGLIGENCE; REPAIR, 2.

SEX. See CITIZEN; DURESS; INFLUENCE.

SHALL. As against the government, in a statute construed "may," unless a contrary intention is manifest.[4]

Construed "must" in order to sustain or enforce an existing right; but need not be, to create a new right.[5] See further MAY.

Whether "shall" imports futurity depends upon the subject-matter and the context.[6]

Shall be allowed. An appeal from the circuit court "shall be allowed" — R. S. § 692. This means *must* be allowed, when asked for by one in a position to demand it.[7]

Shall be given. An act provided that certain lands "shall be given to Major-General Nathaniel Greene." *Held*, those are words of absolute donation, and convey a present right.[8]

Shall be lawful. The meaning of "it shall be lawful," in a statute, depends upon the subject-mat-

[1] See 2 Story, Eq. §§ 1404-8, 1402; 3 Pomeroy, Eq. §§ 1114 *et seq.*

[2] [1 Steph. Com. 332.

[3] [2 Washb. R. P. 358.

[4] Colton *v.* Fox, 67 N. Y. 352 (1876).

[5] Einstein *v.* Marshall, 58 Ala. 153, 164 (1877).

[6] Outcalt *v.* Outcalt, 42 N. J. E. 501 (1886).

[7] 2 Bl. Com. 179.

[1] 2 Bl. Com. 179.

[2] Bennett *v.* New Bedford, 110 Mass. 436 (1872).

[3] Johnston *v.* District of Columbia, 118 U. S. 20-27 (1886), Gray, J., citing, as "the leading authorities," Child *v.* Boston, 4 Allen, 41, 51-53 (1862), Hoar, J.; Mills *v.* Brooklyn, 32 N. Y. 489, 495-500 (1865), Denio, C. J. See also cases collected, 118 U. S. 20; Gilluly *v.* City of Madison, 63 Wis. 522 (1885); Attorney-General *v.* Northampton, 148 Mass. 589 (1887), cases; Hitchins *v.* Frostburg, Md. Ct. Ap. (1887), cases; 24 Cent. Law J. 123, 411 (1887), cases.

[4] Cairo, &c. R. Co. *v.* Hecht, 95 U. S. 170 (1877).

[5] West Wisconsin R. Co. *v.* Foley, 94 U. S. 103 (1876).

[6] Hannibal, &c. R. Co. *v.* Board of Equalization, 64 Mo. 304 (1876).

[7] *Exp.* Jordan, 94 U. S. 251 (1876).

[8] Rutherford *v.* Greene's Heirs, 2 Wheat. 196 (1817).

ter. *Prima facie* the words import a discretion, but they may be imperative.[1]

Shall go. That property held in common between husband and wife "shall go" to the survivor means, shall vest in that person.[2]

Shall not. May mean "cannot;" as, in the provision that if a vessel departs without a permit or clearance, and shall not be seized, the owner shall pay a penalty.[3]

SHAM. Referring to an answer, defense, or plea,—good in form, but false in fact; false and not pleaded in good faith; so clearly false as not to present a substantial issue; interposed for delay.

The distinguishing characteristic of a sham answer is falsity, and, to warrant applying the severe rule of striking it off the record, the matter must be shown to be unquestionably false and not pleaded in good faith.[4]

Compare FRIVOLOUS.

SHARE. A portion of anything: as, a share of stock, a share in an estate, a widow's share.[5] See PART, 1; PORTION.

A share in a corporation is a right to participate in the profits, or in a final distribution of the corporate property *pro rata*.[6]

There is no such thing *in rerum natura* as a "railway share." It is not such a thing as you can see or touch. It is a term which indicates simply a right to participate in the profits of a particular joint-stock undertaking. And the word stock may have the same meaning, as, in a will.[7]

Share and share alike. Equal in quantity and quality; in equal proportions.

In a will, "equally to be divided," "share and share alike," "respectively between and among" certain persons, will generally create a tenancy in common.[8]

Shareholder. See STOCK, 3.

SHARP. In the sense of authorizing summary action, is used (perhaps locally) of a clause in a mortgage or bond, or of the whole instrument itself, which provides for proceedings in execution immediately upon default made in complying with any condition; as, for non-payment of money — principal, interest, premium of insurance, or taxes.

SHAVE. To buy any security for money, at a discount; also, to obtain the property of another by oppression and extortion.

To charge a man with using money for "shaving" is not, within those senses, libelous *per se*.[1]

SHED. See ARSON.

SHEEP. See ANIMAL.

If a ewe is stolen, it must be so called in the indictment; a lamb must be called a lamb; "sheep" is proper only where the animal is a wether.[2] See WORRY.

Sheep-shears. See CUTLERY.

SHEET. See BOOK, 1; FOLIO.

SHELLEY'S CASE. The limitation of a remainder, in fee-simple or fee-tail, to a person who already has an estate of freehold, is governed by a rule of law known as the *rule in Shelley's Case* — a case decided in 1581 by Lord Edward Coke, and in which the rule was first authoritatively declared, and clearly stated. The rule, as there expressed, is: "When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, 'the heirs' are words of limitation of the estate, and not words of purchase."[3]

That is to say, when a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to "the heirs" entitles the ancestor to the whole estate.[4]

The word "heirs," or "heirs of the body," creates a remainder in fee, or in tail, which the law, to prevent an abeyance, vests in the ancestor, who is "tenant for life," and by the conjunction of the two estates he becomes "tenant in fee" or "in tail;" and, whether he takes the freehold by express limitation, by resulting use, or by implication of law, the subsequent remain-

[1] The Queen *v.* Bishop of Oxford, L. R., 4 Q. B. 257, 553 (1879); 1 Barn. & C. *85; 2 Dowl. & R. 172.

[2] Broad *v.* Broad, 40 Cal. 496 (1871).

[3] Parker *v.* United States, 2 Wash. 363 (1809).

[4] See People *v.* McCumber, 18 N. Y. 321 (1858); Thompson *v.* Erie R. Co., 45 *id.* 471 (1871); Wayland *v.* Tysen, *ib.* 282–88 (1871); Littlejohn *v.* Greeley, 22 How. Pr. 345 (1861); Gostorfs *v.* Taafe, 18 Cal. 388 (1861); Glenn *v.* Brush, 3 Col. 31 (1876); Greenbaum *v.* Turrill, 57 Cal. 287 (1881); Baker *v.* Foster, 29 Minn. 167 (1882); 1 Chitty, Pl. 541.

[5] See 49 Ill. 110; 13 N. Y. 98; 27 Barb. 371; 46 Tex. 15; 23 Wis. 655.

[6] Field *v.* Pierce, 102 Mass. 261 (1869), Ames, J.; People *v.* Commissioners, 40 Barb. 353 (1863).

[7] Morrice *v.* Aylmer, L. R., 10 Ch. Ap. 155 (1874).

[8] Gilpin *v.* Hollingsworth, 3 Md. 194 (1852); Provencher's Estate, 1 Leg. Gaz. R. 69 (1870).

[1] [Stone *v.* Cooper, 2 Denio, 300 (1845), Walworth, Ch.

[2] Rex *v.* Birket, 19 E. C. L. 482 (1830).

[3] Shelley's Case, 1 Coke, *104. See Webster *v.* Cooper, 14 How. 500 (1852).

[4] Preston, Estates, 263–419. See also 2 Bl. Com. 241.

der to his heirs unites with, and is executed on, his estate for life.[1]

The words "issue of his body" are more flexible than "heirs of his body." The courts more readily interpret the former as synonymous with "children" and a description of persons, than the latter.[2]

The rule is older than Shelley's Case. Some trace its origin to the feudal system, which favored taking by "descent," for thereby the incidents of wardship, marriage, relief, etc., attached, while in "purchase" the taker was relieved from those burdens. Others attribute it to the aversion of the common law to fees in abeyance, a desire to promote the transferability of realty and make it liable for the specialty debts of the ancestor.[3]

The rule, instead of regarding a part of the entire estate as being in the ancestor, and a part in his heirs, considers the entire estate as in him alone; that the intent in creating it was to have it go in a certain line of succession, and, if the first taker died intestate, his heirs should take by descent from him, and not as purchasers under the original limitation. By statutes in some States (as see below), such a limitation is declared to be what it purports to be in terms,— a contingent remainder in the heirs.[3]

Applies alike to legal and equitable estates.[4]

Applies, also, to trust estates where both the life estate and the remainder are of the same character. The legal effect of the union of the two estates does not occur where the life estate is of an equitable character and the remainder is legal, or *vice versa*. Both estates must be of the same character, whether created by deed or devise.[5]

The rule is that where the ancestor *might* have taken and been seized, the heir shall inherit.[6]

The rule operates only on the intention (of the devisor) when it has been ascertained, not on the meaning of the words used to express it. . . . It gives the ancestor an estate for life in the first instance, and, by force of the devise to his heirs, general or special, the inheritance also, by conferring the remainder on him, as the stock from which alone they can inherit.[7]

The rule, which was adopted as part of the common law of this country, is said to have been abolished, in whole or in part, in Alabama, Connecticut, Illinois, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire (as to devises), New Jersey (devises), New York, Ohio (devises), Rhode Island (devises), Tennessee, Virginia, and Wisconsin.[8]

See HEIR; ISSUE, 5; PURCHASE, Words of.

[1] 4 Kent, 215.

[2] Daniel *v.* Whartenby, 17 Wall. 642-44 (1873), cases, Swayne, J.

[3] 2 Washb. R. P. 268.

[4] Croxall *v.* Shererd, 5 Wall. 281 (1866), cases.

[5] Green *v.* Green, 23 Wall. 489-92 (1874), cases, Hunt, J.

[6] Wallach *v.* Van Riswick, 92 U. S. 213 (1875): Thornby *v.* Fleetwood, 1 Stra. 318 (1720).

[7] Hileman *v.* Bouslaugh, 13 Pa. 354 (1850), Gibson, C. J.; Guthrie's Appeal, 37 *id.* 1, 12-23 (1860), cases, Strong, J.; Millett *v.* Ford, 109 Ill. 162-63 (1886), cases; Allen *v.* Croft, *ib.* 479 (1886), cases.

[8] See Williams, R. P. 249, 4 ed., notes by Rawle; 2 Washb. R. P. 268-76; 2 Kent, 214; Tud. L. C. 482; 10 Conn. 448; 23 Ind. 28; 26 *id.* 251; 86 *id.* 418; 99 *id.* 190; 70 Iowa, 61; 15 B. Mon. 282; 18 *id.* 329; 7 Metc. 172; 16 Gray, 307; 24 Miss. 366; 59 *id.* 299; 40 N. H. 500; 1 N. J. L. 525; 40 Barb. 488; 5 R. I. 127, 276, 549; 6 *id.* 264; 7 *id.* 145, 383; 13 *id.* 680, 714; 11 Lea, 656; 21 Tex. 804; 22 *id.* 547; 16 Pa. 93; 35 *id.* 117; 45 *id.* 179; 50 *id.* 483; 64 *id.* 15; 70 *id.* 73, 335, 509; 75 *id.* 339; 83 *id.* 242, 377; 86 *id.* 396; 87 *id.* 144, 248; 91 *id.* 30.

SHELLS. See MANUFACTURE.

SHERIFF.[1] An officer who represents the administrative power of a State within one of its counties; an officer who executes the mandates of the courts of record within a county; the chief ministerial officer in a county.

Sheriffalty. The office of sheriff.

Shrievalty is about obsolete.

An officer of great antiquity. In Latin, the *vice-comes*, the deputy earl, to whom the custody of the shire was committed at the first division of the kingdom into counties. But the earls, in time, by reason of their high employments and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden, reserving to themselves the honor, while the labor was laid upon the sheriff. So that now the sheriff does all the king's business in the county; and, though he is still called the *vice-comes*, he is entirely independent of the earl; the king by his letters-patent committing the care of the county to the sheriff alone.[2]

He was the immediate officer of the king within the shire; received his commission from the king, and directly represented the sovereign power. In this country his function has been similar, his relation to the sovereign power the same. He is the chief executive officer of the State in his county. In Missouri his office exists by provisions of law and of the constitution. He obeys the mandate of the State in executing writs issued to him by the courts of his own and other counties. He is the State officer whose jurisdiction is ordinarily bounded by his own county.[3]

Originally, the office was held by men of large estate, able to support the retinue of followers which the dignity of the office required, and to answer in damages for neglect of duty. Now, a bond with sureties is given as security for the execution of the duties therein named, all of which are chiefly ministerial.[4]

In England, in his judicial capacity, he formerly held the *sheriff's tourn* or county court, and performed certain other functions. As king's bailiff, he seized all escheats, forfeitures, waifs, wrecks, estrays, etc.[5]

As conservator of the peace in his bailiwick, he represents the sovereign power: has

[1] Sax. *shire*, a part sheared off: a division, county; and *reeve*, a bailiff, officer,— 1 Bl. Com. 116, 117, 339; 56 Pa. 275. See REEVE.

[2] 1 Bl. Com. 339, 117.

[3] State *ex rel.* Beach *v.* Finn, 4 Mo. Ap. 352-53 (1877).

[4] South *v.* Maryland, 18 How. 402-3 (1855), cases.

[5] 1 Bl. Com. 343; 18 How. 401; Dow *v.* Humbert, 91 U. S. 300 (1875), cases.

care of the county; may make arrests upon view; may bind to keep the peace; may command the power of the county. In his ministerial capacity, he executes all processes issued from the courts: summons and returns juries; makes arrests upon warrants; and executes judgments and sentences.[1]

The office exists in this country substantially as derived from England,— the details are matters of constitutional or statutory regulation. The sheriff is generally elected by the people of the county, for a term of two or three years. Presiding at inquests is his chief judicial duty; his other duties are ministerial, and generally performed by deputies.

Obedience to all precepts committed to him is the whole of his duty; and hence, if they issue from competent authority, and with legal regularity, and so appear upon their face, he is justified for every action within the scope of his command.[2]

His liability varies with the conditions under which he acts. In some matters he stands as an insurer, warranting the practical perfection of his work. Thus, he is answerable for the escape of a prisoner in execution; he assumes to know the law, and must not, therefore, commit a legal mistake, and he cannot safely keep property seized in execution.[3]

Deputy sheriff. A person selected by a sheriff to assist him in discharging the duties of his office.

An officer coeval with the sheriff himself. The appointment of deputies arose from the impossibility of the sheriff's performing all the duties of his office in person. It was very early decided that the deputy could execute any writ directed to the sheriff by the name of his office, and not by a particular name. A "deputy sheriff" is a general deputy, with powers as extensive as the sheriff can delegate. An "under sheriff" may mean a deputy sheriff.[4]

A *general deputy* attends to all the ordinary duties of the office. A *special deputy* represents the sheriff in some special relation, as, in executing a particular writ.

A general deputy executes all processes without special power from the sheriff; in some cases he may delegate authority, in the name of the sheriff, to a special deputy.[5] See DEPUTY.

High sheriff. Imports no more than the word "sheriff;" "high" is pleonastic.

[1] 1 Bl. Com. 343; 18 How. 401; Dow v. Humbert, 91 U. S. 300 (1875), cases.

[2] Watson v. Watson, 9 Conn. *146 (1832), Hosmer, C. J. Approved, Conner v. Long, 104 U. S. 228 (1881). See also 7 Metc. 259; 10 Cush. 46; 2 Gray, 410; 5 Wend. 170; 24 *id.* 485; 20 How. 65.

[3] Strout v. Pennell, 74 Me. 262–63 (1882).

[4] Tillotson v. Cheetham, 2 Johns.* 70, 73 (1806), Kent, Chief Justice.

[5] Allen v. Smith, 12 N. J. L. 162 (1831); Gradle v. Hoffman, 105 Ill. 153 (1882); Reves v. State, 11 Lea, 126 (1883); Oliver v. Athey, *ib.* 150 (1883); Marx v. Hanthorn, 30 F. R. 583 (1887).

Sheriff's inquest, or jury. A jury, in number not more than twelve, summoned by a sheriff, to hold an inquest of office or make other inquiry required by local law. See INQUEST.

Sheriff's sale. A sale of property by a sheriff or his deputy, in execution of the mandate of legal process.[1] See SALE, Judicial.

See also ARREST, 2; BAILIWICK; CAPERE; CORONER; COUNTY; ESCAPE, 2; EXIGENCY; MARSHAL, 1 (2); PERISHABLE; RETURN, 2; SERVICE, 6.

SHIFTED. See WARRANT, Land.

SHIFTING. See INHERITANCE; USE, 3.

SHILLING. See POUND, 1.

SHINGLES. See TIMBER.

SHIP. 1. The Anglo-Saxon *scipe*, state, office, calling, destiny.

As, in citizenship, executorship, guardianship, heirship, judgeship, mastership, membership, partnership, receivership, solicitorship, suretyship, survivorship, township, trusteeship, wardship.

2. The Anglo-Saxon *scip*, a ship, literally, a thing shaped: a general designation for any vessel navigated with sails;[2] any vessel employed in navigation.

In the Roman law, anything which floated upon the waters and was accessory to commerce.[3]

Any vessel that substantially goes to sea. By the act of 17 and 18 Vict. (1854), c. 100, s. 2, "every description of vessel used in navigation not propelled by oars."[4]

Includes whatever is built in a particular form for the purpose of being used on water.[5] In its ordinary acceptation, it is generic for anything formed for the purpose of going on the water.[6]

"Ship" and "vessel" are used in a very broad sense, to include all navigable structures intended for transportation. But a fixed structure, like a dry-dock, is not used for such purposes.[7]

Within the meaning of a particular statute, a ferry-boat may not be a "ship;"[8] nor may a canal-boat;[9] nor a coal-barge;[10] nor a small open boat employed

[1] See Batcheider v. Carter, 2 Vt. 172 (1829).

[2] [Tomlins, Law Dict.; 4 Wash. 530.

[3] Raft of Cypress Logs, 1 Flip. 544 (1876).

[4] [*Exp.* Ferguson, L. R., 6 Q. B. *291 (1871).

[5] The Mac, 46 L. T. 909 (1882), Brett, L. J.

[6] *Ibid.* 910, Cotton, L. J.

[7] Cope v. Valette Dry-Dock Co., 119 U. S. 629, 627 (1887), Bradley, J.

[8] 17 Johns. 54.

[9] 5 Hill, 34; 17 Barb. 528; 3 Wall. Jr. 199; 2 Grant, 521. *Contra*, 3 Grant, 40.

[10] 3 Grant, 110.

within a port;[1] nor a dredge, or mud-hopper dredge;[2] nor, as subject to admiralty jurisdiction, are flat-boats or coal-barges transporting merchandise and sold for lumber at the end of the voyage.[3]

A steamship is a vessel whose principal motive power is steam and not sails.[4] See further VESSEL.

Domestic ship; foreign ship. Whether a vessel is foreign or domestic depends upon the residence of her owners, and not upon her enrollment, where the two are different.[5]

General ship. A vessel which carries merchandise for all persons who may apply for transportation, as distinguished from a vessel chartered to one or more individuals.

A ship by which the master or owner engages separately with a number of persons, unconnected with each other, to convey their respective goods to the place of the ship's destination.[6]

Ships are strictly and technically denominated chattels, or personal property, at the common law, although distinguishable from other kinds of personalty by the solemnities by which the title is ordinarily acquired, transferred, and made susceptible of pledge, lien, or mortgage. The title is now usually acquired, transferred, and evidenced by written documents.[7]

In international law ships are regarded as floating sections of the land to which they belong, and whose flag they carry. Hence, a general assignment under the insolvent laws of a State passes title to a vessel on the high seas, as if within the State.[8]

A vessel carries with it the local rights and legal jurisdiction of her state or territory. All persons on board are endowed and subjected accordingly. But the principle is subject to the powers of Congress over commerce and crimes.[9]

Ship-broker. One who makes contracts for the employment of vessels.

Ship-chandlery. Includes everything necessary to furnish and equip a vessel, so as to render her sea-worthy for the intended voyage.[10]

Shipped. Placed on board a vessel for the purchaser or consignee, to be transported at his risk.[11]

Shipper. One who places property of his own on board a vessel for transportation.

Shipping. Ships in general, vessels for navigation; also, relating to ships or vessels; and, the act of placing or receiving goods on board a vessel.

Shipping articles. An agreement, in writing, between the master and seamen on board a vessel, specifying the voyage, and time for which the seamen are shipped.[1]

Shipping commissioner. An officer appointed for each of such ports of entry as, in the judgment of the circuit court having jurisdiction, may seem to require it, and charged with general supervision as to the contracts of seamen, and the enforcement of laws made for their protection and relief.[2]

Shipping, laws of. The law which relates to vessels — their construction, tonnage, ownership, registration, inspection, national character; the employment and rights of seamen, the power and duties of their commanders; ship-brokers, ship-agents, pilots, etc.; the transfer of merchant vessels; freight, charter-parties, demurrage, towage, collisions, salvage, etc.[3]

Ship's bill. The copy of the bill of lading of a vessel retained by the master.

The bill delivered to the shipper controls, if the two do not agree as to the terms of the contract of afreightment.[4]

Ship's husband. The general agent of the owners in respect to a vessel; in statutes of registration, called the managing owner.[5]

The person who, in a vessel's home port, does what the owner would otherwise do — obtains a cargo, and attends to whatever is essential to the due prosecution of the voyage.[6]

There is no maritime lien on a ship in favor of her general agent or husband.[7]

Ship's papers. (1) Documents which, under the laws of individual nations, a ship must carry — a certificate of registry, license, charter-party, bills of lading and of health. (2) Such documents as the general law of nations requires a neutral ship to carry — a

[1] 5 Wend. 564.
[2] 15 Can. L. J. 268; 46 L. T. 206, 207.
[3] 3 Wall. Jr. 53; 1 Flip. 545, a raft.
[4] L. R., 7 Q. B. 569.
[5] The Albany, 4 Dill. 439 (1876), Dillon, Cir. J.; Weaver v. The Owens, 1 Wall. Jr. 365 (1849).
[6] Waru v. Green, 6 Cow. 176 (1826), Savage, C. J.; Abb. Ship. 128, 319; 1 Pars. Mar. L. 130.
[7] Story, Partn. § 416.
[8] Crapo v. Kelly, 16 Wall. 624–32 (1872), cases.
[9] Wilson v. McNamee, 102 U. S. 574 (1880); 1 Kent, 26; Woolsey, Int. Law, § 58.
[10] Weaver v. The Owens, 1 Wall. Jr. 359, 368–69 (1849).
[11] Fisher v. Minot, 10 Gray, 262 (1857).

[1] See R. S. § 4509; 2 Sumn. 443; 1 Mas. 443; 2 *id.* 541; 5 *id.* 272.
[2] See R. S. §§ 4501-8.
[3] See R. S. §§ 4399, 4463–4500. See generally, as to ship-owners and seamen, Scarff v. Metcalf, 107 N. Y 211 (1887), cases: 1 Am. St. R. 812–14 (1888), cases.
[4] The Thames, 14 Wall. 105 (1871).
[5] 1 Parsons, Shipp. & Adm. 109.
[6] Gillespie v. Winberg, 4 Daly, 322 (1872), Daly, C. J
[7] The Esteban de Antunano, 31 F. R. 923 (1887), cases

passport; sea-brief or sea-letter, proofs of property, muster-roll, charter-party, bill of lading, bill of health, log-book or ship's journal, etc.[1]

Shipwreck. When a ship is so broken, disjointed, or otherwise injured that it no longer exists in its original nature and essence.[2]

Ship-yard. In a policy of insurance, may mean the yard in actual use, including sidewalks.[3]

The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessel belongs. In general, the legislation of a State, not directed against commerce but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is obligatory upon the citizens, within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-State, or in any other pursuit.[4] See SALE, Bill of.

See further ABANDON, 1; ADMIRALTY; ANCHOR; APPURTENANCES; ARREST, 2 (1); BARRATRY, 1; BILGED; BOTTOMRY; CARGO; CHARTER-PARTY; COASTING TRADE; COLLISION, 2; COMMERCE; CONSORT, 2; CONVEYANCE, 1; CREW; DEMURRAGE; DERELICT, 3; DEVIATION; DISPATCH; DREDGE; EFFECTS; EMBARGO; FREIGHT; FURNITURE; HYPOTHECATION; INSPECTION, 1; LADING; LAUNCH; LICITATION; LOG-BOOK; LOOKOUT; LOSS, 2; MARITIME; MODERATE, 2; NAVIGATION; NECESSARIES; OUTFIT; PETITORY; PLUNDER; PORT; PRIMAGE; PROTEST, 3; PROVISIONS; QUARANTINE, 2; RANSOM; REGISTRY, 1; RES, 2, Perit; RESPONDENTIA; RESTITUTIO; REVOLT; ROAD, 2; SAIL; SALVAGE, 1; SEA; SEARCH, Right of; SEIZURE, 2; STRANDING; TONNAGE; TOUCH; TOWAGE; VISIT, 1; VOYAGE; WHARF; WRECK; YACHT.

SHIRE. See SHERIFF.

SHOOTING MARK. See GAME, 2.

Shooting at a mark is lawful, but not necessary, and may be dangerous, and the law requires extraordinary care to prevent injury to others. If the act is done where there are objects from which balls may glance and endanger others, the act is wanton, reckless, without due care, grossly negligent.[5]

SHOP. A place kept and used for the sale of goods.[6]

In this country shops for the sale of goods are frequently called "stores."[7] See further STORE, 2; BURGLARY.

Shopkeeper. See TRADER.

Shop-right. See LICENSE, 2.

Shops. See RAILROAD.

SHORE. See BEACH; NAVIGABLE; ON; RIPARIAN; SEA.

SHORT. 1. More limited in time than some other; brief, or the briefest; opposed to *long:* as, a short — cause, draft, lease, note, notice, summons, *qq. v.*

2. Not exhibited in full; not stated in detail: as, a short plea, *q. v.* See ENTRY, II.

3. As opposed to *long*, in the language of brokers, see PUT, 2; WAGER, 2.

Shortly. Three months is not "shortly," that is, a reasonable time, within the presumed meaning of a sale of iron-pipe to "arrive shortly."[1]

SHORT-HAND. See STENOGRAPHER.

SHOULD. See MAY.

SHOW. "Show" and "indicate" are not always interchangeable. "To show" is to make apparent or clear by evidence, to prove; an "indication" may be merely a symptom, that which points to, or give direction to the mind.[2]

Show cause. See RULE, 2.

SHOWS. See ANIMAL.

SHRIEVALTY. See SHERIFFALTY.

SHROUD. See BURIAL.

SHYSTER. See CRANK; PETTIFOGGER.

Has reference to the professional character and standing of a lawyer. Hence, in an action for libeling one, as respects his character as a lawyer, by the use of the word, an issue as to whether the plaintiff is a lawyer or not is material.[3]

In an action for libel expressed in ordinary language, a witness may not testify as to the sense in which he understood the language, nor that he understood it to apply to the plaintiff the term "shyster."[4]

SIC. L. Thus; so. Sometimes calls attention to a quoted word or phrase as being strictly literal.

Sic utere. See UTERE, Sic, etc., 1076.

SICK. See BENEFITS; CHARITY; DISEASE; INFLUENCE; SUNDAY; WILL, 2. Compare LANGUIDUS.

SICUT. See ALIAS; PLURIES.

SIDE. Compare ALONG.

"Fences on the sides of a railroad" may mean fences on the spaces between the road-bed and the outer lines of the company's land; not necessarily on the dividing lines.[5]

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[1] 1 Marsh. Ins. ed. 1802, Ch. VIII, § 5, pp. 317-19.

[2] Peele *v.* Merchants' Ins. Co., 3 Mas. 42 (1822), Story, J.; 1 Marsh. Ins. Ch. XIII, § 1.

[3] Webb *v.* National Fire Ins. Co., 2 Sandf. 504 (1849).

[4] Sherlock *v.* Alling, 93 U. S. 104 (1876), Field, J.

[5] Welch *v.* Durand, 36 Conn. 185 (1869).

[6] Commonwealth *v.* Riggs, 14 Gray, 378 (1860), Metcalf, J.

[7] Commonwealth *v.* Annis, 15 Gray, 199 (1860), Merrick, J.

[1] Thompson *v.* Currie, 4 Can. Leg. News, 189 (1881).

[2] Coyle *v.* Commonwealth, 104 Pa. 133 (1883).

[3] Gribble *v.* St. Paul Pioneer-Press Co., 34 Minn. 342.

[4] Gribble *v.* Same, 37 Minn. 277 (1887), cases.

[5] Marshall *v.* St. Louis, &c. R. Co., 51 Mo. 140 (1872).

Side of the court. The *law side* and the *equity side* of a court designate a court administering justice, in the former case under the forms of strict law or common law, in the latter case according to the more liberal principles of equity.

The equity side of the courts is deemed always open for pleadings and proceedings preparatory to the hearing of causes upon their merits.

Side-report. See REPORT, 2.

Side-track. See RAILROAD.

SIDEWALK. "A raised way for foot passengers at the side of a street or road; a foot pavement." [1]

May rest on posts, as well as on the ground.[1]

The word "street" presumptively always includes the sidewalks; as, in a statute providing for compensation for damages from a change of grade in a street,[2] although "street" often denotes that part of the way devoted to carriage travel.[3]

A walk crossing a public alley is a "crosswalk," as distinguished from sidewalk.[4]

In a suit to recover damages for injuries received from a fall caused by a defective sidewalk the plaintiff may show that other like accidents occurred at the same place from the same cause.[5]

The duty of a municipal corporation is to see that its sidewalks are reasonably safe for persons using ordinary caution. Mere slipperiness, from ice or snow, not accumulated so as to constitute a dangerous obstruction, is not ordinarily such a defect as will make the city liable for damages occasioned thereby.[6] See SNOW; STREET.

SIDING. See RAILROAD.

SIGHT. 1. Presence, *q. v.*

2. Presentment.

Bills of exchange and drafts are frequently drawn at sight or a certain number of days *after sight*. In the former case the paper is called a *sight bill* or *sight draft*, payable on presentment.

Deposits are received by banks subject to sight drafts.

Bills payable at sight are entitled to days of grace by the law-merchant; but statutes may have changed that law. The holder of such paper must use due diligence to put it into circulation. The holder of paper payable after sight must present it within reasonable time.[1] See EXCHANGE, 2, Bill of.

SIGILLUM. See SEAL, 1.

SIGN.[2] Although in general understanding refers to writing the name at the foot or bottom of a document, is not confined to that meaning.

The primary meaning is to write one's name on paper or to show or declare assent or attestation by some sign or mark.[3]

A "signing" may be at the beginning of a document,— within the meaning of the Statute of Frauds.[4]

Within the meaning of that statute, also, a memorandum is "signed" if the name is printed in a letterhead, with the contract underwritten.[5]

But it may be that a will cannot be considered as "signed" unless the testator's name is affixed at the bottom, or otherwise outside the body.[6]

Countersign. (1) To sign on the side opposite to another's name.

(2) To sign what has already been signed by a superior; to authenticate by an additional signature.

Where the charter of a city required a document to be "signed" by certain officers, "countersigned," prefixed to one signature, was held not to be a material irregularity.[7]

Sign a judgment. For the proper officer of a court to formally enter a judgment.

Judgments were formerly pronounced in open court, and are still supposed to be. But now, except in the case of an issue at law, there is no actual delivery in court or elsewhere. The plaintiff or defendant, when the cause is in such a state that by the course of practice he is entitled to judgment, obtains an allowance or entry by the proper officer, expressing generally that judgment for a certain amount is given in his favor. This is called "signing" judgment.[8]

Signature. The act of writing or putting down one's own name; and the name so set down.

May imply the personal act of writing one's own name or of actually making one's own mark.[9]

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[1] Challiss *v.* Parker, 11 Kan. 391 (1873): Webster's Dict. As to power to make, see Attorney-General *v.* Boston, 142 Mass. 204 (1886).

[2] City of Kokomo *v.* Mahan, 100 Ind. 243 (1884).

[3] Dickinson *v.* City of Worcester, 133 Mass. 502 (1885).

[4] Pequignot *v.* City of Detroit, 16 F. R. 211 (1883); O'Neil *v.* City of Detroit, 50 Mich. 133 (1883).

[5] District of Columbia *v.* Armes, 107 U. S. 525-26 (1882), cases.

[6] 2 Dillon, Munic. Corp. § 1006, cases; Chase *v.* Cleveland, 44 Ohio St. 515, 509-11 (1886), cases; Boulder *v.* Niles, 9 Col. 415 (1886); Taylor *v.* Yonkers, 105 N. Y. 205 (1887), cases; 17 How. 169; 32 Iowa, 328; 97 Mass. 389; 77 Pa. 113; 100 *id.* 119; 101 *id.* 616. On obstructing the sidewalk, see 24 Alb. Law J. 464-65 (1881), cases.

[1] See 1 Daniel, Neg. Inst. §§ 617-19, cases.

[2] L. *signare: signum*, a mark.

[3] James *v.* Patten, 6 N. Y. 12-13 (1851), Paige, J.

[4] Clason *v.* Bailey, 14 Johns. *486 (1817).

[5] Drury *v.* Young, 58 Md. 546 (1882), cases.

[6] Catlett *v.* Catlett, 55 Mo. 339-41 (1874). As an element of "execution," see Ladd *v.* Ladd, 8 How. 23 (1850).

[7] Gurnee *v.* City of Chicago, 40 Ill. 167 (1866).

[8] [Steph. Plead. *111; Tidd, Pr. 616.]

[9] Chapman *v.* Limerick, 56 Me. 392 (1868).

May consist of the act of writing one's name with intention to authenticate the instrument.[1]

At common law, includes a mark unattested, unless the instrument is one which must be witnessed, irrespective of the mode of signing.[2]

Where an instrument shows on its face the names of the contracting parties, an agent may sign his own name first, and add to it, "agent" for his principal, or he may sign the name of the principal first, and add, by himself, "as agent." All that is required is that the contract shall purport on its face to be the contract of the principal.[3]

See BLANK, 2; DATE, False; FORGERY; MARK, 1; SEAL, 2.

Sign-manual. (1) The king's signature to grants or letter-patents, as a personal, unofficial act. See SEAL, 1, Great.

(2) Any autograph signature.

SIGNET. See SEAL, 1, Great.

SILENCE. In the law of estoppel, imports knowledge with opportunity to act.[4]

No principle is better established than that a party is not estopped by his silence unless he has misled another to his hurt.[5]

Although silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation, yet concealment or suppression by either party to a contract of sale, with intent to deceive, of a material fact, which he in good faith is bound to disclose, is evidence of, and equivalent to, a false representation.[6]

That silence in an instrument is exclusion may be applied to a statute.[7]

Silent. A contract is sometimes said to be silent as to a contingency. See IMPLIED.

See further ACCOUNT, 1; ACQUIESCENCE; CONCEAL, 5; CONSENT; ESTOPPEL, Equitable; KNOWLEDGE, 1; REPRESENTATION, 1; RESCISSION; STAND BY.

SILK GOWN. See GOWN, 2.

SILVER. See COIN; MINE; MONEY; TENDER, 2, Legal.

SIMILAR. Denotes partial sameness, and, also, sameness in all essential particulars.[8] See SIMILIS.

Within a statute respecting counterfeit money, is not equivalent to "in the similitude of."[9] See SIMILITUDE.

[1] Watson v. Pipes, 32 Mo. 466 (1856): 2 Greenl. Ev. § 674.

[2] Bickley v. Keenan, 60 Ala. 295 (1877).

[3] Elwell v. Shaw, 16 Mass. 46 (1819); Smith v. Morse, 9 Wall. 82-83 (1869).

[4] Pence v. Langdon, 99 U. S. 581 (1878).

[5] Philadelphia, &c. R. Co. v. Dubois, 12 Wall. 64 (1870); Hill v. Epley, 31 Pa. 334 (1858); Parrish v. Thurston, 87 Ind. 428 (1882), cases.

[6] Stewart v. Wyoming Cattle Ranch Co., 128 U. S. 383 (1888).

[7] Bates v. Brown, 5 Wall. 717 (1866).

[8] Commonwealth v. Fontain, 127 Mass. 454 (1879).

[9] State v. McKenzie, 42 Me. 394 (1856).

SIMILIS. L. Like. Compare QUASI.

De similibus idem est judicium. As to like cases, the judgment is the same. See ARGUMENTUM.

Nullum simile est idem. No like thing is the same; likeness or similarity is not identity.

Thus, while a partner is like a joint-tenant and a tenant in common, he is neither;[1] a telegraph company is like, but is not the same as, a common carrier;[2] an award of arbitrators is not like a judgment in all respects;[3] a check resembles a bill of exchange, yet it is not the same thing. In the patent and copyright laws, identity, not resemblance, is regarded.[4]

Similiter. Likewise; the like. A reply that as one party has put himself upon the country, the other does the same.

The full sentence was *et prædictus similiter*, equivalent to "and he does the like." Expresses concurrence in referring a trial to the jury. In strictness, no part of the pleadings: it neither affirms nor denies any fact; is matter of form. Spoken of as the *similiter*.[5]

SIMILITUDE. Likeness; resemblance.

"In the similitude of" may be synonymous with forged or counterfeited. "Similar" may not be equivalent.[6]

Since, in the act of 1877 against counterfeiting silver coins, the words "in resemblance or similitude" are a variation or exposition of the preceding words "falsely make, forge, or counterfeit," each meaning to make something in the resemblance or similitude of another, the former expression may be omitted in an indictment.[7] See COUNTERFEIT; GENUINE; TRADE-MARK.

Between articles subject to duty, see DUTY, 2.

SIMONY. The corrupt presentation of one to an ecclesiastical benefice for money, gift, or reward.[8]

So called from resemblance to the sin of Simon Magus.[9]

SIMPLE. See BATTERY; CONTRACT; FEE, 1; INTEREST, 2 (3); LARCENY; RECEIPT, 2; TRUST, 1.

SIMPLEX. See COMMENDATIO.

SIMULATED.[9] Feigned; fictitious.

A simulated sale presents the outward appearances of a sale, while, in reality, no transfer of property is made.[10]

[1] Story, Partn. § 90.

[2] 2 Pars. Contr., 6 ed. *257c, 257a.

[3] *Ibid.* 701.

[4] *Ibid.* 257*ap*. See also 2 Bl. Com. 61; 2 Story, 512.

[5] Gould, Plead. 290-91; Steph. Plead. 265; 9 Mass. 533; 2 Day, 393; 11 S. & R. 32.

[6] State v. McKenzie, 42 Me. 394 (1856): Me. R. S., c. 127, § 5.

[7] United States v. Otey, 31 F. R. 69 (1887).

[8] 2 Bl. Com. 278-79; 4 *id.* 62; 1 C. P. D. 649.

[9] L. *simul*, together; or *similis*, like.

[10] See 34 La. An. 198, 324.

An interest conferred upon a person for the purpose of causing the jurisdiction of a particular court to attach, is sometimes characterized as a "simulated interest." See FICTITIOUS.

SINCE. May cover the whole of a period between an event and the present time; while "subsequently" may refer to a particular time.[1]

SINE. L. Without.

Sine die. Without a day — for the reassembling of a body, or for the appearance of a defendant.

Sine hoc. Without this. See ABSQUE.

SINGLE. See ACKNOWLEDGMENT, 2; ADULTERY; BILL, III; BOND; MAN; ORIGINAL, 2; SALE.

SINGULAR. See NUMBER.

SINKING FUND. See FUND.

SISTER. See CONSANGUINITY.

Where a testator's property would be diverted from his lineal descendants to strangers by construing "sister" to mean half-sister, the burden of proving that that was his intention rests upon the contestant.[2]

SIT. To hold a session of court; to hold court.

Sittings. In England, has much the same meaning that session or term has with us. *Sittings in banc* are for determining matters of law; *sittings at nisi prius*, for trying issues of fact.[3] See SESSION; TERM, 4.

SITUATE. To have a *situs* (q. v.), a place or position.

Situated. In the United States, in such expressions as "all that tract of land situated," etc., has been more commonly used than "situate."

Personalty is situated wherever it may be at a particular time. Strictly speaking, it cannot have a *situs*.[4] See CONTAINED.

A house may be said to be situated on all the lands within the inclosure necessary for its enjoyment, and actually so used.[5]

SITUS. L. A thing placed, or lying; manner of lying, local position, place, site, situation. *In situ.* In place, in position.

Personalty has its *situs* at the place of its owner's domicil. For purposes of taxation, a debt has its *situs* at the residence of the creditor.

Realty has its *situs* where it has been placed by nature.

Lex rei sitæ. The law of the state where realty is situated, where property lies.[1] Compare LEX, Loci. See PROPERTY.

SIXTY YEARS. See TEMPUS; YEAR.

SKATING RINKS. See EXHIBITION.

SKEPTIC. See OATH; RELIGION.

SKILL. See CARE; CONTRACT, Implied EXPERT; GAME, 2; INVENTION.

SKINS. See PERISHABLE.

SLANDER.[2] 1. Injuries affecting a man's reputation and good name are, first, by malicious, scandalous, and slanderous *words*, tending to his damage and derogation; and, second, by printed or written libels, pictures, signs, etc., which set him in an odious and ridiculous light, and thereby diminish his reputation.[3] The former is sometimes called *oral* or *verbal slander*, the latter *written slander* or libel.

False defamatory words when spoken.[4]

As, if a man maliciously and falsely utters any false tale of another, which may endanger him in law by impeaching him of some heinous crime, as, to say that a man has poisoned another or is perjured; or which may exclude him from society, as, to charge him with having an infectious disease; or which may impair or hurt his trade or livelihood, as, to call a tradesman a bankrupt, a physician a quack, a lawyer a knave. Words spoken in derogation of a peer, a judge, or other great officer of the realm, and words tending to scandalize a magistrate or person in a public trust, are reputed more highly injurious than when spoken of a private person. For such scandalous words an action on the case may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen. But with regard to words that do not thus upon the face of them import such defamation as will of course be injurious, it is necessary that the plaintiff aver some particular damage to have happened.[5]

Oral slanders, as a cause of action, are: (1) Words falsely spoken of a person which impute the commission of some criminal offense involving moral turpitude, for which, if the charge is true, he may be indicted and punished. (2) Words falsely spoken which impute that he is infected with some contagious disease, and which, if true, would exclude him from society. (3) Defamatory words falsely spoken, which impute unfitness to perform the duties of an office or employment of profit, or the want of integ-

[1] *Re* Rosenfield, 7 Am. Law Reg. 621 (1868); 79 Me. 195.

[2] Wood *v.* Mitcham, 92 N. Y. 379 (1883).

[3] See Gird *v.* State, 1 Oreg. 311 (1860).

[4] County of Allegheny *v.* Gibson, 90 Pa. 397 (1879).

[5] Orr *v.* Baker, 4 Ind. 86 (1853).

[1] Story, Conf. Laws, § 379.

[2] F. *esclandre*, scandal, *q. v.*

[3] 3 Bl. Com. 123, 125.

[4] Odgers, Libel & Slander, 1, 7.

[5] 3 Bl. Com. 123-24.

rity in the discharge of the duties thereof. (4) Defamatory words falsely spoken, which prejudice the person in his profession or trade. (5) Defamatory words falsely spoken, which, though not in themselves actionable, occasion the person special damage. The ordinary meaning is to be affixed to the words.[1]

Mere scurrility, or opprobrious words which neither import nor are attended with injurious effects, will not support an action. Words of heat and passion, as, to call a man a rogue and rascal, if provocative of no ill consequence, and not being of the dangerous species mentioned, are not actionable; neither are words spoken in a friendly manner, as, by way of advice, admonition, or concern, without any tincture or circumstance of ill will: for, in both cases, they are not spoken maliciously; nor are words used in a legal proceeding, pertinent to the cause. . . If the defendant is able to justify and prove the words true, no action will lie, though special damage ensue: if the fact be true, any damage is *damnum abeque injuria*.[2]

The words must be "published," that is, be communicated to a third person in a language he understands. See PUBLICATION.

A party to a judicial or *quasi* judicial proceeding may say anything concerning the case that is pertinent and material, and cannot be held to answer for scandalous words, unless, under pretense of pleading the cause, he designedly wanders from the question, and slanders another person. The rule is the same as to a witness, and counsel. Public policy dictates that a man should not be hampered in prosecuting or defending a right by fear of an action for defamation. It is only when he abuses his right by using it as a cloak for malice that he will be held responsible.[3]

Evidence of the truth of language is inadmissible unless a justification is pleaded.[4] Under the plea of "not guilty," the defendant cannot, in mitigation, in effect prove guilt.[5] To establish a justification, the proof must be as broad as the charge; the plea, unsupported, is evidence of actual malice and augments the damages.[6]

Where the words are *prima facie* privileged, express malice must be proved.[7] After proof that the words were spoken, the plaintiff, to show malice, may give evidence of other words of the same nature (not actionable *per se*) spoken at different times.[1]

Evidence of the plaintiff's reputation must relate to the time before the speaking of the words; since bad reputation, after the utterance, may result from the publication.[2]

In the absence of malice, the motive of the speaker may be considered in mitigation of damages. The plaintiff is entitled to reasonable compensation for the injury suffered, but if the injury was unintentional, or committed under a sense of duty, or through an honest mistake, no vindictive damages should be given.[3]

Mental suffering is an element of damage.[4]

Evidence of the defendant's pecuniary resources is admissible, to enhance the exemplary damages.[5]

See ATTORNEY; BAD, 1; COLLOQUIUM; COMMUNICATION, Privileged, 2; DAMAGES, EXEMPLARY; DEFAMATORY; INNUENDO; LIBEL, 5; RUMOR; SCANDAL; SENSUS, Mitiori; TRANSLATION, 2.

2. Defamation of one's interest in real or personal property, or of the property itself objectively considered.

Slander of another's title, by spreading such injurious reports, as, if true, would deprive him of his estate, is actionable, provided special damage accrues to the proprietor; as, if he loses an opportunity to sell the land.[6]

The title is personified, and made subject to some of the rules applicable to personal slander when the words are not actionable *per se*. The language must be false, be uttered maliciously, and be followed, naturally, by pecuniary damage, which must be specially alleged and substantially proved.[7]

That rule "applies not only to actions for slander of title, strictly and properly so called, that is, with reference to real estate, but also to cases in which personalty is involved, or personal rights and privileges."[8]

SLAUGHTER-HOUSE. See CONDITION; NUISANCE; POLICE, 2.

Slaughter-House Cases. See POLICE, 2; SERVITUDE, 1; STATE, 3 (2).

SLAVERY. An institution by which one man is made the property of another.[9]

[1] Pollard *v.* Lyon, 91 U. S. 226 (1875), Clifford, J. Approved, Page *v.* Merwin, 54 Conn. 434 (1886). As to injury to business, see Singer *v.* Bender, 64 Wis. 172 (1885).

[2] 3 Bl. Com. 124-25.

[3] Stewart *v.* Hall, 83 Ky. 380-381, 383 (1885), cases, Holt, J. Uttered by witness, see Shodden *v.* McElwee, 86 Tenn. 149 (1887), cases; in legal proceedings, 26 Cent. Law J. 2-8 (1888), cases.

[4] Odgers, Lib. & Sl. 304, cases.

[5] Smith *v.* Smith, 39 Pa. 442 (1861), cases; Porter *v.* Botkins, 59 *id.* 484 (1869).

[6] Burford *v.* Wible, 32 Pa. 96 (1858), cases; Gorman *v.* Sutton, *id.* 248 (1858); Howard *v.* Thompson, 1 Am. L. C. 178-79, cases.

[7] Brockerman *v.* Keyser, 1 Phila. 369 (1851).

[1] Elliott *v.* Boyles, 31 Pa. 65. (1857); M'Almont *v.* McClelland, 14 S. & R. 358 (1826).

[2] Odgers, Lib. & Sl. 305; Townshend, § 408.

[3] Odgers, Lib. & Sl. 302.

[4] Mahoney *v.* Belford, 132 Mass. 394 (1882) cases.

[5] See 23 Alb. Law J. 44 (1881), cases. On special damages, see 17 Cent. Law J. 105 (1883).

[6] 3 Bl. Com. 124; Malachy *v.* Soper, 3 Bing. N. C. 381 (1836); Paull *v.* Halferty, 63 Pa. 46 (1869), cases.

[7] Kendall *v.* State, 1 Seld. 18 (1851), cases.

[8] Halsey *v.* Brotherhood, L. R., 15 C. D. 514 (1880) [affirmed, 19 *id.* 386 (1881)], in which B. had stated his belief that H.'s patent on a steam-engine infringed his patent; following Wren *v.* Weild, L. R., 4 Q. B. 730 (1869), which also concerned the infringement of a patent. Compare case of libel of letters patent, Meyrose *v.* Adams, 12 Mo. Ap. 329 (1882). See generally Odgers, Lib. & Sl. 138; Heard, Lib. & Sl. §§ 10, 59.

[9] Douglass *v.* Ritchie, 24 Mo. 180 (1857): Justinian.

The wish to use the bodily powers of another person as a means of ministering to one's own ease or pleasure is doubtless the foundation of slavery.[1]

In the United States, up to July 28, 1868 (as see below), a slave had no political rights, and only such civil rights as were given him by local law. The offspring followed the status of the mother. See PARTUS.

The master owned whatever property his slave acquired; and the slave could be a witness only for or against another slave or one who had been a slave; and he could sue in court only for his freedom: in other cases the master sued for his own use. If the master neglected to provide proper support for his helpless or impotent slave, a public officer made the provision at the owner's expense. In Louisiana, for cruel treatment, the slave could be emancipated; in Alabama and Texas, sale to another master was part of the penalty. He could be the subject of unlawful homicide; and was himself responsible for acts of crime. His owner could manumit him: the effect being to make him, not a citizen, but merely a freeman.[2]

The first governmental action toward abolishing the slave-trade was the provision that "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."[3]

In 1807, importing slaves was made to cease after January 1, 1808; and in 1818, a law passed increasing the penalties of the trade. In 1819, the vessels and effects of citizens engaged in the trade were made liable to seizure and confiscation. And by the act of March 3, 1820, all persons over whom our jurisdiction extends, whether found on domestic or foreign vessels, concerned in the slave-trade, or in kidnaping negroes or mulattoes, were to be deemed pirates and to suffer death. In Great Britain the trade was declared unlawful in 1807, and in 1824 it was made piracy. Since then efforts have been made by that nation, by treaties and otherwise, to suppress the trade everywhere. As early as 1793, the State of Georgia prohibited the trade.[4]

Slavery is a status unprotected by the law of nations, supported, where it exists, by local law. Hence persons seized to be sold as slaves in a territory where the importation of slaves is forbidden, commit no crime when they get possession of the vessel, and either slay the crew or compel them to sail for another country.[1]

The maxim in international law is that "the air makes free." If then a cargo of slaves is stranded on the soil of a state which prohibits slavery, there is no process, excepting express treaty, by which they can be prevented from availing themselves of their freedom.[2]

But the Constitution provided that "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."[3]

In the *Dred Scott Case* it was decided: that a free negro, whose ancestors were brought here and sold as slaves, is not a "citizen" within the meaning of the Constitution. When that instrument was adopted, Africans were not regarded in any State as "people or citizens;" the two clauses which refer to them treat them as persons whom it was lawful to deal in as articles of property and to hold as slaves. A citizen may take into United States territory any article of property recognized as such by the Constitution, and the Federal government is pledged to protect him in his lawful uses of it. Dred Scott acquired no title to freedom by being taken by his owner into Illinois from Missouri: the status of a person of African descent depending on the law of the State in which he resides.[4]

See Amendments XIII, XIV, XV, under CITIZEN; CHATTEL; DEBT, Public; MIGRATION; VILLEIN; WAR.

SLAY. Signifies no more than "kill," and is not necessary in an indictment.[5]

SLEEP. Occurs in a few expressions in its literal or in a figurative sense.

"Sleeping with a man" is equivalent to lying awake with a man, and being "in bed with a man" is equivalent to sleeping with him.[6]

Sleeping on rights. See DELAY; SILENCE; STALE; VIGILANS.

Sleeping partner. See PARTNER, Dormant.

Sleeping-car company. Is not responsible either as a common carrier or as an innkeeper. It is bound, however, not only to

[1] Maine, Anc. Law, 158, 157-61.

[2] See 2 Kent, 248-58; Commonwealth *v.* Aves, 18 Pick. 206-25 (1836), Shaw, C. J.; Wood *v.* Ward, 2 Flip. 342-43 (1879), cases; Civil Rights Cases, 109 U. S. 22 (1883); 70 Ala. 388.

"Everywhere, always, by everybody, in statutes alike of Virginia and South Carolina, in speeches, in letters, slavery in those days (1787) was spoken of as an evil." 2 Bancroft, Const. 129 (1884).

"Every word in the Constitution bearing on the subject was chosen with the greatest caution." *Ib.* 164. See also *ib.* 141-44, 151-64.

[3] Constitution, Art. I, sec. 9.

[4] See 2 Story, Const. §§ 1332-37, 1915-27.

[1] See United States *v.* The Amistad, 15 Pet. 587-98 (1841), Story, J.; "The Case of the Amistad," a pamphlet read before the New Haven Historical Society in 1886, by Prof. S. E. Baldwin, of Yale Law School.

[2] See Priscilla Smith *v.* Smith, 13 La. *444 (1838); Eliz. Thomas *v.* Generis, 16 *id.* *486 (1840); Woolsey, Int. Law, § 74.

[3] Constitution, Art. IV, sec. 2, cl. 3.

[4] Dred Scott *v.* Sandford, 19 How. 393, 399-456 (1856), Taney, C. J., Wayne, Nelson, Grier, Daniel, Campbell, and Catron, JJ., concurring, 454-529; McLean and Curtis, JJ., dissenting, 529-633.

[5] State *v.* Thomas, 32 La. An. 351 (1880).

[6] Barnett *v.* Ward, 36 Ohio St. 110 (1880).

furnish its guest a berth, but to keep a watch during the night, exclude unauthorized persons from the car, and take reasonable care to prevent theft.

In case of loss from negligence the company is liable for such articles as a passenger usually carries about his person, and such sums of money as may be reasonably necessary for his traveling expenses. The invitation to make use of the bed carries with it an invitation to sleep, and an implied agreement to take reasonable care of the guest's effects while he sleeps.[1]

A sleeping-car company holds itself out to the world as furnishing safe and comfortable cars, and, when it sells a ticket, it impliedly stipulates to do so. It invites passengers to pay for, and make use of, its cars for sleeping, all parties knowing that, during the greater part of the night, the passenger will be asleep, powerless to protect himself or to guard his property. He cannot, like the guest of a hotel, by locking the door, guard against danger. He has no right to take any such steps to protect himself in the sleeping-car, but, by the necessity of the case, is dependent upon the owners and officers of the car to guard him and the property he has from danger from thieves or otherwise. The law raises the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier, or as an inn-holder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if through want of such care the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it.[2]

A passenger is entitled to a continuous passage in such berth and on such car as his ticket calls for, or in an equally desirable berth or an equally safe, convenient, and comfortable car.[3]

The law will not permit a railroad company, engaged in carrying persons for hire, through any arrangement with a sleeping-car company whose cars constitute part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey.[4]

A company may refuse to sell accommodations to a person who does not have a proper railroad ticket.[5]

The obligation of the company for injury to a person, not a passenger, who is wantonly assaulted and beaten by the porter, is not governed by the principles which regulate the liability of a common carrier for a like assault committed by a servant.[1]

See CARRIER, Common.

SLIGHT. See CARE; NEGLIGENCE.

SLUICE-DAM. Is for the purpose of utilizing the water of a stream by raising a head sufficient to float logs over obstructions and shoal places down to the dam; and then, by letting the water out, flood the stream below so as to carry the logs to their destination. It is constructed with a "sluice-way," or opening, for the passage of logs. To "sluice" and "sluicing" mean simply opening the gates for logs to pass through.[2]

The owner has charge of his own property all the time. The owner of the dam has no control over the logs, except by virtue of a lien for tolls.[3]

SMART-MONEY. See DAMAGES, Exemplary.

SMELTING. See ART, 1; PROCESS, 2.

SMOKE. See AIR; NUISANCE; POLICE, 2.

SMUGGLE.[3] The act, with intent to defraud, of bringing or attempting to bring into the United States dutiable articles without passing them, or the package containing them, through the custom-house, or submitting them to the officers of the revenue for examination.[4]

Implies something illegal, and is inconsistent with an innocent intent. Conveys the idea of a secret introduction of goods, with intent to avoid payment of duty.[5]

An article found secreted in baggage will be forfeited, and a penalty of treble the value imposed.[6] In other cases the penalty is of a sum of equal or double the value.

The penalty for making or attempting to make an entry of merchandise by means of a false invoice, certificate, etc., is forfeiture of the merchandise;[7] or the value of the property may be recovered by suit.[8] See MOIETY.

If particular goods were actually smuggled or

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[1] Blum *v.* Southern Pullman Palace Car Co., 3 Cent. Law J. 591 (U. S. C. C. W. D. Tenn., 1876), Brown, J.; Woodruff Sleeping & Parlor Coach Co. *v.* Diehl, 84 Ind. 481-84 (1882), cases: s. c. IX Am. & Eng. R. Cases, 294, 301, cases; Pullman Co. *v.* Smith, 73 Ill. 360 (1874); Pullman Co. *v.* Gardner, 14 W. N. C. 17 (Pa., 1883); Pardee *v.* N. Y. Central Sleeping Car Co., N. Y. (1884): 1 Ry. Corp. Law J. 490.

[2] Lewis *v.* N. Y. Central Sleeping Car Co., 143 Mass. 273 (1887), cases, Morton, C. J.; Pullman Palace Car Co. *v.* Pollock, 69 Tex. 120 (1887). See also Pullman Co. *v.* Gaylord, Super. Ct. Ky. (1884): 23 Am. Law Reg. 788; Whitney *v.* Pullman Co., 143 Mass. 243 (1887); 22 Cent. Law J. 364-65, 367 (1887), cases; 19 Am. Law Rev. 204-22 (1885), cases; 20 *id.* 159-82 (1886), cases.

[3] Pullman Palace Car Co. *v.* Taylor, 65 Ind. 153 (1879).

[4] Pennsylvania Company *v.* Roy, 102 U. S. 457 (1880).

[5] Lawrence *v.* Pullman P. Car Co., 144 Mass. 7 (1887).

[1] Williams *v.* Pullman's Palace Car Co., Sup. Ct. La. (1888), cases. The plaintiff entered a car to ask to be permitted to wash his hands, and, without provocation, was beaten by the porter.

[2] Anderson *v.* Munch, 29 Minn. 416 (1882), Mitchell, J.

[3] Scan. *smug-*, to creep through a hole.—Skeat.

[4] [Act 22 June, 1874, § 4: 1 Sup. R. S. 77.

[5] United States *v.* Claflin, 13 Blatch., 184 (1875), Benedict, J.; Stockwell *v.* United States, 13 Wall. 546 (1871)

[6] R. S. § 2802.

[7] R. S. § 2864, cases.

[8] United States *v.* Flax Spinning Co., 17 Blatch. 138 (1879).

brought in by fraud, the government is entitled to a decree of forfeiture under the act of June 22, 1874, § 12, notwithstanding the claimant may have purchased in good faith and for full value.[1]

As an indictable offense, punishable by a fine of as much as five thousand dollars, and with two years imprisonment, either or both.[2]

SNAKE. A bill pending before a legislative body, which, while introducing a general rule of law, is especially designed to change the law in relation to some matter then in controversy, to the advantage of the originator or supporters of the bill. Compare RIDER.

SNOW. See SIDEWALK.

The owner of a building who leases it, reserving only the right to enter "to repair," is not liable to a person injured by a fall of snow from the roof, it not appearing that the tenant might not by reasonable care have prevented the accident.[3]

SO. "Hence" and "therefore" are sometimes the equivalents of "so," and the latter word is thus understood whenever what follows is an illustration of a conclusion from what has gone before.[4]

As a proviso in a will, "so" is a limitation. It is also descriptive, and the same as "hereinbefore."[5]

That "so much" of a piece of land shall be sold, refers to a fractional portion.[6]

So help you God. See OATH.

So that. See CONDITION, Precedent; PROVIDED.

SOBER. See INTEMPERATE.

SOCAGE.[7] Holding lands in consideration of services certain or definite in nature and amount. The principal kind of title to land recognized by modern English law.[8]

In the United States, allodial tenure; which is subject only to ultimate rights in the state — such as eminent domain, and escheat. See FEUD.

SOCIALISM. See COMMUNISM; NIHILIST, 2.

SOCIETY. See ASSOCIATION; BENEFIT; CHURCH; COMPACT, Social; CONSORTIUM; GOVERNMENT.

[1] United States *v.* Certain Diamonds, 30 F. R. 364 (1887).

[2] R. S. § 2865, cases. Cases on violation of laws, Friedenstein *v.* United States, 125 U. S. 224 (1888); Origet *v.* United States, *ib.* 240 (1888).

[3] Clifford *v.* Atlantic Cotton Mills, 146 Mass. 47 (1888), cases.

[4] Clem *v.* State, 33 Ind. 431 (1870).

[5] Giles *v.* Melsom, 6 L. R., H. L. C. 24 (1873); 42 L. J., Ch. 122; 21 W. R. 417; 28 L. T. 789.

[6] Straw *v.* Poor, 74 Me. 55 (1882).

[7] Sax. *soc.* liberty, privilege, — 2 Bl. Com. 80.

[8] See 2 Bl. Com. 79–82; Maine, Anc. L. 225.

SODOMY. Carnal copulation, by human beings with each other against nature, or with a beast.[1]

Named from the prevalence of the sin in Sodom.[2]

The infamous "crime against nature," committed either with man or beast; an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out.[3] Sometimes called "bestiality" or "buggery."

SOIL. See LAND.

SOJOURN. Something more than to "travel," and applies to a temporary, as contradistinguished from a permanent, residence.[4] See RESIDE.

SOLAR. See DAY; MONTH.

SOLATIUM. L. A soothing, assuaging; compensation, indemnification.

Compensation for injury to the feelings, as distinguished from indemnification for pecuniary loss or for physical suffering.[5] See DAMAGES, Exemplary.

SOLD. Imports a valuable consideration, and a valid contract to sell or convey.[6] See SALE.

Sold note. See NOTE, 1, Bought, etc.

SOLDIER. See BOUNTY; ENLISTMENT; MILITARY; MILITIA; PENSION, 3; RANK; WAR.

SOLE. Alone; single; separate: individual; opposed to joint and married: as, a sole — administrator, executor, corporation, tenant, use, a feme-sole, *qq. v.*

In a will, "sole" has no fixed technical meaning which requires that a person who contests that meaning must show, by implication, that it is not used in a strict technical sense. In a marriage settlement, it may have a particular and exclusive meaning.[7]

In a will, was held to mean "absolute," rather than "separate," — the phrase being "sole and separate use."[8] See SEPARATE, 2.

SOLEMN. Made in due form; conforming to the requirements of law; formal: as, a solemn — admission, instrument, *qq. v.* See also OATH, Corporal; SEAL, 1.

Solemnize. To be present at a marriage ceremony, that it may have due publication

[1] Bishop, Cr. L. § 1029.

[2] Ausman *v.* Veal, 10 Ind. 356 (1858).

[3] 4 Bl. Com. 215.

[4] [Henry *v.* Ball, 1 Wheat. 5 (1816), Marshall, C. J.

[5] See Malloy *v.* Bennett, 15 F. R. 373 (1883); 22 Conn 298; 132 Mass. 394; 15 N. Y. 415; 10 E. L. & E. 437; 2 Greenl. Ev. § 267.

[6] See 74 N. C. 593; 3 Wend. 112; 1 Smith, 54; 5 Wall 720.

[7] Massey *v.* Rowen, L. R., 4 E. & I. Ap. 295 (1869).

[8] Lewis *v.* Mathews, L. R., 2 Eq. 180 (1866).

before third persons, for the sake of notoriety and the certainty of its being made.[1]

SOLICIT.[2] To importune, entreat, implore, ask, attempt, try to obtain.

So held under an indictment for soliciting, by newspaper publication, persons to commit murder.[3]

A solicitation to commit a crime is a misdemeanor.[4] See CHASTITY. Compare ATTEMPT.

Solicitor. A practitioner in courts of equity.[5]

Solicitor-general. A law-officer next in rank to the attorney-general.

In some States, the chief law-officer of the government; corresponding to the attorney-general in other States. See further ATTORNEY.

SOLIDUM. See CONSOLIDATE; IN SOLIDO.

SOLUM. L. The lowest part: land, soil.

Ædificatum solo, solo cedit. What is built upon the land, goes with the land: a building follows the ownership of the land. See FIXTURE.

Cujus est solum, ejus est usque ad coelum et ad inferos. Of whom is the land, of him is it also to the sky and to the deepest depths: he who owns the land owns all above and all below the surface.

Upward no man may erect a building to overhang another's land; and downward, whatever is in a direct line belongs to the owner of the surface.[6]

The owner of land has the right to use that which is beneath the soil, whether rock or water, where there is no intent to injure the adjoining owner.[7] See MINE; TREE.

Solo cedit quod solo implantatur. With the land goes whatever is on the land planted.

See LAND; TERRA.

SOLUTIO. See OBLIGATION, 1.

SOLVENCY.[8] Ability to pay one's own debts — in the ordinary course of business; also, ability to pay at some future time, upon settlement of one's estate.

Solvent. Owning property enough to pay all one's own debts.

"Solvency" may mean being in such condition with respect to property that a demand may be collected by due course of law; as, within the law of suretyship, a solvent principal.[1]

The solvency which will sustain a voluntary deed consists in such condition as to means that payment can be enforced by process of law.[2]

Does not depend upon the amount of property owned which is subject to execution: the debtor may be solvent and yet have no property liable thereto.[3]

"Debts due from solvent debtors," which are taxable under a statute, refer not to general solvency, but to the amount which may be realized, that is, to the value of the debts.[4]

In Missouri, a bank is solvent which has assets sufficient to pay, within reasonable time, all its liabilities, through its own agencies.[5]

See further INSOLVENCY.

SOLVIT. L. He paid. See DIES, Solvit.

SOME. See NUMBER.

SON. 1, Eng. See CHILD; ELDEST; NAME, 1.

2, F. See ASSAULT; TORT, 1.

SONANS. See IDEM.

SOON. Within a reasonable time; as, in the case of a promise to do an act soon.[6] See TIME.

As soon as. A contract to deliver cotton "as soon as it can be picked out and shipped" was held to allow the lapse of a reasonable time, and until the usual mode of transportation could be employed.[7]

The charter of a railroad company authorized it "as soon as it conveniently can" to construct a road, with tracks, works, appendages, etc. *Held*, that the company was not bound to exercise its whole authority in the beginning, when the demands of business are few.[8]

SORCERY. See WITCHCRAFT.

SOROCIDE. See HOMICIDE.

SOUL. A corporation is sometimes said to have no soul or to be soulless: it is an artificial body.

"Neither can a corporation be excommunicated, for it has no soul, as is gravely observed by Sir Edward Coke; and therefore it is not liable to be summoned into the ecclesiastical courts upon any account."[9]

SOUND. 1, *v.* An action brought for damages, as, in covenant or trespass, and not for specific property, is said to "sound in damages."[10]

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[1] [Pearson *v.* Howey, 11 N. J. L. 19 (1829).

[2] L. *sollicitare*, to agitate, arouse, urge.

[3] Regina *v.* Most, 44 L. T. 827 (1881).

[4] 4 Bl. Com. 16.

[5] [3 Bl. Com. 26.

[6] 2 Bl. Com. 18, 16.

[7] Redman *v.* Forman, 83 Ky. 216 (1885).

[8] L. *solvens: solvere*, to disengage, liberate, be free; to pay.

[1] Huffman *v.* Hulbert, 13 Wend. 378 (1835).

[2] Eddy *v.* Baldwin, 32 Mo. 369, 374 (1862).

[3] McKown *v.* Fergason, 47 Iowa, 637 (1878).

[4] Lamar *v.* Palmer, 18 Fla 155 (1881).

[5] Dodge *v.* Mastin, 17 F. R. 665 (1883).

[6] Sandford *v.* Shepard, 14 Kan. 282 (1875).

[7] Waddell *v.* Reddick, 2 Ired. L. 429 (1842). See also Ubsdell *v.* Cunningham, 22 Mo. 124 (1855).

[8] Philadelphia, &c. R. Co. *v.* Williams, 54 Pa. 107 (1867).

[9] 1 Bl. Com. 477; 10 Rep. 32.

[10] Stephen, Plead. 105.

Within the meaning of a particular statute relating to appeals and writs of error, an action "sounding in damages" is one in which the damages cannot be determined in dollars by witnesses, but certain facts are proven from which the jury may determine the amount of damages, as, in slander, and the like,—when the damages are not susceptible of direct proof.[1]

Sounding the same. See IDEM, Sonans.

2, *adj.* (1) Referring to wood, vegetables or other inanimate substance: free from decay or rottenness;[2] opposed to that which is defective, decaying, injured,—not merely inferior.[3]

(2) Referring to an animal: that neither from nature, disease, or other cause is the animal incapable of performing its ordinary functions; as applied to organs of seeing, hearing, smelling, etc., that the organ has not, from nature, disease, or other cause any defect which makes it incapable or unfit to perform the services ordinarily required of it.[3]

Free from disease. . . The only qualification arises from the purpose for which the warranty is given. If a horse is purchased for a specified use, "sound" means that he is useful for that purpose, and "unsound" that he is affected with something which will impede that use.[4]

A general warranty will cover even a patent defect, when so intended.[5]

False assertion of soundness, knowingly made, is such a fraud upon the vendee as will entitle him to a rescission, whether the assertion amounted to a warranty or not.[6]

In Massachusetts, a representation that a horse is "sound," known to be false, is a false pretense.[7]

Sound health. See HEALTH.

Sound mind and memory. See INSANITY, 2 (5).

SOUS SEING PRIVE.[8] F. Under his private signature. In Louisiana, an act or contract evidenced by writing under private signature—a "private act."

An "authentic act" is an agreement entered into in the presence of a public officer.[8]

[1] Bradshaw *v.* Standard Oil Co., 114 Ill. 172 (1885).

[2] Bell *v.* Jeffreys, 13 Ired. L. 357 (1852).

[3] Hawkins *v.* Pemberton, 35 How. Pr. 333 (1868), Robertson, C. J.

[4] Kiddell *v.* Burnard, 9 M. & W. *670-71 (1842), Alderson, B.

[5] Fletcher *v.* Young, 69 Ga. 593 (1883); Pinney *v.* Andrus, 41 Vt. 641 (1869).

[6] Nelson *v.* Martin, 105 Pa. 229 (1884).

[7] Commonwealth *v.* Jackson, 132 Mass. 16 (1882); 17 Me. 211; 64 *id.* 157; 5 Q. B. 49. See also Kingsley *v.* Johnson, 49 Conn. 462 (1882); Means *v.* Means, 88 Ind. 196 (1882).

[8] *Privé.* See Louque's Dig. (1878) XXIV-V.

SOVEREIGNTY.[1] The public authority which orders and directs what is to be done by each member of a political community in relation to the purposes of the association.[2]

The supreme power which governs the body politic or society that constitutes the state.[3]

The exercise of, or right to exercise, supreme power, dominion, or sway; as applied to a State, the right to exercise supreme power, dominion, or authority.[4]

In international law, the uncontrolled exclusive exercise of the powers of a state, *q. v.*; that is, both of the power of entering into relations with other states, and of the power of governing its own subjects.[5]

All legislative powers appertain to sovereignty. The original power of giving the law, on any subject whatever, is a sovereign power. In America, the powers of sovereignty are divided between the government of the Union, and those of the States. Each is sovereign with respect to the subjects committed to it.[6]

Sovereignty and legislature are convertible terms: one cannot subsist without the other. Legislature is the greatest act of superiority that can be exercised by one being over another. . . Wherever the power of making laws resides, all other powers must conform to and be directed by it. . . In a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will. In England, where the people do not debate in a collective body, but by representation, the exercise of sovereignty consists in the choice of representatives.[7]

The sovereign or supreme power in every state resides in the people. Blackstone supposes the *jura summi imperii*, or the right of sovereignty, to reside in those hands in which the exercise of the power of making laws is placed. Our simple and more reasonable idea is that the government is a mere agency established by the people for the exercise of those powers which reside in them. The powers of government are not, in strictness, granted, but delegated powers. They are then trust powers, and may be revoked. It results that no portion of sovereignty resides in government.[8]

See further GOVERNMENT; KING; STATE, 3; SUIT, 3; TREASON.

[1] F. *soverain:* L. L. *superanus*, chief: *super*, above.

[2] [Vattel, Law of Nations, § 1.

[3] Gilmer *v.* Lime Point, 18 Cal. 251 (1861).

[4] Territory *v.* Lee, 2 Monta. 130 (1874), Wade, C. J.; Moore *v.* Smaw, 17 Cal. 199 (1861); Chancely *v.* Bailey, 37 Ga. 532 (1868).

[5] Woolsey, Int. Law, § 37.

[6] M'Culloch *v.* Maryland, 4 Wheat. 409-10 (1819), Marshall, C. J.

[7] 1 Bl. Com. 46, 49, 52, 170-71. See also 1 Story, Const. § 207.

[8] 1 Sharsw. Bl. Com. 49. See also Penhallow *v.* Doane, 3 Dall. *98 (1795).

SPAN. 1. The word does not, even in architecture, always mean a part of a structure. It perhaps as often denotes the distance or space between two columns. Referring to a bridge, it may therefore designate the measure of the distance between the piers — the space left open for navigation purposes.[1]

The act of Congress of July 25, 1866, § 10 of which authorized a bridge to be constructed over the Missouri river at Kansas City, required that the distance of one hundred and sixty feet between the piers should be obtained by measuring along a line between the piers drawn perpendicularly to their faces and the current of the river. *Held*, that as the length of such a line between the piers actually built measured seven feet less than the required distance, the bridge was not a lawful structure.[1]

2. Of horses, see HORSE.

SPANISH LAWS. See PUEBLO.

SPARRING MATCH. See PRIZE-FIGHTING.

SPEAKING. See COLLOQUIUM; DEMURRER; IMPARLANCE; SPEECH.

SPECIAL. Relating to a species (*q. v.*), a single kind or sort: individual; particular; peculiar; distinctive. Opposed to common, ordinary, general,[2] *qq. v.* Compare PARTICULAR; SEPARATE; SOLE; SPECIFIC.

As, in speaking of special or a special — acceptance, act, administration, agent, *allocatur*, *assumpsit*, bail, case, charge, constable, contract, count, custom, damages, demurrer, deposit, deputy, finding, guaranty, indorsement, injunction, issue, jury, law, legacy, legislation, lien, limitation, matter, meeting, minister, occupant, partner, plea, pleading, privilege, property, return, rule, session, statute, tail, term, traverse, tribunal, trust, verdict, warranty, *qq. v.*

SPECIALIST. See EXPERT.

SPECIALTY. An instrument under seal.

Debts by "specialty," or special contract, are debts whereby a sum of money becomes or is acknowledged to be due by deed or instrument under seal; as, by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation.[3]

A specialty is any sealed contract or obligation; a special contract as distinguished from an oral or verbal contract, a parol or unsealed contract, and a contract or obligation of record.[1]

See CONTRACT, Special; COVENANT; DEED, 2; SEAL, 1.

SPECIE.[2] Metallic money issued by public authority; generally used in contradistinction to "paper money."[3]

SPECIES. L. Look, view; appearance; a particular thing among others to which attention is directed: *specere*, to look, see. Opposed, *genus*, q. v. See IN SPECIE; SPECIAL; SPECIE; SPECIFIC.

SPECIFIC. Characterizing a species (*q. v.*), a particular kind; particular; definite; limited, restricted. Opposed to general, *q. v.*

As, specific or a specific — intent, legacy, performance, duty, *qq. v.*

SPECIFICATION. A statement of the species or particulars; an account or narrative in detail.

As, a specification of the items of a claim, the plans and specifications of a building.

In architecture, not only the dimensions and mode of construction, but a description of every piece of material — its kind, length, breadth, thickness, and the manner of joining separate parts.[4] See *Jones* v. *Watson*, CONTRACT, Executed.

In patent law, see INVENTION; ISSUE, 1; PATENT, 2.

SPECULATION. Gambling is not to be confounded with speculation. Merchants speculate upon the future price of that in which they deal, and buy and sell accordingly. In other words, they think of and weigh, that is, speculate upon, the probabilities of the coming market and act upon this outlook into the future.[5]

But when ventures are made upon the turn of prices alone, with no *bona fide* intent to deal in the article, but merely to risk the difference between the rise and the fall of the price at a given time, the case is changed. The purpose then is not to deal in the article, and the bargain represents not a transfer of property, but a mere stake or wager upon its future price.[6] See WAGER, 2.

Speculative. See DAMAGES, 1, Speculative.

[1] Hannibal & St. Joseph R. Co. *v.* Missouri River Packet Co., 125 U. S. 260, 270 (1888), Lamar, J. The defendant, in the court below, recovered $5,300 for damages to steamboats, caused by striking the piers of the bridge.

[2] See 4 N. Y. 561; 6 *id.* 176; 12 *id.* 508; 16 *id.* 80; 18 *id.* 57; 20 *id.* 434; 5 Barb. 169; 23 *id.* 88; 5 Cal. 43; 45 *id.* 679; 48 *id.* 70.

[3] 2 Bl. Com. 465.

[1] See January *v.* Goodman, 1 Dall. 208 (1787); Bank of the United States *v.* Donnally, 8 Pet. 371 (1834); 10 Ga. 167; 15 Ind. 282; 5 Neb. 87; 10 Ohio St. 40; 2 S. & R. 503.

[2] "Money paid by tale;" probably by confusion with L. abl. *specie*, as if paid *in specie* — in visible coin, — Skeat. See SPECIES.

[3] Walkup *v.* Houston, 65 N. C. 502 (1871), Dick, J.; Webb *v.* Moore, 4 T. B. Mon. 488 (1827); Henry *v.* Salina Bank, 5 Hill, 536 (1843).

[4] Gilbert *v.* United States, 1 Ct. Cl. 34 (1863), Casey, Chief Justice.

[5] Kirkpatrick *v.* Bonsall, 72 Pa. 158 (1872), Agnew, J.

SPEECH. See LIBERTY, 1, Of speech; SLANDER.

SPEED. See MODERATE.

Speedy. See TRIAL.

SPELLING. See IDEM, Sonans.

SPENDTHRIFT. See COMMITTEE; TRUST, 1.

SPES RECUPERANDI. L. Hope of recapture. See CAPTURE.

SPINSTER. A single or unmarried woman of mature years.

Formerly used as a title or addition to the surname. The primitive meaning seems to have been "spinner:" the unmarried daughters who remained at home did the spinning, while the "wife" did the weaving. The termination "-ster" is for "-er," and signifies a female doer.

SPIRIT OF A STATUTE. See CASUS, Omissus; LETTER, 2.

SPIRITS; SPIRITUOUS. See COUPON; DISTILLERY; EMPTY; INTOXICATE; LIQUOR.

SPIRITUAL ADVISER. See COMMUNICATION, Privileged, 1.

SPIRITUALISM. See INFLUENCE.

Obtaining money upon a representation that the party obtaining it can cause the spirits of deceased persons to be present in a material form, is punishable under statutes against false pretenses.[1] See PRETENSE.

While, as an abstract proposition, spiritualism does not prove insanity, a person may be a monomaniac upon that subject as upon any other form of religion.[2]

SPLIT. To split a cause of action is to bring separate actions for parts of a claim or several actions where one action would suffice.

A party seeking to enforce a claim must present to the court, by the pleadings or proofs, or both, all the grounds upon which he expects a judgment. He may not split up his demand and prosecute it piecemeal, or present only a portion of the grounds upon which relief is sought, and leave the rest for a second suit, if the first fails. Otherwise, there would be no end to litigation. But this principle does not require distinct causes of action, that is, distinct matters, each of which by itself would authorize independent relief, to be presented in a single suit, though they exist at the same time and might be construed together.[3]

[1] Regina v. Lawrence, 36 Law Times, 404 (1877), Cockburn, C. J.; Regina v. Giles, 11 id. 643 (1865), Erle, C. J.; Thompson v. Hawks, 11 Biss. 440 (1883); Commonwealth ex rel. Gordon v. Keeper of County Prison, 15 W. N. C. 289 (1884).

[2] Conner v. Stanley, 73 Cal. 556 (1887): 26 Am. Law Reg. 523-31 (1887), cases. See also, generally, Chafin Will Case, 32 Wis. 563 (1873), cases; Smith's Will, 52 id. 543 (1881).

[3] Stark v. Starr, 94 U. S. 495 (1876), Field, J.

SPOLIATION.[1] 1. An injury done by one clerk or incumbent to another, in taking the fruits of his benefice without right, but under a pretended title.[2]

2. Mutilation of an instrument by a stranger.

"Alteration" is applied to the act of a party entitled under an instrument, and imports some fraud or improper design on his part to change its effect. But the act of a stranger, without the participation of the party interested, is a mere "spoliation," or mutilation of the instrument, not changing its legal operation, so long as the writing remains legible, and, if it be a deed, any trace of the seal remains. The law regards a spoliation which destroys the identity of an instrument, as far at least as the rights of the parties are concerned, as an accidental destruction of primary evidence, compelling a resort to that which is secondary.[3] See ALTERATION, 2; SPOLIATOR.

SPOLIATOR. L. A despoiler, a destroyer; a wrong-doer; one who fraudulently alters a writing.

In odium spoliatoris omnia præsumunter. In condemnation of the despoiler, all things are presumed.

Omnia præsumunter contra spoliatorem. All things are presumed against the despoiler: every presumption will be made against a person who destroys or suppresses that which might be evidence against him; also, all things are presumed against the wrong-doer: no man shall receive advantage from his own wrong.[4]

The rule, applied in all its rigor, is for wrong-doers — for those who have been guilty of fraud or willful disregard of duty.[5]

SPORT. See CRUELTY, 3; GAME, 2; WANTON.

SPRING. A stream of water which does not appear as a stream to casual observation, and which is finally lost in the ground, may be described as a "spring" in a reservation in a conveyance.[6]

Appellant and appellee owned adjoining lands, and appellee had been using water that ran from a spring on appellant's land into a pool on his (appellee's) side of the line, from which he watered stock. Although partially subterranean, the course of the vein was

[1] Pronounced spō'. L. *spoliare*, to strip off spoil, despoil.

[2] 3 Bl. Com. 90.

[3] 1 Greenl. Ev. § 566; 2 Whart. Ev. §§ 1264-65; Medlin v. Platte County, 8 Mo. 239 (1843).

[4] Armory v. Delamirie, 1 Sm. L. C. 649-45, cases; 2 Best, Ev. §§ 411-14; Broom, Max. 938; 1 Greenl. Ev. § 37.

[5] Knapp v. Edwards, 57 Wis. 196 (1883), Lyon, J.

[6] Peck v. Clark, 149 Mass. 440 (1889).

well defined, for years running in the same channel, a few feet only, from one farm to another. *Held*, that the appellant could not be enjoined from interfering altogether with the flow of the water; that he was entitled to the reasonable use of it for farm purposes, and that if he enlarged the spring and his stock consumed all the water, appellee could not complain.[1]

In a recent case in New York, the waters from a spring on defendant's land, one hundred and twenty feet from the plaintiff's line, had been for years conducted to a trough; the waste disappeared in the ground, but one hundred feet from the trough, and near the plaintiff's line, appeared on the surface, sometimes in motion toward a sluice under the division fence, where it again disappeared, and, twenty feet beyond, on the plaintiff's land, arose, forming a spring or reservoir. The defendant diverted the water from his spring for domestic purposes, thereby intercepting the plaintiff's supply. *Held*, that the defendant was not liable in damages for the diversion. The court said: "No stream or water-course ran from the spring. The source from which it came, and the flow of its waste or surplus, were alike under-ground, concealed, and matters of speculation and uncertainty. Such a spring belongs to the owner of the land. It is as much his as the earth or minerals beneath the surface, and none of the rules relating to water-courses and their diversion apply. The only exception established by the authorities is that of under-ground streams which are known and notorious, and flow in a natural channel between defined banks. A few such exceptions are admitted to exist, and others may occur. But, outside of these, sub-surface currents or percolations are not governed by the rules and regulations respecting the use and diversion of water-courses, and they may be interrupted or diverted by the owner of the land for any purpose of his own."[2]

See AQUA, Currit; WATER; WELL, 1.

SPRINGING. See USE, 8.

SPURIOUS. A spurious bank-bill may be a legitimate impression from the genuine plate, an illegitimate impression from a genuine plate, or an impression from a counterfeit plate. It may also be both counterfeited and forged, or both counterfeited and spurious, but not both forged and spurious.[3] See GENUINE; TRADE-MARK.

SQUARE. A dedication of land to public use as a square, means for free passage or for ornamentation and improvement.[4] See DEDICATION, 1.

In the expression "owners in each fourth of a square," means each subdivision of the territory bounded on all sides by principal streets.[5]

Square yard. In a contract for removing earth, held to mean "cubic yard."[1]

SQUATTER. A person who settles or locates on land without obtaining a legal title.[2] See INTRUDER; PRE-EMPTION.

SQUIRE. See ESQUIRE.

SS. See SCIRE, Scilicet.

ST. State; statute.

St. L. Statutes at Large, *q. v.*

ST. LOUIS. See COUNTY.

STAB. To wound with a pointed instrument; to penetrate the skin at least, and draw blood.[3] See CUT, 1.

STABLE. See ARSON; BARN.

STAGE. See DRAMA; OPERA; THEATER.

STAKEHOLDER. A depositary for both parties of the money advanced by them respectively with a naked authority to deliver it over upon the proposed contingency.[4]

The loser may withdraw his stake at any time before actual payment to the winner. A *locus penitentiæ* is allowed to each party. Payment by the stakeholder after notice not to pay will make him personally liable for the amount.[5]

See further BET; DELICTUM, In pari; GAME, 2; WAGER, 2.

STALE. Describes a claim too old to be entertained in a court of equity or of admiralty, on account of laches in the complainant; antiquated.

Those courts have not always considered themselves bound by the Statute of Limitations, though the tendency is to give the statute uniform application in all courts.

Courts of equity, acting on their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established and the facts have been fraudulently and successfully concealed by the trustee from the beneficiary.

In a case for relief, the beneficiary should set forth in his bill, specifically, what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, the means used to keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill.[6]

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[1] Redman *v.* Forman, 83 Ky. 214 (1885).

[2] Bloodgood *v.* Ayers, 108 N. Y. 405 (1888), cases.

[3] [Kirby *v.* State, 1 Ohio St. 187 (1853), Corwin, J.

[4] Methodist Epis. Church *v.* Hoboken, 33 N. J. L. 17 (1868). See also Abbott *v.* Cottage City, 143 Mass. 523-26 (1887), cases.

[5] Caldwell *v.* Rupert, 10 Bush, 181 (1873).

[1] Louisville *v.* Hyatt, 2 B. Mon. 182 (1841).

[2] O'Donnell *v.* McIntyre, 16 Abb. N. Cas. 86 (1885); McAdam, Landl. & T. § 283; 5 Biss. 529; 35 Ga. 141.

[3] State *v.* Patza, 3 La. An. 514 (1848); State *v.* Lowry, 33 *id.* 1224 (1881); Ward *v.* State, 56 Ga. 410 (1876).

[4] Fisher *v.* Hildreth, 117 Mass. 562 (1875), Colt, J.

[5] Willis *v.* Hoover, 9 Oreg. 421 (1881), cases; Corson *v.* Neatheny, 9 Col. 214 (1886), cases; Smith, Contr. 265; 48 Me. 107; 4 Metc., Mass., 10; 8 Johns. 147; 16 S. & R. 148; 32 L. J., Q. B. 297; 5 Ap. Cas. 342.

[6] Badger *v.* Badger, 2 Wall. 92, 95 (1864), cases, Grier, J

To let in a defense that a claim is stale it is not necessary that a foundation be laid in the answer. If the case, as it appears at the hearing, is liable to the objection by reason of laches, the court will, upon that ground, be passive, and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the Statute of Limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly.[1]

Length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of original transactions; it operates by way of presumption in favor of the party in possession. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others and cannot be excused but by showing some actual hinderance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor.[2]

See DELAY; LIMITATION, 3.

STALL. See HOMESTALL; MARKETSTALL.

STALLION. See HORSE.

STAMP. Compare BRAND. See WRITING.

1. The act of March 3, 1875, required that every bank check, draft, order, or voucher for the payment of money, drawn upon any bank, banker, or trust-company, should have a two-cent stamp.[3] This act was repealed by act of March 3, 1883.[4]

Regard was had to the form of the instrument rather than to its operation, though the device was intended to evade the revenue acts.[5]

If not attached to a document which the law requires to be stamped, the document is not evidence; but it may be attached before it is offered in evidence.[6]

2. Although a statute designates stamps as "distiller's warehouse" and "tax paid" stamps, a designation in an indictment as "United States internal-revenue distillery warehouse stamps," and "tax-paid stamps for distilled spirits," will be sufficient — the offense charged being the removal, without destroying, of stamps from a cask of distilled spirits.[7] See COUPON-STAMP.

3. As to postage-stamps, see MAIL, 2.

[1] Sullivan *v.* Portland, &c. R. Co., 94 U. S. 811 (1876), cases, Swayne, J.; 2 Story, Eq. §§ 1519-20 *c*; 16 Blatch. 561; 4 Cliff. 226, cases.

[2] Wagner *v.* Baird, 7 How. 258 (1849); United States *v.* Throckmorton, 98 U. S. 65 (1878); Spidal *v.* Henrici, 120 *id.* 387 (1887), cases; Richards *v.* Mackall, 124 *id.* 187-88 (1888), cases; Bell *v.* Hudson, 73 Cal. 287 (1887), cases: 2 Am. St. R. 795-806 (1888), cases; 1 Pom. Eq. §§ 418-19.

[3] Act 3 March, 1875: 1 Sup. R. S. 132; R. S. § 3418.

[4] 22 St. L. 488, c. 121.

[5] United States *v.* Isham, 17 Wall. 496 (1873).

[6] R. S. §§ 3421-22; 1 Whart. Ev. §§ 697-99; 47 N. Y. 467; 58 Pa. 176; 82 *id.* 280; 39 Vt. 412; 26 Wis. 163.

[7] United States *v.* Bayaud, 16 F. R. 376 (1883): R. S. § 3294.

STAND. Pleadings and transactions which cannot be shown to be illegal are said "to stand;" and a person who has or has not a right to sue is said to have or not to have "standing in court." Compare STATUS.

Stand aside. Statute 33 Edw. I (1303) forbade the crown to challenge jurors except for cause shown. A rule of practice then arose which permitted the prosecution to direct jurors to "stand aside until the whole panel be gone through and it appear that there will be a full jury without the persons so challenged."

The practice was inherited by us, and has been repeatedly recognized by the courts. It is precisely the same here as in England, and exists in cases of misdemeanor as well as in felonies.[1]

Stand by. To know of a thing being done against one's right and not to protest until another's interest has been materially affected.

"Standing by" does not import actual presence, but knowledge under such circumstances as to render it the duty of the possessor to communicate it.[2]

The expression, often used in discussing cases of estoppel, does not mean actual presence or actual participation in the transaction, but silence where there is knowledge and a duty to make a disclosure.[3] See ESTOPPEL, Equitable.

Stand by precedents. See DECISUM, Stare, etc.

Stand committed. To be committed.[4]

Stand mute. See MUTE.

STAPLE. A settled, established mart or market. The grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of Parliament, in certain trading towns, and presided over by a mayor.[5]

The hereditary customs of the crown, which were certain customs due on the exportation of wool, skins, and leather, were styled "the staple commodities" of the

[1] See United States *v.* Shackleford, 18 How. 590 (1855); Haines *v.* Commonwealth, 100 Pa. 322-23 (1882); Zell *v.* Commonwealth, 94 *id.* 272-73 (1880); 14 Cent. Law J. 402-6 (1882), cases; Baldw. 78, 82; 4 Bl. Com. 353; 2 Bac. Abr. 365; Coke, Litt. 156; 2 Hale, P. C. 271; 26 How. St. Tr. 1231; 92 E. C. L. 92; 7 Watts, 586; 37 Pa. 54-55, 1 Bish. Cr. Proc. § 938; 2 Whart. Am. Cr. L. § 2956; Thomp. & M., Juries, 147.

[2] Gatling *v.* Rodman, 6 Ind. 292 (1855); 8 Blackf. 47.

[3] Anderson *v.* Hubble, 93 Ind. 573 (1883), cases, Elliott, C. J. See generally Richardson *v.* Pickering, 41 N. H. 386, 384-85 (1860), cases.

[4] Young *v.* Makepeace, 103 Mass. 57 (1869).

[5] 2 Bl. Com. 160.

kingdom, because they were brought to those ports where the king's staple was established to be rated before being exported.[1]

"While we make the goods prepared or sold the 'staple of the place,' our grandfathers made the place the 'staple' of the goods."[2]

Staple productions. Such productions of the soil as have an established and defined character in the commerce of the country.[3]

Statute staple. A security for money, entered into before the mayor of the staple. See further STATUTE-MERCHANT.

STAR. In law-books, indicates the line and word at which the pages of the first edition began.

STAR-CHAMBER. The room or chamber in which were originally kept the chests containing *starra* or *starrs* (Heb. shetâr): the contracts or covenants of the Jews; no *starr* being valid unless deposited in the legal repository.[4]

After the Jews were expelled from England the *starr-chamber* was used by the king's council sitting in their judicial capacity. Later, the room was designated as the *camera-stellata*.[4]

Court of star-chamber. An ancient English court, remodeled by 3 Hen. VII (1488), and 21 Hen. VIII (1530). The court repressed the turbulence of the nobility and gentry in the provinces, and supplied a court for matters which, being of novel origin, were unprovided for by the existing tribunals; such as riots, perjury, misbehavior of sheriffs, and offenses against proclamations in ecclesiastical matters. The court enhanced the royal authority by supplying it with speedy and effective machinery. It acted without the assistance of a jury. The abuses to which its processes were liable led to its abolition in 1640, by 16 Char. I, c. 10.[5]

STARE. L. To stand, stand firm; to be established.

See words following in *stat-*, and *stet*.

Stare decisis. See DECISUM.

START. Is, not limited to setting out upon a journey or a race; it means, as well, the commencement of an enterprise or undertaking; as, in the phrase he "started to leave the State," said of an insolvent creditor.[6] Compare DEPARTURE, 1.

STAT. See VOLUNTAS, Stat, etc.

[1] 1 Bl. Com. 314.

[2] Trench, Glossary, 187.

[3] Keeran *v.* Griffith, 34 Cal. 581 (1868).

[4] 4 Bl. Com. 266 *a*.

[5] 4 Bl. Com. 266-68; 4 Steph. *ib.* 308-10; 12 Am. Law Rev. 21-38 (1877); 1 Steph. Hist. Cr. Law Eng. 168-80; Green, Short Hist. Eng. Peop. 115.

[6] Graw *v.* Manning, 54 Iowa, 521 (1880), Day, J.

STATE.[1] 1, *v.* To set, set down, establish; to represent as true, declare as fact, allege, aver.

"Stating" a case to be within the purview of a statute is simply alleging that it is so; while "showing" it to be so, consists of a disclosure of the facts which bring it within the statute.[2]

State a case. For parties to agree upon the facts in a case and to submit the same to a court for a decision as to the law governing the case. See CASE, Stated.

State an account. To exhibit the items which constitute an account. See ACCOUNT, Stated.

State of the case. In New Jersey a narrative of facts which takes the place of a declaration. See *Statement*.

State of the facts. Formerly, each party to a suit in equity placed before the master a statement showing how the party represented the matter in question to be, that is, exhibiting his version of the facts.

Statement. A formal narrative of facts; an averment, allegation: as, a plaintiff's statement of claim, defendant's statement of defense. See ALLEGATION; REPRESENTATION, 1.

A "declaration" is a specification, in legal and technical form, of the circumstances which constitute the plaintiff's cause of action. A "statement" is an immethodical declaration, stating, in substance, the time of the contract, the sum, and on what founded, whether a verbal promise, a book-account, a note, a bond, a penal or single-bill, with a certificate of the belief of the plaintiff, or his agent, of what is really due.[3]

Brief statement. In Maine, a short notice filed by a defendant, without formal or full statement of the matters relied upon. The reply to this, filed by the plaintiff, is called his *counter brief statement*. They are used instead of pleas and replications, and relieve the parties from that exactness of allegation and denial by which trial upon the merits could formerly be avoided. The statements are, in effect, little more than notices of special matter to be given in evidence.[4] See PLAIN.

Statement by an accused person. In Alabama, at trial, on any criminal proceeding,

[1] F. *estat*: L. *statum*, a condition: *stare*, to stand.

[2] Spalding *v.* Spalding, 3 How. Pr. 301 (1848).

[3] Dixon *v.* Sturgeon, 6 S. & R. *28 (1820), Duncan, J.

[4] Trask *v.* Patterson, 29 Me. 502 (1849), Shepley, C. J. See also Brickett *v.* Davis, 21 Pick. 406 (1838).

the defendant may make a statement as to the facts in his own behalf, but not under oath.

He is not then a witness; nor can he be examined or cross-examined, nor impeached by proof of extrinsic facts introduced for that purpose.[1]

Stated term. One of the terms of a court in their established order.

Stating part. The portion of a bill in equity which alleges the facts in the case. See EQUITY, Bill in.

2, *n.* The circumstances or condition in which a person or thing stands or exists; standing, *status*, q. v.

3, *n.* (1) In general public law, a nation, republic, people, government, *qq. v.*

A body politic or society of men united together for the promotion of their mutual safety and advantage by the joint efforts of their combined strength.[2]

A community of persons living within certain limits of territory, under a permanent organization which aims to secure the prevalence of justice by self-imposed law. The organ of the state by which its relations with other states are managed is the "government."[3]

A complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others.[4]

The "people" do not constitute the "state," though it exists for their benefit, and is maintained by their means. A people without a "government" is not a state. The people are only an element of the state. When, within prescribed territorial limits, they effect a political organization and establish a government, a state arises. The government is established to protect them from external wrong and internal disorder. In this organization and government what is called "sovereign power" rests. Under American organizations this power is distributed among the several departments, each wielding the portion vested in it, as well against the body of the people as against individuals.[5]

In its most enlarged signification, the word "state" includes all republics, and governments not monarchical; and even monarchies, if they fall within the reason of its use.

This comprehensive sense is restrained, in the Constitution, by the subject-matter.[6]

(2) In American constitutional law, **state** means, sometimes, a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often, only the country or territorial region inhabited by such a community; not unfrequently, the government under which the people live; at other times, combines the idea of people, territory, and government. In all senses the primary conception is that of people or community — the fundamental idea upon which our institutions are established.

In the Constitution, most frequently expresses the idea of the people, territory, and government,— a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution and established by the consent of the governed. It is the union of such **States**, under a common Constitution, which forms the distinct and greater political unit which that Constitution designates as the **United States** and makes of the people and States which compose it one people and one country.

The word is used in the threefold idea in the prohibitions upon the States to make treaties, emit bills of credit, lay tonnage duties, in the guaranty of representation in Congress, etc. The geographical idea obtains in the provisions that a representative in Congress shall be an inhabitant of the State in which he is chosen, and that the trial of crimes shall be held within the States where they are committed. The idea of a political community is presented in the provision that the United States shall guarantee to every State a republican form of government, and protect it against invasion.

The union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of their common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And when these Articles were found to be inadequate to the exigencies of

[1] Chappell *v.* State, 71 Ala. 322 (1882); Act 2 Dec. 1882.

[2] [Vattel, Law of Nations, § 1.

[3] Woolsey, Int. Law, § 36.

[4] Chisholm *v.* Georgia, 2 Dall. *455 (1793), Wilson, J.

[5] State *v.* Young, 29 Minn. 536 (1881), Gilfillan, C. J.

[6] [Terry *v.* Olcott, 4 Conn. 445 (1823), Hosmer, C. J.

the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly — a perpetual union, made more perfect.

But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. . . It may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States.[1]

The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a state, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States.

Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a National government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. In the Constitution the independent existence and authority of the States is distinctly recognized. To them nearly the whole charge of internal regulation is committed or left; to them and to the people all powers not expressly delegated to the National government are reserved. The general condition was well stated by Mr. Madison in the Federalist, thus: "The Federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes."[2]

"In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this. The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the general government. Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government. But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights — the rights of person and of property — was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation. But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and even hand the balance between State and Federal power."[1]

For all national purposes intended by the Constitution the States are regarded as domestic, but in all other respects they are foreign and independent.[2]

All the rights of the States as independent nations were surrendered to the United States. The States are not nations, either as between themselves or toward foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political status at home and abroad is that of States in the United States. They can neither make war nor peace without the consent of the National government. Neither can they, except with like consent, "enter into any agreement or compact with another State."[3]

[1] Texas v. White, 7 Wall. 720-21, 725 (1868), Chase, C. J.; United States v. Reese, 92 U. S. 249-52 (1875).

[2] Lane County v. Oregon, 7 Wall. 76 (1868), Chase, C. J. See also White v. Hart, 13 id. 650 (1871), Swayne, Justice.

[1] Slaughter-House Cases, 16 Wall. 81-82 (1872), Miller, J., all the justices concurring. The question concerned the scope of the XIIIth and XIVth Amendments.

[2] Buckner v. Finley, 2 Pet. 590 (1829); 44 Pa. 330; 76 Va. 27. See also Kidd v. Pearson, 128 U. S. 16-18 (1888), Lamar, J.

[3] New Hampshire v. Louisiana, 108 U. S. 90 (1883), Waite, C. J.

The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, a paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State — concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights. The one qualification is that where a right arises under a law of the United States, Congress may, if it sees fit, give to the Federal courts exclusive jurisdiction — which may be by express enactment or by implication. Thus, where Congress creates a penalty, without specifying a remedy, the penalty may be enforced in a State court, which is as much bound to recognize United States laws as operative as to recognize its own laws. The laws of the two systems form one system of jurisprudence, which constitutes the law of the land of the State.[1]

The political society which attempted to separate itself from the Union did not destroy its identity as a State, nor free it from the binding force of the Constitution.[2]

"State" in the Internal Revenue Title of the Revised Statutes includes the Territories and the District of Columbia, when such construction is necessary to carry out its provisions.[3]

"State" in the act of March 2, 1837, relating to the taking of pilots on water forming the boundary between two States, includes an organized Territory.[4]

See AID, 1; BODY, 3; CITIZEN; COMMERCE; CONSTITUTION; COURT; DEBT, Public; DEPARTURE, 1; ESCHEAT; EVIDENCE; GOVERNMENT; INSPECTION, 1; LAW, Common; LOTTERY; MILITIA; OFFICER; POLICE, 2; POLICY, 1; PRIVILEGE, 2; PRISON; PURPOSE; STATUTE; SUIT; TAX, 3; TERRITORY, 2; TRIAL; WAR.

STATION. In the broadest sense, a place, position, or post. Compare STATUS.

1. It may be said that wherever a man stays in pursuance of orders, he is "stationed," and that if he is a military man, such place becomes a "military station." But as used in the army laws and regulations, "military station" is synonymous with "military post," and means a place where troops are assembled, where military stores are kept or distributed, where military duty is performed, or military protection afforded,— where, in short, something more or less closely connected with arms or war is kept or is to be done.[5]

2. A stopping place at which passenger tickets are ordinarily sold; as, within the meaning of a statute forbidding a railroad company to eject a person from its cars for non-payment of fare, except at "some passenger station." In another statute or connection a different sense may be intended.[1]

As to what constitutes a "station or depot," within the meaning of a statute providing that no railway company shall abandon any station or depot on its road, after the same has been established twelve months, except by the approval of the railroad commissioners after public notice and a hearing had, has been discussed in two cases in Connecticut.[2] See ABANDON, 1; DEPOT, 2; RAILROAD; USUAL.

STATIONERY. Includes blanks for use in public offices.[3]

STATU. See STATUS.

STATUARY. A copy, made by a modern artist, of an antique statute is a "professional production of a statuary or sculptor," within the customs law.

Revised Statutes, § 2504, Schedule M, directs that the duty on "paintings and statuary not otherwise provided for" shall be "ten *per centum ad valorem*. But the term statuary as used in the laws now in force imposing duties on foreign importations shall be understood to include the professional productions of a statuary or sculptor only."

The object of this section is to encourage a taste for art, and hence to admit the work of professional artists at a low rate of duty.

A *sculptor* is "one whose occupation is to carve wood, stone, or other material, into images or statues." A *statuary* is "one who professes or practices the art of carving images or making statues." The "professional productions" of a statuary or sculptor are the practical results of the practice of his profession or occupation,— the "images or statues" produced by the exercise of his professional skill. In this sense, the statute embraces all the artistic work of a statuary or sculptor who pursues the employment of his class as a profession.[4]

See COPYRIGHT; DESIGN, 2; FURNITURE; SATISFACTORY.

STATUS. L. Standing: state, condition, situation. Compare ESTATE.

A corporation has no *status* as a citizen outside of the jurisdiction where it was created.

Statu quo or in statu quo. In the condition in which — a person or thing was; upon the original footing.

A court in equity is reluctant to rescind a contract unless the parties can be put back *in statu quo*, that

[1] Claflin *v.* Houseman, 93 U. S. 136-42 (1876), cases, Bradley, J.; Martin *v.* Hunter's Lessee, 1 Wheat. 334 (1816), Story, J.

[2] Keith *v.* Clark, 97 U. S. 462 (1878); White *v.* Hart, 13 Wall. 651 (1871).

[3] R. S. § 3140.

[4] The Ullock, 19 F. R. 207 (1884); R. S. § 4236. See also 2 Cranch, 445; 1 Wheat. 91; 5 How. 377; 6 Wall. 287; 8 Saw. 321.

[5] United States *v.* Phisterer, 94 U. S. 222 (1876), Hunt, J.; Caldwell's Case, 19 Wall. 268 (1873).

[1] Baldwin *v.* Grand Trunk R. Co., Sup. Ct. N. H (1888).

[2] State *v.* New Haven & Northampton R. Co., 37 Conn. 163 (1870); Same *v.* Same, 41 *id.* 134 (1874).

[3] County of Knox *v.* Arms, 22 Ill. 179 (1859); *contra*, Commissioners *v.* Koons, 1 Col. 160 (1869). See also Commissioners' Court *v.* Goldthwaite, 35 Ala. 704 (1860).

[4] Viti *v.* Tutton, 14 F. R. 246, 741 (1882), McKennan, Cir. J.; s. c. 14 Rep. 741; 108 U. S. 312.

is, can be remitted to the position they occupied before the transaction complained of. Where a thing should not have been done, the parties are to be placed, as far as possible, in the situation in which they would have stood if there had been no such transaction.[1] See COMPENSATION; DAMAGES; LACHES; REFORM; RESCISSION.

STATUTE.[2] 1. The written will of a legislature, expressed in the form necessary to constitute it part of the law; an act of legislation; an enactment; a written law.

The express written will of the legislature, rendered authentic by certain prescribed forms and solemnities.[3]

An act of ordinary legislation, by the appropriate organ of government; the provisions of which are to be executed by the executive or judiciary, or by officers subordinate to them.[4]

The written laws of the kingdom are statutes, acts, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in parliament assembled.[5]

The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.[6]

2. Formerly, the whole legislation of one session of a legislature, each distinct enactment being referred to as a "chapter" of the statute; whence the abbreviations *ch.* and c.

Statutable. Introduced, provided for, or required by express legislative enactment.

Statutory. Relating to that which exists, obtains, or is maintainable, by virtue of legislation, instead of by force of common law; regulated by express enactment: as, statutory — copyright, indictment, lien, proceedings, remedy, *qq. v.*

General or public statute. An universal rule that regards the whole community.[7]

Local statute. Applies to the citizens of a part of a State; also, a written law of one State as distinguished from national law.

Special or private statute. This is rather an exception than a rule, being that which operates only upon particular persons and private concerns.[7]

A "public" act or statute relates to the public at large.[1]

The disposition is to enlarge the limits of public statutes, and to bring within them all enactments of a general character or which in any way affect the community at large.[2]

Examples of public statutes are: statutes relating to a particular officer, establishing or defining municipal corporations, respecting roads or navigation generally, regulating the sale of liquors, giving jurisdiction to a particular court, affecting all classes of persons in a State; also, municipal ordinances before a municipal court; but the laws of a school board are private.[3]

A "private" act or statute concerns the particular interests or benefit of certain individuals or of particular classes of men.[1]

A private statute affects only an individual or a small number of persons;[4] concerns only a particular species, thing, or person.[5]

A "local" statute touches but a portion of the territory of a State, a part of its people, or a fraction of the property of its citizens.[6]

A local statute may be general or private in nature. In discussions on the relative authority of State and United States laws, "local" statute often refers to the statute law of one State, as opposed to a law, on the same subject, of another State, or of Congress, or the general commercial law.

Other distinguishing epithets applied to statutes are: *declaratory, directory, mandatory; enabling, disabling; penal,* and *remedial,* qq. v.

General or public statutes are noticed judicially without proof. Private statutes are to be formally pleaded and proved.[7]

Private statutes are proved by copy, examined by the roll itself, or by an exemplification under the great seal. In the United States, printed copies of the laws of a legislature, published in "statute-books" by its authority, are competent evidence either by statute or judicial decision; and it is sufficient, *prima facie,* that the book purports to have been so printed. The laws and resolutions of each session of our legislatures are printed by their authority; confidential

[1] Neblett *v.* Macfarland, 92 U. S. 103 (1875), cases; 20 How. 155; 93 U. S. 62; 101 *id.* 789.

[2] F. *statut;* L. *statutum; statuere,* to establish, lay down as settled or decided: *stare,* to cause to stand. Compare CONSTITUTION; LAW.

[3] 1 Kent, 447; 51 Miss. 773; 15 Barb. 114.

[4] Eakin *v.* Raub, 12 S. & R. *348 (1825), Gibson, J.

[5] 1 Bl. Com. 85.

[6] Munn *v.* Illinois, 94 U. S. 134 (1876), Waite, C. J.

[7] 1 Bl. Com. 86.

[1] [Potter's Dwar. Stat. 52: Devine *v.* Cook County, 84 Ill. 592 (1877).

[2] Unity *v.* Burrage, 103 U. S. 455 (1880), cases, Woods, Judge.

[3] 1 Whart. Ev. § 293, cases.

[4] Morgan *v.* Cree, 46 Vt. 784-86 (1861).

[5] Village of Winooski *v.* Gokey, 49 Vt. 235 (1877).

[6] People *v.* Supervisors of Chautauqua, 48 N. Y. 16-17 (1870); People *v.* Squire, 107 *id.* 593 (1888); 49 *id.* 135; 68 *id.* 383; 5 Lans. 115; 2 Abb. Pr. 348. See also 22 La. An. 548; 7 Nev. 350; 9 *id.* 218; 15 *id.* 249; 93 N. Y. 323; 8 Oreg. 422; 6 W. Va. 349; 10 Wis. 178.

[7] 1 Bl. Com. 86; Unity *v.* Burrage, 103 U. S. 454 (1880); 8 Oreg. 422.

persons are selected to compare the copies with the original rolls, and superintend the printing.[1]

The following rules for the construction of statutes, formulated by Sir William Blackstone,[2] are frequently quoted:

(1) In construing a remedial statute, the old law, the mischief, and the remedy are to be considered. See *post*, 971, c. 2.

(2) A statute which treats of things or persons of an inferior rank cannot by general words be extended to those of a superior rank. See EJUSDEM.

(3) Penal statutes must be construed strictly. See *post*, 971, c. 1.

(4) Statutes against frauds are to be liberally and beneficially expounded.

(5) One part of a statute must be so construed by another that the whole may, if possible, stand. See RES, Ut res, etc.

(6) A saving totally repugnant to the body of a statute is void.

(7) When the common law and a statute differ the common law gives place to the statute, and an old statute to a new statute.

(8) If a statute that repeals another is itself afterward repealed, the first statute is thereby revived without formal words for that purpose. See REPEAL.

(9) Acts of Parliament derogatory from the power of subsequent Parliaments bind not.

(10) Acts of Parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those consequences, void.

To the foregoing, Judge Sharswood, in his annotations to Blackstone's Commentaries, at page ninety-one of book one, adds the following five canons, with references to decided cases:

(11) A statute shall always be so construed as to operate prospectively, and not retrospectively, unless the language is so clear as to preclude all question as to the intention of the legislature. See RETROSPECTIVE.

(12) Contemporaneous usage may be resorted to as evidence of the construction put upon a statute by those best acquainted with the mind and intention of the law-makers. See EXPOSITIO, Contemporanea.

(13) The judicial interpretation of the statute of a State as settled by its own courts is to be received and followed by the courts of other States and by the Federal judiciary. See COMITY; DECISION, Rules of.

(14) When there has been a general revision of the statute code of a State, under the authority of the legislature, and the revision has been approved, a mere change of phraseology, introduced by the revisers, will not be held to have effected a change in meaning unless such clearly appears to have been the intention. See REVISED STATUTES.

(15) A statute cannot be repealed by usage or become obsolete by non-user.

That a part of a statute may be unconstitutional, see CONSTITUTIONAL.

[1] 1 Greenl. Ev. § 480; Young *v.* Bank of Alexandria, 4 Cranch, 388 (1808); Watkins *v.* Holman, 16 Pet. 56 (1842); Biddis *v.* James, 6 Binn. *326 (1814).

[2] 1 Bl. Com. 87-91. See also 1 Kent, *460-65.

Blackstone, on pages fifty-nine to sixty-two of the same book (Vol. 1, Book 1) of his Commentaries, had made the subjoined "observations" concerning the interpretation of particular statutes, which, like the canons given above, are everywhere quoted or cited Having premised that "the most rational method to interpret the will of the legislator is by exploring his intentions" as evinced by the *words* employed, the *context*, the *subject-matter*, the *effect and consequences*, and the *spirit and reason*,— he adds, more at length, that —

(1) Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar as their general and popular use. . . Terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. See ART, 3.

(2) If words are still dubious their meaning may be established from the context.

(3) As to the subject-matter, words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end.

(4) As to the effects and consequences, the rule is that where words bear either none, or a very absurd signification, if literally understood, the received sense may be a little deviated from.

(5) But the most effectual way of discovering the true meaning of a law, where the words are dubious, is by discovering the reason and spirit of it; the cause which moved the legislator to enact it. See EQUITY, Of a statute, p. 409.

The following paragraphs, for the most part from the decisions of the Supreme Court of the United States, will serve still further to elucidate this important subject:

Regard is to be had to the words, and to the intent: by reference to the context, previous or current enactments, the history of the art or trade, general history, etc.[1]

A meaning is to be accorded, if possible, to every word. That construction which makes a word redundant is to be rejected. The light had when the statute was made, and not the light of experience, is to be followed.[2]

Every part must be construed in connection with the whole, so as to make all the parts harmonious, if possible, and give a meaning to each part.[3]

A thing within the intention is as much within the statute as if it were within the letter; and a thing within the letter is not within the statute if contrary to the intention of it.[4]

[1] Merritt *v.* Welsh, 104 U. S. 702 (1881).

[2] Platt *v.* Union Pacific R. Co., 99 U. S. 58-59, 63 (1878), cases.

[3] Washington Market Co. *v.* Hoffman, 101 U. S. 115 (1879).

[4] People *v.* Utica Ins. Co., 15 Johns. *381 (1818), Thompson, C. J. Approved, Insurance Co. *v.* Grindley, 100 U. S. 615 (1879). See also United States *v.* Moore, 95 *id.* 763 (1877); Harrison *v.* Commonwealth, 83 Ky. 171 (1885).

The intention of the law-maker is the law. The duty of the court, being satisfied of this intention, clearly expressed in a constitutional enactment, is to give effect thereto, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction.[1]

The business of the interpreter is to expound, not to improve, the language. The question is not so much what the law-makers meant, as what their language means.[2]

A construction leading to an absurd consequence is to be discarded. . . General terms will be so limited in their application as not to lead to injustice, oppression, an absurdity, or an unconstitutional operation, if possible. It will be presumed that exceptions were intended which would avoid results of that nature.[3]

If a literal interpretation of any part of a statute would operate unjustly or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. The best way to discover the meaning, when expressions are rendered ambiguous by their connection with other clauses, is to consider the causes which induced the enactment.[4]

No statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied. Hence, a new statute is regarded as applying to future cases.[5]

Settled construction is as much a part of a statute as the text itself, and a change of decision is the same in effect on contracts as an amendment of the law by enactment.[6]

The practical construction given to a statute through a long period, and acquiesced in by all the departments of government, should control the court in construing it, though that construction contravene the letter of the law.[7]

Where no Federal question is involved, the Federal courts accept the construction of the statutes of a State made by the courts of the State, however much they may question the correctness of that construction.[8]

Penal statutes are not to be construed so strictly as to defeat the obvious intention of the legislature.

This rule is founded on the tenderness of the law for the rights of individuals; and on the principle that the power of punishment is vested in the legislature, and not in the judicial department. It would be dangerous to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of kindred character with those which are enumerated.[1]

But the court must not disregard the rule that the intention of the law-maker, gathered from the words employed, governs in all cases.[2]

The intention being the law, that sense is to be adopted which best harmonizes with the context, and promotes in the fullest manner the policy and the object of the legislature.[3]

A citizen is not to be placed where, by an honest error in construction, he may be prosecuted.[4]

"The criminal law ought to be plain, perspicuous, and easily apprehended by persons of common intelligence. It is cruel and unjust to punish men for actions which can be construed to be crimes only by the application of artificial principles according to a mode of disquisition unknown in the ordinary pursuits of life."[5]

Laws in derogation of common law, and statutes conferring exclusive privileges, are also to be construed strictly, that is, by close adherence to the words.[6]

A *remedial statute* must be construed liberally, so as to afford all the relief within the power of the court which the statute indicates the legislature intended to grant. Courts will look into the occasion for the passage of such a statute, and consider the evils it seeks to remedy, their nature and extent, to determine how far it was to reach.[7]

The meaning may be extended beyond the precise words used, from the reason or motive upon which the legislature proceeded, the end in view, or the purpose designed — the limitation being that to extend the meaning to a case not included in the words, the case must be shown to come within the same reason upon which the law-maker proceeded, and not only within a like reason.[8]

Contemporaneous construction by those called upon to carry a statute into effect is entitled to great respect.[9]

[1] Oates *v.* First Nat. Bank of Montgomery, 100 U. S. 244 (1879), Harlan, J.

[2] Senior *v.* Batterman, 44 Ohio St. 673 (1887).

[3] United States *v.* Kirby, 7 Wall. 486 (1868), Field, J.; Carlisle *v.* United States, 16 *id.* 153 (1872); Oates *v.* Nat. Bank, 100 U. S. 244 (1879); Montclair *v.* Ramsdell, 107 *id.* 152 (1882).

[4] Heydenfeldt *v.* Daney Gold Co., 93 U. S. 638 (1876), Davis, J., quoting Gyger's Estate, 65 Pa. 312 (1870), Sharswood, J. See also Lamp Chimney Co. *v.* Brass, &c. Co., 91 U. S. 662-63 (1875); Leavitt *v.* Lovering, Sup. Ct. N. H. (1888).

[5] Twenty Per Cent. Cases, 20 Wall. 187 (1873), cases.

[6] Douglass *v.* Pike County, 101 U. S. 687 (1879).

[7] Harrison *v.* Commonwealth, 83 Ky. 170-71 (1885).

[8] Erie Railway Co. *v.* Pennsylvania, 21 Wall. 497 (1874), cases.

[1] United States *v.* Wiltberger, 5 Wheat. 95, 96 (1820), Marshall, C. J.; 81 Va. 243.

[2] *Re* Coy, 31 F. R. 800 (1887), Harlan, J.; State *v.* McMahon, 53 Conn. 413 (1885).

[3] United States *v.* Hartwell, 6 Wall. 395-96 (1867), cases, Swayne, J.; 1 Story, 255; 17 F. R. 437.

[4] United States *v.* Reese, 92 U. S. 219 (1875).

[5] Lamb *v.* State, 67 Md. 534 (1887), Bryan, J.

[6] See Wright *v.* Nagle, 101 U. S. 796 (1879); Ruggles *v.* Illinois, 106 *id.* 531 (1883).

[7] Johnston *v.* United States, 17 Ct. Cl. 171 (1881), Richardson, J.; Neurath *v.* District of Columbia, *ib.* 226 (1881); Stewart *v.* Kahn, 11 Wall. 504 (1870); *ib.* 515; Intoxicating-Liquor Cases, 25 Kan. 704 (1881); 70 N. Y. 228; 1 Kent, 455.

[8] United States *v.* Freeman, 3 How. 565 (1845), Wayne, Justice.

[9] United States *v.* Pugh, 99 U. S. 269 (1878); Brown *v.*

Where *English statutes* have been adopted, the settled construction of them by the English courts has been considered as incorporated in the text.[1]

Decisions made in England since the separation of the Colonies are entitled to great respect, but their authority is not admitted.[2]

See ACT, 2; CONSTRUCTION; CONSTITUTION; DAY; DECLARATORY; DEROGATION; EXCEPTION, 2; EXPOSITIO; FORM; LAW; MATERIA; ORDINANCE, 2; PREAMBLE, 2; PROHIBITORY, 1; PROVIDED; PUNCTUATION; PURVIEW; REPEL; REVISE; REPUGNANT; TITLE, 2; WAIVER.

Statute of Accumulations. See ACCUMULATION.

Statute of Distributions. See DISTRIBUTION, 1.

Statute of Elizabeth. See CHARITY, 2; CONVEYANCE, 2, Fraudulent.

Statute of Frauds. See FRAUD, Statute, etc.

Statute of Gloucester. See COSTS.

Statute of Limitations. See LIMITATION, 8.

Statute of Uses. See USE, 3.

Statute of Wills. See WILL, 2.

Statutes at large. Statutes in full or at length as originally enacted, in distinction from abridgments, compilations, and revisions. In particular, the title of the publication containing, chiefly, the acts of Congress — the United States Statutes at Large.

Acts of the State legislatures, as a rule, go by other names, as, "session laws," in Pennsylvania "pamphlet laws."[3]

The United States Statutes at Large exhibit the legislation of the several Congresses from March 4, 1789, the day of the organization of the government and of the first meeting of the First Congress. Each volume after the eighth contains all matters in the nature of legislation ordained or enacted by the Congress or Congresses in session, or by the Administration in power, during the periods covered by the volumes respectively — general or public statutes, private acts, treaties with the Indian tribes and with foreign nations, postal, consular and other conventions, public proclamations by the President and by the heads of departments, Executive orders, resolutions by the Senate and House, etc.

The different volumes and legislative periods are subjoined. Compare REVISED STATUTES, Of the United States; SESSION, 2.

Vol. 1. Congresses: I,[4] II, III, IV, V.[4] March 4, 1789 to March 4, 1799.

Vol. 2. Congresses: VI, VII, VIII, IX, X, XI,[1] XII. Dec. 2, 1799 to March 4, 1813.

Vol. 3. Congresses: XIII,[1] XIV, XV, XVI, XVII. May 24, 1813 to March 4, 1823.

Vol. 4. Congresses: XVIII, XIX, XX, XXI, XXII, XXIII. Dec. 1, 1823 to March 4, 1835.

Vol. 5. Congresses: XXIV, XXV,[1] XXVI, XXVII, XXVIII. Dec. 7, 1835 to March 4, 1845.

Vol. 6. Private laws. March 4, 1789 to March 4, 1845.

Vol. 7. Indian treaties. Sept. 17, 1778 to Oct. 11, 1842.

Vol. 8. European treaties. Feb. 6, 1778 to Nov. 10, 1845.

Vol. 9. Congresses: XXIX, XXX, XXXI. Dec. 1, 1845 to March 4, 1851.

Vol. 10. Congresses: XXXII, XXXIII. Dec. 1, 1851 to March 4, 1855.

Vol. 11. Congresses: XXXIV,[1] XXXV. Dec. 3, 1855 to March 4, 1859.

Vol. 12. Congresses: XXXVI, XXXVII.[1] Dec. 5, 1859 to March 4, 1863.

Vol. 13. Congress: XXXVIII. Dec. 7, 1863 to March 4, 1865.

Vol. 14. Congress: XXXIX. Dec. 4, 1865 to March 4, 1867.

Vol. 15. Congress: XL.[1] March 4, 1867 to March 4, 1869.

Vol. 16. Congress: XLI.[1] March 4, 1869 to March 4, 1871.

Vol. 17. Congress: XLII.[1] March 4, 1871 to March 4, 1873.

Vol. 18. Congress: XLIII. Dec. 1, 1873 to March 4, 1875.

Vol. 19. Congress: XLIV. Dec. 6, 1875 to March 4, 1877.

Vol. 20. Congress: XLV.[1] Oct. 15, 1877 to March 4, 1879.

Vol. 21. Congress: XLVI.[1] March 18, 1879 to March 4, 1881.

Vol. 22. Congress: XLVII. Dec. 5, 1881 to March 4, 1883.

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STATUTE-MERCHANT, STATUTE-STAPLE. A species of estate defeasible on condition subsequent; a security for money.

The statute-merchant was entered into before the chief magistrate of some trading town, pursuant to 13 Edw. I (1286), *de mercatoribus;* the statute-staple, pursuant to 27 Edw. III (1354), c. 9, before the mayor of the staple, *q. v.* They are both securities for debts acknowledged to be due; and were originally permitted only among traders, for the benefit of commerce. They allowed the debtor to be imprisoned, his goods seized, and his lands delivered to the creditor till out of the income the balance of the claim was paid in full. While the creditor held the lands he was tenant

United States, 113 *id.* 571 (1885), cases; Barbour *v.* Louisville, 83 Ky. 102 (1885).

[1] Pennock *v.* Dialogue, 2 Pet. *18 (1829); McDonald *v.* Hovey, 110 U. S. 628 (1884).

[2] Cathcart *v.* Robinson, 5 Pet. *280–82 (1831).

[3] See Dwarris, Statutes, 626.

[4] Held an extra session.

[1] Held an extra session.

by statute-merchant or statute-staple.[1] Compare EXTENT, 2.

STAY. To interrupt, arrest, suspend. Used also as a noun: as, stay of judgment, sentence, execution, or other proceeding. See STET; SUPERSEDEAS.

May result from an agreement, an order of court, or the operation of law — as, when an appeal, a writ of error, or a *certiorari* is perfected by bail being furnished and the requirements of the law in other respects observed. See ERROR, 2, (3), Writ of.

Stay-laws. Statutes designed to relieve debtors against the oppressive enforcement of remedies for the collection of debts in time of general financial distress. See IMPAIR.

STEAL. To commit larceny, *q. v.*

But the words "he stole my patterns" are not actionable as imputing the felonious taking of property if the defendant meant that the plaintiff fraudulently used knowledge which he had acquired.[2]

Receiving stolen goods, knowing them to be stolen, is a misdemeanor.[3]

The possession of goods recently stolen creates a presumption that the person in whose possession they are found is the thief, but not that he got them by burglary or house-breaking.[4]

The temporary retention of chattels alleged to have been stolen, pending the prosecution of the supposed thief, is within the police power.[5]

Stealing public property is a felony. Concealers and receivers are punishable alike.[6]

By 25 Geo. II (1752), c. 36, to advertise a reward for the return of things stolen, with "no questions asked," or other words to that effect, subjects both the advertiser and the printer to a forfeiture of fifty pounds each.[7] See COMPOUND, 1 (4).

As to stolen bills of lading, notes, bonds, and other evidences of indebtedness, see BEARER; LOST, 2; NEGOTIABLE.

Compare HOOK; PLUNDER. See RESTITUTION; SEARCH-WARRANT.

STEAM. See NEGLIGENCE; POLICE, 2; RAILROAD; SHIP, 2.

STEER. See CATTLE.

STENCIL-PLATE. See BRAND.

STENOGRAPHER. A short-hand writer or reporter who officially takes down testimony, and the rulings and charge in a case on trial.

His transcript of evidence is admissible when he testifies that he took the testimony in short-hand, that the transcript is correct, and exhibits all the testimony received.

A deposition should be read to and signed by the witness, after being written out in long-hand.[1]

The official stenographic notes that, by direction of a statute, are the "best authority in any matter of dispute," are the notes made up under the eye and with the approval of the court.[2] In Pennsylvania, also, his note of a bill of exceptions taken to the admission or rejection of testimony is sufficient, without the bill being actually sealed by the judge.[3] But a county is not liable for a transcript of his notes, unless made by order of court, or filed in performance of his general duty.[4]

His notes are still "in writing" although not transcribed. Where a record was incomplete for want of transcription not attributable to the plaintiff in error, the case was remanded for a new trial.[5]

A transcribed report cannot be used to contradict the witness on a subsequent trial, the legislature not having made the report evidence for any purpose.[6] But a transcript may be used on the hearing of a bill in equity for a new trial in a suit at law, the stenographer testifying to the correctness of the copy, that the witnesses were sworn, etc.[7]

His minutes of the testimony given on a former trial by a witness who has left the jurisdiction are admissible.[8]

But, before such testimony can be used in a later trial, the examination must have been completed, and the stenographer must testify to the accuracy of his report.[9]

Where a stenographer was employed by the master in a case to take testimony at the accounting before him, the expense was not allowed as costs, the parties not having agreed thereto.[10]

STEP-CHILD. See CHILD.

STET. L. Let it stand or be stayed.

Stet processus. Let the process stand; let proceeding be stayed.

An entry on a record, by leave of court, by which a plaintiff agreed that no further proceeding should be had. It prevented a defendant who became insolvent

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[1] 2 Bl. Com. 160.

[2] Dunnell *v.* Fiske, 11 Metc. 554-55 (1846). See Alexander *v.* State, 12 Tex. 540 (1854); 1 Sprague, 196; 8 F. R. 247-49; 10 Oreg. 366.

[3] 4 Bl. Com. 132.

[4] Taliaferro *v.* Commonwealth, 77 Va. 413 (1883), cases; Jenkins *v.* State, 62 Wis. 49 (1885); 2 Whart. Cr. Law, § 1605.

[5] Simpson *v.* St. John, 98 N. Y. 363 (1885).

[6] 1 Sup. R. S. 183-84.

[7] 4 Bl. Com. 134.

[1] *Re* Cary, 9 F. R. 754 (1881).

[2] Taylor *v.* Preston, 79 Pa. 442 (1875); Act 15 May, 1874.

[3] Chase *v.* Vandegrift, 88 Pa. 217 (1878); Act 8 May, 1876.

[4] Briggs *v.* Erie County, 98 Pa. 570 (1881); Lehigh County *v.* Meyer, 102 *id.* 479 (1883).

[5] Nichols *v.* Harris, 32 La. An. 646 (1880).

[6] Phares *v.* Barber, 61 Ill. 272 (1871).

[7] Brown *v.* Luehrs, 79 Ill. 581 (1875).

[8] Stewart *v.* First Nat. Bank of Ft. Huron, 43 Mich. 257 (1880).

[9] Misner *v.* Darling, 44 Mich. 438 (1880).

[10] Bridges *v.* Sheldon, 18 Blatch. 507 (1880). See also Gunther *v.* Liverpool, &c. Ins. Co., 20 *id.* 390 (1883). See generally 10 Am. Law Rec. 257; 10 Law J. 337; 1 Leg. News, 565, 592, 593, 604; 7 Mo. Law Mag. 194.

pending the action from obtaining judgment as in case of nonsuit.

STICK IN THE BARK. See LITERA.

STIPITAL. See STIRPS.

STIPULATION.[1] 1. The mode of furnishing security or bail in admiralty; also, the instrument by which this is done.

The name given to the securities which the parties are required to furnish or enter into, as a means of enabling the court to enforce justice.[2]

Corresponds to "bond" and "recognizance" at common law. No particular form of words is used: the instrument states the pendency of the suit, and that the required obligation is assumed; it is acknowledged, but need not be sealed. A deposit of money may be made instead. The stipulations now in use are for costs, for costs and damages, for value, to appear and abide the decree, or to pay money recovered.[3]

Stipulator. An obligor or surety.

Stipulators, like sureties, are not liable beyond the amount specified, except for costs and interest by way of damages in case of default to make payment pursuant to the terms of the obligation.[4]

The court may require the security to be kept good.[5]

2. An agreement between counsel respecting business before a court.

Generally, by rules or practice of the courts, is to be reduced to writing. May be to refer or to postpone a cause, to admit one or more facts, to waive an objection, to waive a trial by jury, or the like. Once filed, becomes part of the record, to be withdrawn only by leave of court.[6] See FINDING, Special.

STIRPS. L. A root, stock; source of descent.

Taking property by representation is called succession *in stirpes* or *per stirpes*, according to the roots; since all branches inherit the share that their root, whom they represent, would have inherited. Whence "stipital distribution." Opposed, distribution *per capita*, by heads or individuals.[7] See CAPUT, Per capita.

STOCK.[8] 1. The animals which are used with, supported by, or raised upon a farm or land.[9]

In its popular sense includes the domestic animals, cattle, etc., raised and used upon a farm.[1]

Domestic animals or beasts collected, used or raised on a farm: as, a stock of cattle or of sheep; called also "live-stock."[2] See ANIMAL.

2. Articles accumulated in a business or calling for use and disposal in its regular prosecution. See STORE; ROLLING-STOCK.

3. (1) Public funds; the indebtedness of a state or government.

"The reasonable expenses of a prosecutor are by statute to be allowed him out of the *common stock*."[3]

Shares in a public stock are represented by scrip issued to creditors, or by entries in official books kept in government offices. The funded national debt of Great Britain is understood to stand wholly in the form of stocks. In this country, an issue of bonds has been the more common form, though there have been Federal and State stocks.[4]

Since the introduction of the system of borrowing upon interminable annuities, "stock," instead of signifying the security upon which loans are advanced, has come to signify the principal of the loans themselves.[5]

(2) The capital of an incorporated company in transferable shares of a specified amount. In a restricted sense, refers to the interests of the respective shareholders. The aggregate of these interests may, in cases, be denominated the stock of the corporation.[6]

Capital stock. In its general acceptation, money invested in business; "capital" is a synonymous term. In this general sense it is money invested in business operations, whether that business be conducted by a single individual, a partnership, a corporation, or government; and it makes no difference how the money is obtained, whether by labor, by borrowing, or otherwise. If the money is borrowed it is represented in the hands of the lender by bonds, notes or other papers, with the government by governmental securities, sometimes called "stocks." But in such cases the lender is not a stockholder in the business. So far as the party

[1] L. *stipula*, a straw. The early Romans, upon making a solemn promise, broke a *stipula*, and, joining the parts, acknowledged the agreement. See The Nation, Vol. 35, p. 445; 36 *id.* 12.

[2] 2 Conkling, Adm. 80.

[3] Benedict, Adm. §§ 489, 491, 493; 3 Bl. Com. 291, 108.

[4] The Wanata, 95 U. S. 605-18 (1877), cases.

[5] The City of Hartford, 11 F. R. 89 (1882).

[6] R. S. § 649; 94 U. S. 277; 106 *id.* 622, 634; 103 *id.* 554.

[7] 2 Bl. Com. 217, 204; 41 N. J. E. 504.

[8] A thing "stuck" or fixed; hence a post, trunk, stem, a fixed store, fund, capital, cattle, etc.,— Skeat.

[9] [Graham v. Davidson, 2 Dev. & B. 171 (N. C., 1838).

[1] Baker v. Baker, 51 Wis. 546 (1881), Cole, C. J.

[2] Inman v. Chicago, &c. R. Co., 60 Iowa, 461 (1883), Day, C. J.; State v. Clark, 65 *id.* 338 (1884).

[3] 4 Bl. Com. 362.

[4] Abbott's Law Dict.

[5] [Mozley & Whiteley's Law Dict.

[6] [Bailey v. New York Central, &c. R. Co., 22 Wall. 637 (1874), cases, Clifford, J.; State Railroad Taxes, 92 U. S. 603 (1875); Indianapolis, &c. R. Co. v. Vance, 96 *id.* 455 (1877).

himself is concerned, if the money is invested in his business, it is his capital or stock in trade. This is the general meaning of the term. But when it refers to a chartered or joint-stock company, made up of individuals, it has a somewhat more limited signification. It then means the money advanced by the corporators or members as capital, which, for convenience, is divided into equal amounts called "shares," for which each member is entitled to a certificate, showing the number of shares which he has in his company; or, in other words, the amount of money he has furnished to the common stock; which certificate is the evidence of his being a stockholder. Referring to a corporation, especially in connection with "subscribing" to its stock, means capital stock.[1]

In the case of an individual, "capital stock" means the fund of money or the property on which he does business; in the case of a voluntary association of persons for conducting a business, as, a partnership, the fund of money or property controlled by one or more of the associates, employed as a basis of a business, on which and with which the business is to be commenced and carried on. "Capital" alone means this.[2]

The capital stock of a corporation is the amount of capital prescribed to be contributed at the outset by stockholders, for the purposes of the corporation.[3]

The funds of a corporation may fluctuate — may be increased by surplus profits or be diminished by losses; but its capital stock remains inviolable, unless changed by legislative authority.[4]

The capital stock of a corporation is that money or property, which is put into a single corporate fund, by those who by subscription therefor become members of the corporate body.[4]

That fund becomes the property of the aggregate body only. A *share* of the capital stock is the right to partake, according to the amount put into the fund, of the surplus profits of the corporation; and ultimately, on the dissolution of it, of so much of the fund thus created as remains unimpaired and is not liable for the debts of the corporation.[1]

Referring to a corporation, the property contributed by its stockholders or otherwise obtained by it, to the extent required by its charter.[3]

"Capital stock" and "shares of capital stock" are distinct things. Thus, the capital stock of a bank is the money paid or authorized to be paid in as the basis of the business and the means of conducting its operations. It represents whatever it may be invested in. If a large surplus be accumulated, that does not become a part of it. The amount authorized cannot be increased without legal authority. If there are losses which impair it, there can be no formal reduction without the like sanction. Shares of capital stock in a bank are usually represented by "certificates." Each holder is a *cestui que trust* to the extent of his ownership. The shares are held and may be bought, sold, and taxed like other property. Each share represents an aliquot part of the capital stock. The holder cannot touch a dollar of the principal. He is entitled only to share in the dividends and profits. Upon a dissolution of the institution, each shareholder is entitled to a proportionate share of the residuum, after satisfying all claims. The liens of creditors are prior to his. He, and not the corporation, can vote upon his shares. The capital stock and the shares thereof may both be taxed.[3]

Capital stock exempt from taxation is that which in the legitimate operations of the corporation comes to represent the capital. The capital stock of a bank usually consists of money paid in to be used in banking.[4]

In revenue laws, the capital stock of a corporation often means the capital stock actually issued, not the capital authorized to be issued.[5]

The capital stock of a corporation, especially unpaid subscriptions, is a trust fund for the benefit of the general creditors. The board of directors, except by fair and honest dealing and for value, cannot release an obligation to pay a subscription.[6]

The capital stock of a national banking association is a fund set apart for the payment of its debts; a substitute for the personal liability which subsists in private corporations. The creditors have a lien upon it. If diverted, they may follow it as far as it can be traced and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for value and without notice. It is publicly pledged for the security of creditors. Unpaid stock is as much a part of the assets as is the cash paid in upon it.[7]

[1] State *v.* Cheraw, &c. R. Co., 16 S. C. 528-29 (1881), Simpson, C. J.

[2] San Francisco *v.* Spring Valley Water Works, 68 Cal. 529 (1883), Thornton, J. See also People *v.* Commissioners of Taxes, 23 N. Y. 219-20 (1861), Comstock, C. J.; approved, 22 Wall. 636, *ante*.

[3] State *v.* Morristown Fire Association, 23 N. J. L. 196 (1851); Seignouret *v.* Home Ins. Co., 24 F. R. 332 (1885), cases: 25 Am. Law Reg. 32-34 (1886), cases. On the illegal issue and over-issue, see 27 Am. Law Reg. 667-92 (1888), cases; 21 Am. Law Rev. 696-704 (1887).

[4] Burrall *v.* Bushwick R. Co., 75 N. Y. 216 (1878), Folger, J.; Barclay *v.* Culver, 30 Hun, 5 (1883).

[1] Burrall *v.* Bushwick R. Co., *ante*.

[2] Williams *v.* Western Union Tel. Co., 93 N. Y. 188 (1883), cases. See also 30 Ark. 693; 83 Ill. 602; 40 Ga. 98; 8 *id.* 486; 52 Pa. 177; 18 Wis. 291.

[3] Farrington *v.* Tennessee, 95 U. S. 686-87 (1877), cases, Swayne, J.

[4] Railroad Companies *v.* Gaines, 97 U. S. 707 (1878), Waite, C. J.

[5] Commonwealth *v.* Texas, &c. R. Co., 98 Pa. 100 (1881).

[6] Sawyer *v.* Hoag, 17 Wall. 620 (1873), cases.

[7] Sanger *v.* Upton, 91 U. S. 60-61 (1875), cases, Swayne,

The directors of the corporation are the trustees of the capital stock. The trust is to be managed for the benefit of the stockholders during its life, and of its creditors in the event of its dissolution. The trustees are bound to call in what is unpaid. They cannot squander or give away the capital paid in. Accepting and holding a certificate of shares makes the holder liable to all the responsibilities of a shareholder.[1]

Certificate of stock. Not a security for money, nor a negotiable instrument in the strict sense; simply a muniment and evidence of the holder's title to a described share or interest in stock, as, in the property and franchises of a corporation.[2]

Does not partake of the character of a negotiable instrument. A *bona fide* assignee, with power to transfer the stock, takes the certificate subject to the equities which existed against his assignor.[3]

A transfer not entered on the books of the corporation may be valid against all the world except a subsequent purchaser in good faith.[4]

Deferred stock. Irredeemable railroad bonds, not entitled to interest until certain common stock has received six per centum, and after that to share *pari passu* with said common stock, do not constitute "deferred stock," in form or substance. They more nearly resemble a perpetual loan, with the interest indefinitely postponed, the owners having no rights as stockholders.[5]

Preferred stock. "Preferred," "preference," "preferential" or "guaranteed" shares of stock, as they are indifferently called, are issued by incorporations which have expended their original capital, in order to obtain further capital. The owners are entitled to profits to a certain extent in preference to other creditors. Opposed, **common stock.**[6]

The object of issuing "preferred" stock is to strengthen the company's standing or to enlarge its business. A crisis having been reached, the old stockholders are unwilling to risk more money in the enterprise, yet are ready to give those who will do so a preference in any profits which the increased means may enable the concern to make. The company cannot pay dividends with such stock. The holders are stockholders, not creditors. The question of the ability to pay dividends or interest upon it will be decided by the court. The declaring of dividends or interest on "common stock" is discretionary with the directors. The right of a holder of preferred stock extends only to a priority of dividends out of profits actually earned.[1]

Stock associations. A "joint-stock association" or "company" is a union of persons owning a capital stock devoted to a common purpose, under an organization analogous to that of a corporation; or, it is a body upon which some of the privileges or powers of a corporation have been conferred. A "joint-stock corporation" is a fully incorporated body, owning and managing a stock capital.[2]

A "joint-stock company" is a partnership with shares of capital transferable without the express consent of all the partners; that is, no *delectus personarum* exists.[3]

A partnership made up of many persons acting under articles of association, for the purpose of carrying on a partnership business, and having a capital stock, divided into shares transferable at the pleasure of the holder. Never used, in Massachusetts, of a corporation created by an act of the legislature, and authorized to issue certificates of stock.[4]

English joint-stock companies are not pure corporations, but are intermediate between corporations as known to the common law and ordinary partnerships. They are so far clothed with corporate powers that they may be treated in this country, for the purpose of taxation at least, as foreign artificial bodies, or corporations.[5]

Stock-exchange. An association of persons who deal in stocks as a business; also, the building or room maintained by the association for the public sale of stocks.

J.; County of Morgan *v.* Allen, 103 *id.* 506 (1880); Bissit *v.* Kentucky River Nav. Co., 15 F. R. 353 (1882); *ib.* 359–65, cases.

[1] Upton *v.* Tribilcock, 91 U. S. 47–48 (1875), cases.

[2] [Bailey *v.* New York Central R. Co., 22 Wall. 636 (1874), cases, Clifford, J.

[3] Mechanics' Bank *v.* New York, &c. R. Co., 13 N. Y. 611, 627 (1856).

[4] Parrott *v.* Byers, 40 Cal. 614 (1871). As to risks in purchasing, see 22 Cent. Law J. 3, 269 (1886), cases. On compelling issue of new certificate, where old negligently canceled, see St. Romes *v.* Cotton Press Co., 127 U. S. 619 (1888), cases.

[5] Philadelphia & Reading R. Co.'s Appeal, 39 Leg. Int. 98 (Pa., 1882).

[6] Lockhart *v.* Van Alstyne, 31 Mich. 81 (1875), Cooley, J. See also State *v.* Cheraw, &c. R. Co., 16 S. C. 530–31 (1881); St. John *v.* Erie R. Co., 22 Wall. 136 (1874); Warren *v.* King, 109 U. S. 389 (1883); N. Y. Central R. Co. *v.* Nickals, 119 *id.* 296, 308 (1887); Mackintosh *v.* Flint, 32 F. R. 350 (1887); Gilkey *v.* Paine, 80 Me. — (1888); 20 Am. Law Rev. 633–49 (1881), cases; 139 Mass. 9; 24 Hun, 360; 45 N. Y. 468; 78 *id.* 159; 84 *id.* 157; 8 R. I. 359.

[1] Lockhart *v.* Van Alstyne, *ante.*

[2] [1 Abbott's Law Dict. 652, 654.] See Smith, Contr. 326.

[3] [1 Pars. Contr. 121.

[4] Attorney-General *v.* Mercantile Ins. Co., 121 Mass. 596 (1877), cases, Endicott, J. See also 1 Disney, 90 (1855).

[5] Oliver *v.* Liverpool, &c. Ins. Co., 100 Mass. 531, 538 (1868). See Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566, 573 (1870).

The persons transacting business professionally "on the exchange" are either *brokers* or *jobbers:* the former are agents merely for customers; the latter deal for themselves, at the same time making purchases and sales for customers, chiefly by means of "time bargains."[1]

Stock-exchange boards are voluntary associations for business purposes, with elective membership, and provisions for a right in each member to assign his "seat" to be sold to an approved purchaser. The number of members being limited, the right to a seat at the board has a moneyed value. When a member fails to perform his contracts, or becomes insolvent, he can no longer be a member, at least until he resumes payment; and his seat may be sold for his benefit, or for that of his creditors among the other members of the board to the exclusion of outside creditors — the seat not being a matter of absolute purchase, but incumbered with conditions of tenure not imposed by the member, and which violate no principle of public policy.[2] See further EXCHANGE.

Stockholder. The owner of one or more shares of stock, either state or corporation; a shareholder. What he "holds" is strictly a certificate of ownership.

Within the meaning of a statute, a person who holds stock, issued in his name, may be regarded as a stockholder, as well as the person who owns it.[3]

A stockholder is an integral part of the corporation, and is constructively before the court in all proceedings touching the body.[4]

The liability of a subscriber is several. By subscribing he becomes a separate debtor to the company. His subscription may be enforced without the joinder of other subscribers. Where the object is to wind up the affairs, all the shareholders, as far as ascertainable, should be made parties, in order to equalize the burdens and avoid multiplicity.[5]

The individual liability of shareholders in a corporation is a creature of statute. But, on failure of a bank, in which each is liable for twice the amount of his shares, a suit in equity by or for all the creditors is the appropriate mode of enforcing payment.[6]

A certificate is not necessary to perfect a subscription. All that is needed, as to creditors, is that the subscriber shall have bound himself to become a contributor to the fund which the capital stock represents.[7]

In a national bank, the shareholders are individually responsible, equally and ratably, and not one for another, for all engagements of the association, to the extent of the amount of the stock of each shareholder, at the par value, in addition to the amount invested in such shares. This liability may be enforced through a receiver appointed by the comptroller.[1]

The separate property of a married woman who holds stock in a national bank may be charged with an assessment thereon.[2]

At common law, the individual property of the shareholder was not liable for the debts of the corporation. Such liability exists now by statutes. In a national bank it exists by contract from assent to the foregoing provision in accepting a charter. That liability, as stated, is several. It cannot be made joint; the shareholders are not guarantors or sureties one for another. The insolvency of one shareholder, or his absence, does not affect the liability of another, nor does the fact that the bank itself is a holder. To fix the liability of each shareholder, ascertain the whole amount of the par value of all the stock held by all the stockholders, and the amount of deficit to be paid after exhausting the assets of the bank; and then apply the rule that each share shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock at its par value.[3]

A purchaser of national bank stock, who, to conceal ownership and escape individual liability, transfers the stock to a person pecuniarily irresponsible, is still liable, as long as he is the actual owner.[4]

The responsibility of a holder ceases upon surrender of his certificate and delivery of a power of attorney intended and sufficient to effect a transfer of the stock; unless, perhaps, the transferee avows an intention not to have the formal entry made in the books of the bank for a period of time unreasonably long.[5]

To enable a stockholder in a corporation to sustain in equity in his own name a suit founded on a right of action existing in the corporation itself, there must exist as a foundation some action or threatened action of the managing board of directors or trustees which is beyond the authority conferred on them by their charter or other source of organization; or, such a fraudulent transaction completed or contemplated by

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[1] Brown's Law Dict.; 2 South. Law Rev. 821–45 (1876), cases; L. R., 4 Ch. Ap. 8; L. R., 4 C. P. (Ex. Ch.) 36; L. R., 4 Ex. 81.

[2] Hyde *v.* Woods, 94 U. S. 523 (1876), Miller, J.; Nicholson *v.* Gooch, 5 El. & B. 999 (1856); 9 Reporter, 305; 5 W. N. C. 36; Pancost *v.* Jowen, 93 Pa. 66 (1879); Dos Passos, Stock Brokers, &c., 14, 87, 96.

[3] State *v.* Leete, 16 Nev. 242 (1881).

[4] Sanger *v.* Upton, 91 U. S. 59 (1875).

[5] Hatch *v.* Dana, 101 U. S. 211–15 (1879), cases.

[6] Terry *v.* Little, 101 U. S. 217–18 (1879); Pollard *v.* Bailey, 20 Wall. 520 (1874); Pittsburgh, &c. R. Co. *v.* Applegate, 21 W. Va. 172 (1882), cases.

[7] Hawley *v.* Upton, 102 U. S. 316 (1880), cases. See generally Gray *v.* Town of York, 15 Blatch. 338–39 (1878), cases; Foreman *v.* Bigelow, 4 Cliff. 545–49 (1878), cases; Clark *v.* Bever, 31 F. R. 676–77 (1887), note; 25 Cent. Law J. 411 (1887), cases. On subscriptions by municipal corporations, see Kelley *v.* Milan, 127 U. S. 150 (1888), cases.

[1] R. S. §§ 5151, 5234, cases.

[2] Witters *v.* Sowles, 32 F. R. 767 (1887), cases. Case of a bill filed by a receiver to enforce payment of an assessment, Bundy *v.* Cocke, 128 U. S. 185 (1888).

[3] United States *v.* Knox, 102 U. S. 424–25 (1880), cases, Swayne, J.

[4] Davis *v.* Stevens, 17 Blatch. 259 (1879); Crescent City Nat. Bank *v.* Case, 99 U. S. 628 (1878).

[5] Whitney *v.* Butler, 118 U. S. 655, 662 (1886).

As to non-liability for par value, see 26 Am. Law Reg. 161–65 (1887), cases; as to prohibitions on transfer, *ib.* 104–6 (1887), cases.

the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation or to the interests of the other shareholders; or, where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or, where the majority of the shareholders themselves are oppressively and illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers. The complaining shareholder must first make an earnest, not a simulated, effort with the managing body to induce remedial action on their part, and this must be made apparent to the court. If time permits, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.[1]

The capital stock of a corporation exists for the benefit of the creditors whenever their interests require it. Its payment can be enforced in modes not available to the corporation and without using its name. Creditors' bills in the names of individual creditors, whether by judgment or otherwise, proceedings by assignees in bankruptcy either directly by bill or by petition, and proceedings by insolvent assignees or receivers under direction of the proper courts, are the ordinary modes; in all which it is essential that there should be an ascertainment of the fact of insolvency, of the exhaustion of all other assets, of the amount of the debts due by the corporation, of the amount of capital stock required for the discharge of those debts, and an assessment and call upon the stockholders for the payment of the amount due from each. If the contract of subscription is without conditions relieving the stockholders from paying the full par value of the stock, the call may be made by the directors, and if the corporation is *sui juris* and has not passed into the hands of assignees or receivers, the proceeding to recover the money may be prosecuted by the corporation in its own name. If, however, the corporation refuses to act, or is disabled, either by the terms of its contract or from legal incapacity by reason of insolvency, the assessment must be made by a court having jurisdiction of the matter and the parties, in some suitable proceeding by way of bill or petition; and the court will either order an assessment to be made upon each stockholder of the amount to be paid by him, and upon which an action can be tried in the common-law courts, or a decree can be made directly against each stockholder who has been made a party and served with process, for the payment of the money due by him, and such decree can be enforced by immediate execution process.[1]

Letters of administration are sufficient evidence of authority in an administrator to transfer stock. On the same footing is the trustee of an insolvent, and an executor. In general, the transfer agent is not to look beyond the certificate or letters of appointment of such person. He may demand inspection of a will, especially where stock is held in trust for a person named. Because the corporation is a trustee of the property and title of each owner of stock, it may demand this evidence of authority to make a transfer.[2]

A discretionary power to transfer stock cannot be delegated; a mere ministerial power may be. But a ratification of the delegation of a discretionary power would validate the transfer made.[3]

A power of attorney to transfer stock is valid, though executed in blank. The right to insert the name of a transferee is implied. The commercial usage is not to insert the name.[4]

The pledgee of stock may vote on it without losing his character as a pledgee.[5]

Where shares of stock are pledged as collateral, the pledgee reserving the right to sell in case of default and of causing a transfer to him on the books of the corporation, until the pledgor's rights are foreclosed by a sale, he may vote the stock, no statute providing otherwise.[6]

See further BANK, 2 (2); CALL, 5; CARRY, 6; CONSPIRACY; CORPORATION; DIRECTOR; DIVIDEND, 8; PROXY; SCRIP; SUBSCRIBE, 2; TAX, 2; VOTE.

STOCKS. A contrivance for inflicting punishment, consisting of a frame, acting like a large clamp, with openings for the legs, or legs and arms, and which, when adjusted, held the delinquent in a sitting posture.[7] Compare RACK.

STOLEN. See STEAL.

STONE. See QUARRY; WRITING.

STOP. See ESTOPPEL; ORDER, 2.

STOPPAGE IN TRANSITU. The right which arises to an unpaid vendor to resume the possession, with which he has parted, of goods sold upon credit, before they come into the possession of a vendee who has become insolvent, bankrupt, or pecuniarily embarrassed.[8]

An equitable extension, recognised by the courts of common law, of the seller's lien for the price of goods

[1] Hawes *v.* City of Oakland, 104 U. S. 450, 457, 460 (1881), cases, Miller, J; Huntington *v.* Palmer, *ib.* 482 (1881); City of Detroit *v.* Dean, 106 *id.* 537 (1882); Bulkley *v.* Big Muddy Iron Co., 77 Mo. 106 (1882), cases.

[1] Lane's Appeal, 105 Pa. 69-63, 60 (1884), cases, Green, J.

[2] Bayard *v.* Farmers' &c. Bank, 53 Pa. 232, 235 (1866), cases, Strong, J.

[3] Bohlen's Estate, 75 Pa. 304 (1874).

[4] German Association *v.* Sendmeyer, 50 Pa. 67 (1865); Denny *v.* Lyon, 38 *id.* 101 (1860).

[5] Burgess *v.* Seligman, 107 U. S. 29-31 (1882), cases.

[6] State *v.* Smith, 15 Oreg. 98, 112 (1887), cases.

[7] See Webster's Dict.; Penny Mag. Vol. 1, 54 (1832).

[8] Inslee *v.* Lane, 57 N. H. 457 (1876), Foster, C. J.

of which the buyer has acquired the property, but not the possession. The right is paramount to any lien created by usage or by agreement between the carrier and the consignee for a general balance of account, but not to the carrier's lien for freight.[1]

The right is personal to the consignor. An exercise of the right is not a rescission of the contract, but, at most, a revesting of possession in the vendor. The right must be exercised while the goods are in transit. That ends when the goods come into the possession, actual or constructive, of the vendee or his agent; but an ending as to a part is not an ending as to all the goods, unless the contract is entire. The termination may be accelerated by the vendee; but it may not be prolonged by the carrier. The right is defeated by the consignee negotiating the bill of lading to a *bona fide* transferee for value.[2] See REVENDICATION.

STOPPING-PLACE. See USUAL.

STORE. 1, *v.* To keep merchandise for safe custody, to be delivered in the same condition as when received.

Safe-keeping is the principal object of deposit, not consumption or sale.[3] See BAILMENT.

2, *n.* In England, is never applied to a place where goods are sold, only to a place where they are deposited. In this country, denotes both of these places.[4]

A shop for the sale of goods of any kind, by wholesale or retail. That is, we use "store" for *store-house*, a word properly meaning the quantity of a thing accumulated or deposited, for the place of deposit. But "shop" may refer to a place where a mechanic art is carried on.[5]

That is, again, "store" is of larger signification than "shop." The latter word frequently designates the place in which a mechanic pursues his trade.[6]

The common use of "store," when applied to a building, is to designate a place where traffic is carried on in goods, wares and merchandise, and not to designate a "store-house."[7]

Store fixtures. Store fittings or furniture, which are peculiarly adapted to make a room a store rather than something else. "Store" designates a shop or warehouse, never a factory. Therefore, fixtures in a shoe factory are not covered by the expression "store fixtures," in a policy of insurance."[1]

Store orders. Legislation intended to prevent persons *sui juris* from making their own contracts for the sale of labor or merchandise is unconstitutional; as, a statute providing that no person shall issue, for the payment of labor, any order or paper than such as is redeemable in money.[2] See CIRCULATION.

STORES. See PROVISIONS; STATION, 1.

STORM. See ACCIDENT; DANGERS; TEMPEST.

STORY, JOSEPH.

Was born September 18, 1779, at Marblehead, and died September 10, 1845, at Cambridge, Massachusetts.

He was graduated from Harvard college in 1798, standing second in his class; and in 1801 he was admitted to the bar at Salem.

From 1805 to 1808 he was a representative in the legislature; in 1808 he was sent to the lower house of Congress from the Essex district; and in 1810, having declined a re-election to Congress, he was returned to the legislature, of which, in January, 1811, he became speaker.

November 18, 1811, without solicitation, he was appointed a justice of the United States Supreme Court, which position he filled, with distinction, to the day of his death, thirty-four years later. From the death of Marshall in July, 1835, to the appointment of Taney in March, 1836, he acted as chief justice.

His decisions as judge of the circuit court for the first district are contained in two volumes of reports by Gallison, five by Mason, three by Sumner (Charles), and three by his son William Wetmore Story. His decisions in the Supreme Court are found among the decisions of that Court comprised in volumes seven, eight, and nine of Cranch's reports, the twelve volumes of Wheaton, the sixteen of Peters, and the first three of Howard.

In 1829 he became law professor at Harvard university on a foundation specially established for him by Nathan Dane for the delivery of lectures on general law and equity. The lectures prepared in discharge of the duties of this position were delivered extemporaneously, and so were not preserved. But there is scarcely a branch of the law that he did not illustrate and enlarge — constitutional, admiralty, prize, patent, copyright, insurance, real estate, commercial law so-called, and equity.

In 1833 he published a Commentary, in two volumes, 8vo, on the "Constitution of the United States." Four editions of this work have been issued up to 1889, the original text being preserved intact.

In 1834 appeared his "Conflict of Laws," eight editions of which have been issued, the third being the last edition under his supervision.

In 1835 he published his "Equity Jurisprudence," a work of which there have been thirteen authorized editions, the fifth being the last revised by the author

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[1] Potts *v.* New York, &c. R. Co., 131 Mass. 457 (1881), cases.

[2] See Audenried *v.* Randall, 3 Cliff. 106-9 (1868), cases; Wheelhouse *v.* Parr, 141 Mass. 595 (1886), cases; Bethell *v.* Clark, 19 Q. B. D. 553 (1887): 36 Alb. L. J. 446; 1 Law Quar. Rev. 397 (1885); 14 Cent. Law J. 242-44 (1882), cases; 24 *id.* 387 (1887), cases as to what is a delivery; 1 Am. St. R. 312-14, cases; Story, Sales, §§ 343-47; 2 Kent, 702; 5 Wait, Act. & Def. 612.

[3] See O'Niel *v.* Buffalo Fire Ins. Co., 3 N. Y. 127 (1849); 16 Barb. 129; 6 Wend. 628; 5 Minn. 503.

[4] Barth *v.* State, 18 Conn. 440 (1847), Storrs, J.

[5] State *v.* Canney, 19 N. H. 137 (1848), Gilchrist, C. J.

[6] Sparrenberger *v.* State, 53 Ala. 483 (1875), Brickell, Chief Justice.

[7] Hittinger *v.* Westford, 135 Mass. 259 (1883), Colburn, J.; Boston Loan Co. *v.* Boston, 137 *id.* 335 (1884).

[1] Thurston *v.* Union Fire Ins. Co., 17 F. R. 129 (1883); 16 Gray, 359.

[2] Godcharles *v.* Wigeman, 113 Pa. 431 (1886): Act 20 June, 1881.

himself; and in 1838 he published his "Equity Pleadings," of which there have been nine editions, the third, issued in 1844, by Story himself, the fourth, by Charles Sumner, containing notes left by Story.

In 1839 he published his "Agency." The original text is preserved in the ninth, the last edition.

His "Bailments" seems to have been prepared next. The fourth edition of this work, now in its ninth edition, was issued in 1846, the revised matter consisting chiefly of notes to the original text left by Story.

In 1841 he published his work on "Partnership." Of this there have been seven editions, the second, issued in 1847, being the last edition embodying changes made by the author.

In 1843 appeared his "Bills of Exchange." The original text is retained in the four editions.

In 1845 came his "Promissory Notes." Of this treatise there have been seven editions, the second, issued in 1847, containing the latest notes prepared by the author.

The popular treatises known as Story on "Contracts" and on "Sales of Personal Property" were published by his son, W. W. Story, the former in 1844, the latter in 1847. The son also published, in 1851, a life of his father, (2 vols., 8vo), and in 1854, a collection of his "Miscellaneous Writings."

The style of Joseph Story is characterized less by strength than by variety and fullness, his wide learning tending to make him somewhat diffuse. His experience at the bar was of too short duration to demonstrate his ability as an advocate.[1]

STOWAGE. See LADING, Bill of.

STRADDLE. In stock-brokers language, the double privilege of a "put and call;" securing to the holder the right to demand of the seller at an agreed price, within a given time, a certain number of shares of specified stock, or to require him to take within the time the same shares of stock.[2]

STRANDING. The striking of a vessel upon a rock, bank, reef, or the like.[3]

To constitute a "voluntary" stranding it is not necessary that there should have been a previous intention to injure the vessel, nor is that supposed to exist. It is sufficient that the vessel was selected to suffer the common peril instead of the whole of the associated risks, in order that the rest might be saved. A stranding is voluntary whenever the will of man in some degree contributes thereto, though existence of the particular reef or bank was not before known to the master, and though he did not intend to strand the vessel thereon; provided it sufficiently appears that in exposing the vessel he was aware that stranding was the chief risk incurred, and that it was not wholly unexpected by him.[4]

STRANGER. A person who has no direct interest in the subject-matter of a suit, and who has, hence, no right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment.[5]

A person not a party or privy to an act, contract, or title; as, in saying that a "stranger" must know the extent of an agent's power.

Strangers are "third persons" generally — all persons in the world except parties and privies. For example, those who are in no way parties to a covenant, nor bound by it, are said to be strangers to the covenant.

See PARTY, 2; PRIVY, 2; NEGOTIABLE; NOTICE; RECORD; RES, Inter alios.

STRAW BAIL. A nominal or worthless person as a surety. A person who frequents the neighborhood of law-courts ready to be bail for any one on the payment of a fee.

Formerly such persons wore *straw* in their shoes as a sign of their occupation.[6]

"We have all heard of a race of men who used in former days to ply about our own courts of law, and who, from their manner of making known their occupation, were recognized by the name of 'straw shoes.' An advocate or lawyer who wanted a convenient witness knew by these signs where to meet with one, and the colloquy between the parties was brief. 'Don't you remember . . ?' said the advocate. 'To be sure I do,' was the reply. 'Then come into the court and swear it.'"[7]

"During the process by which the English original writ of summons was gradually falling into disuse and the *capias* becoming in fact the first process, bail underwent a corresponding change. Originally, when the *capias* was a real arrest, the bail were two men of substance who bound themselves for the defendant's future appearance and obedience. By Blackstone's time common bail had degenerated to the two legal men-of-all-work — John Doe and Richard Roe. But there was an intermediate stage when the bail were required to be men of flesh and blood — money being of no consequence. Hence it became a regular profession to stand about the courts with straw in the shoes, signifying willingness to go any one's bail for a consideration. These were 'men of straw,' and the bail thus put in was 'straw bail.'"[8]

STRAY. A stray beast is one that has left an inclosure and wanders at large with-

[1] See Life of Story; 13 Alb. Law J. 90-92 (1876); American Cyclopaedia; 6 Am. Law Mag. 241; 1 U. S. Jur. 90, 102.

[2] [Harris *v.* Tumbridge, 83 N. Y. 95 (1880), Finch, J.

[3] Strong *v.* Sun Mut. Ins. Co., 31 N. Y. 106 (1865), Denio, C. J.; 18 Ohio, 66; 4 M. & S. 505; 1 Camp. 131; 8 *id.* 431; 4 *id.* 474; 4 B. & A. 34; 5 Q. B. D. 542; Arnould, Ins. §§ 297, 318.

[4] Star of Hope, 9 Wall. 203, 232 (1869), cases, Clifford, Justice.

[5] [Robbins *v.* Chicago, 4 Wall. 672 (1866), Clifford, J.; 1 Greenl. Ev. § 523.

[6] Imperial Dict., tit. Bail.

[7] Quarterly Rev., Vol. xxxiii, 344 (1825).

[8] The Nation, No. 935, p. 467 (1884); 3 Bl. Com. 374, 287, 295.

out its owner, and beyond his control.[1] See ESTRAY.

STREAM. See AQUA, Currit, etc.; SPRING; WATER-COURSE.

STREET.[2] Strictly, a paved way or road, but now used for any way or road in a city or village.[3]

In common parlance, a road or highway.[4]

Prima facie, a public highway.[5]

As used upon a map of a town imports a public way for the free passage of its trade and commerce.[6]

A public way,—a highway or town way, or a way which has become public by dedication or prescription.[7]

Includes the whole surface and so much of the depth as is or can be used, not unfairly, for the ordinary purposes of a street.[8]

Includes the sidewalks.[9]

The word may not include a road owned by a private corporation, as, a toll-road within the boundaries of a city.[10]

A conveyance of land bounded by a street gives the grantee a title to the middle of the street, if the grantor owned thereto; and, presumptively, a lot bounded by a street extends to the middle of it.[11]

The owner of a lot abutting upon a public street owns to the center. His title is a fee burdened only by the easement in the public.[12]

Such owner has a special interest in the street differing from that of the general public.[13]

A street cannot be devoted to purposes inconsistent with street purposes without compensation being made to the abutting owners.[14]

A city must keep its streets in a safe condition for use. But this duty is relative, not absolute. Where a defect was created by the unauthorized act of a person not an officer of the city, the duty of the city to make repairs arises only after actual notice of the existence of the defect, or after such a lapse of time as would justify the imputation of negligence, if the defect or obstruction had not been discovered. What is such reasonable time is a question for a jury.[15]

See DEDICATION, 1; GUTTER; MAP; OBSTRUCT, 1; OPEN, 1 (7), 2 (13); PAVE; REPAIR, 2; ROAD; SIDEWALK; TELEGRAPH; WAY.

Street-car.[16] See RAILROAD; VEHICLE.

Street-sprinkler. See VEHICLE.

STRICT. In the sense of governed by exactest rule, rigorously regular and legal in form, rigidly interpreted or enforced, is used — of the construction of language, of the performance of a covenant, of proof of marriage in trials for bigamy and criminal conversation, and of settlements of land for remote descendants. See STRICTUS.

STRICTUS. L. Tightly drawn: exact; rigorous; strict, *q. v.*

Stricti juris. Of exact right; of strict law. See SURETY.

Strictissimi juris. Of the strictest right; subject to the most rigid construction or rigorous application of the rules of law.

An expression applied to licenses and grants to one or more individuals and in derogation of common right.

STRIKE. 1, *v.* See ACCOUNT, 1; BALANCE; BARGAIN; BATTERY; HAND, 1.

Strike off. See ATTORNEY; JURY; ROLL, p. 910, c. 2.

Struck off. Property at auction is "struck off" or "knocked down" when the auctioneer, by the fall of his hammer or by other audible or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount of his bid, according to the terms of the sale.[1]

Strike out. See CANCEL.

2, *n.* A combination among laborers, or those employed by others, to compel an increase of wages, a change in the hours of labor, a change in the manner of conducting the business of the principal, or to enforce some particular policy in the character or number of the men employed, or the like.[2]

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[1] Sturges *v.* Raymond, 27 Conn. 474 (1858).

[2] L. *strata* (*via*), paved (way).

[3] Brace *v.* N. Y. Central R. Co., 27 N. Y. 271 (1863).

[4] Sharett's Road, 8 Pa. 92 (1848); 4 S. & R. 106.

[5] Hamlin *v.* City of Norwich, 40 Conn. 25 (1873).

[6] City of Denver *v.* Clements, 6 Col. 486 (1877).

[7] Commonwealth *v.* Boston, &c. R. Co., 135 Mass. 551 (1881).

[8] Coverdale *v.* Charlton, L. R., 4 Q. B. D. 121 (1878).

[9] Taber *v.* Grafmiller, 109 Ind. 209 (1886).

[10] Wilson *v.* Allegheny City, 79 Pa. 272 (1875).

[11] Grier *v.* Sampson, 27 Pa. 190 (1856).

[12] Terre Haute, &c. R. Co. *v.* Rodel, 89 Ind. 129 (1883); Same *v.* Scott, 74 *id.* 38 (1881), cases; Columbus, &c. R. Co. *v.* Witherow, 82 Ala. 195 (1886), cases; 25 Am. Law Reg. 442-44 (1886), cases.

[13] Brakken *v.* Minneapolis, &c. R. Co., 29 Minn. 42-43 (1881), cases; Sciota Valley R. Co. *v.* Lawrence, 38 Ohio St. 45 (1882); 24 Cent. Law J. 51 (1887), cases.

[14] Mahady *v.* Bushwick R. Co., 91 N. Y. 153 (1883); Story *v.* Elevated R. Co., 90 *id.* 122 (1882).

[15] Rehberg *v.* New York City, 91 N. Y. 142-43 (1883), cases, Andrews, C. J.; Ironton *v.* Kelley, 38 Ohio St. 52 (1882); Bennett *v.* Fifield, 13 R. I. 139-40 (1880), cases *pro* and *con*; Hanscom *v.* Boston, 141 Mass. 245 (1886), cases.

[16] See street railways, generally, 15 Am. Law Rev. 390-401 (1881), cases.

[1] Sherwood *v.* Reade, 7 Hill, 439 (1844).

[2] [Delaware, &c. R. Co. *v.* Bowns, 58 N. Y. 582, 583 (1874), Allen, J.

A party, contracting to deliver a quantity of any commodity (as, coal) may provide that he shall not be liable for non-delivery in the event of a strike preventing his obtaining the article.[1]

The fidelity of the employees of a railroad company is at the risk of the company. Therefore, to a suit for non-delivery of goods within time, the carrier cannot answer that the delivery was prevented by a strike, unless, perhaps, the interference come from discharged employees.[2]

If a society or union bring about a strike and uphold a striker's extraordinary demand, all who participate in the action of the association are chargeable with conspiracy.[3]

"If A is possessed of a stone-pit, and B, intending to discredit it and deprive him of the profits, imposes so great threats upon his workmen, and disturbs all comers, threatening to maim, and vex them with suits, if they buy stones, so that some desist from working, others from buying, etc., A shall have an action upon the case against B, for the profit of his mine is thereby impaired."[4]

Freedom is the policy of this country. But freedom does not imply a right in one person, alone or with others, directly or indirectly, to injure another in his lawful business, and to threaten him with annoyance or injury, for the sake of compelling him to buy his peace.[5]

With respect to strikes and boycotts generally, the States may be divided into (1) those in which the common law of conspiracy alone prevails, and (2) those in which the law is regulated by statute.

Arkansas, California, Florida, Illinois, Iowa, Maine, Missouri, Nevada, New Jersey, and Tennessee follow, in substance, the section (Ch. VIII, § 163, sec. 6) in the New York Code which makes it a crime "to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws."

Michigan, New York, Rhode Island, Texas, and Vermont have statutes to the effect that every person, who by himself or with others shall attempt by force, threats, or intimidation to prevent any other person from pursuing any employment he may think proper, shall be deemed guilty of a misdemeanor.

In Kansas and Michigan it is a crime to combine to impede, by any act or by means of intimidation, the regular operation of any railroad company, or other incorporation, firm, or individual; or to hinder the running of any locomotive engine, freight or passenger train, except by due process of law.

It is a crime in Georgia and South Carolina for any one, knowing the fact, to persuade the servant of another to leave his employment, when such servant is under an attested contract.

In Alabama, Missouri, and Wisconsin an overt act is necessary to constitute a conspiracy a crime, except when a felony is the object.

In Indiana it is a crime to conspire to commit a felony.

In Colorado and Maine it has been made a crime to conspire to indict a person, or to do any other unlawful act.

In Delaware any railroad employee who, to aid, incite, or encourage a strike, shall abandon any train before it reaches its destination, or shall refuse to move the cars of another company, such company's employees then being on a strike, or if any person in aid of a strike shall molest or obstruct a railroad employee engaged in the discharge of his duty, or destroy the track, such person shall be guilty of a misdemeanor.

Michigan, New Jersey, New York, and Pennsylvania allow employees to combine to leave their employment, and to use peaceable means to persuade others to leave their employers.[1]

See BOYCOTTING; CARRIER; COMBINATION, 2; OBSTRUCT, 2; RIOT; TRADES-UNIONS.

STRIPES. See WHIPPING.

STRONG. See HAND, 2.

STRUCK. See STRIKE, 1.

STRUCTURE. Compare BUILDING; ERECT, 1.

Where a statute provided that for an injury caused by a structure legally placed upon a highway by a railroad company, the company, and not the person bound to keep the highway in repair, should be liable, it was held that by "structure" was meant some permanent stationary erection, rather than an object like a moving car or engine.[2]

Another statute authorizing a mechanic's lien on any house, manufactory, other building, appurtenance, fixture, or other structure, and on the interest of the owner in the lot on which the same stands or is removed to, for labor, machinery, or materials furnished by the contractor, for erecting, altering, repairing, or removing the same, was held not to authorize a lien upon a railroad, although, within the general signification of the term, a railroad may be considered a "structure."[3]

STUB. See COUPON, Stamps.

Stub duplicate of tax receipts, made by a county treasurer, as required by law, are evidence of the receipt of the tax, although they have never been returned to the county auditor, as directed by the same law.[4]

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[1] [Delaware, &c. R. Co. *v.* Bowns, *ante*.

[2] Blackstock *v.* N. Y. & Erie R. Co., 20 N. Y. 48 (1859); Cooley, Torts, 640.

[3] Commonwealth *v.* Curren, 3 Pittsb. 143 (Pa., 1869).

[4] Bacon, Abridg. Actions on the Case, F., Bouv. ed. p. 119; Gwillim's ed. of 1797.

[5] Carew *v.* Rutherford, 106 Mass. 15 (1870), Chapman, C. J. See also Mapstrick *v.* Ramge, 9 Neb. 390 (1879).

[1] 22 Am. Law Rev. 241-42 (April, 1888), citing statutes, codes, cases. See also 21 *id.* 41-69 (1887), cases; 3 Kan. Law J. 389 (1886) — Weekly Law Bul. (1886): 10 Va. Law J. 391; 17 Cent. Law J. 163-66 (1883) — Can. Law Times. As to interference with railroad property in hands of a receiver, see *Re* Doolittle, 23 F. R. 544, 549 (1885), cases; United States *v.* Kane, 6 Cr. Law Mag. 530 (1885).

[2] Lee *v.* Barkhampted, 46 Conn. 217 (1878).

[3] Rutherfoord *v.* Cincinnati, &c. R. Co., 35 Ohio St. 563 (1880).

[4] State *v.* Ring, 29 Minn. 84 (1882).

STUDENT. See ABODE; GRADUATE; SCHOOL.

STUFF. See GOWN, 2.

STULTIFY.[1] To allege or prove oneself to have been *non compos mentis*.

In the time of Henry VI (1422-61), the reasoning that a man shall not be allowed to disable himself by pleading his own incapacity, because he cannot know what he did under such a situation, was adopted by the judges upon the question whether the heir was barred by his right of entry by the feoffment of his insane ancestor. And from these loose authorities the maxim that "a man shall not stultify himself" has been handed down as settled law.[2]

The true and only rational explanation of the maxim is that it is to be understood of acts done by a lunatic in prejudice of others; as to which he shall not be permitted to excuse himself from civil responsibility on pretence of lunacy. It is not to be understood of acts done to the prejudice of himself; for this can have no foundation in reason or natural justice.[3] See INSANITY.

STUMP. Presumably, a stump rooted in the soil, and not, at least under the circumstances of the case cited, a stump cast upon a highway.[4]

Stumpage. The price paid for a license to enter upon another's land, to cut down standing trees, and to remove the timber.[5] See TIMBER.

SUA. See SUUS.

SUABLE. See SUIT.

SUB. L. Under, below; upon.

As a prefix, expresses inferiority, subordination.

In composition before *c*, *f*, *g*, *p*, *r*, or *m*, the *b* changes to that letter.

Sub colore juris. Under color of right.

Sub conditione. Upon condition.

Sub judice. Under advisement.

Sub modo. In a manner; qualifiedly.

Sub nomine. In name; under the title of.

Sub potestate. Under authority — another's power. See POTESTAS.

Sub silentio. In silence; without objection.

SUB-AGENT. See AGENT; DELEGATUS.

SUB-CONTRACT. See CONTRACTOR.

SUBINFEUDATION. See FEUD.

SUBJECT.[6] 1, *adj.* See UNDER AND SUBJECT. Compare AFTER; WHEN.

2, *n.* (1) The thing forming the groundwork; the basis; the matter in contract or in question.

Subject-matter. The cause of action.[1]

The thing or matter spoken of, written about, or legislated upon; the thing or object in controversy or dispute.

The subject-matter of litigation is the right which one party claims against the other, and demands the judgment of the court upon.[2]

Section 3253 of the New York Code of Civil Procedure authorizes the allowance of extra costs in an action wherein rights of property are involved and a pecuniary value may be predicated of the subject-matter involved. *Held*, that "subject-matter involved" refers simply to property or other valuable thing, the possession, ownership or title to which is to be determined by the action, and does not include other property although it may be directly or remotely affected by the result.[3]

See MATTER; JURISDICTION, 2; TITLE, 2, Of act.

(2) One who owes obedience to the laws and is entitled to partake in the elections into public office.[4] See further CITIZEN.

SUB-LET. See LEASE.

SUBMARINE CABLES. See CABLE.

SUBMIT.[5] 1. To place before a court for decision or determination; as, to submit a cause without argument. Compare 3.

2. To place before a jury for their verdict. Thus, a judge may not submit a question when the state of the testimony forbids it. See NONSUIT.

3. To leave to a referee or arbitrators for a finding or an award.

A "submission" is a contract between two or more parties whereby they agree to refer the subject in dispute to others and to be bound by their award.[6]

Parties "submit" a cause when they refer it to the court or a referee. The word is sometimes applied to *evidence*, though not with the same accuracy. Where in an equity case evidence is brought forward and placed at the disposal of the court, to be admitted or excluded, it is in some sense submitted, and it is certainly offered.[7]

See ARBITRATION. Compare REFER, 1.

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[1] L. *stultus*, foolish, simple, silly; irresponsible.

[2] 2 Bl. Com. 292.

[3] 1 Story, Eq. § 226. See also 4 Kent, 451; Owing's Case, 1 Bland Ch. 376-77 (1828).

[4] Cremer *v.* Portland, 36 Wis. 96 (1874).

[5] Blood *v.* Drummond, 67 Me. 478 (1878).

[6] L. *sub-jectus*, lying or being under.

[1] Borst *v.* Corey, 15 N. Y. 509 (1857).

[2] Jacobson *v.* Miller, 41 Mich. 93 (1879), Cooley, J.

[3] Conaughty *v.* Saratoga County Bank, 92 N. Y. 401, 404 (1883).

[4] Respublica *v.* Chapman, 1 Dall. *60 (1781), M'Kean, Chief Justice.

[5] L. *sub-mittere*, to put or place under.

[6] Witcher *v.* Witcher, 49 N. H. 180 (1870), Foster, J.; 9 Wend. 661; 17 How. Pr. 21.

[7] Miller *v.* Wolf, 63 Iowa, 235 (1884), Adams, J.; Iowa Code, § 2742.

SUBORDINATE. See AGENT; DELEGATUS; INFERIOR; OFFICER; SUPERIOR; SUPREME.

SUBORN.[1] To procure another person to commit perjury.

Suborner. The active party in such a case.

Subornation. The offense committed. See further PERJURY.

SUBPŒNA.[2] 1. A writ requiring a person to appear at a certain time and place, or in default to pay a penalty or undergo punishment.

Devised about 1382, by John Waltham, chancellor to Richard II, to make a feoffee to uses accountable in chancery to his *cestui que use*. The process was afterward extended to matters wholly determinable at common law. In the time of Edward IV (1461–83), process by "bill and subpœna" had become the daily practice in chancery.[3]

As soon as a common bill is filed, process of subpœna is taken out, which is a writ commanding the defendant to appear and answer the bill, on pain of one hundred pounds. If he is served and does not appear, within the time limited by the rules of the court, and plead, answer, or demur, he is in contempt.[4] Compare SUMMONS.

2. In divorce causes, an order to appear and answer the bill or libel. See LIBEL, 3.

3. In courts of common law, a process for bringing witnesses into court in order to obtain their testimony — a writ of *subpœna ad testificandum:* a "subpœna for testifying," for causing a person to appear and testify.

The writ commanded the witness, laying aside all pretenses and excuses, to appear at the trial on pain of one hundred pounds to be forfeited to the king, and, by 5 Eliz. (1564), c. 9, twenty pounds to the party aggrieved, and, also, damages equivalent to the loss sustained by the want of the evidence.[5]

But no witness, unless his reasonable expenses are first tendered him, is bound to appear in a civil suit; nor, if he appears, is he bound to give evidence till such charges are actually paid him.[6]

Subpœna duces tecum. A subpœna that you bring with you. A writ issued to procure, in addition to a witness's oral testimony, the production of one or more writings in his possession.

It consists of a clause of requisition, particularly designating the document, added to the ordinary subpœna.[1]

A witness examined under Rev. St., § 863, may be compelled to produce books and papers in his possession which would be material and competent evidence for the party calling him, upon the trial of the cause, but he cannot be compelled to produce them merely for the purpose of refreshing his memory.[2]

The writ is used to compel the production of *written* testimony. It cannot issue to a witness, not a party, to produce a thing like a stove-pattern.[3]

The witness must obey the subpœna, leaving to the court the sufficiency of the reason for not producing the document. Whether a private paper belongs to him or not, he must bring it into court, if in his possession. But a custodian of public records cannot be compelled to produce such records, they not being within his power.[4] See further PRODUCE, 1.

Subpœnas are to be personally served. The length of time depends upon the circumstances of each case; generally, twenty-four hours notice for each twenty miles is sufficient.[5]

The manner of service is regulated by local statutes or rules, as are likewise fees, mileage, etc. If the cause goes over to another term, the witness must be subpœnaed anew.[6]

4. The word is also used, as seen above, in verbal senses: to subpœna, be subpœnaed, subpœnaing, etc.

See DISCOVERY, 6; INSPECTION, 2; PROCESS, 1; WITNESS.

SUBROGATION.[7] The substitution of a new for an old creditor; more generally, the act of putting, by transfer, a person in the place of another, or a thing in the place of another thing.[8]

The doctrine of marshaling securities or funds was derived from the Roman law, in which it was called "subrogation" or "substitution." By that law when a surety paid the creditor he was entitled to a cession of the debt and subrogation to all the creditor's rights against the debtor.[9] See MARSHAL, 2.

The doctrine that when one has been compelled to pay a debt which ought to have

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[1] F. *suborner:* L. *subornare: sub*, under, secretly; *ornare*, to furnish.

[2] L. *sub-pœna*, under penalty.

[3] 3 Bl. Com. 51–52; 1 Story, Eq. § 46.

[4] 3 Bl. Com. 443, 444–45.

[5] [3 Bl. Com. 369; 1 Greenl. Ev. § 310.

[6] 3 Bl. Com. 369; 4 Chitty, *ib.* 362.

[1] See 3 Bl. Com. 382; R. S. §§ 716, 863–71, cases.

[2] United States *v.* Tilden, 10 Bened. 566, 570–81 (1879), cases.

[3] *Re* Shepard, 18 Blatch. 296 (1880); 9 East, 473; 3 Stark. Ev. p. 1722.

[4] 1 Whart. Ev. § 377, cases.

[5] 1 Whart. Ev. § 378, cases.

[6] 1 Greenl. Ev. §§ 309–19, cases.

[7] L. *surrogare*, to choose in place of another, to substitute.

[8] Houston *v.* Branch Bank, 25 Ala. 257 (1854), Chilton, C. J.; Knighton *v.* Curry, 62 *id.* 408 (1878), cases. Brickell, C. J.

[9] [1 Story, Eq. § 635; 3 Pom. Eq. § 1419.

been paid by another, he is entitled to a cession of all the remedies the creditor possessed against that other.[1]

Subrogee. He who succeeds to the rights of the creditor in that case.

To the creditor, both may have been equally liable, but if, as between themselves, there is a superior obligation resting upon one to pay the debt, the other, after paying it, may use the creditor's security to obtain reimbursement. It is not allowed to one partner as against his copartner, or to a joint debtor as against his co-debtor, because, as between them, there is no obligation to pay the debt resting upon one superior to that which rests upon the other. The doctrine does not depend upon privity, nor is it confined to strict cases of suretyship. It is a mode which equity adopts to compel the ultimate discharge of the debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay. To effect this, the latter is allowed to take the place of the creditor, and make use of all the creditor's securities, as if they were his own.[1]

The right is not founded on contract. It is a creation of equity; is enforced for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relation between the parties.[2]

Subrogation is purely an equitable result. It arises only in favor of a party who on some sort of compulsion discharges a demand against a common debtor. The doctrine applies in all cases where a payment has been made under a legitimate and fair effort to protect the ascertained interests of the party paying, and when intervening rights are not legally jeopardized or defeated.[3]

The principle does not apply where one voluntarily pays the debt of another; but only where he is surety for the debt, or is compelled to pay it to protect his own interests, or where the debt is assigned to him on payment, or where he pays it under a special agreement that he shall be substituted to the rights of the creditor.[4]

Subrogation in equity is confined to the relation of principal and surety and guarantor; to cases where a person, to protect his lien, is compelled to remove a superior lien; and to cases of insurance. One under no legal obligation to pay the debt is a volunteer.[5]

The doctrine requires (1) that the person seeking its benefit must have first paid a debt due to a third party; (2) that he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as, in cases of sureties, prior mortgages, etc. The right is never accorded to one who is a mere volunteer in paying the debt of one person to another.[6]

The surety is entitled to all the means of payment held by the creditor against the principal debtor; and the creditor has a reciprocal right to all the securities the principal debtor may have furnished for the surety's indemnity.[1]

But before the principle can be applied the whole debt must be paid.[7]

The doctrine cannot be invoked where it would work inequitably.[8]

The right of an insurer, upon paying a total loss, to recover from third persons, is only such right as the assured has.[9]

SUBSCRIBE.[10] 1. To sign one's own name beneath or at the end of an instrument; also, to write one's name as attesting witness.[6]

To set one's hand to a writing.[7]

The purpose of a law requiring the subscription to a will to be at the end of the paper is to prevent fraudulent additions before or after execution, and a statute of wills should be so construed as to accomplish this purpose.[6]

The subscribing witnesses to a deed being dead, the execution is to be established by proof of their handwriting.[9]

A summons issued by an attorney with his name *printed* at the end of the paper, is subscribed by him.[10]

See ATTEST; HAND, 3; SIGN; WITNESS.

2. To agree in writing to furnish a sum of money, or its equivalent, for a designated purpose; as, to assist a charitable or religious object, or to take stock in a corporation.

Applied to a contract for stock in a railroad company, has a definite technical sense, including the idea of a promise to pay the

[1] McCormick *v.* Irwin, 35 Pa. 117 (1860), Strong, J. Approved, Reber *v.* Gundy, 13 F. R. 58 (1882).

[2] Memphis, &c. R. Co. *v.* Dow, 120 U. S. 301 (1887).

[3] Mosier's Appeal, 56 Pa. 81 (1867), Thompson, C. J.

[4] Clark *v.* Moore, 76 Va. 262 (1882), Burks, J.

[5] Suppiger *v.* Garrels, 20 Bradw. 629 (1880), cases.

[6] Ætna Life Ins. Co. *v.* Town of Middleport, 124 U. S. 549-51 (1888), Miller, J., approving the statement of the doctrine in Gadsden *v.* Brown, Speer, Eq. 41 (S. Car., 1843).

[1] Hauser *v.* King, 76 Va. 733-35 (1882), cases. As to collateral securities, see *Exp.* Dever, 53 L. T. 131 (1885); 21 Cent. Law J. 460, 464 (1885), cases.

[2] Carithers *v.* Stuart, 87 Ind. 433 (1882), cases.

[3] Gerrish *v.* Bragg, 55 Vt. 337 (1883). See generally Wadsworth *v.* Lyon, 93 N. Y. 214 (1883), Gans *v.* Thieme, *ib.* 225, 232 (1883); Hampton *v.* Phipps, 108 U. S. 263-66 (1883), cases; Dering *v.* Earl of Winchelsea, 1 Cox, 318 (1787); 1 W. & T. Ld. Cas. Eq. 120-68, cases; 25 Am. Law Reg. 465-68 (1886), cases; 25 Cent. Law J. 472-73 (1888), cases; 2 Colum. Jur. 38.

[4] Phœnix Ins. Co. *v.* Erie, &c. Transportation Co., 117 U. S. 312, 321 (1886), cases; Pearman *v.* Gould, 42 N. J. E. 9-10 (1886), cases.

[5] L. *sub-scribere*, to write under or beneath.

[6] James *v.* Patten, 6 N. Y. 12 (1851).

[7] Riley *v.* Riley, 36 Ala. 502 (1860): Pridgen *v.* Pridgen, 13 Ired. L. 260 (1852).

[8] Younger *v.* Duffie, 94 N. Y. 539 (1884), Earl, J.

[9] Stebbins *v.* Duncan, 108 U. S. 44 (1883), cases.

[10] Barnard *v.* Heydrick, 49 Barb. 62 (1866); Meschen *v.* More, 54 Wis. 214 (1882); Herrick *v.* Morrill, 37 Minn. 252 (1887).

amount subscribed in the manner agreed upon.[1]

A claim for a "subscription" to stock implies that the subscription is a writing, and it must be set out as written.[2]

A promise to pay a subscription to a charity is a mere offer, revocable any time before acceptance — some act whereby a legal liability is incurred or money expended on the faith of the promise. The death of a promisor revokes his offer; but not so if thereby his co-subscribers would have to pay his subscription.[3]

Where an advance has been made or an expense or liability incurred by others in consequence of a subscription, before notice given of a withdrawal, the subscription becomes obligatory, provided the advances were authorized by a reasonable dependence on the subscription. When the subscription is made on the condition that it is not to bind unless a specified sum is raised, all subscribers are equally liable, and if some subscribe only to make up the sum or to induce others, they themselves not to be called upon, no subscription is binding. The sum is raised when the subscriptions of solvent and responsible (*q. v.*) persons are received to the full amount. A seal to each name, or one seal with a written declaration that each subscriber adopts it as his own seal, will preclude a defense on the ground of want of consideration.[4]

A gratuitous subscription cannot be enforced unless the promisee, in reliance on the promise, has incurred or assumed some liability or obligation.[5]

An actual manual subscription on the books of a railroad company is not indispensably necessary to bind a municipality as a subscriber to the capital stock. The contract may be effected by the acceptance of a copy of an ordinance or resolution making a subscription on behalf of the municipality.[6]

See CONSIDERATION, 2; STOCK, 3 (2); SUNDAY.

SUBSEQUENT. See CONDITION; CONVEYANCE, 2; POSSESSION; SINCE.

SUBSIDY.[7] 1. Aid granted to the king by Parliament, upon exigencies of state, to be levied of each subject upon his property; also, a custom payable upon exports and imports of staple commodities.[8]

2. Pecuniary assistance from a government toward an enterprise of benefit to the public; as, of money to a steamship company, or of money and lands to a railroad corporation.

3. Money paid an ally in war.

SUBSTANCE.[1] 1. The sustaining element; the essential constituent; the real essence; the important part; the material thing. Opposed, *form*, q. v. See also PURPORT.

Substantial. Not merely nominal, but considerable or fair in amount; as, substantial damages; opposed to formal or technical, as, a substantial right.[2]

Substantially. Really or essentially the same as: as, substantially naphtha.[3]

Machines may differ somewhat in their structure, and yet be "substantially the same." If they are substantially alike in structure, and produce a similar effect, they are in principle the same. "Substantial" as here applied is not susceptible of specific definition. . . . A pleading may be substantially good, though technically informal; an instrument substantially described in a declaration or indictment may be given in evidence.[4]

See DEMURRER; DESCRIPTION, 3; INDICTMENT; SAME; TRADE-MARK.

2. In the sense of property, see EFFECTS.

SUBSTITUTE. 1, *v.* To put one thing or person in the place of another.

2, *n.* A person or thing made to take the place of another.[5]

Whence *substituted* agent, executor, deputy, service; *substitutionary* evidence; and *substitution* in the sense of subrogation, *qq. v.*

See DELEGATUS.

SUB-TENANT. See TENANT.

SUBTRACTION. Withholding or withdrawing from another what he is entitled to: as, subtraction of feudal rents and services, of tithes, of conjugal rights, of legacies, of church rates.[6]

SUBVERT. To overthrow, overturn.

All allegation that a defendant subverted the water from a well, does not charge him with corrupting the water. "Subvert" has no such natural meaning when applied to a material object.[7]

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[1] Cheraw, &c. R. Co. *v.* White, 14 S. C. 62 (1880), Willard, C. J.

[2] Knapp *v.* Duck Creek Valley Oil Co., 53 Pa. 191 (1866).

[3] Grand Lodge *v.* Farnham, 70 Cal. 159–160 (1886), cases.

[4] 1 Pars. Contr. 453–55, cases.

[5] Cottage Street Church *v.* Kendall, 121 Mass. 530 (1877), cases, Gray, C. J: 16 Am. Law Reg. 548–54 (1877), cases. See also Miller *v.* Ballard, 46 Ill. 377 (1868); Pratt *v.* Baptist Society, 98 *id.* 478 (1879), cases; Stuart *v.* Presbyterian Church, 84 Pa. 388 (1877); Williams *v.* Rogan, 59 Tex. 438 (1883), cases; Eaton *v.* Pacific Nat. Bank, 144 Mass. 260, 274 (1887), cases; 9 Va. Law J. 321–31 (1885), cases; 26 Am. Law Reg. 1–20 (1887), cases.

[6] Bates County *v.* Winters, 112 U. S. 327 (1884), cases.

[7] L. *subsidium*, troops in reserve, assistance.

[8] [Moxley & W.; 1 Bl. Com. 310–12, 315.

[1] L. *sub-stare*, to stand under.

[2] People *v.* New York Central R. Co., 29 N. Y. 421, 430 (1864); Rahn *v.* Gunnison, 12 Wis. *531 (1860).

[3] Commonwealth *v.* Wentworth, 118 Mass. 442 (1875).

[4] Brooks *v.* Jenkins, 3 McLean, 456–57 (1844).

[5] See Henderson *v.* State, 50 Ala. 91 (1877).

[6] 3 Bl. Com. 230, 88, 102, 94, 98.

[7] Chesley *v.* King, 74 Me. 170 (1882).

SUCCESSION.[1] The mode by which a right is transmitted to another person or set of persons.

1. Transmission of the rights and obligations of a deceased person to his heir or heirs.[2] (Civil law.)

Succession tax. As succession is the devolution of title to realty, by will, deed, or the laws of descent, a "succession tax" is a tax imposed upon such devolution.[3]

Not a tax on property, but a premium demanded for the privilege of transmitting one's estate. In the absence of a constitutional inhibition, the power to impose such a tax is inherent in a legislature.[4] See DESCENT; INHERIT.

2. The mode by which the members of a corporation aggregate acquire the rights which belonged to their predecessors.

A method of gaining a property in chattels, whether personal or real; but, in strictness, is applicable only to a corporation aggregate: in which one set of men, by succeeding another set, acquire a property in all the goods, movables, and other chattels of the corporation. In law, the corporation never dies: predecessors and successors constitute one and the same body. Hence, in a gift to the corporation, no allusion need be made to successors. But in the case of a sole corporation, no chattel interest can regularly go in succession. "Successor," applied to a person in his political capacity, is equivalent to "heir," in his natural capacity.[5]

In a grant to a corporation aggregate, the word "successors," though usually inserted, is not necessary.[6]

By analogy to the rule of the common law, that a grant to a natural person, without words of inheritance, creates only an estate for life, the grant of a franchise, without words of perpetuity, to a corporation aggregate, whose duration is limited, creates only an estate for its life.[7] See PERPETUAL.

"Heirs," used instead of "successors," will not vitiate a deed.[8]

3. To the office of President of the United States, see PRESIDENT.

[1] L. *suc-* (*sub*), next, after; *cedere*, to go, follow.

[2] See Hunt *v.* Hunt, 37 Me. 344 (1853); Blake *v.* McCartney, 4 Cliff. 103 (1869).

[3] See Blake *v.* McCartney, 4 Cliff. 103-6 (1869); United States *v.* Hunnewell, 13 F. R. 617, 618-23 (1882), cases; 2 Bl. Com. 516.

[4] Peters *v.* Lynchburg, 76 Va. 929 (1882): Eyre *v.* Jacob, 14 Gratt. 428 (1858), Lee, J.

[5] 2 Bl. Com. 430-31, 108, 126; 1 *id.* 468.

[6] Union Canal Co. *v.* Young, 1 Whart. *425 (1836); Overseers *v.* Sears, 22 Pick. 132 (1839); Congregational Society *v.* Stark, 34 Vt. 249 (1861).

[7] St. Clair County Turnpike Co. *v.* Illinois, 96 U. S. 68 (1877).

[8] Walker *v.* Colby Wringer Co., 14 F. R. 517 (1882).

SUCH. The context should show to what antecedent this word refers.[1]

It sometimes means "the same."[2]

A statute in Vermont provides that "such" and "said" in statutes shall be taken to refer to the same person or thing last mentioned.

In a statute providing that "in actions by and against executors, administrators, or guardians, in which judgments may be rendered for or against them as such, neither party should be allowed to testify against the other," "as such" refers to those persons in their representative capacity.[3]

SUE. See SUIT.

SUFFER. Is synonymous with permit, *q. v.*; as, in a statute against "suffering" an animal to go at large.

To suffer an act to be done, by a person who can prevent it, is to permit or consent to it, to approve it, not to hinder it. It implies willingness.[4]

Illustrative expressions are to "suffer" guests to use forbidden games, to "suffer" minors to drink liquor in a house, to "suffer" travel on the Lord's day.[4]

Includes knowledge of what is to be done, and intention that what is done is what is to be done.[5]

The words "grant, bargain, and sell," in a conveyance of a fee-simple, constitute a covenant against acts done or suffered by the grantor. "Suffered" here implies that the covenant is not confined to the voluntary acts of the grantor, and, therefore, includes a tax assessed during his ownership of title. All governmental burdens rest upon the principle of consent.[6]

In the sense of the Bankruptcy Act of 1867, a debtor "suffered" or "procured" his property to be seized under an execution, when, knowing himself to be insolvent, an admitted creditor, who had brought suit against him, and who, as he knew, would, unless he applied for the benefit of the act, secure a preference over other creditors,— proceeded in the effort to get a judgment until one was actually obtained by the perseverance of the creditor and the default of the debtor.[7]

Within the meaning of that act, "suffer" did not import a demonstrative, active course, as did "pro-

[1] Stephenson *v.* Short, 92 N. Y. 439 (1883); Mott *v.* Ackerman, *ib.* 548 (1883); Steinlein *v.* Halstead, 52 Wis. 291 (1881); 62 *id.* 96; 65 *id.* 570; 48 Ark. 81; 41 N. J. E. 97; 12 Wheat. 477.

[2] Ackley *v.* Fish, 55 Vt. 20 (1883).

[3] Jones *v.* Parker, 67 Tex. 81 (1886).

[4] [Selleck *v.* Selleck, 19 Conn. 505-6 (1849), Church, C. J. See also Collinsville *v.* Scanland, 58 Ill. 221 (1871).

[5] Gregory *v.* United States, 17 Blatch. 231 (1879).

[6] Shaffer *v.* Greer, 87 Pa. 375 (1878); Blossom *v.* Van Court, 34 Mo. 390 (1864).

[7] Buchanan *v.* Smith, 16 Wall. 277, 300-9 (1872).

cure."[1] It aptly applied in the case of pressure and powerful motives brought to bear upon a party. Under the influence of their pressure and the operation of these motives he suffered a thing to be done; that is, allowed or permitted it.[2] See PREFER, 2.

Sufferance. Consent given from a failure to object; negative permission; toleration; allowance.

Estate at sufferance. Where one comes into possession of land by a lawful title, but keeps it afterward without any title at all.

Examples are: the estate of a tenant for years whose term has expired; the estate of a mortgagor who continues in possession after foreclosure; the estate of a grantor who agrees to deliver possession by a certain day and holds over, without authority from the grantee; the estate of a tenant during the life of another person, after the death of that other.[3]

A tenant by sufferance is a tenant who comes in by right and holds over without right.[4]

SUFFERING. See DECLARATION, 1.

SUFFICIENT. Adequate, competent, ample in law. Opposed, **insufficient**: less in amount or degree than satisfies the requirements of the law.

Used of allegations of claim and of defense in proceedings in courts of common law, equity, and admiralty, and of charges in indictments in courts of criminal law, which meet or fulfill the requirements of the law with respect to certainty, notice, and the other elements of a *prima facie* case.

Strictly speaking, evidence is "insufficient" in law only when there is a total absence of such proof, in quantity or kind, as, in the particular case, a rule of law requires as essential to the establishment of the fact. Insufficiency in point of fact may exist where there is no insufficiency in point of law; that is, there may be some evidence to sustain every element of the case, competent, both in quality and quantity, in law to sustain it, and yet it may be met by countervailing proof so potent as to leave no reasonable doubt of the opposing conclusion.[4]

"Sufficient sureties," to an appeal bond, imports two or more persons as sureties.[5]

See ANSWER, 3; DEED, 2; DEFENSE, 2; DEMURRER; EVIDENCE; INDICTMENT.

SUFFRAGE.[6] Choice, voice, vote; the elective franchise.

The right of suffrage is the right to vote at elections of officers of government and upon fundamental questions of governmental policy or action.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation."[1]

The right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment; and that Amendment does not add to those privileges and immunities: it simply furnishes an additional guaranty for the protection of such as the citizen already had. Suffrage has never been co-extensive with citizenship in the States. The Constitution did not make all citizens voters. A State may confine the right of voting to male citizens of the United States.[2]

The Amendment vests citizens of the United States with the right of exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.[3]

The right of suffrage is not a necessary attribute of national citizenship. That there shall be exemption from discrimination in exercising the right, for the causes named, is an attribute. The right to vote in the States comes from the States; the right to exemption from prohibited discrimination comes from the United States.[4] See CITIZEN.

SUGGESTIO. See SUPPRESSIO.

SUGGESTION. 1. Indirect introduction; informal statement or representation; indefinite communication; intimation. Opposed, *suppression*. See SUPPRESSIO.

Suggestive. Leading, indicating the answer desired; as, a suggestive interrogatory. See QUESTION, 1, Leading.

2. A more or less formal representation; the communication to a court of a fact essential to the adjustment of the rights of parties to a cause, but not as yet of record nor pleadable.

In this sense is "suggestion" of and to "suggest" the death of a party, that his representative may be substituted; to "suggest" diminution of record; to "suggest" freehold as security for costs, or in stay of execution. Compare SURMISE.

SUI. L. Of one's self — himself, herself, itself, themselves. Other forms are, *se*, *sese*, one's self: *suus*, one's own.

Se defendendo. In defending one's self. See DEFENSE, 1.

Cf. FELO DE SE; IN SE; INTER SE; PER SE; PRO SE.

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[1] Campbell *v.* Traders' Nat. Bank, 2 Biss. 481 (1871).

[2] 2 Bl. Com. 150.

[3] Cook *v.* Norton, 48 Ill. 26 (1868); Anderson *v.* Brewster, 44 Ohio St. 580 (1886); 42 Ga. 574; 12 Barb. 483; 59 Tex. 637; Wood, Landl. & T. 15; 1 Washb. R. P. 524.

[4] Metropolitan R. Co. *v.* Moore, 121 U. S. 569, 567-68 (1887), cases. Matthews, J.

[5] State *v.* Fitch, 30 Minn. 533 (1883): 12 *id.* 420.

[6] L. *suffragium*, a voting-tablet, a ballot; the right to cast a vote.

[1] Constitution, Amd. Art. XIV, Ratified July 28, 1868.

[2] Minor *v.* Happersett, 21 Wall. 162 (1874), Waite, C. J. See also Van Valkenburg *v.* Brown, 43 Cal. 43 (1872).

[3] United States *v.* Reese, 92 U. S. 214 (1875).

[4] United States *v.* Cruikshank, 92 U. S. 555-56 (1875).

Sua sponte. Of one's own free will; of one's own motion, *q. v.*; spontaneously.

A court may *sua sponte* instruct a jury;[1] or *sua sponte* dismiss a bill where there is adequate remedy at law, or for other cause not first suggested by counsel.[2]

Sui generis. Of its own kind.

Sui juris. Of one's own right. See JUS, Sui.

Suo jure. In one's own right.

Suum cuique tribuere. To render to each one his own; give every man his due.

The fundamental maxim of distributive justice.[3] See LAW.

SUICIDE.[4] Self-killing, self-destruction; also, self-murder.

The death of a person by his own voluntary act. "Dying by his own hand" translates this Anglicized Latin word. Life insurance companies indiscriminately use either expression, as conveying the same idea.[5]

Voluntary death caused by an act done by a person sound in mind, and capable of measuring his moral responsibility.[6]

Death by accident or mistake, as, from drinking a mixture not known to be poison, is, literally, self-killing, but not suicide; nor is death self-caused by an insane person. Death which is the result of insanity is death by disease.[7]

Does not necessarily imply criminal self-destruction. Thus, a condition in an insurance policy providing for forfeiture in case of suicide will not be construed to apply to an act of self-destruction not involving evil will. Death by one's hand in the case of a person *non compos*, is the result of disease. To provide for death by disease is the very object of life insurance.[8]

A self-killing by an insane person, understanding the physical nature and consequences of the act, but not the moral aspect, is not a death by suicide within the meaning of a condition that a policy of insurance upon his life shall be void in case he shall die by suicide.[9]

A policy provided that the insurer should pay the beneficiary within a certain time after proof made that the insured sustained bodily injuries, effected through external, violent and accidental means, which alone caused death within a limited period, no claim to be presented in case of suicide, felonious or otherwise, sane or insane. *Held*, that the burden of proof was on the claimant (subject to the limitation that it is not to be presumed as law that the deceased took his own life or was murdered) to show that the death was caused by external violence and accidental means; and that no claim could be made if the deceased himself intentionally or when insane inflicted the injuries.[1]

At common law, self-murder is ranked among the highest of crimes. But there was no felony committed where the person lacked years of discretion or was out of his senses. The punishment was forfeiture of goods to the state, and ignominious burial.[2]

In New York, an attempt to commit suicide is a felony,[3] but actual self-destruction is not.[4]

An attempt to commit suicide may be considered in connection with previous conduct, as evidence tending to prove insanity.[5]

See ADMINISTER, 1; DIE, By his own hand; INSANITY, 2.

SUINE. See OLEOMARGARINE.

SUIT.[6] 1. Followers: witnesses for the plaintiff.

The actual production of the "suit," the followers, has been disused since the time of Edward III (1327-77), though the form is continued. This explains the meaning of the phrase, still found in declarations at common law, "and therefore he brings suit:" *inde producit sectam.*[7]

Those words were affixed at a time when a suitor's witnesses were his followers, as prompt to maintain his quarrel in the forum as in the field. Now, as then, a party usually selects his witnesses from among his friends, who insensibly catch the spirit of their side.[8] See LIS, Mota.

Sue out. To seek after; to apply for and obtain: as, to sue out a writ or a pardon.[9]

2. Following another; pursuit; also, at-

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[1] 96 U. S. 265.

[2] 2 Black, 550; 7 Wall. 618; 23 *id.* 466.

[3] Hurtado *v.* California, 110 U. S. 531 (1884).

[4] L. *sui-cidium*, a killing of one's self: *cædere*, to kill.

[5] [Bigelow *v.* Berkshire Life Ins. Co., 93 U. S. 286 (1876).

[6] See Connecticut Mut. Life Ins. Co. *v.* Groom, 86 Pa. 97 (1878), cases.

[7] Eastabrook *v.* Union Mut. Life Ins. Co., 54 Me. 227 (1866), cases, Appleton, C. J. See particularly Clift *v.* Schwabe, 54 E. C. L. 457-81 (1846).

[8] Hancock Mut. Life Ins. Co. *v.* Moore, 34 Mich. 45 (1876).

[9] Manhattan Life Ins. Co. *v.* Broughton, 109 U. S. 121, 127-32 (1883), cases, Gray, J.; Accident Ins. Co. of North America *v.* Crandel, 120 *id.* 530 (1887), cases; 21 Cent. Law J. 378-82 (1885), cases; 25 Am. Law Reg. 886-90 (1886), cases.

[1] Travelers' Ins. Co. *v.* McConkey, 127 U. S. 661 (1888).

[2] 4 Bl. Com. 189-90.

[3] Penal Code, §§ 173, 174, 178.

[4] Darrow *v.* Family Fund Society, 42 Hun, 247 (1886).

[5] Wolff *v.* Connecticut Mut. Life Ins. Co., 2 Flip. 358 (1879), cases; Coyle *v.* Commonwealth, 100 Pa. 579 (1882).

[6] L. *secta: sequi*, to follow. Whence sue, pursue, prosecute. *Ad sectam*, abridged to *ads*, at suit of, is still in use, Bowen *v.* Wilcox, &c. S. M. Co., 86 Ill. 12 (1877); 31 N. J. L. 313, 316; and see VERSUS.

[7] 3 Bl. Com. 296; 2 *id.* 54; 8 Wheat. 662; 1 Steph. Hist. Cr. L. Eng. 67; 63 Ga. 638.

[8] Commonwealth *v.* Jolliffe, 7 Watts, 585 (1838), Gibson, C. J.; 71 Pa. 174.

[9] 2 Bl. Com. 68.

tendance upon another: as, to do suit, suit at a feudal lord's court, fresh suit.

Fresh suit. (1) When a lord distrained animals for rent and the owner rescued or drove them upon ground not belonging to the distrainer, and the latter followed and reseized them.

(2) When a person who had been robbed at once followed and apprehended, or afterward helped to convict, the thief.

As punishment for making no effort to capture the thief, the king confiscated any goods thrown away by him in his flight.[1]

3. Any proceeding in a court of justice by which an individual pursues that remedy which the law allows him. Whatever the mode, if a right is litigated the proceeding by which the decision of the court is sought is a "suit."[2]

The prosecution, or pursuit, of some claim, demand, or request. In law language, the prosecution of some demand in a court of justice.[3]

To "commence" a suit is to demand something by the institution of process in such court; and to "prosecute" a suit is to continue that demand.[3]

In any legal sense, action, suit, and cause are convertible terms.[4]

Any proceeding in a court in which a plaintiff pursues his remedy to recover a right or claim.[5]

Any proceeding in a court for the purpose of obtaining such remedy as the law allows a party under the circumstances.[6]

"Suit at law" is synonymous with "action at law."[7]

Usually "suit" and "action" are synonymous terms, although "suit" is of more general meaning, and is indefinitely applied to proceedings in law as well as in equity, while "action" is applied to proceedings at law.[8]

In its most extended sense, a suit includes a criminal prosecution. "An indictment is an accusation at the suit of the king."[1]

May apply to a controversy which has not yet taken the form of a pending suit.[2]

The instruments whereby a remedy is obtained for a wrong done are a diversity of "suits" or "actions," which are defined to be the lawful demand of one's right, or, in the words of Justinian, *jus prosequendi in judicio quod alicui debetur*, the right of seeking in court whatever is due to anyone.[3]

Sue. To institute or continue an action or proceeding for the recovery of a right.

To seek for in law; to make legal claim; to prosecute.[4]

Suitor. A party to a suit in court; a party litigant.

See ACTION, 2; CAUSE, 1 (3); CONTROVERSY; INTERPLEAD; INTERVENE; LAWSUIT; MULTIPLICITY; PARTY, 2; PROSECUTE; RECORD, 2; VEX. Compare LIS.

No suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him — in his political capacity. Jurisdiction implies supremacy of power.[5]

The principle is elementary that a state cannot be sued in its own courts without its consent. This is a privilege of sovereignty.[6]

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[7]

The Constitution, as originally adopted, provided that the judicial power of the United States should extend to controversies "between a State and Citizens of another State," or "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects," and that in all cases "in which a State shall be a Party, the supreme Court shall have original Jurisdiction."[8] The Supreme Court, in the case of *Chisholm v. Georgia*,[9] decided in 1793, held that under these provisions a State could be sued in that Court by a citizen of another State. This decision led Congress in 1794 to pass a joint resolution, proposing an amendment to the Constitution, which, being ratified, became the Eleventh Amendment.[10]

Every government has an inherent right to protect

[1] 1 Bl. Com. 296-97.

[2] [Weston *v.* Council of Charleston, 2 Pet. 464 (1829), Marshall, C. J.; Holmes *v.* Jennison, 14 *id.* 566 (1840), Taney, C. J.; Kohl *v.* United States, 91 U. S. 375 (1875), Strong, J.

[3] Cohens *v.* Virginia, 6 Wheat. 408-11 (1821), Marshall, C. J.

[4] *Exp.* Milligan, 4 Wall. 112 (1866), Davis, J. See also 4 Conn. 322; 58 N. H. 126; 1 Flip. 605.

[5] Sewing Machine Cases, 18 Wall. 585 (1873), Clifford, J.; New Orleans, &c. R. Co. *v.* Mississippi, 102 U. S. 143-44 (1880).

[6] Harris *v.* Phœnix Ins. Co., 35 Conn. 312 (1868), Hinman, C. J.

[7] White *v.* School District, 45 Conn. 61 (1877).

[8] McPike *v.* McPike, 10 Bradw. 333 (Ill., 1882); Ulshafer *v.* Stewart, 71 Pa. 174 (1872).

[1] United States *v.* Moore, 11 F. R. 251 (1882); Commonwealth *v.* Moore, 144 Mass. 137 (1886); 3 Bacon, Abr. 542, 544.

[2] Larkin *v.* Saffarans, 15 F. R. 151 (1883).

[3] 3 Bl. Com. 116; 4 Conn. 322.

[4] [United States *v.* Moore, 11 F. R. 251 (1882): Webster's Dict.

[5] 1 Bl. Com. 243.

[6] Memphis, &c. R. Co. *v.* Tennessee, 101 U. S. 335 (1879).

[7] Constitution, Amd. XI. Ratified Jan. 8, 1798.

[8] Constitution, Art. III, sec. 2.

[9] 2 Dallas, 419.

[10] See New Hampshire *v.* Louisiana, and New York *v.* Louisiana, 108 U. S. 86 (1883).

itself against suits. If they are permitted, it is only upon the conditions prescribed by statute. But for the protection which the principle affords a government would be unable to perform its duties. It might be impossible to collect the revenue for its support, without infinite embarrassments and delays, if subject to civil processes the same as a private person.[1]

A State may withdraw the right while an action pends to secure an adjudication, that being merely an auditing of the claim, not a remedy for enforcing a contract.[2]

When the power to sue the United States is given in an act of Congress, "State" means a member of the Union, and not the District of Columbia or a Territory.[3]

But the officers whose acts are illegal and void may be sued.[4]

A cause cannot be maintained against a State, though brought in its name, if the absolute right to the subject in controversy is in an individual (as, the real owner of a bond sued on), the plaintiff State being a mere collecting agent.[5]

Reference must be had to the real party in interest, not merely to the parties to the record. An action brought to restrain the attorney-general of a State (Virginia) and the treasurers of the various counties from enforcing certain statutes alleged to impair contract obligations of the State, with respect to coupon bonds issued by her, was held not to be maintainable, although the laws in question might violate such obligations.[6]

See COURT, Of claims; RIGHT, 2, Petition of.

SUITABLE. 1. Proper, competent, fit in a legal view: as, a suitable person for administering an estate.[7]

Unsuitable. May imply no want of capacity, but unfitness arising out of the relation of the person to the estate, either from being indebted to it or having claims upon it, or from his interest under a will, or from his situation as heir at law.[1]

2. A "suitable" bridge or railroad viaduct may mean such structure as, in the opinion of the proper officer or board, is required for the safety and convenience of the public and the interests of a particular corporation or corporations.[2]

Under a statute authorizing a town to take land for a public cemetery without the owner's consent, "when land cannot be obtained in any suitable place at a reasonable price by contract," the most suitable land may be taken. What is a suitable place is a question of fact to be determined on a consideration of all the circumstances. The term is a relative one. The legislature meant the most suitable place, or a place as suitable as any other, or a place as suitable as the town can afford to pay for.[3]

SUM. Amount or aggregate: as, the face sum, the penal sum.

The word of itself imports a sum of money.[4]

See DISPUTE; EXCEEDING; PENALTY.

SUM UP. To bring together under one view.

To address a referee, a board of arbitrators, a master, but more often a jury, at the close of a case, reviewing the evidence and applying the law thereto. Whence *summing up*, which is applied to the final arguments of counsel, to that part of the judge's charge which reviews the testimony, and to that stage in a case in which these respective duties are performed. See CHARGE, 2 (2, c).

SUMMARY. Without delay for a trial by a jury; immediate; speedy; peremptory: as, a summary — conviction, or proceeding, summary relief.

By the common law of England and the laws of many of the Colonies before the Revolution, and of the States before the formation of the Constitution, a summary proceeding existed for the recovery of debts due to the government, especially of debts due from the receivers of the revenues.[5]

The mode of assessing taxes by all governments is necessarily summary, that it may be speedy and effectual. But by "summary" is not meant arbitrary, unequal, or illegal. The mode must be lawful, which does not necessarily mean by a judicial proceeding.[6]

The term is also applied to statutory proceeding for

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[1] Nichols *v.* United States, 7 Wall. 126 (1868).

[2] Memphis, &c. R. Co. *v.* Tennessee, 101 U. S. 339-40 (1879); South & North Alabama R. Co. *v.* Alabama, *ib.* 834 (1879).

[3] Scott *v.* Jones, 5 How. 377 (1847), cases.

[4] Newton *v.* Commissioners, 100 U. S. 560 (1879), cases; Davis *v.* Gray, 16 Wall. 220 (1872), cases; United States *v.* Lee, 106 U. S. 196 (1883).

[5] New Hampshire *v.* Louisiana, and New York *v.* Louisiana, 108 U. S. 77, 91 (1883), cases, Waite, C. J.

[6] *Exp.* Ayers, Scott, and McCabe, 123 U. S. 443, 485 (1887), Matthews, J., reviewing previous cases; Harlan, J., dissenting.

See generally United States *v.* Lee, 106 U. S. 205-23 (1882), cases: Clark *v.* Barnard, 108 *id.* 447 (1883); Virginia Coupon Cases, 114 *id.* 287-88 (1885), cases; Hagood *v.* Southern, 117 *id.* 69 (1886), cases; Baltimore, &c. R. Co. *v.* Allen, 17 F. R. 171 (1883); *ib.* 188-97, cases. On compelling a State to pay its debts, see 12 Am. Law Rev. 625 (1878); 15 *id.* 519 (1881); 7 South. Law Rev. 544-48 (1881).

[7] Peters *v.* Public Administrator, 1 Bradf. 207 (1850).

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[1] [Thayer *v.* Homer, 11 Metc. 110 (1845), Hubbard, J.

[2] Worcester *v.* Railroad Commissioners, 113 Mass. 171 (1873).

[3] Crowell *v.* Londonderry, 63 N. H. 48 (1884).

[4] United States *v.* Van Auken, 96 U. S. 368 (1877); Tax on Notes, 16 Op. Att.-Gen 344 (1879).

[5] Murray's Lessee *v.* Hoboken Land, &c. Co., 18 How. 280 (1855).

[6] McMillen *v.* Anderson, 95 U. S. 41 (1877).

the prompt dispossession of a tenant who holds over after default in paying rent, or after his term has expired; to hearings and determinations of charges of the lighter misdemeanors, by committing magistrates without the intervention of a jury; and to punishments for contempts committed in open court.[1]

See CONTEMPT; CONVICTION, Summary; JURY, Trial by; PRIZE, 3; PROCESS, 1, Due.

SUMMING UP. See SUM UP.

SUMMON.[2] To officially notify a party that he has been sued, so that he may appear in court and answer the complaint.

Summons. A warning to appear in court at the return-day of the original writ.[3]

Under codes of civil procedure, not a writ or process of the court, but simply a notice to the defendant that an action has been commenced against him, and that he is required to answer the complaint, which is either attached thereto or is or will be filed in the proper clerk's office.[4]

Bouvier, Brown, Wharton, Stormonth, Webster, and Worcester give "summon" as the spelling of the verb and "summons" as the spelling of the noun. Abbott, under the title "Summons," uses that spelling for both the verb and the noun, while elsewhere he employs "summon," "summoned," and "summoning" as the verb and its inflections.

Summon, referring to notification to a party, has been used for "subpœna," which, strictly, refers to a judicial command to a witness to appear and testify.[5]

From the time of the service of a summons the court acquires jurisdiction.[6]

See CITATION, 2; MONITION; PROCESS, 1; SERVICE, 6; SUBPŒNA.

SUMPTUARY.[7] "Under the head of public economy may be ranked all sumptuary laws against luxury, extravagant expense in dress, diet, and the like."[8]

These laws were originally passed in England in the view that luxury, in some degrees, was opposed to public policy. Notable statutes were passed in 1336, 1363, 1463, and 1482; but all statutes were repealed in 1603, by 1 James I, c. 25.[9]

The habits, occupation, food, and drink,—the life of the individual, are severally matters for his own determination. They can be abridged by the majority of the people speaking through the legislature only when the public safety, the public health, or the public protection demands it. The constitutional guaranty of "life, liberty, and the pursuit of happiness" can be limited only by the absolute necessities of the general public.[1]

See further POLICE, 2; PROHIBITION, 2.

SUNDAY. The Sabbath, the Lord's Day, and Sunday all mean the same thing: the first day of the week.

Sabbath laws do not rest upon the ground that it is immoral or irreligious to labor upon the Sabbath day. They simply prescribe a day of *rest*, from motives of public policy and as a civil regulation. The day prescribed is the Christian Sabbath: yet, so entirely is the law based upon the ground of public policy that the statutes would be equally constitutional and obligatory did they name any other day.[2]

The provision in the Massachusetts law which prohibits traveling, like the law which forbids the doing of any business, labor or work, excepts what is done from "necessity or charity." The exception covers everything morally fit and proper to be done upon that day under the circumstances of each case. "Charity" includes everything that proceeds from a sense of moral duty or from a feeling of kindness and humanity, and is intended wholly for the relief or comfort of another, and not for one's own benefit or pleasure,—acts to prevent or relieve suffering in men or animals.[3]

The duty of observing the day set apart is imposed upon all as members of the body politic without reference to the religious faith and worship of any. The day, as a day of rest, is a *legal holiday* rather than a holy day. Jews and Seventh-Day Baptists are not then compelled, against conscience, to keep it as a day of worship.[4]

Laws setting aside Sunday as a day of rest are upheld not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States.[5]

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[1] See Barter *v.* Commonwealth, 3 P. & W. 259 (1831); Philadelphia *v.* Duncan, 4 Phila. 145 (1860); United States *v.* Smith, 17 F. R. 510 (1883).

[2] F. *somoner*, *semoner:* L. *summonere*, to remind privily.

[3] 3 Bl. Com. 279.

[4] Mezchem *v.* Moore, 54 Wis. 215-16 (1882), cases, Taylor, J.; Hanna *v.* Russell, 12 Minn. 86 (1866); Gilmer *v.* Bird, 15 Fla. 410, 421 (1875).

[5] See 1 Greenl. Ev. § 336.

[6] Woodward *v.* Baker, 10 Oreg. 493-94 (1883), cases.

[7] L. *sumptuarius: sumptus*, expense: *sumere*, to take to use or consume.

[8] 4 Bl. Com. 170.

[9] See 2 Knight, Hist. Eng. 272-74; 2 Kent, *330 (*b*).

[1] Intoxicating Liquor Cases, 25 Kan. 761 (1881), Brewer, J.

[2] McGatrick *v.* Wason, 4 Ohio St. 571 (1855), Thurman, C. J.; Bloom *v.* Richards, 2 *id.* 387-406 (1853), cases.

[3] Doyle *v.* Lynn, &c. R. Co., 118 Mass. 197 (1875), cases, Gray, C. J.

[4] *Exp.* Burke, 59 Cal. 6, 13-20 (1881), cases, Morrison, C. J.; *Exp.* Koser, 60 *id.* 188 (1882); Commonwealth *v.* Starr, 144 Mass. 361 (1887).

[5] Soon Hing *v.* Crowley, 113 U. S. 710 (1885), Field, J. See also, generally, Shover *v.* State, 10 Ark. 262 (1850), Johnson, C. J.; Commonwealth *v.* Nesbit, 34 Pa.

"Besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to the state, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people that sense of their duty to God so necessary to make them good citizens, but which yet would be worn out and defaced by an unremitted continuance of labour, without any stated times of recalling them to the worship of their Maker."[1]

At common law, a contract made on Sunday was valid. Legal invalidation must therefore arise from some statute in force at the place where the contract is made.[2]

A contract made on Sunday is not void unless completed on that day. Therefore, merely signing the paper containing the terms does not vitiate the contract. Until the paper is delivered, the parties have a *locus penitentiæ*.[3]

Making a will is not such secular employment as is forbidden.[4]

Subscriptions made on that day for the support of public worship are binding. What work is "of necessity or charity" is a question of law and statutory construction. Mere inconvenience of time and opportunity cannot be a test.[5]

The publication of notice of a sheriff's sale in a Sunday newspaper is void.[6]

Crying newspapers was held disorderly conduct;[7] and selling newspapers is "business."[8]

Running passenger trains is a work of necessity.[9]

Shaving customers is not a work of necessity or charity.[10]

Writs in civil actions cannot be served.[11]

Lading, unlading, and sailing vessels are works of necessity.[12]

A person may be driven to a church in his private conveyance.[13]

In Pennsylvania ice cream may not be sold on that day;[14] nor cigars.[15]

See further CHARITY; CHRISTIANITY; HOLIDAY; LABOR, 1; NECESSITY, Works of; RELIGION.

SUNDRY. See DIVERS.

SUO. See SUI.

SUPER. L. Above, over; upon. Compare SUPRA; SUR.

Super altum mare. Upon the high sea.

Super visum corporis. Upon view of the body. See CORONER.

SUPERIOR.[16] 1, *adj.* Higher in rank than another person or thing; opposed to inferior, *q. v.*

A statute which treats of persons or things of an inferior rank cannot by general words be extended to those of a superior rank.[17] See GENERAL, 6.

Higher in authority than another, yet not the highest: as, a court intermediate between an inferior court or courts and a higher court or courts or the court of last resort, and the jurisdiction of which may extend over a city, a county, several counties as one district, or over a State. See further COURT.

2, *n.* One who controls the actions of another; a principal, as distinguished from his agent. See RESPONDERE, Respondeat.

SUPERSEDE. 1. To suspend, stay, supplant. Said of a proceeding which arrests

405 (1859); Lindenmuller *v.* People, 33 Barb. 568-75 (N. Y., 1861); Sparhawk *v.* Union Passenger R. Co., 54 Pa. 433 (1867); More *v.* Clymer, 12 Mo. Ap. 14-19 (1882); Richmond *v.* Moore, 107 Ill. 433-40 (1883); Commonwealth *v.* Dexter, 143 Mass. 28 (1886); Parker *v.* State, 16 Lea, 476 (1886); 28 Am. Law Reg. 273-84 (1880), cases; 34 *id.* 726-29 (1886), cases; 18 South. Law Rev. 273-300 (1880), cases; 21 Am. Law Rev. 533-50 (1887), cases; 26 Cent. Law J. 103 (1888), cases.

[1] 4 Bl. Com. 63.

[2] More *v.* Clymer, 12 Mo. Ap. 14 (1882); Richmond *v.* Moore, 107 Ill. 433 (1883), cases; Kinney *v.* McDermott, 55 Iowa, 674 (1881): 20 Am. Law Reg. 740-42 (1881), cases.

[3] Gibbs, &c. Manuf. Co. *v.* Brucker, 111 U. S. 601-3 (1884), cases, Woods, J.; Von Hoven *v.* Irish, 3 McCrary, 443 (1882); Evansville *v.* Morris, 87 Ind. 274 (1882), cases; Beitenman's Appeal, 55 Pa. 185 (1867), cases; Swann *v.* Swann, 21 F. R. 299, 308 (1884), cases. *Contra*, Richmond *v.* Moore, 107 Ill. 429 (1883); More *v.* Clymer, 12 Mo. Ap. 11 (1882); 24 Am. Law Reg. 889-97 (1885), cases.

[4] Beitenman's Appeal, 55 Pa. 184 (1867).

[5] Allen *v.* Duffie, 43 Mich. 1, 7 (1880), cases, Cooley, J.; Dale *v.* Knepp, 98 Pa. 389, 393 (1881). *Contra*, Catlett *v.* Meth. Epis. Church, 62 Ind. 365 (1878).

[6] Shaw *v.* Williams, 87 Ind. 158 (1882).

[7] Commonwealth *v.* Teamann, 1 Phila. 177 (1853).

[8] Commonwealth *v.* Osgood, 144 Mass. 362 (1887).

[9] Commonwealth *v.* Louisville, &c. R. Co. 80 Ky. 291 (1882). *Contra*, Sparhawk *v.* Union Passenger R. Co., 54 Pa. 401 (1867): Act of 1794.

[10] Phillips *v.* Innes, 4 Clark & F. 234 (H. L., 1837); Commonwealth *v.* Dextra, 143 Mass. 28 (1886).

[11] Kinney *v.* Emery, 37 N. J. E. 341 (1883), cases in note; 9 Pac. R. 798, cases.

[12] Philadelphia, &c. R. Co. *v.* Steam Towboat Co., 23 How. 219 (1859).

[13] Commonwealth *v.* Nesbit, 34 Pa. 398 (1859). As to injuries received when violating the law, see 21 Cent. Law J. 525-29 (1885), cases.

[14] Commonwealth *v.* Burry, 5 Pa. Co. Ct. R. 481 (1888). *Contra*, Commonwealth *v.* Bosch, 15 W. N. C. 316 (Pa., 1884).

[15] Baker *v.* Commonwealth, 5 Pa. Co. Ct. R. 10 (1888). See generally other decisions, 2 Alb. Law J. 61-64 (1870), cases; 8 *id.* 161-62 (1873), cases.

[16] L. *superior*, higher.

[17] 1 Bl. Com. 88.

the operation of another proceeding. See STAY; SUPERSEDEAS.

2. To be superseded, in military law, is to have one person put in the place which, by the ordinary course of military promotion, belongs to another.[1]

SUPERSEDEAS. L. That you stay or suspend. The emphatic word of a writ (anciently in Latin) commanding a stay of proceedings in a designated case. It is now oftenest applied to a proceeding which operates as a writ of *supersedeas;* as, a perfected appeal, writ of error, or writ of *certiorari.*

Merely an auxiliary process designated to supersede the enforcement of the judgment of the court below brought up by writ of error for review.[2]

In the code of Kentucky, defined to be "a written order signed by the clerk, commanding the appellee and all others to stay proceedings on the judgment or order." It is a remedy for the unsuccessful litigant who complains of errors committed to his prejudice by the court below. It stops all proceedings on the judgment until the appeal is disposed of.[3]

An appeal allowed and security taken operate as a *supersedeas.* In the absence of fraud, the power of the lower court is exhausted; all control is transferred to the higher court.[4]

It is a statutory remedy, obtained only by strict compliance with all required conditions.[5]

No execution shall issue upon a judgment, where a writ of error may be a *supersedeas*, until the expiration of ten days after the judgment.[6]

See APPEAL, 2; CERTIORARI; ERROR, 2 (3), Writ of.

SUPERSTITIOUS. See USE, 3.

SUPERVISOR. An overseer; a surveyor.

An officer whose duty it is to take care of public roads.

One of a board of persons intrusted with the fiscal affairs of a county.

Of elections: a person commissioned by a judge of the United States circuit court in a city of over twenty thousand inhabitants, or in any Congressional district, to attend at the registration of voters for Congressmen, and so supervise the registry as to insure the detection of improper removals or additions of names.[7]

[1] *Exp.* Hall, 1 Pick. *263 (1823).

[2] Williams *v.* Bruffy, 102 U. S. 249 (1880), Field, J.

[3] Smith *v.* Western Union Tel. Co., 83 Ky. 271 (1885).

[4] Draper *v.* Davis, 102 U. S. 371 (1880), cases; Hovey *v.* McDonald, 109 *id.* 150 (1883).

[5] Sage *v.* Central R. Co., 93 U. S. 417 (1876), cases; 109 *id.* 160; 9 Bened. 269.

[6] R. S. § 1007; 109 U. S. 159-61.

[7] See fully R. S. §§ 2011-31; *Exp.* Siebold, 100 U. S. 371 (1879); *Exp.* Clarke, *ib.* 399 (1879); *Re* Appointment of Supervisors, 9 F. R. 14 (1881).

SUPPLEMENTAL. Added to a thing to complete it; supplying a defect in something that precedes: as, a supplemental affidavit, bill, answer, complaint, petition,—each of which adds to or supplies matter either not previously known or omitted as non-essential, without taking the place of the original paper or proceeding. See ANSWER, 3; BILL, IV; DEFENSE, 2, Affidavit of

"Supplementary" and "suppletory" are also used, as, of an oath to books of original evidence, and of comparison of handwriting, at common law. See OATH, Suppletory.

As to supplemental legislation, see TITLE, 2, Of act.

SUPPLICAVIT. L. He has besought. A writ in chancery in the nature of a process at common law to find sureties of the peace, upon articles filed for that purpose.

Very rarely used, as the common-law remedy is generally adequate; sometimes resorted to by a wife against her husband.[1]

SUPPORT. 1. Sustenance; maintenance, *q. v.*

G. sent D. a letter saying "Please let S. and family have whatever they may want for their support, and I will pay you." *Held*, that D. could not recover for services and medicines furnished by a physician; that "support" is generally used to mean articles for sustenance, and that G. did not intend the word to mean necessaries.[2] See NECESSARIES, 1; MEANS; WANT.

2. The right in an owner to rely upon the support afforded his land by the ground adjoining, in its natural state. Spoken of as "lateral," when the support is thought of as contiguous or adjacent, rather than as subjacent.

The right to support for land in its natural condition is *ex jure naturæ*, not dependent on grant and not acquirable by prescription. The right to support for artificial burdens is an easement acquirable only by grant, express or implied. The right may be implied from circumstances, as, where houses, needing the support of each other, are built by the same owner, and one is conveyed without stipulation to the contrary. But such implied right is confined to the *status quo* at the time of grant, and extends not to increase the burdens upon the soil.[3]

Subject to any express grant, reservation, covenant, or inconsistent right gained by prescription, it is well established that when the surface of land belongs to one person and the subjacent earth and minerals to another, the latter is burdened with a natural servitude to support the former, and also that the owner of land is entitled to the performance of a similar servitude of lateral support by adjacent land; but these easements only extend to the land in its natural and

[1] 2 Story, Eq. §§ 1476-77; 4 Bl. Com. 253.

[2] Grant *v.* Dabney, 19 Kan. 389 (1877), Horton, C. J.

[3] Tunstall *v.* Christian, 80 Va. 3-9 (1885), cases.

unincumbered state, and not with the additional weight of buildings upon it. To maintain an action for a nuisance affecting such an easement, some appreciable damage must be shown.[1]

Every land-owner has a right to have his land preserved unbroken. An adjacent owner excavating on his land is subject to the restriction that he must not remove the earth so near his neighbor's land that his soil will crumble under its own weight and fall. But this right to lateral support extends only to soil in its natural condition. It does not protect whatever is placed upon the soil increasing the downward and lateral pressure. If it did, it would be in the power of a lot-owner, by erecting heavy buildings, to greatly abridge the right of his neighbor to use his lot.[2]

See EASEMENT; UTERE, SIC, etc.

Supports. Of a bridge: the abutments, piers, and trestles on which the string-pieces rest from beneath.

The cross-pieces, under the string-pieces, and to which they are bolted, are not supports.[3]

SUPPOSE. "To suppose" and "to believe" mean substantially the same — to think, to receive as true.

As, when a plaintiff compromises what he honestly "supposes" is a good cause of action.[4]

SUPPRESS. To prevent; never, therefore, to license or sanction.[5] See SUPPRESSIO; PROHIBITION, 2.

SUPPRESSIO. L. Concealing, misrepresenting; literally, pressing down or under, holding back. Opposed, *suggestio*, intimation.

Suppressio veri, suggestio falsi. Concealment of the truth is (equivalent to) statement of what is false: suppression of fact, which should be disclosed, is the same in effect as willful misrepresentation.[6] See further DECEIT; FRAUD; REPRESENTATION, 1.

SUPRA. L. Above, over; formerly.

Alone, and in *ut supra* and *vide supra*, refers to matter, of text or citation, preceding in the same book or work, and usually upon the same page; in this book, upon the same column. Compare ANTE. Opposed, *infra*.

Supra protest. Over protest. See PROTEST, 2.

Supra riparian. Upper riparian. See RIPARIAN.

SUPREME.[1] Superior to all others; of the last resort; highest: as, the supreme Magistrate, the supreme court, the supreme power of a State, the supreme law of the land. Opposed to inferior, subordinate, superior, *qq. v.* See COURT; LAW; MAGISTRATE.

SUR. F. On, upon; over, beyond. L. *super, supra.*

Sur judgment: upon a judgment; *sur* mortgage: upon a mortgage; debt *sur* bond: debt upon a sealed instrument. Observe words following, beginning in *sur*.

SURCHARGE. Overcharge; an excessive or unlawful charge.

Surcharge and falsify. In the language of the common law "surcharge" imports an overcharge in quantity, price, or value beyond what is just, correct, and reasonable. In this sense it is nearly equivalent to "falsify;" for every item which is not truly charged as it should be, is false; and, by establishing such overcharge, it is falsified. But in the sense in which used in courts of equity, the words are contrasted with each other.[2]

A surcharge is appropriately applied to the balance of the whole account; and supposes credits to be omitted, which ought to be allowed. A falsification applies to some item in the debits; and supposes that the item is wholly false, or in some part erroneous. "If any of the parties can show an omission [in a stated account] for which credit ought to be taken, that is a surcharge; or if anything is inserted that is a wrong charge, he is at liberty to show it, and that is falsification. But that must be by proof on his side."[3]

SURETY.[1] A person who engages to be answerable for the debt, default, or miscarriage of another. The engagement constitutes a contract of *suretyship*.[2]

A person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by

[1] Moak, Underh. Torts, 419, cases.

[2] Northern Transportation Co. *v.* Chicago, 99 U. S. 645 (1878), cases, Strong, J. See also Gilmore *v.* Driscoll, 122 Mass. 201-9 (1877), cases, Gray, C. J.; Keating *v.* Cincinnati, 38 Ohio St. 148-49 (1882), cases; Carlin *v.* Chappel, 101 Pa. 350-53 (1882), cases; 3 Kent, 435; 1 Am. Law Rev. 1-22 (1866), cases; 27 Am. Law Reg. 539-39 (1879), cases; 24 Cent. Law J. 270 (1887), cases.

[3] Abbott *v.* Town of Wolcott, 38 Vt. 672 (1866).

[4] See Parker *v.* Enslow, 102 Ill. 277 (1882).

[5] See Schwuchow *v.* Chicago, 68 Ill. 448 (1873); Town of Nevada *v.* Hutchins, 59 Iowa, 508 (1882).

[6] See Fleming *v.* Slocum, 18 Johns. *405 (1820); 17 Alb. Law J. 501-4 (1878), cases; 1 Story, Eq. § 191; Bishop, Eq. § 213.

[1] L. *supremus*, uppermost.

[2] 1 Story, Eq. § 525, quoting Lord Hardwicke in Pit *v.* Cholmondeley, 2 Ves. 565-66 (1354). See also Perkins *v.* Hart, 11 Wheat. 256 (1826).

[3] F. *sureté:* L. *se-*, apart from, free of; *cura*, anxiety.

[4] See Evans *v.* Keeland, 9 Ala. 46 (1845).

some other person who ought himself to have made or performed before the former was compelled to do so.[1]

The relation is fixed by the arrangement and equities between the debtors or obligors, and may be unknown to the creditor.[1]

Co-surety. Persons are co-sureties, so as to give the right of contribution, when they are bound for the performance by the same principal of the same duty.[2]

A contract of "suretyship" is a direct liability to the creditor for the act to be performed by the debtor; a "guaranty" is a liability only for his ability to perform this act. A surety assumes to perform the contract if the principal should not; a guarantor undertakes that his principal can perform — that he is able to perform. The undertaking in suretyship is immediate and direct that the act shall be done; if not done, the surety becomes at once responsible. In a case of guaranty, non-ability, that is, insolvency, must first be shown.[3]

A "surety" is usually bound with his principal, by the same instrument, executed at the same time and on the same consideration. He is an original promisor, and a debtor from the beginning, and held to know every default of his principal. He may be sued with the principal. The contract of a "guarantor" is his own separate undertaking, in which the principal does not join. The original contract of the principal is not his contract, and he is not bound to take notice of its non-performance. He is often discharged by indulgence to the principal, and usually is not liable unless notified of his default. At the same time, each stands responsible for the debt, default, or miscarriage of the other; each is a favorite in law, and not bound beybnd the strict terms of the engagement.[4]

The liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. The courts scan contracts of sureties with considerable strictness.[5]

When a change is made without his assent, he is not bound by the contract in its original form, for that has ceased to exist. He is not bound by the contract in its altered form, for to that he never assented.[6]

He is a "favored debtor." His rights are zealously guarded both at law and in equity. The slightest fraud on the part of the creditor, touching the contract, annuls it. Any alteration after it is made, though beneficial to the surety, has the same effect. His contract, exactly as made, is the measure of his liability; and, if the case against him be not clearly within it, he is entitled to go acquit. But there is a duty incumbent on him. He must not rest supine, close his eyes and fail to seek important information within his reach. If he does this, and a loss occurs, he cannot, in the absence of fraud by the creditor, set up as a defense facts then first learned which he ought to have known and considered before entering into the contract.[1]

When it is said that the contract is to be construed strictly, the meaning is that the obligation is not to be extended to any other subject, or person, or period of time than is expressed or necessarily included in it This rule applies only to the contract itself, not to matters collateral and incidental or arising in execution of it, which are governed by the rules that apply to like circumstances, whatever the relation of the parties.[2]

In the case of an absolute guaranty by a surety of payment of a debt, no duty rests upon the creditor in the first instance to take steps against the debtor, and a request to proceed, and damage resulting to the surety from a failure to proceed, must be shown by the surety, to establish a defense. But in the case of an undertaking of such a nature that proceedings must be taken against the debtor before the obligation of the surety to pay arises, proof of a request to proceed is not necessary, the law in such case implying the condition precedent that due diligence will be used in proceeding against the principal.[3]

Where a law provides that a surety may require his creditor, by written notice, to commence action against the principal, the notice must be unconditional — to commence forthwith; a notice that the surety "wishes" the creditor to collect the claim or have it arranged, the surety not desiring to remain liable, is not sufficient.[4]

A surety who pays the debt for which he is bound is not only entitled to all the rights of the creditor against the principal for the whole amount, but against the other sureties for their proportional part.[5]

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[1] Smith *v.* Shelden, 35 Mich. 48 (1876), Cooley, C. J.; Wendlandt *v.* Sohr, 37 Minn. 163 (1887).

[2] Young *v.* Shunk, 30 Minn. 505 (1883), Gilfillan, C. J.

[3] Reigart *v.* White, 52 Pa. 440 (1866), Agnew, J.

[4] Markland Mining & Manuf. Co. *v.* Kimmel, 87 Ind. 566–69 (1882), cases, Zollars, J. See also Barns *v.* Barrow, 61 N. Y. 42–46 (1874), cases; Kingsbury *v.* Westfall, *ib.* 360 (1875); Hammel *v.* Beardsley, 31 Minn. 315 (1883).

[5] Miller *v.* Stewart, 9 Wheat. 703 (1824), cases, Story, J.

[6] Reese *v.* United States, 9 Wall. 21 (1869); Smith *v.* United States, 2 Wall. 233–35 (1864), cases; Read *v.* Bowman, *ib.* 603 (1864), cases; State *v.* Churchill, 48 Ark. 442 (1886), cases; 20 Cent. Law J. 183–89 (1885), cases.

[1] Magee *v.* Manhattan Life Ins. Co., 92 U. S. 93 (1875), cases, Swayne, J.

[2] Warner *v.* Connecticut Mut. Life Ins. Co., 109 U. S. 363 (1883), Matthews, J.; Burge, Suretyship, 1 Am. ed. 40.

[3] Toles *v.* Adee, 91 N. Y. 573 (1883), Rapallo, J.

[4] Meriden Silver Plate Co. *v.* Flory, 44 Ohio St. 435 (1886); Baker *v.* Kellogg, 29 *id.* 665 (1876): Ohio Rev. St. § 5833.

[5] United States *v.* Ryder, 110 U. S. 733 (1884); Hampton *v.* Phipps, 108 *id.* 263–66 (1883), cases; Shaeffer *v.* Clendenin, 100 Pa. 567 (1882); Stevens *v.* Tucker, 87 Ind. 122 (1882), cases; 1 Harv. Law Rev. 326–37 (1887), cases; 9 Va. Law J. 1–7 (1885), cases.

The rule of law is that where one surety has paid the debt, he can recover from a co-surety, at law, an aliquot part of the debt, regard being had to the number, but not to the solvency, of the sureties. If any co-surety is insolvent, a larger proportion may be recovered in equity.[1]

When a surety has contracted with reference to the conduct of a party in a proceeding in court, in the absence of fraud or collusion, he is concluded by the judgment.[2]

If the surety holds indemnity from the principal, the creditor may have the debt satisfied out of it; if the indemnity is against a contingent liability, the creditor cannot be substituted until the liability becomes absolute, that is, until the claim is reduced to judgment.[3]

If the purpose for which the contract is made is illegal, the surety cannot be held. Thus, a bond to release property from an unlawful attachment creates no liability.[4]

Surety company. An association of persons, usually incorporated, which makes a business of acting as surety for persons occupying positions of trust, for a compensation which varies with the amount of the bond or security required. Such companies are sometimes also called "guaranty companies."

See ALTERATION, 2; APPEAL, 2; ASSENT; CONTRIBUTION; DISCUSSION; GUARANTY, 2; INDORSEMENT; JOINT AND SEVERAL; LIABILITY, Contingent; PEACE, 1; RECOGNIZANCE; STRICTUS; SUBROGATION.

SURFACE. May refer to the existing or artificial and not to the original or natural surface.

As, in a statute which makes a lot-owner liable for damages done by excavating more than a certain number of feet below the surface of the adjoining lot.[5] See LAND; MINERAL; SUPPORT, 2.

Surfacing. In a contract for constructing a railroad, was held not to include the work of filling in between the ties, nor of raising the road-bed.[6]

Surface-water. Ceases to be such after it has entered the space between the banks of a watercourse.[7] See AQUA, CURRIT; PERCOLATE; WATERCOURSE.

[1] Griffin *v.* Kelleher, 132 Mass. 83 (1882), cases; 1 Story, Eq. § 496.

[2] Blaiden *v.* Mercer, 44 Ohio St. 343-46 (1886), cases.

[3] Macklin *v.* North. Bank Kentucky, 83 Ky. 319 (1885).

[4] Pacific Nat. Bank *v.* Mixter, 124 U. S. 729 (1888).

Wife as surety for husband, see 20 Cent. Law J. 205 (1885), cases. Sureties on official bonds, 23 *id.* 124 (1886), cases. Bond signed conditionally, 37 Alb. Law J. 188-93, 208-12 (1888), cases. Judgment against principal as evidence against surety, 36 *id.* 404-8 (1887), cases. Recovering penalty and interest, 37 *id.* 108-11 (1888), cases. Limitation of actions for deficits, on U. S. officers' bonds, Act 8 Aug. 1888: 25 St. L. 387.

[5] Burkhardt *v.* Hanley, 23 Ohio St. 559 (1873).

[6] Snell *v.* Cottingham, 72 Ill. 167 (1874).

[7] Jones *v.* Hannovan, 55 Mo. 466-67 (1874). See Weis *v.* City of Madison, 75 Ind. 241 (1881), cases; M'Clure *v.* City of Red Wing, 28 Minn. 192 (1881), cases.

SURGERY. See PHYSICIAN.

Surgical instruments. See BAGGAGE.

SURMISE. Formerly, as a verb, to suggest; as a substantive, a statement or allegation intended to induce judicial action.

When a defendant pleaded a local custom, he had to "surmise," that is, to suggest, that the custom be certified by the mouth of the recorder; without which the issue was tried as any other issue of fact.[1]

SURNAME. See NAME, 1.

SURPLUS.[2] Excess; residue.

Of an insurance company: the fund it has in excess of its capital stock after paying the debts.[3]

"Surplus earnings" of a company: the amount owned by it over and above its capital and actual liabilities.[4]

As used in a will, may have a meaning different from "overplus" or that which shall happen to be left over.[5]

Where a contractor was to fill a trench and haul away the surplus, it was held that the surplus belonged to him.[6]

SURPLUSAGE.[7] 1. Surplus matter; overplus; residue; also, a balance over. See MORE OR LESS; RESIDUE.

2. Matter, in any instrument, foreign to the purpose; whatever is extraneous, impertinent, superfluous, or unnecessary.

Whatever may be stricken from the record without destroying the plaintiff's right of action; as, in a suit for a breach of warranty, that goods were not such as the defendant warranted them — "and that he knew this." Yet it is not every immaterial or unnecessary allegation that is surplusage; for if the party, in stating his title, should state it with unnecessary particularity, he must prove it as alleged. Regard must be had to the nature of the averment itself, and its connection with the substance of the charge, rather than its grammatical collocation or structure.[7]

Surplusagium non nocet. L. Surplusage does not vitiate. Mere surplusage may be rejected.

The statement of what the law implies is surplusage, and avails nothing. Such is the phrase "value received," on the face of bills and notes; and the

[1] Vin. Abr. 246 (P); 1 Burr. 251.

[2] F. *surplus;* L. *super*, above; *plus*, more.

[3] [State *v.* Parker, 34 N. J. L. 482 (1871), Van Syckel, Judge.

[4] [People *v.* Commissioners, 76 N. Y. 74 (1879), Church, Chief Justice.

[5] Page *v.* Leapingwell, 18 Ves. Jr. *466 (1812).

[6] White Lot Sewer, 16 Op. Att.-Gen. 378 (1879).

[7] 1 Greenl. Ev. § 51, cases; United States *v.* Burnham, 1 Mas. 67 (1816).

words "and the survivor of them," in a lease to persons for their joint lives.

In an indictment, any allegation, not descriptive of the identity of the offense, which can be omitted without affecting the charge and without detriment to the complaint, may be treated as surplusage, and need not be proved.[1]

See DESCRIPTION; INDICTMENT; REDUNDANCY.

SURPRISE. 1. In equity is not a technical term. Johnson's common definition explains it: the act of taking unawares; the state of being taken unawares; sudden confusion or perplexity. When equity relieves for surprise it is on the ground that the party has been taken unawares, has acted, without due deliberation, under confused and sudden impressions. Loosely used, the word may presume or import "fraud;" in accurate usage it refers to something done which, as being unexpected, misleads or confuses on the sudden, and thus operates as a fraud.[2] Compare MISTAKE.

2. In statutes providing for amendments of pleadings at trial, and the granting of new trials: such variance between the allegations and the proofs as misleads the opposite party in maintaining his action or defense on the merits. It constitutes a material variance which the party is not prepared to meet and could not expect.[3]

One remedy for a surprise is a motion for a new trial.[4]

The surprise for which a court will set aside proceedings, fair and regular on their face, which have resulted in vesting rights to realty in a purchaser, must be a legal surprise, without fault in the person alleging it.[5]

It must be absolutely impossible for the adverse party to be taken by surprise by an amendment which does not touch the merits or substance of a cause.[6]

A modification, not a change, in the cause of action, is allowed — any alteration, indeed, which does not affect the identity of the transaction.[7] See ALLEGATION.

SURREBUTTER. See REBUTTER.

SURREJOINDER. See JOINDER.

SURRENDER. To give up, make over, deliver; also, such act itself. See DELIVERY; WAIVER.

To relinquish or give up, unless the meaning is extended by construction; as, in a statute providing that attached goods should be surrendered upon delivery of a bond.[1]

Surrenderee. He to whom a surrender has been made. **Surrenderor.** He who makes a surrender.

Surrender by bail. For a person who has become another's bail or surety to give him over again into the custody of the officer who made the arrest or of the sheriff, marshal, or jailor. See BAIL, 2.

Surrender of a criminal. For the executive of a State to give up an alleged fugitive from justice to the authorities of the State from which he fled. See EXTRADITION.

Surrender of an estate. A yielding up of an estate for life or years to him that has the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement.[2]

A "surrender" is the falling of a less estate into a greater; in a "release" (*q. v.*) the greater estate descends upon the less. The surrenderor must be in possession, and the surrenderee must have a higher estate into which the estate surrendered may merge. Hence, a tenant for life cannot surrender to him that is in remainder for years.[3]

Surrender of a lease. A yielding up, by a tenant, of his estate, to the landlord, so that the leasehold interest becomes extinct by mutual agreement.

May be by express words, or by operation of law where the parties have done some act which implies that they both agreed to consider the surrender as made.[4] See QUIT.

Surrender of a preference. For a creditor of a bankrupt to turn over to the assignee whatever property or security he may have received in preference to other creditors, in order to share in a dividend.[5]

SURROGATE.[6] 1. One who is substituted or appointed in the place of another.

Formerly, a person selected by the bishop to issue, in his stead, licenses to marry. He presided in the

[1] Commonwealth *v.* Rowell, 146 Mass. 130 (1888); *ib.* 146, 286, 331.

[2] [1 Story, Eq. § 120, note, cases; *ib.* § 251.]

[3] Nash *v.* Towne, 5 Wall. 698 (1866), cases, Clifford, J.

[4] Mulhall *v.* Keenan, 18 Wall. 343, 350 (1873).

[5] Hendrickson *v.* Hinckley, 17 How. 446 (1854); Central Pacific R. Co. *v.* Creed, 70 Cal. 501 (1886).

[6] Franklin *v.* Mackey, 16 S. & R. *118 (1827).

[7] Farmers', &c. Bank *v.* Israel, 6 S. & W. *295 (1830).

[1] Clark *v.* Wilson, 14 R. I. 13 (1882).

[2] Coke, Litt. 337 *b.*

[3] 2 Bl. Com. 326. See also 4 Kent, 103; 26 Minn. 136, 321; 30 N. Y. 462; 12 Johns. 361; 5 Pa. 424; 18 Gratt. 159; 8 Wis. *158.

[4] Beall *v.* White, 94 U. S. 389 (1876), cases, Clifford, J.; Spooner *v.* Spooner, 26 Minn. 136 (1879), cases; Smith *v.* Pendergast, *ib.* 321 (1879), cases; Martin *v.* Stearns, 52 Iowa, 347 (1879), cases.

[5] See *Re* Richter's Estate, 1 Dill. 552 (1870).

[6] L. *surrogatus*, elected in place of another: *subrogare*.

bishop's diocesan court. As representative of the ordinary, he granted letters of administration. Whence —

2. A judicial officer, corresponding to the ordinary or to a judge of an orphans' court or court of probate,[1] *qq. v.*

SURROUNDINGS. See RES, Gestæ.

SURVEY.[2] A view or examination, usually professional or official, with reference to the boundaries, features, etc., of land, the condition and value of a building, the seaworthiness of a vessel, or the quality, condition, or value of merchandise.

Whence *surveyor* of land, of highways, of customs or of the port, of vessels; and *surveyor-general* of public lands.

Survey of buildings. In insurance law, a plan and description of the existing state, condition, and mode of use of property. "Plan" and "description" may be synonymous.[3]

Includes the application, containing the questions propounded and the answers thereto.[4]

Survey of land. The actual measurement of land, ascertaining the contents by running the lines and angles, and fixing the corners and boundaries.[5]

In civil engineering, does not necessarily mean a map or profile; but the terms are sometimes convertible.[6]

Chamber survey. A survey not made upon the ground.

Where a return of an official survey is made and accepted, a *prima facie* presumption arises that the survey was made upon the ground, but for twenty-one years after the return such presumption may be rebutted by proof that it was but a chamber survey.[7]

Junior survey and *senior survey* are used in the ordinary sense of younger or later and older or earlier survey, respectively.

In Pennsylvania, unless a survey is returned to the land-office within a reasonable time,— seven years, as fixed by the courts,— it is regarded as abandoned.[8]

In that State, also, original marks and living monuments are the highest proof of a location; calls for adjoining surveys are next in importance. Both these being wanting, corners and distances returned to the land-office govern. Surveys constituting a block are treated as one survey; and its lines and corners, belonging to every sub-tract as much as to any particular one, fixes the location of the whole block. When a survey can be determined by its own marks upon the ground or by its own calls, it cannot be controlled by the lines of an adjoining junior survey; but when marks have disappeared from the senior survey, so that a line is rendered uncertain, original and well-established marks found upon a later adjoining survey, made by the same surveyor about the same time, are admissible to aid the jury in settling the location of the senior survey. After twenty-one years from the return of a survey the presumption is that the warrant was located as returned to the land-office: but this may be rebutted by proof of the existence of marked lines and monuments, and of other facts showing that the actual location was different from the official courses and distances.[1]

See BOUNDARY; TAKE, 8.

Survey of a vessel. A public document which affords the means of ascertaining the condition of the ship and the other property at hazard.[2]

SURVIVE.[3] To live beyond an event or person.

1. A right of action is said to "survive," rather than to abate, upon the death of a person, when his representative may institute or continue the action; as, for breach of a contract or for injury to property.[4]

A right of action survives against one's representatives where by means of the offense property is acquired which benefited the decedent.[5] See further ACTION, 2, Personal.

2. To live beyond another related person. To remain in life after the death of another.[6]

The persons may be partners, executors, administrators, trustees. Whence *surviving* partner, executor, etc., or simply the *survivor*.

"Surviving," "survivor," or "survivors," is often used, in wills, in the broad sense of all "others," rather than as referring to members of a particular class alone, which is its ordinary and perhaps strict sense.[7] See EXECUTOR; PARTNER.

Survivorship. When two or more persons are seized of a joint estate of inheritance for their own lives, or for the life of another, or are jointly possessed of a chattel interest, the entire tenancy, upon the death of any of

[1] See 2 Bl. Com. 508; 2 Kent, 420; 2 Steph. Com. 247.

[2] F. *sur*, over; *veër* (*voir*), to see.

[3] Denny *v.* Conway Ins. Co., 13 Gray, 497 (1859), Bigelow, J.

[4] May *v.* Buckeye Ins. Co., 25 Wis. 307 (1870).

[5] [Winter *v.* United States, 1 Hemp. 332 (1848), Johnson, J.

[6] Attorney-General *v.* Stevens, 1 N. J. E. 385 (1831).

[7] Packer *v.* Schrader Mining, &c. Co., 97 Pa. 383 (1881); 1 Whart. Ev. §§ 668-70.

[8] Paxton *v.* Griswold, 122 U. S. 441 (1887), cases.

[1] Clement *v.* Packer, 125 U. S. 327, 332, 336 (1888), cases.

[2] [Potter *v.* Ocean Ins. Co., 3 Sumn. 43 (1837), Story, J.

[3] F. *survivre*, to outlive: L. *super-vivere*.

[4] See Jenkins *v.* French, 58 N. H. 533 (1879).

[5] United States *v.* Daniel, 6 How. 13 (1848); 20 Am. Law Rev. 49-79 (1886), cases.

[6] Hawley *v.* Northampton, 8 Mass. *31 (1811).

[7] Scott *v.* West, 63 Wis. 593-94 (1885), cases.

them, survives to the survivor, and at length to the last survivor.[1]

Also called *jus accrescendi*, because, upon the death of one joint-tenant, the right accumulates and increases to the survivor.[2]

Generally abolished, and preference given to tenancy in common, unless otherwise directed in devises, and except as to mortgages, trust estates, and, perhaps, as to devises and conveyances to husband and wife.[3] See TENANT.

Where two or more persons, entitled to inherit from one another, perish together in the same shipwreck, battle, or conflagration, or otherwise, the English common law requires the matter of successive survivorship to be proved by facts. The French civil code and the civil code of Louisiana deduce rules from the probabilities resulting from age, sex, and strength.[4]

There is no presumption of survivorship in the case of persons who perish by a common disaster. One who claims through a survivorship must prove the survivorship.[5]

See ACCUMULATION; COPARCENARY; ENTIRETY; TENANT, Joint-tenants.

SUS. PER COLL. An abbreviation of the Latin *suspendatur per collum*, let him be hanged by the neck.

These words were formerly written on the criminal calendar, opposite the name of a person convicted of a capital felony, and constituted the sheriff's warrant for executing him.[6]

SUSPENSION.[7] Temporary stopping or interdiction of the exercise of some power, proceeding, right, or law.

As, the suspension of, and to suspend,— a right of entry upon, and the pre-emption of, public lands, the running of the statute of limitations, the privilege of the writ of *habeas corpus* (q. v.), rendering a decision or pronouncing a sentence, execution of a judgment or sentence, or from office.[8]

See ARREST, 1; REPRIEVE; SENTENCE; STAY; VACANCY.

SUSPICION. "The act of suspecting, or the state of being suspected; imagination of something ill; distrust, mistrust; doubt."[9]

1. "Suspicions" is frequently applied to an act, thing, or occurrence which, from its nature or from some circumstance attending it, may well put a man of ordinary caution upon his guard against deception.

Mere suspicion that there may be something wrong with a piece of negotiable paper will not defeat recovery by a purchaser. He loses protection against an infirmity only when he is guilty of bad faith, or buys with actual notice of the defect.[1] See BEARER; INNOCENT.

A man may have grounds of suspicion that his debtor is in failing circumstances and yet have no cause for a well-founded "belief" of the fact. To make mere suspicion a ground of nullity would render business transactions too insecure. "A reasonable cause to believe" a debtor insolvent is a different matter.[2]

2. "Suspicions" is also applied to cases in which a party fails or omits to produce evidence within his exclusive possession, and which, being introduced, would have changed the result, presumably against his interest.

3. The words are likewise applied to the case of a person who is believed to have committed a crime, or whose actions fairly indicate an intention to commit crime.

Suspicious character. A person suspected of intending to commit, in the present or near future, some act of criminal misbehavior.

The grounds for the suspicion appearing reasonable to a committing magistrate, such person may be required to find security for keeping the peace, and for good behavior.[3]

A justice of the peace may issue a warant to apprehend a person suspected of felony, though the suspicion originates with the person who prays the warrant; because the justice is competent to judge of the probability of the suspicion.[4]

Where a high crime has been committed, very stringent proof is not required that there was ground for a reasonable belief that a suspected party was guilty. Peace officers may arrest upon suspicion of felony. A high officer, as, the sheriff, may arrest a person merely suspected of a capital offense. Yet suspicion is not belief; probable cause for suspicion by a prudent and reasonable man that a person committed a high crime may not be sufficient to induce him to believe the person guilty.[5]

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[1] 2 Bl. Com. 183–84; 4 Kent, 360.

[2] 2 Bl. Com. 183.

[3] See 1 Washb. R. P. 408, note; 4 Kent, 361–63.

[4] 1 Greenl. Ev. §§ 29–30, cases; 2 Whart. Ev. §§ 1280–82, cases; 30 Alb. Law J. 45–46 (1884), cases; 14 Cent. Law J. 367–71 (1882), cases,— Irish Law T.

[5] Newell *v.* Nichols, 75 N. Y. 86–90 (1878), cases, Church, C. J.; Russell *v.* Hallett, 23 Kan. 278 (1880), cases; Johnson *v.* Merithew, 80 Me. — (1888), cases.

[6] 4 Bl. Com. 403; 44 L. T. 365.

[7] L. *suspendere*, to hang up.

[8] See Richards *v.* Burden, 59 Iowa, 756 (1882).

[9] McCalla *v.* State, 66 Ga. 348 (1881), Speer, J.

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[1] Fox *v.* Bank of Kansas City, 30 Kan. 446 (1883), cases, Brewer, J.; Swift *v.* Smith, 102 U. S. 444 (1880), cases, Strong, J.

[2] Grant *v.* First Nat. Bank of Monmouth, 97 U. S. 81 (1877).

[3] 4 Bl. Com. 252.

[4] 4 Bl. Com. 290.

[5] McCarthy *v.* DeArmit, 99 Pa. 70 (1881), cases. McCarthy, as mayor of Pittsburgh, Pa., at the time of

In an action for malicious prosecution it is enough if the circumstances produced an honest and strong suspicion of guilt; a "conviction" would imply a higher degree of proof than the law requires.[1]

Circumstances which merely cast upon one suspicion of guilt will not support a conviction by being coupled with the confession of an alleged accomplice.[2]

See ARREST, 2; CAUSE, 2, Probable; NIGHT-WALKER.

SUUM; SUUS. See SUI.

SWAMP. Within the meaning of the act of Congress of September 28, 1850, granting swamp and overflowed lands to the States, such lands as, by periodical overflow at seasons of sowing and harvesting, are rendered unfit for cultivation of the staple crops.[3] See MEADOW.

SWEAR. 1. To take an oath before an officer employed to administer oaths. Compare JURARE. See OATH; AFFIDAVIT.

The certificate of a magistrate that a complaint was "taken and sworn" before him is sufficient in form; so are the words "sworn before me."[4]

An allegation that the defendant did "depose and swear" to the truth of an answer, does not show that he was "sworn" to the truth. One may "swear" who is not "sworn;" and in that case the oath is self-imposed.[5]

False swearing. Swearing to a statement with knowledge of its falsity, as, by an assured.[6]

A verified false assertion which deceives, or is fitted and likely to deceive, the one to whom it is made.[7]

The words "she has sworn falsely" do not of themselves import perjury. To render them actionable it must be averred that they were spoken with reference to a judicial oath, and were meant to charge perjury.[8]

It is sufficient to charge that the accused willfully and knowingly swore, deposed, or gave in evidence that which was false, in a matter judicially pending, or on a subject in which he could be legally sworn, or in which he was required to be sworn. Proper allegations of the falsity of the matter are as necessary as in an indictment for perjury. The indictment should be direct and certain as to the falsity of the oath, which, in both cases, must be knowingly and willfully made.[1] See FORSWEAR; PERJURY; TRUE.

2. To use such profane language as the law forbids.

Profane swearing is generally punished by statutes. See BLASPHEMY; PROFANITY.

SWEDEN TABLES. See TABLE, 4.

SWEEPING. Comprehending many particulars in one act or action: as, a sweeping objection, exception, or denial.

Sweeping clause. The last (eighteenth) paragraph of section 8, Art. I, of the Constitution, conferring power upon Congress "To make all Laws which shall be necessary and proper for carrying into Execution" the powers vested in the general government. See further NECESSARY.

SWELL. To augment, increase the amount of: as, that a circumstance in a case of wrong-doing will, or will not, swell the damages recoverable.

SWIFT. Said of a witness who is over-ready to answer, betraying, possibly, partiality for the side by which he is called; a zealous or over-zealous witness. See EXAMINATION, 9.

SWINDLE. Does not, with any degree of certainty, import the commission of an indictable offense. The word was imported into England from Germany, and implies no more than to "cheat,"[2] *q. v.*

In Minnesota, whoever by any device, sleight of hand, or other means, by use of cards or instruments of like character, obtains from another any money or other property, shall be guilty of the crime of "swindling."[3]

The Penal Code of Texas defines it as the acquisition of movable property, money, or a writing securing a valuable right by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the right of the party justly entitled to the same.[4]

In a State where the term does not necessarily import a crime, not actionable *per se*.[5]

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the railroad riots there July 21-22, 1877, caused De-Armit's arrest, without a warrant, on suspicion that he was the person who had "avenged" the death of a brother by shooting two militiamen.

[1] Keep *v.* Griggs, 12 Bradw. 516-17 (1882); Harpham *v.* Whitney, 77 Ill. 38 (1875).

[2] McCalla *v.* State, 66 Ga. 346 (1881).

[3] Thompson *v.* Thornton, 50 Cal. 144 (1875). See the decisions under the act of 1850 reviewed and explained at length, United States *v.* Louisiana, 127 U. S. 182-91 (1888); Merrill *v.* Tobin, 30 F. R. 738 (1887).

[4] Commonwealth *v.* Bennett, 7 Allen, 533 (1863).

[5] United States *v.* McConaughy, 33 F. R. 168 (1887), Deady, J.

[6] Franklin Ins. Co. *v.* Culver, 6 Ind. 139 (1855).

[7] Maher *v.* Hibernian Ins. Co., 67 N. Y. 292 (1876), Folger, J.

[8] Barger *v.* Barger, 18 Pa. 492 (1852), Black, C. J.

[1] Commonwealth *v.* Still, 83 Ky. 277 (1885).

[2] Stevenson *v.* Hayden, 2 Mass. *408 (1807), Sedgwick, Judge.

[3] State *v.* Gray, 29 Minn. 142 (1882): Gen. St. 1878, c. 99, § 15.

[4] Blum *v.* State, 20 Tex. Ap. 591 (1886): Code, art. 790.

[5] Chase *v.* Whitlock, 3 Hill, 140-41 (1842), cases; Pollock *v.* Hastings, 88 Ind. 248 (1882). See also Herr *v.* Bamberg, 10 How. Pr. 130 (1854); Odiorne *v.* Bacon, 6 Cush. 185 (1850).

SWINE. See CATTLE; HOG.

SWITCH. See RAILROAD.

SWORN. See SWEAR.

SYLLABUS.[1] An abstract; a head-note.

The brief statement of the point or points decided, prefixed to the printed report of a case.

Being prepared by the reporter, it is not an authoritative part of the report. See REPORT, 1 (2).

English plural, *syllabuses;* Latin plural, *syllabi.*

SYMBOL. In the law of trade-marks, see TRADE-MARK.

Symbolic delivery. Delivering one thing in evidence of the transfer of some other more important thing: as, of a bill of lading in place of the merchandise. See DELIVERY, 1; LADING, Bill of; SALE, Bill of.

SYNDIC.[2] F. The assignee of an insolvent; also, a director, or the managing director, of a community — company or corporation.

In Louisiana, all the property rights of an insolvent who makes a cession, pass to the syndic.[3]

SYNDICATE. Persons united for the purposes of an enterprise too large for successful management by a single individual; also a number of persons who buy all of an issue of stock or bonds, in order, by advancing the market value, to make a profit to themselves as members of the company.[4] See SYNDIC.

SYNGRAPH.[5] An instrument under the hand and seal of all the parties; an indenture, in the original meaning of that term.[6]

SYNOD. See CHURCH.

T.

T. 1. As an abbreviation, usually stands for *tempore*, term, terminer, Territory, title, trial, Trinity.

2. As a brand or mark of infamy, commonly meant "thief."

Anciently, a person convicted of a felony, not murder, and admitted to clergy, was branded with a T on the brawn of the thumb.[7]

In Colonial times, was branded or imprinted with indelible ink upon the cheek of a person convicted of theft.

A law enacted in Pennsylvania in 1698 provided, as part of the punishment for stealing goods worth five shillings, that the culprit be ordered, upon penalty of banishment, to wear, when away from his own premises, for six months, upon the outside of the left sleeve between the shoulder and the elbow, a badge of his "thieving" in the shape of a Roman "T," four inches long by one broad, of a color unlike that of the garment,— red, blue, or yellow, as the court directed.[1]

TABLE. 1. In the sense of billiard-table, gaming-table, etc., see GAME, 2.

2. In the sense of a condensed statement or a view of items or details, for ready reference, is used of genealogical tables, interest tables, tables of descent, of weights, measures, etc. See TIME-TABLE.

Table of cases. A statement of the decided cases reported or cited in a law-book, arranged in alphabetical order by their respective titles, with reference to the page or pages where found in the book, and, perhaps also, in the original volume; the whole being printed at the beginning or at the close of the book.

3. In the sense of a law or chapter of a statute, see TWELVE TABLES.

4. Statistics concerning the longevity of large numbers of individuals have been arranged in "tables;" from which the probable duration of the life of a particular person may be estimated, from any year in life.

These tables are chiefly used for determining the present worth of annuities, dower interests, reversions, and policies of insurance.

Life and annuity tables are framed upon the basis of the average duration of the lives of a great number of persons. They have never been held to be absolute guides.[2]

The *Northampton Tables* were prepared, by a Dr. Price, from bills of mortality kept in the parish of All Saints, a town in the north of England, between 1735 and 1780.

The *Carlisle Tables* were framed for the town of Carlisle, also in the north of England, from observations made upon a population of 8000 persons, during 1779 and 1780.

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[1] Gk. *syl'labos*, taken together — as a whole; a thing made concise; a brief.

[2] Gk. *syn'dicos*, an assistant to a judge or court.

[3] Arnold *v.* Danziger, 30 F. R. 899 (1887), cases; 32 *id.* 1; La. Civ. Code, art. 429.

[4] See Appeal of Whelen, 108 Pa. 162, 195 (1884).

[5] Gk. *syn-graphein*, to write together. Compare HOLOGRAPH.

[6] See 2 Bl. Com. 296.

[7] Wharton, Law Dict.

[1] Laws of Prov. of Penn., Linn, 275; 1 Bioren's Laws, 3 (1700).

[2] Vicksburg & Meridian R. Co. *v.* Putnam, 118 U. S. 556, 554 (1886), cases, Gray, J.,— an action for damages for personal injuries; 67 Wis. 37.

The *Equitable Tables* were made by the Equitable Insurance Company of London, from data collected by the company in the transaction of its business.

The *Sweden Tables* are based upon returns collected between 1755 and 1776, corrected by returns made between 1775 and 1805, from the population of the whole of Sweden and Finland.

Finlaison's Tables were constructed, about 1825, by John Finlaison, actuary of the National Debt Office of England, from observations upon 25,000 life annuities of the English government, from about 1795 to 1825.

McKean's Tables, first issued in 1837, were prepared by Alexander McKean, actuary, of London.

Wigglesworth's Tables were framed by a Dr. Wigglesworth, from observations made in New England.

Bland's Tables were arranged by Chancellor Bland, of Maryland, from various other tables.[1]

TABULA. L. A plank or board.

Tabula in naufragio. A plank in a shipwreck: a thing saved out of a general loss.

In English law, the right in a third mortgagee, who did not know of the existence of a second mortgage, to acquire the first mortgage, and, by tacking his own to that, to secure satisfaction of both incumbrances before the second received anything.[2] See TACKING.

TACIT. Silent; not expressed, but understood; implied from acts: as, tacit consent, or acknowledgment. See SILENCE.

TACKING. In English law, the equitable doctrine of uniting securities given at different times, to prevent an intermediate purchaser from redeeming or discharging a prior lien without discharging the liens subsequent to his title.[3]

Suppose, for example, that there are three mortgages of different dates. The mortgagee first in time holds the *legal title;* the others are simply equitable incumbrancers. If, now, the third mortgagee buys the first mortgage, so as to become the owner of the legal title, he has a right to tack his two mortgages together, and receive the whole amount due upon both, prior to the second mortgagee. But this is allowed, when at all, only where the third mortgagee had no *notice* of the second mortgage at the time he took his mortgage. The right has existed in favor of those who have advanced money on the credit of land. The doctrine does not exist in the United States. A rule apparently analogous is found in cases where a mortgage is given to secure future advances and the mortgagee is allowed to recover sums subsequently advanced, as against a mesne mortgagee.[4]

The reasoning in support of the doctrine has been that where the equity is equal the *law* shall prevail. But this assumes the whole case. He who is prior in time is prior in right, and has the better equity.[5]

The doctrine is opposed to the policy and express provisions of the recording acts of our States, which direct that the rights of incumbrancers shall be determined by the records of their incumbrances.[6]

TAIL.[7] Fee-*tail*, as descriptive of an estate in lands, was borrowed from the feudists, among whom it signified any mutilated or truncated inheritance from which the heirs general were "cut off."[8]

Entail. 1, *v.* To restrict an inheritance to a class of issue or descendants. Opposed, **disentail:** to bar an estate in tail.

2, *n.* An estate in tail; an estate-tail.

The words formerly employed in creating the estate were "heirs (male or female) of the body" of a particular person; but other expressions, such as "issue forever," and "posterity," have been held to be of not less extensive import. Where the estate is not recognized, language which, formerly, would have created it will be construed to create a fee-simple.[9]

Entailments are generally abolished in the United States; where retained, they may be barred, as, by a deed from the tenant. Our law favors free alienation, *q. v.* In England the law has been so modified as to remove the more serious inconveniences that attended such estates.[10] See further FEE, 1.

TAINT. See ATTAINDER.

TAKE. With its inflections, has its popular, a *quasi* or a wholly technical sense.

1. In the sense of being entitled to, procuring, acquiring, obtaining, receiving, accepting, reserving, is of frequent use.

As in the expressions: take a note; take by descent, by purchase, by devise, by will; take up a lease, or claim; take out a copyright, a patent, a caveat; take possession; take an oath; take words in their popular sense; take effect; take a rule, a nonsuit, an exception, a bill *pro confesso*, a verdict, a judgment, an appeal, a writ of error.

That it will "take" all one's property to pay his debts means it will require all.[11]

In a statute providing than an estate by curtesy should not "be liable to be taken" for the debts of the husband, "taken" was held to mean taken *in invitum*.[12]

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[1] See Williams' Case, 3 Bland, Ch. R. 227–35 (1828); Scribner, Dower, 663–76, App. A. p. 811. As to Bland's Table, see 3 Bland, Ch. R. 237–38; as to Wigglesworth's, see Memoirs Am. Acad. Arts. & Sc., Vol. 2, p. 131; 10 Mass. 315.

[2] See 1 Story, Eq. §§ 414–15, cases; Boone *v.* Chiles, 10 Pet. *211 (1836); 18 Wall. 475.

[3] [1 Story, Eq. § 412.

[4] See Bispham, Eq. §§ 158–59.

[5] 1 Story, Eq. § 413.

[6] See at length Marsh *v.* Lee, 1 Lead. Cas. Eq. *611–29, cases; 1 W. & T. *ib.* 853–80, cases; 2 Pom. Eq. § 768; 10 Conn. 251; 29 *id.* 324; 1 Johns. Ch. 399; 1 Dall. 158; 11 S. & R. 223; 30 Pa. 378; 13 Vt. 309.

[7] F. *taille*, a cutting.

[8] 2 Bl. Com. 112.

[9] Brann *v.* Elzey, 83 Ky. 442–43 (1885).

[10] 1 Washb. R. P. 92–111; 4 Kent, 13–23.

[11] King *v.* Kent, 29 Ala. 555 (1857).

[12] Briggs *v.* Titus, 13 R. I. 138 (1880).

Power in a bank to "take" realty in payment of debts includes power to sell the same again.[1]

Reserving interest as discount is the same as taking interest. But where there is a penalty, actual receipt is necessary.[2]

Taker. The "first taker" under a will is presumed to have been a favorite of the deceased.[3] See DEVISE, Executory.

2. To take up a bill or note is to pay the amount thereof, and receive the paper back; to retire the bill or note by paying it or substituting other paper for it. See RENEWAL; RETIRE.

3. To avail one's self of the provisions of a law; to take such action in court as will secure one's self the benefits of a particular law: as, to take the bankrupt or insolvent law.

4. To apply for and secure; to procure: as, to "take out" a license, letters of administration or letters testamentary, a policy of insurance, a writ of any kind. See GRANT, 4.

An appeal from a decree of a circuit court is not "taken" until it is some way presented to the court which made the decree, so as to put an end to its jurisdiction over the cause.[4]

5. The technical word in a precept ordering an arrest. See ARREST, 2; CAPERE.

6. The technical word charging felonious appropriation in embezzlement; in larceny the words are "take and carry away."

"Take" and "steal" are not necessarily synonymous.[5]

The taking is *actual* when the seizing and carrying away is without pretense of an existing contract; and *constructive*, when, under such pretense, possession, with intent to convert, is obtained. See CARRY, 1; EMBEZZLEMENT; LARCENY; ROBBERY.

7. A mere attempt to seduce is not a taking within a statute against abduction: there must be some positive act to get the person away.[6]

But a taking for purposes of prostitution need not be by force; it may be by improper solicitations or inducements.[7]

8. To appropriate to a public use, against the will of the owner: as, to take private property.

The constitutions of all of the States provide, in substance, as follows: "Nor shall any person . . be deprived of . . property, without due process of law; nor shall private property be taken for public use, without just compensation."[1] In this connection "taken" means, broadly,— occupied, used, diminished in value, injured, damaged, destroyed.

The courts of some States hold, or have held, that the inhibition extends only to cases of actual appropriation — direct, physical seizure or dispossession; the courts of other States, that cases of indirect, consequential injury are also included. The later constitutions generally include the latter class of cases under such phrases as "property taken or damaged," damaged meaning injuriously affected.[2]

When a public use causes to property, no part of which is taken, an injury of such a character that, if it accrued when a portion of the property was taken, it would form an element of the damages as to the part not taken, there is such damage as entitles the owner to compensation.[3]

Applied to the condemnation of land for railway use, "taken" means the exclusion of the owner from use and possession and the actual assumption of exclusive possession by the corporation at the termination and as the result of judicial proceedings.[4]

Where the tracks of a street railway, which owned an exclusive franchise for that mode of carriage, were paralleled by the tracks of a cable tram-way, the latter having obtained from owners of the soil the right to occupy the streets, the property of the former was held to be "damaged," and not "taken," within the meaning of the constitution of Nebraska.[5]

Under the Constitution of Illinois of 1870, in which the words used are "taken or damaged," a recovery may be had wherever private property has sustained a substantial injury from the making and use of any public improvement, whether the damage be *direct*, as when caused by trespass or physical invasion, or *consequential*, as in diminution of market value.[6]

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[1] Jackson *v.* Brown, 5 Wend. 594 (1830).

[2] Bank of United States *v.* Owens, 2 Pet. *538 (1829).

[3] Grim's Appeal, 89 Pa. 334 (1879).

[4] Credit Co. *v.* Arkansas Central R. Co., 128 U. S. 261 (1888); R. S. § 1008.

[5] Stone *v.* Stevens, 12 Conn. *229 (1837).

[6] People *v.* Parshall, 6 Park. Cr. 132 (1864).

[7] People *v.* Marshall, 59 Cal. 388 (1881).

[1] U. S. Constitution, Amd. V. See 1 Bl. Com. 139.

[2] Rigney *v.* Chicago, 102 Ill. 71, 75 (1882), cases; Mollandin *v.* Union Pacific R. Co., 14 F. R. 894 (1882); Gottscholk *v.* Chicago, &c. R. Co., 14 Neb. 559 (1883); Hollingsworth *v.* Parish of Tensas, 4 Woods, 280 (1883); Rochette *v.* Chicago, &c. R. Co., 32 Minn. 203-4 (1884), cases; Pittsburgh Junction R. Co. *v.* McCutcheon, 18 W. N. C. (Pa., 1886); Sharpless *v.* Philadelphia, 21 Pa. 166 (1853); *Re* Dorrance Street, 4 R. I. 245 (1856).

[3] Omaha Horse Ry. Co. *v.* Cable Tram-Way Co., 32 F. R. 733 (1887); McElroy *v.* Kansas City, 21 *id.* 257 (1884).

[4] Woodruff *v.* Catlin, 54 Conn. 297 (1886), Pardee, J.

[5] Omaha Horse Ry. Co. *v.* Cable Tram-Way Co., 32 F. R. 727 (1887).

[6] Chicago *v.* Taylor, 125 U. S. 161, 168 (1888), Harlan, J.,

The word "injured," in the constitution (art. XVI, § 8) of Pennsylvania of 1874, in the phrase "property taken, injured or destroyed" by corporations, etc., refers to such legal wrong done as would be the subject of an action for damages at common law; to injuries which, though *consequential*, are yet actual, positive, and visible, the natural and necessary result of original construction or of enlargement, and of such certain character that compensation may be ascertained immediately, and be paid for or secured in advance. Hence, in that State, a railroad company is not liable for indirect injuries, the result of the operation of its road in a lawful way, without negligence, unskillfulness, or malice, upon its own property.[1]

Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking.[2] Thus, the State may take a portion of a man's property by way of taxation for support of the government.[3]

Destroying a building to prevent a conflagration is not viewed as a taking.[4] But statutes make it this, in some States. See FIRE.

A lot abutting on a street may be "damaged" by laying tracks and running railroad cars through the street.[1]

Where realty is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking. That is, a serious interruption to the common and necessary use of property may be equivalent to taking it, as, by overflowing land with back-water.[2]

An entry upon land for a survey, preliminary to locating a railroad, is not such a taking as entitles the owner to compensation for the fee; but he may claim for the temporary occupation.[3]

The right to enter upon and use is complete as soon as the property is actually appropriated under authority of law, but the title does not pass from the owner until compensation is made.[4]

Taking differs from a sale, in that the transfer of title may be compelled, and the amount of compensation be determined by a jury or officers appointed for that purpose. A taking is an exchange of property for an equivalent.[5]

Only such estate is taken as is necessary to carry out the purposes for which the land is used. This estate is an easement; the fee remains in the original owner.[6]

The object must be a public one.[7]

The particular use for which the land is first taken cannot be departed from.[8]

See further BRIDGE; COMPENSATION, 3; DOMAIN, Eminent; LEVEE; PROPERTY; RIPARIAN.

TALE. See DECLARATION, 2.

TALES. L. Plural of *talis*, such, of such a kind: additional jurors.

If, from any cause, a sufficient number of unexceptionable jurors do not appear at the trial, or if a panel is exhausted by challenges before a jury is obtained, either party, at common law, may pray a *tales*, that is, more of such men as were summoned upon the first panel, to make up the deficiency.

Talesman. One of such additional jurors.[9]

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citing many Illinois cases, and relying chiefly upon the unanimous opinion in Chicago & Western Indiana R. Co. *v.* Ayres, 106 Ill. 518 (1883), and Rigney *v.* Chicago, 102 *id.* 64 (1882). Under the constitution of 1848, which provided for compensation for property "taken or applied" to public use, it was held that recovery could not be had for merely consequential damages, provided the improvement had the sanction of the legislature,— 125 U. S. 164-65, cases. In the same State, damages for an actual appropriation are payable in advance; an injury sustained in common with the public at large is not a subject of claim; and any special injury must be remedied by an action at law, as it cannot be by an injunction,— Lorie *v.* North Chicago City R. Co., 32 F. R. 270 (1887).

[1] Pennsylvania R. Co. *v.* Marchant, 119 Pa. 541, 553 (1888), one justice dissenting. (Counsel for plaintiff cite many English and American cases.) The railroad company had invested a large sum on the south side of Filbert street, Philadelphia, in purchasing property and in constructing a depot and elevated tracks. The defendant owned a dwelling-house upon the north side of the street, fifty-one feet from the railroad; and claimed damages for loss of light, for the noise, jarring, smoke, etc. The decision of the lower court, which was in his favor, was reversed. Occupation of the street itself, in front of his house, would have constituted the subject of a claim in the nature of special damages. The words used in the constitution of 1838 were "taken or applied" to a public use, and it was held that some portion of one's private property had actually to be taken — an immunity not enjoyed by individuals, and occasioning great hardships. See Marchant's case annotated, 27 Am. Law Reg. 391-400 (1888).

[2] Northern Transp. Co. *v.* Chicago, 99 U. S. 642 (1878), cases: Illinois constitution of 1848, as to which see *supra*.

[3] Munn *v.* Illinois, 94 U. S. 145 (1876).

[4] Surroco *v.* Geary, 3 Cal. 73 (1853).

[1] Frankle *v.* Jackson, 30 F. R. 398 (1887), cases.

[2] Pumpelly *v.* Green Bay Co., 13 Wall. 181, 179-80 (1871), cases, Miller, J.: Illinois constitution of 1848; 28 Minn. 540.

[3] Bonaparte *v.* Camden, &c. R. Co., Baldw. 225 (1830); Polly *v.* Saratoga, &c. R. Co., 9 Barb. 457 (1850).

[4] Kennedy *v.* Indianapolis, 103 U. S. 602 (1880).

[5] County of Mobile *v.* Kimball, 102 U. S. 703 (1880).

[6] Attorney-General *v.* Jamaica Pond Aqueduct Corporation, 133 Mass. 365 (1882), cases.

[7] Cole *v.* La Grange, 113 U. S. 6 (1885), cases; Varner *v.* Martin, 21 W. Va. 551-52 (1883), cases. As to one railroad condemning land for another, see 27 Cent. Law J. 207-12 (1888), cases.

[8] Oregon Ry. & Nav. Co. *v.* Oregon Real Estate Co., 10 Oreg. 445 (1882), cases.

[9] [3 Bl. Com. 364-65; 4 *id.* 354; O'Connor *v.* State, 9 Fla. 225 (1860).

At *nisi prius*, by virtue of 35 Hen. VIII (1544), c. 6, the judge is empowered to award a *tales de circumstantibus*, of by-standers — persons present in court, to be joined to the other jurors to try the cause. They are subject to the same challenges as the principal jurors.[1]

By-standers may still be chosen, except in California. A jury so impaneled is regarded as a "jury of the county" where the offense was committed.[2]

Since a *tales* signifies a returning of as many men as will make up the full complement of jurors, it is not granted where there is a total default; only where the number is deficient.[3]

"When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the by-standers sufficient to complete the panel."[4]

The act of June 30, 1879, c. 52, § 2, prescribing the mode for drawing jurors, does not repeal the foregoing provision, nor affect the power, when a panel has become exhausted, to call in talesmen.[5]

Octo tales, eight such jurors, and *decem tales*, ten such jurors, were the names, at common law, of bodies of additional jurors, and of the writs by which they were summoned.[6]

TALTARUM'S CASE. See DONUM, De donis.

TAME. See ANIMAL.

TANNERY. See CONDITION; NUISANCE; POLICE, 2.

TANNING. See ART, 1; PROCESS, 2.

TANTAN. See GAME, 2.

TARDE. See VENIRE, Tarde.

TARIFF.[7] Originally, a list or schedule showing the price or charge affixed to each of a number of items. Latterly, a statute, or a commercial convention, as well as a list or schedule, exhibiting the kinds or the names of articles of merchandise designed for importation or exportation, upon which duties or customs are to be paid for the use of the general government. See CUSTOMS; DUTY, 2.

TAUTOLOGY. See SURPLUSAGE.

TAVERN. At common law, a tavern-keeper is one who makes it his business to entertain travelers or passengers and provide lodging and necessaries for them, their horses and attendants. When licensed they usually had the privilege of selling liquors, but this depended wholly upon the provision of law.[1]

"Tavern," "hotel," and "public house" are synonymous in this country; and while they entertain the traveling public, and receive compensation therefor, they do not lose their character, though they may not have the privilege of selling liquors. The distinction, as respects inn-keepers and tavern-keepers, observed in England, under the common law, does not exist with us, and different names are applied to them, though "hotel" and "house" are commonly used to denote a higher order of public houses than the ordinary tavern or inn. As employed in a statute, the word may refer to the whole class, comprehending all houses that entertain the public for compensation.[1]

See further INN.

TAX.[2] 1, *v.* To assess, adjust, fix, determine: as, to tax the items and the amount of the costs in a case. Whence re-tax.

Costs are taxed, in the first instance, by the clerk of the court; and provision is made, by statute or rule of court, for appeal, after due notice to the adverse party, to the judge or judges of the court itself. See COSTS.

2, *n.* A charge, a pecuniary burden, for the support of government.[3]

A charge or burden for which the state may make requisition in a prescribed mode.[4]

A tax is not a "debt," that is, an obligation for the payment of money founded upon contract. It is an impost levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to its enforcement: it operates *in invitum*. The form of

[1] [3 Bl. Com. 364–65.

[2] State *v.* Kemp, 34 Minn. 66 (1885).

[3] Williams *v.* Commonwealth, 91 Pa. 500 (1879); 1 Chitt. Cr. Law, 518.

[4] R. S. § 804; Act 24 Sept. 1789; Clawson *v.* United States, 114 U. S. 487 (1885), cases.

[5] Lovejoy *v.* United States, 128 U. S. 173 (1888); United States *v.* Rose, 6 F. R. 136 (1881); Clawson *v.* United States, 114 U. S. 487 (1885).

[6] 3 Bl. Com. 364.

[7] F. *tariffe*, a casting of accounts. Sp. *tarifa*, a list of prices, a book of rates. Arab. *ta'rif*, giving information, notification,— Skeat. Or, *Tarifa*, a town in Spain, at the entrance of the straits of Gibraltar, where duties were collected,— see Webster.

[1] St. Louis *v.* Siegrist, 46 Mo. 594 (1870), Wagner, J. See also Curtis *v.* State, 5 Ohio, 394 (1832); Rafferty *v.* New Brunswick Fire Ins. Co., 18 N. J. L. 434 (1842); Bonner *v.* Welborn, 7 Ga. 308 (1849); People *v.* Jones, 54 Barb. 316 (1868); 3 Hill, 150; 2 Daly, 15; 3 Brewst. 344; 2 Kent, *597, note *a*.

[2] F. *taxer:* L. *taxare*, to handle, appraise.

[3] United States *v.* Baltimore & Ohio R. Co., 17 Wall. 326 (1872), Hunt, J.; Loan Association *v.* Topeka, 20 *id.* 664 (1874), cases; County of Mobile *v.* Kimball, 102 U. S. 703 (1880).

[4] Tompkins *v.* Little Rock, &c. R. Co., 15 F. R. 12 (1882), Caldwell, J. See also 20 Cal. 350; 34 *id.* 454; 27 Ind. 63; 34 La. An. 1050; 30 Minn. 357; 6 Neb. 77; 56 N. H. 159; 4 N. Y. 424; 19 Pa. 260; 21 *id.* 169; 39 *id.* 83; 93 *id.* 131; 46 Vt. 784.

procedure to collect, as, an action of debt, does not change its character.[1]

Power to tax is vital to the functions of government: it helps sustain the social compact and give it efficacy; it is intended to promote the general welfare; it reaches the interests of every member of the community. It may be restrained by contract in special cases for the public good, where such contracts are not forbidden. But the contract must be shown to exist; there is no presumption in its favor; every reasonable doubt will be resolved against it. Where it exists it is to be rigidly scrutinized, and never permitted to extend, in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all.[2]

The power to tax is an incident to the exercise of the legitimate functions of government No government dependent upon taxation can bargain away its whole power of taxation; that would be a substantial abdication.[3]

The power rests upon necessity, and is unlimited, except by constitutional prohibition. The amount is co-extensive with the wants of government. The power is also applicable to all property and rights created or protected by law: it is correlative with protection.[4]

The power is the strongest, most pervading one of government. "The power to tax is the power to destroy."[5]

There can be no lawful tax which is not laid for a public purpose.[6]

Levying a tax is a high act of sovereignty falling to the legislative department, and to be performed upon considerations of policy, necessity, and public welfare.[7]

Security against the abuse of the taxing power is found in the structure of the government itself. The legislature acts upon its constituents; and responsibility to them constitutes a sufficient security against erroneous and oppressive taxation.[8]

The legislature may direct that the whole or a part of the expense of a public improvement, like that of laying out, grading or repairing a street, shall be paid by the owners of the lands benefited; determination of the territorial district which shall be taxed for the improvement is within the province of its discretion. If provision is made for notice to and hearing each proprietor, at some stage of the proceedings, as to what proportion of the tax his land shall bear, there is no taking of his property without due process of law.[1]

A tax is not a lien unless made so by statute. *Mandamus* will compel a levy. Being levied by authority of the legislature, it can be altered, postponed, or released only at its pleasure. But a repeal of such authority is invalid when it impairs the obligation of a contract, the tax being the inducement.[2]

But a court of equity has no jurisdiction to appoint a collector or receiver, by *mandamus*.[3]

Because a levy is the exercise of legislative function, and a court cannot make a new assessment if one already made is erroneous, and because taxes should be promptly paid,—neither illegality nor irregularity in the proceedings, nor error nor excess in the valuation, nor the hardship or injustice of the law, provided it is constitutional, nor a grievance which can be remedied by a suit at law, will authorize an injunction against collection. Moreover, before that, all taxes rightfully due must have been paid or tendered.[4] See REVENUE, p. 899, c. 2.

The system which most nearly attains perfect equality and uniformity is the best, but none is complete.[5]

Taxation by a uniform rule requires "uniformity" in the rate and in the mode of assessment. Uniformity implies equality in the burden of taxation, and this cannot exist without uniformity in both those essentials. The uniformity must be co-extensive with the territory to which it applies—State, county, city, town, etc.; and be extended to all property subject, so that all be taxed equally.[6]

Where inequality is designed to discriminate against any class of persons or any species of property, a court of equity will give relief.[7] See UNIFORM.

An assessment of a tax is invalid, if, being laid upon different kinds of property as a unit, it includes property not legally assessable, the part assessed upon

[1] Meriwether v. Garrett, 102 U. S. 513–15 (1880), Field, J.; Lane County v. Oregon, 7 Wall. 80 (1868), cases, Chase, C. J.

[2] Tucker v. Ferguson, 22 Wall. 575 (1874), cases, Swayne, J.; Erie Ry. Co. v. Pennsylvania, 21 *id.* 498–99 (1874), cases; Farrington v. Tennessee, 95 U. S. 686 (1877), cases; Memphis Gas Co. v. Shelby County, 109 *id.* 400 (1883), cases; Vicksburgh, &c. R. Co. v. Dennis, 116 *id.* 668–69 (1886), cases.

[3] Stone v. Mississippi, 101 U. S. 820 (1879), Waite, C. J.

[4] Pittsburgh, &c. R. Co. v. Commonwealth, 66 Pa. 73 (1870).

[5] M'Culloch v. Maryland, 4 Wheat. 431 (1819), Marshall, C. J.

[6] Loan Association v. Topeka, 20 Wall. 663–64 (1874).

[7] Meriwether v. Garrett, 102 U. S. 515–18 (1880), cases.

[8] M'Culloch v. Maryland, 4 Wheat. 428 (1819), Marshall, C. J.; Spencer v. Merchant, 125 U. S. 355 (1888), cases.

[1] Spencer v. Merchant, 125 U. S. 355–56 (1888), cases: s. c. 100 N. Y. 585, 587–89.

[2] Meriwether v. Garrett, *ante*.

[3] Thompson v. Allen County, 115 U. S. 550 (1885).

[4] State Railroad Tax Cases, 92 U. S. 613–17 (1875), cases, Miller, J.; German Nat. Bank of Chicago v. Kimball, 103 *id.* 733–35 (1880), cases.

[5] State Railroad Tax Cases, 92 U. S. 612 (1875).

[6] Exchange Bank v. Hines, 3 Ohio St. 15 (1853); Cummings v. Merchants' Nat. Bank, 101 U. S. 153 (1879); Worth v. Wilmington, &c. R. Co., 89 N. C. 296 (1883); Morrison v. Manchester, 58 N. H. 549 (1879); Edes v. Boardman, *ib.* 589 (1879).

[7] People v. Weaver, 100 U. S. 539 (1879); Pelton v. Commercial Nat. Bank, 101 *id.* 143 (1879); Cummings v. Merchants' Nat. Bank, *ib.* 153 (1879); German Nat. Bank v. Kimball, 103 *id.* 735 (1880); Santa Clara Co. v. Southern Pacific R. Co., 18 F. R. 385 (1883): 8 Saw. 254, 282, 301.

the latter property not being separated from the other part.[1]

Double taxation is never to be presumed. Justice requires that the burdens of government, as far as practicable, shall be laid equally on all. Hence, also, presumably, all species of property are subject to taxation.[2]

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."[3] "Direct Taxes shall be apportioned among the several States . . according to their respective Numbers," as determined by the decennial census.[4] "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration."[5] "No Tax or Duty shall be laid on Articles exported from any State."[6] "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws."[7] "No State shall, without the Consent of Congress, lay any Duty of Tonnage."[8]

Capitation tax. A poll tax; a tax imposed upon each individual person without regard to his property, business, or other circumstances.[9]

A tax upon the person simply, without reference to his property, real or personal, or to any business in which he may be engaged, or to any employment which he may follow.[10] See *Direct Tax.*

Direct tax; indirect tax. Attempts to define "direct tax," as used in the Constitution, have been unsatisfactory. For an understanding of the meaning resort must be had to the historical evidence. A review of the acts of Congress shows that personalty, contracts, occupations, and the like, have never been regarded as proper subjects for such tax. What was meant is, such a tax as may be levied (1) by capitation, and (2) on land and its appurtenances; or, perhaps, (3) by valuation and assessment of personalty upon general lists. These were the subjects from which the Colonies had usually raised their principal supplies.[1]

Taxes are usually "direct" and "indirect." Under the former are included taxes on real property; under the latter, taxes on consumption.[2]

Direct taxes are only capitation taxes, as expressed in the Constitution, and taxes on real estate; not, therefore, a tax (1) upon pleasure carriages, nor (2) upon receipts of insurance companies from premiums and assessments, and additions to surplus or contingent funds, nor (3) upon notes of State banks paid out by other banks, nor (4) a succession tax on realty, nor (5) internal revenue assessments upon income and profits.[3]

Poll tax. See *Capitation Tax.*

The power conferred upon Congress to lay and collect taxes extends to every object except exports, and in such measure as that body may determine. Definition of the particular words used, in the provisions for exercising the power, was unimportant. And there are no limitations upon the exercise of the power. Directions as to the *mode* are, that a direct tax shall be laid in proportion to the census, and that duties, etc., must be uniform.[1]

The Constitution gave the power to tax, directly and indirectly, to the National government, and, subject to the one prohibition of any tax upon exports and to the conditions of uniformity in respect to indirect and of proportion in respect to direct taxes, the power was given without express reservation. On the other hand, no power to tax exports, or imports except for a single purpose and to an insignificant extent, or to lay any duty on tonnage, was permitted to the States. In respect, however, to property, business, and persons, within their respective limits, their power remains entire. It is a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred. With this qualification it is absolute. The extent, the subjects, and the mode are equally within the discretion of the legislatures. That discretion is restrained only by the will of the people, expressed in the constitutions or through elections, and by the condition that the power is not to be used so as to embarrass the operations of the National government.[4]

But the National government may not tax the agencies of the State governments; otherwise it might destroy them by oppression.[5]

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[1] Santa Clara Co. *v.* Southern Pacific R. Co., 118 U. S. 410, 416 (1886), cases.

[2] Tennessee *v.* Whitworth, 117 U. S. 137 (1886); *Re* Surgert, 119 Ill. 87 (1886).

[3] Constitution, Art. 1, sec. 8, cl. 1.

[4] *Ibid.* sec. 2, cl. 3.

[5] *Ibid.* sec. 9, cl. 4. "This was intended to prevent Congress from enforcing a general emancipation by the special taxation of slaves." 2 Bancroft, Const. 164.

[6] Constitution, Art. 1, sec. 9, cl. 5.

[7] *Ibid.* sec. 10, cl. 2.

[8] *Ibid.* sec. 10, cl. 3.

[9] See Head-Money Cases, 18 F. R. 139 (1883); 3 Dall. 171; 5 Wheat. 317.

[10] Gardner *v.* Hall, 61 N. C. 22 (1866); 1 Nev. 313.

[1] Veazie Bank *v.* Fenno, 8 Wall. 541, 543, 544 (1869), cases, Chase, C. J.

[2] 1 Story, Const. § 950; 1 Kent, 254–58.

[3] Springer *v.* United States, 102 U. S. 602, 595–602 (1880), cases, Swayne, J.

[4] Lane County *v.* Oregon, 7 Wall. 77 (1868), Chase, C. J.

[5] United States *v.* Baltimore & Ohio R. Co., 17 Wall. 327 (1872).

Outside of the Constitutional prohibitions the power in a State extends to all objects within its sovereign power, except as to the means and instruments of the Federal government.[1]

The power, in a State, is necessarily limited to subjects within its jurisdiction. These are persons, property, and business,—whatever the form of taxation, whether as duties, imports, excises, or licenses. The power may touch property in every shape: in its natural condition, in its manufactured form, in its transmutations. It may touch business in any of its infinite forms—in professions, commerce, manufactures, transportation. The amount is determined by the value, use, capacity, or productiveness. Unrestrained constitutionally, the power of the State as to the mode, form, and extent is unlimited, provided the subject be within her jurisdiction.[2]

The property of a non-resident, not yet in course of transportation to another State, may be taxed, even though he is taxed in his own State for the value thereof.[3]

The actual *situs* of tangible personalty, not the domicil of the owner, often determines the State in which personalty may be taxed. The same is true of public securities, and the circulating notes of banks. But other personalty, as, private bonds, mortgages, and debts generally, has no *situs* independent of the domicil of the owner. . . Debts are not the property of the debtor in any sense; therefore a non-resident holder of the bonds of a corporation is not taxable.[3]

In corporations four elements of taxable value are sometimes found: franchises, capital stock in the hands of the corporation, corporate property, shares of the capital stock in the hands of individuals.[4]

A tax on the capital stock of a corporation is a tax on its property and assets; and, the taxing power of a State being limited to the subjects within its jurisdiction, when an act declares that the capital stock of a foreign corporation, doing business within the State, shall be taxed, such tax will be limited, in intent, to the property and assets within the State.[5]

Liable to taxation are, further, the capital stock and shares thereof of State banks; the franchises of a corporation; accumulated earnings; profits and dividends; realty of a corporation necessary to its business; and, by the United States, banks and bankers, on—their deposits, capital employed in business, circulation, notes of individuals or of State banks used and paid out for circulation.[6]

A State may tax its own securities as property in the hands of creditors, entitled to bear a proportion of the public burdens.[1] It may also tax, in the hands of her own citizens, the registered public debt of another State, whether there taxed or exempt.[2] But it may not tax United States loans: that would restrict the power of the United States to borrow money, and might be used to defeat the Federal power altogether.[3]

"It seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the Government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the Government, and repugnant to its paramount sovereignty."[4]

The exemption, being founded in the implied necessity for the use of the instrumentalities of the Government, is limited by the principle that State legislation which does not impair the usefulness to serve the Government is valid. Hence a State may tax shares of national bank stock, provided that thereby a discrimination is not created in favor of other moneyed capital.[5]

A legislature may make a difference between the capital stock of a corporation in its own hands and shares in the hands of individuals. The capital stock of the national banks invested in United States securities is not taxable by the States, because those securities are not taxable (R. S. § 3701); but shares in the hands of individuals may be taxed—they, by the terms of the Banking Act, are put for purposes of State taxation, upon the same footing as other moneyed capital (R. S. § 5219).[6]

The main purpose of Congress in fixing limits to State taxation on investments in shares of national banks was to render it impossible for a State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business, and operations and investments of like character.[7]

A lien for taxes does not stand upon the footing of an ordinary incumbrance; and, unless otherwise pro-

[1] State Tonnage Tax Cases, 12 Wall. 212 (1870); Transportation Co. *v.* Wheeling, 99 U. S. 276–85 (1878), cases; 18 F. R. 433–42, cases; 19 *id.* 372, 381–88, cases.

[2] State Tax on Foreign-held Bonds, 15 Wall. 319 (1872), Field, J.; United States *v.* Erie R. Co., 9 Bened. 72–74 (1877), cases; 12 F. R. 551–53, cases; 14 *id.* 35–38, 534–39, cases; 16 *id.* 201–6, cases.

[3] Coe *v.* Errol, 116 U. S. 524 (1886), cases.

[4] Tennessee *v.* Whitworth, 117 U. S. 137 (1886).

[5] Commonwealth *v.* Standard Oil Co., 101 Pa. 145 (1882), cases.

[6] R. S. §§ 678, 1015; Farrington *v.* Tennessee, 95 U. S. 687–88 (1877), cases.

[1] Murray *v.* Charleston, 96 U. S. 432 (1877); Hartman *v.* Greenhow, 102 *id.* 683 (1880).

[2] Bonaparte *v.* Tax Court, 104 U. S. 592 (1881).

[3] Bank of Commerce *v.* New York City, 2 Black, 620 (1862); Bank Tax Case, 2 Wall. 200 (1864).

[4] California *v.* Pacific R. Co., 127 U. S. 41, 1 (1888), Bradley, J. Actions to recover taxes assessed upon the property and franchises of the Central, Northern, Southern, and California Pacific Railroad Companies. The assessments aggregated $50,000,000. Some of the franchises had been conferred by Congress, and the State Board of Equalization blended, in the assessments, all franchises indistinguishably.

[5] First Nat. Bank of Louisville *v.* Kentucky, 9 Wall. 353 (1869); Bank of New York *v.* Supervisors, 7 *id.* 26 (1868); Boyer *v.* Boyer, 113 U. S. 689 (1885): R. S. § 5219; Tennessee *v.* Whitworth, 117 *id.* 136 (1886), cases.

[6] Tennessee *v.* Whitworth, 117 U. S. 135–36 (1886), cases.

[7] Mercantile Bank *v.* New York, 121 U. S. 138 (1887).

vided, is not displaced by a sale under a pre-existing judgment or decree. It attaches to the *res* without regard to individual ownership, and, when enforced by sale pursuant to the statute, the purchaser takes an unimpeachable title.[1]

The right to redeem land sold for taxes is commonly reserved, and is favored by the policy of the law.[2]

Immunity from taxation is a personal privilege, not transferable except under express authority of the legislature; and the exemption does not necessarily attach to the property after it passes from the privileged owner.[3]

Unless exempted in terms which amount to a contract not to tax, the property, privileges and franchises of a corporation are legitimate subjects.[4] Exemption of a corporation extends only to the property necessary for its business; otherwise, it could extend its immunity, and escape the common burden of government.[5]

An exemption granted an individual is a franchise which may be lost by acquiescence for a period of years.[6]

Property of the United States is exempt by the Constitution from taxation by a State.[7]

The necessities of government, the nature of the duties to be performed, and usage, have established a procedure in regard to the levy and collection of taxes which differs from proceedings in courts of justice, but which is still "due process of law." When levied by a city, for a public purpose, by authority of law, though some of the property assessed be farm lands, within the city, the State does not deprive the owner of his property without due process.[8]

Where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal than in other cases, and whether notice is necessary may depend on the character of the tax, and the manner in which its amount is determinable.[9]

To sustain an action to recover illegal taxes paid, it is necessary: that authority to levy be wholly wanting; that the money was actually received by the defendant; that payment was made under compulsion, to prevent the immediate seizure of his goods or the arrest of his person.[10] The remedy which a statute provides is exclusive.[1] See PROTEST, 1.

Compounds of tax are: tax-*assessor*, tax-*certificate*, tax-*deed*, tax-*fund*, tax-*levy*, tax-*lien*, tax-*payer*, tax-*receipt*, tax-*receiver*, tax-*sale*, qq. v. Other common words are, taxable, non-taxable, taxables, qq. v.

See ASSESS, 1; CHARTER, 2; CIRCULATION; COMMERCE; CORPORATION; DISTRICT, 2; DUTY, 2; ESCAPE, 2; FRANCHISE, 1; IMPAIR; IMPORT; IMPOST; INCOME; LEVY, 3 (1); LIST, 2; MANDAMUS; PRIVILEGE, 1; PROCESS, 1, Due; RATE, 2; SALE; SCHOOL; SCRIP; SECTARIAN; STOCK, 3 (2); SUFFER; TONNAGE; WORSHIP.

TEACHER. He is not an "officer" in the ordinary sense: he is not usually elected or appointed, but is employed — contracted with.[2] See PARENS, In loco; PUNISHMENT, Corporal; SCHOOL.

TEAM. Within the meaning of an exemption law, one or more horses, with their harness and the vehicle to which they are customarily attached for use.[3]

The animals which a householder or the head of a family uses in the business of providing for his family.[4]

In a statute allowing damages for injury from the condition of a highway, was held to include a horse driven with other horses unharnessed.[5]

Referring to turning out on meeting in a highway, may mean a vehicle, with animals drawing it, and used for loads instead of persons.[6]

A statute making a railroad company liable in damages for injuring "live-stock running at large" at a place where it should have fenced its track, was held to include a runaway "team," that is, two or more horses, oxen or other beasts, harnessed together to the same vehicle for driving.[7]

Team work. In a statute exempting from execution two horses kept and used for team work, means work done by a team as a substantial part of a man's business.[8]

Teamster. One who drives a team; also, one who habitually drives a team, or is engaged in the business of teaming as a means of earning a livelihood.[9] See CARRIER, Common; ROAD, 1, Law of.

[1] Osterberg *v.* Union Trust Co., 93 U. S. 428 (1876).

[2] Barrett *v.* Holmes, 102 U. S. 657 (1880), cases.

[3] Morgan *v.* Louisiana, 93 U. S. 222-24 (1876), cases; East Tennessee, &c. R. Co. *v.* County of Hamblen, 102 *id.* 274 (1880); Wilson *v.* Gaines, 103 *id.* 417 (1880); Memphis R. Co. *v.* Commissioners, 112 *id.* 617 (1884), cases.

[4] North Missouri R. Co. *v.* Maguire, 20 Wall. 61 (1873).

[5] Bank of Commerce *v.* Tennessee, 104 U. S. 496-97 (1881), cases.

[6] Given *v.* Wright, 117 U. S. 648, 656 (1886).

[7] Van Brocklin *v.* Tennessee, 117 U. S. 153-80 (1886), cases.

[8] Kelly *v.* Pittsburgh, 104 U. S. 78 (1881), Miller, J.

[9] Hagar *v.* Reclamation District, 111 U. S. 708 (1884); 18 F. R. 449-50 (1883), cases.

[10] Dillon, Munic. Corp. § 940; Lamborn *v.* Commissioners, 97 U. S. 181 (1877); Union Pacific R. Co. *v.* Commissioners, 98 *id.* 541 (1878).

[1] Snyder *v.* Marks, 109 U. S. 189, 193 (1883), cases. See generally 18 F. R. 445-55 (1883), cases.

[2] Seymour *v.* Over-River School District, 53 Conn. 509 (1885). On rights as between teacher and pupil, see 25 Cent. Law J. 339 (1887), cases.

[3] Dains *v.* Prosser, 32 Barb. 291 (1860), cases; Brown *v.* Davis, 9 Hun, 44 (1876).

[4] Wilcox *v.* Hawley, 31 N. Y. 653 (1864); 47 Barb. 497.

[5] Elliott *v.* Lisbon, 57 N. H. 29-30 (1876), cases.

[6] Hotchkiss *v.* Hoy, 41 Conn. 577 (1874).

[7] Inman *v.* Chicago, &c. R. Co., 60 Iowa, 462 (1883).

[8] Hickock *v.* Thayer, 49 Vt. 375 (1877).

[9] See Brusie *v.* Griffith, 34 Cal. 306 (1867); Elder *v.* Williams, 16 Nev. 419 (1882); Story, Bailm. § 496.

TECHNICAL.[1] 1. Pertaining to an art, trade, science, profession, or vocation; artificial.

Technical language is construed in the sense generally received in the business or calling to which the subject-matter relates, unless it is apparent that the words were understood in another sense.

2. As employed in law or jurisprudence; legal; opposed, in some relations, to actual and moral: as, technical or a technical — estoppel, fraud, malice, trust, *qq. v.* See further ART, 3; CONSTRUCTION; CONTRACT; INDICTMENT; STATUTE; WILL, 2; FRENCH; LATIN.

Technical culpability exists where a person transgresses a law without intending to do an unlawful act. Thus, the merest touching of another's person or clothing may amount to a battery, and be punishable as a crime. See also FRAUD, Constructive.

Technicalities are unintended applications of rules designed to give effect to principles imperfectly understood, and rigidly adhered to from fear that departure from them should relax legal rules in general. . . Once established, they are adhered to partly because they are looked upon as the outworks of the principles which they distort; partly from a perception of the truth that an inflexible adherence to established rules, even at the expense of particular hardships, is essential to the impartial administration of justice; and partly because to a certain kind of mind arbitrary rules are pleasant in themselves. . . As long as the doctrines of any department of knowledge are supposed to be absolutely true, technicalities are devised and maintained by those who believe in the doctrines, and are treated as a *reductio ad absurdum* by those who deny their truth. Wider experience demonstrates that a technicality or absurd inference from an alleged truth shows not that the proposition from which it follows is wholly untrue, but only that it is imperfectly expressed. Technicalities thus mark the progress of knowledge.[2] See CERTAINTY.

TELEGRAPH.[3] *v.* To write afar off or at a distance.

A wire or wires used for the purpose of telegraphic communication, with any casing, coating, tube, or pipe inclosing the same, and any apparatus connected therewith for the purpose of such communication.[4]

Includes any apparatus for transmitting messages or other communications by means of electric signals.[5] See CABLE.

[1] Gk. *technicos*', belonging to an art.

[2] 3 Stephen's History Crim. Law Eng. 347-48.

[3] Gk. *têle*, afar; *grâph'ein*, to write.

[4] 26 & 27 Vict. c. 112 — Telegraph Act of 1863.

[5] 32 & 33 Vict. c. 73 — Telegraph Act of 1869. See TELEPHONE.

Telegram. Any message or other communication transmitted or intended for transmission by telegraph.

Morse was the first and original inventor of the electro-magnetic telegraph, for which a patent was issued to him in 1840, and re-issued in 1848. His invention was prior, as well as superior, to those of Steinhiel of Munich, and Wheatstone and Davy of England.[1]

Though in some respects a telegraph company is like a common carrier, it is not strictly a common carrier, nor is it held to the same degree of responsibility. A common carrier is an insurer; a telegraph company is held only to a reasonable degree of care and diligence, in proportion to the degree of responsibility.

Since telegraph companies undertake to exercise a public employment, in many respects analogous to that of a common carrier, they must bring to the employment that degree of skill and care which a prudent man, under the circumstances, would exercise in his own affairs; and any stipulation intended to relieve them from this duty, or to restrict their liability for its non-use, is forbidden by the demands of sound public policy.[2]

A telegraph company, by express contract or by reasonable rules contained in a printed notice so brought to the knowledge of a patron as to create an implied contract, may limit its liability for delay or error in transmitting and delivering a message, except as to such delay or error as is caused by its own misconduct or gross want of care.

Most of the rules and regulations embodied in the printed blanks for messages have been upheld by the courts as reasonable requirements.

While the contract for a message is made only with the sender, companies have been held liable to receivers who have been misled to their damage by negligence in the companies' servants.

When a message is sent over a connecting line, the same principles are applied as in the case of common carriers of merchandise.

A company cannot protect itself against gross negligence or incompetency in its employees, or as against a remediable imperfection in its instruments. It must receive all messages offered, except such as are illegal or immoral in character, unreasonably lengthy, or in disregard of reasonable rules; and must send them in the order in which they are received, preference being given to government messages. Every message is to be sent as written; if illegible, it may be refused. Liability for negligence extends to the natural and immediate consequences only.[3]

[1] O'Reilly *v.* Morse, 15 How. 134, 62 (1853).

[2] Smith *v.* Western Union Tel. Co., 83 Ky. 114 (1885), cases.

[3] See generally Western Union Tel. Co. *v.* Reynolds, 77 Va. 180-83 (1883), cases; Pinckney *v.* Western Union Co., 19 S. C. 82-85 (1882), cases; Western Union Co. *v.* Blanchard, 68 Ga. 299, 308-10 (1882), cases; White *v.* Western Union Co., 14 F. R. 710, 718-23 (1882), cases; Jones *v.* Western Union Co., 18 *id.* 717, 718-19 (1883), cases; Southern Express Company *v.* Caldwell, 21 Wall. 270 (1874), cases; 24 Am. Law Reg. 831-39 (1885),

In Dryburg's case, the message, as sent from New York city, read "Send two hand bouquets, very handsame, one of five, one of ten dollars." As received in Philadelphia it read: "Send two hundred bouquets," etc. Before the error was discovered, Dryburg, a florist, had cut flowers to the amount of one hundred dollars, as a jury found.[1]

A telegram, like a letter, may constitute an admission, and complete a contract.[2] To charge the sender the original draft must be produced. The sending operator may be called to prove the sender's presence.[3]

The company or operator may be compelled to disclose the contents of a dispatch, unless a statute provides otherwise.[4]

An accepted telegram is a sufficient memorandum within Statute of Frauds.[5]

Congress may regulate communication by telegraph between the States. And where a State has given exclusive privileges to one company, which would preclude free intercourse, Congress, under the powers "to regulate commerce" and "to establish post-offices and post-roads," may provide for the construction of competing lines.[6] See COMMERCE.

A telegraph company holds the same relation to commerce as a carrier of messages that a railroad company holds as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. From their essentially different characteristics, the regulations suitable for one of these kinds of commerce would be inapplicable to the other.

Within the reservation that it does not encroach upon the exercise of the powers vested in Congress, a State may make such provisions in respect to the buildings, poles and wires of the companies within its jurisdiction as the comfort and convenience of the community may require.[7]

Any telegraph company organized under the laws of any State, shall have the right to construct, maintain, and operate lines through and over any portion of the public domain, over and along any military or post-road, and over, under, or across the navigable streams or waters of the United States; the lines not to obstruct navigation, or interfere with ordinary travel.[1]

Acceptance of that provision, as far as government business is concerned, makes the company agent of the United States.[2]

But the privilege conferred does not involve exemption from the ordinary burdens of taxation in a State within which a company may own or operate lines.[3]

A railroad being a post-road that act of 1866 is paramount over any agreement for the exclusive use of a road by one company.[4]

A State may not tax inter-State messages: they are commerce, as well as in the nature of postal service, and exempt from State regulations, except as to regulations of a strictly police character. Any regulation by way of a tax upon the occupation or business of transmitting messages between different States, or as a license to transact business, is unconstitutional.[5]

Nor may a State tax a company's receipts from inter-State messages.[6]

Whether the poles, wires, and instruments are part of the realty to which they are annexed, depends upon the intent with which they were erected.[7]

A city may determine the conditions upon which a company shall pass through its limits. After expiration of the time for erecting poles, etc., in pursuance of an ordinance, express direction from the city council, and notice to the company, should be given, before the mayor proceeds to remove the poles.[8]

It is no part of the corporate duty of a company to collect and send out market reports.[9]

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cases; 2 Kent, 12 ed. [829], cases; 2 Pars. Contr. 6 ed. 257 *f*; Shearm. & Redf. Neg. §§ 549–71; 11 F. R. 1, 10; 27 Iowa, 451; 113 Mass. 301; 15 Mich. 532; 37 Mo. 472; 48 N. Y. 132; 62 Pa. 88; 5 S. C. 358; 19 *id.* 71; Allen's Tel. Cases; Scott & Jarn. Tel.

[1] New York & Wash. Tel. Co. *v.* Dryburg, 35 Pa. 298 (1860). See further, as to negligence by operator, Wabash R. Co. *v.* McDaniels, CARRIER, Common.

[2] Trevor *v.* Wood, 36 N. Y. 307 (1867): 93 Am. Dec. 514–17 (1887), cases; Utley *v.* Donaldson, 94 U. S. 29 (1876); 4 Biss. 357; 1 Woods, 286; 4 Dill. 431; 39 Iowa, 39; 103 Mass. 327; 20 Mo. 254; 35 Barb. 463; 36 N. Y. 307; 37 *id.* 457; 41 *id.* 544; 30 Wis. 605.

[3] See 14 Cent. Law J. 262–65 (1882), cases; 3 Dill. 571; 40 Conn. 363; 26 Ill. 591; 82 *id.* 73; 49 Ind. 223; 15 La. An. 668; 7 Allen, 548; 37 Miss. 682; 48 N. H. 488; 40 Pa. 9; 29 Vt. 127; 40 Wis. 431; 18 U. C., Q. B. 60.

[4] 27 Am. Law Reg. 65–79 (1879), cases; 5 South. Law Rev. 473–520 (1879), cases; 3 Dill. 567; 15 F. R. 713; 58 Me. 267; 7 W. Va. 544; 2 Pars. S. Cas. 274; 13 West. Jur. 122; 20 Law Times, 421.

[5] Godwin *v.* Francis, L. R., C. P. 293 (1870); Reuss *v.* Picksley, L. R., 1 Ex. 342 (1866); 39 L. J., C. P. 121; 4 H. & C. 588; 6 U. C., C. P. 221.

[6] Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 9 (1877), Waite, C. J.; 125 *id.* 185.

[7] Western Union Tel. Co. *v.* Pendleton, 122 U. S. 356–89 (1887).

[1] R. S. § 5263: Act 24 July, 1866.

[2] Western Union Tel. Co. *v.* Texas, 105 U. S. 464 (1881).

[3] Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530 (1888).

[4] Western Union Tel. Co. *v.* Baltimore & Ohio Tel. Co., 19 F. R. 660 (1884), Wallace, J.; Western Union Tel. Co. *v.* Burlington, &c. R. Co., 3 McCrary, 135 (1882), cases; Same *v.* Baltimore, &c. Tel. Co., 23 F. R. 12 (1885), cases.

[5] Leloup *v.* Port of Mobile, 127 U. S. 640 (1888). The plaintiff, as agent for the Western Union Co., had been fined for refusing to pay $225 imposed by ordinance as an annual license tax. Western Union Tel. Co. *v.* Texas, 105 U. S. 460 (1881), followed.

[6] Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, 423 (1888): Ohio R. S. § 2778; Western Union Tel. Co. *v.* Pennsylvania, 128 *id.* 39 (1888).

[7] Western Union Tel. Co. *v.* Burlington, &c. R. Co., 3 McCrary, 139 (1882).

[8] Mutual Union Tel. Co. *v.* Chicago, 16 F. R. 309 (1883). See also American Union Tel. Co. *v.* Town of Harrison, 31 N. J. E. 627 (1879); 21 Alb. Law J. 44–46 (1880), cases; 27 Cent. Law J. 447–51 (1888), cases.

[9] Metropolitan Grain, &c. Stock Exchange *v.* Mutual Union Tel. Co., 11 Biss. 531 (1883).

As to the use of the public domain and materials, the priority of Government messages, and the purchase of lines by the Government, see at length R. S. tit. LXV, §§ 5263–69.

TELEPHONE.[1] A conversation held through a telephone is a message, or a communication transmitted by a telegraph,—a telegram.[2]

A telephone is a telegraph. The idea conveyed by each term is the sending of intelligence to a distance.[3]

In a general sense, "telephone" applies to any instrument or apparatus which transmits sound beyond the limits of ordinary audibility. But the word is technically and primarily restricted to an instrument or device which transmits sound by means of electricity and wires similar to telegraphic wires. In a secondary sense, the term refers generally to the art of telephony; and, more particularly, to the apparatus, as an entirety, used in the transmission, as well as in the reception, of telephonic messages.[4]

The discoverer of a new art is entitled to the broadest claim for it which can be permitted in any case; not to the abstract right to the art without regard to the means, but to all the means and processes which he has both invented and claimed.[5]

Edison's patent, granted July 30, 1877, infringed on Bell's patent of December 9, 1876.[6]

In the five cases (bills for the infringement of letters patent No. 174,465, of March 7, 1876, and No. 186,787, of January 30, 1877, to Alexander Graham Bell, for "improvements in telegraphy" and "electric telephony," respectively) between the American Bell Telephone Company and Dolbear *et al.*, the Molecular, the Clay Commercial, the People's, and the Overland Telephone Companies, decided March 19, 1888, by the Supreme Court, and known as the **Telephone Cases** or *Dolbear* v. *American Bell Telephone Company*,[7] Chief Justice Waite, delivering the opinion of the majority (four) of the court, said, in substance, as follows:

The important question in each of these cases is as to the scope of the fifth claim of the patent of March 7, 1876, which is as follows: "The method of and apparatus for transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth." It is contended that this embraces the art of transferring to or impressing upon a current of electricity the vibrations of air produced by the human voice in articulate speech, in a way that the speech will be carried to and received by a listener at a distance on the line of the current. Articulate speech is not mentioned by name in the patent. The invention, as described, "consists in the employment of a vibratory or undulatory current of electricity, in contradistinction to a merely intermittent or pulsatory current, and of a method of and apparatus for producing electrical undulations upon the line wire." The question is not whether "vocal sounds" and "articulate speech" are used synonymously as scientific terms, but whether the sound of articulate speech is one of the "vocal or other sounds" referred to in the claim for the patent. We have no hesitation in saying that it is.

In this art—or, what is the same thing under the patent law, this process, this way, of transmitting speech—electricity, one of the forces of nature, is employed; but electricity, left to itself, will not do what is wanted. The art consists in so controlling the force as to make it accomplish the purpose. It had long been believed that, if the vibrations of air caused by the voice in speaking could be reproduced at a distance by means of electricity, the speech itself would be reproduced and understood. How to do it was the question. Bell discovered that it could be done by gradually changing the intensity of a continuous electric current, so as to make it correspond exactly to the changes in the density of the air caused by the sound of the voice. This was his art. He then devised a way in which these changes of intensity could be made, and speech actually transmitted. Thus his art was put in a condition for practical use. In doing this, both discovery and invention, in the popular sense of those terms, were involved; discovery in finding the art, and invention in devising the means of making it useful. For such discoveries and inventions the law has given the discoverer and inventor the right to a patent, as discoverer, for the useful art, process, method of doing a thing, he has found; and, as inventor, for the means he has devised to make his discovery one of actual value. Other inventors may compete with him for the ways of giving effect to the

[1] Gk. *têle*, far; *phônê*, sound, voice. Whence te-lĕph'-ony, tel-e-phŏn'-ic.

[2] Attorney-General *v.* Edison Telephone Co., 43 L. T. 708 (1881), Stephen, J.; Telegraph Acts of 1863—26 & 27 Vict. c. 112, and of 1869—32 & 33 Vict. c. 73.

[3] Commonwealth *v.* Pennsylvania Telephone Co., 42 Leg. Int. 180 (Pa., 1885)—Revenue Act 7 June, 1879.

[4] Haughey's Case (Hockett *v.* State), 105 Ind. 250, 261 (1885), Niblack, C. J.; *ib.* 509; Central Union Telephone Co. *v.* Bradbury, 106 *id.* 9 (1885).

[5] American Bell Telephone Co. *v.* Spencer, 8 F. R. 809 (1881), Lowell, Cir. J.; Same *v.* Dolbear, 15 *id.* 448 (1883), Gray, J., 17 *id.* 604 (1883).

[6] United Telephone Co. *v.* Harrison, L. R., 21 C. D. 720 (1882).

[7] 126 U. S. 1, 531–78, Waite, C. J., Miller, Matthews, and Blatchford, JJ., concurring in affirming the decrees of the lower (circuit) courts which supported the patent granted to Bell; Bradley, Field, and Harlan, JJ., dissenting, pp. 573–77. Gray, J., not being present, and Lamar, J., not being a member of the court, at the time of argument (Jan. 24—Feb. 8, 1887), took no part in the decision. The history of the cases, including pleadings, exhibits, etc., covers pp. 1–149; and the arguments of counsel, 149–531. A petition for a rehearing was filed May 7, 1888, but no justice who united in the opinion having requested the rehearing, the application was denied, 584.

discovery, but the new art he has found will belong to him, and to those claiming under him, during the life of his patent. If another discovers a different art or method of doing the same thing, reduces it to practical use, and gets a patent for his discovery, the new discovery will be the property of that discoverer; and thereafter the two will be permitted to operate each in his own way, without interference by the other. The only question between them will be whether the second discovery is in fact different from the first. The patent for the art does not necessarily involve a patent for the particular means employed for using it. Indeed, the mention of any means, in the specification or descriptive portion of the patent, is only necessary to show that the art can be used.

The effect of the decision in the case of *O'Reilly* v. *Morse*, 15 How. 62, 106 (1853), was that the use of magnetism as a motive power, without regard to the particular process with which it was connected in the patent, could not be claimed, but that its use in that connection could. In the present case the claim is not for the use of a current of electricity in its natural state as it comes from the battery, but for putting a continuous current, in a closed circuit, into a certain specified condition, suited to the transmission of vocal and other sounds, and using it in that condition for that purpose. So far as at present known, without this peculiar change in its condition it will not serve as a medium for the transmission of speech, but with the change it will. Bell was the first to discover this fact, and how to put such a current in such a condition; and what he claims is its use in that condition for that purpose, just as Morse claimed his current in his condition for his purpose. Bell's claim is in all respects sustained by the authority of Morse's case. It may be that electricity cannot be used at all for the transmission of speech except in the way Bell has discovered, and that therefore, practically, his patent gives him its exclusive use for that purpose, but that does not make his claim for the use of electricity distinct from the particular process with which it is connected in his patent. It will, if true, show more clearly the importance of his discovery; it will not invalidate his patent.

When Bell applied for his patent, it is true that he had never actually transmitted telegraphically spoken words so that they could be distinctly heard and understood at the receiving end of his line, but in his specification he did describe accurately, and with clearness, his process, that is to say, the exact electrical condition that must be created to accomplish his purpose, and he also described, with sufficient precision to enable one of ordinary skill in such matters to make it, a form of apparatus which, if used in the way pointed out, would produce the required effect. The particular instrument which he had, and which he used in his experiments, did not, under the circumstances in which it was tried, reproduce the words spoken so that they could be clearly understood, but the proof is abundant, and of the most convincing character, that other instruments, carefully constructed, and made exactly in accordance with the specification, without any additions whatever, have operated, and will operate, successfully. . . The law does not require that a discoverer or inventor, in order to get a patent for a process, must have succeeded in bringing his art to the highest degree of perfection; it is enough if he describes his method with sufficient clearness and precision to enable those skilled in the matter to understand what the process is, and if he points out some practicable way of putting it into operation. This Bell did.

The patent is for both the magneto and the variable resistance *methods*, and for the particular magneto *apparatus* which is described, or its equivalent. There is no patent for any variable resistance apparatus. When Bell got his patent he thought the magneto method was the best. Indeed, he said, in express terms, he preferred it, but that does not exclude the use of the other, if it turns out to be the most desirable way of using the process.

Precisely how the subtle force operates under Bell's treatment, or what form it takes, no one can tell. All we know is that he found out that, by changing the intensity of a continuous current so as to make it correspond exactly with the changes in the density of air caused by sonorous vibrations, vocal and other sounds could be transmitted and heard at a distance. This was the thing to be done, and Bell discovered the way of doing it. He uses electricity as a medium for that purpose, just as air is used within speaking distance. In effect he prolongs the air vibrations by the use of electricity.

Reis discovered how to reproduce musical tones. He could sing through his apparatus, but he could not talk. In his first paper on the subject he said "I have succeeded in constructing an apparatus with which I am enabled to reproduce the the tones of various instruments, and even to a certain extent the human voice." Although this paper was published in 1861, and Bell did not appear as a worker in the field until fifteen years afterward, no advance had been made, by the use of what he had contrived or of his method, toward the great end to be accomplished. He caused his instruments to be put on the market for sale, and both he and those whom he employed for that purpose called attention to them by prospectus, catalogue, and otherwise, and to describe what they were and what they would do. . . It is not contended that Reis had ever succeeded in actually transmitting speech, but only that his instrument was capable of it if he had known how. With the help of Bell's discoveries in 1875 we now know why he failed. As early as 1854, Bourseul had said, substantially, that, if the vibrations of air produced by the human voice in articulate speech could be reproduced by means of electricity at a distance, the speech itself would be heard there. As a means of stimulating inquiry to that end he called attention to the principle on which the electric telegraph was based and suggested an application of that principle to such a purpose. That Reis was working all the time upon the principle of the telegraph as thus suggested by Bourseul, is abundantly proven. . . It was left to Bell to discover that the failure of Reis was due not to workmanship but to the principle which was adopted as a basis of what had to be done. He found that what he called the "intermittent current"—one caused by alternately opening and closing the circuit—could not be made under any circumstances to reproduce the delicate forms of the air vibrations caused by the human voice in articulate

speech, but that the true way was to operate on an unbroken current by increasing and diminishing its intensity. This he called a "vibratory or undulatory current," not because the current was supposed to actually take that form, but because it expressed with sufficient accuracy his idea of a current which was subjected to gradual changes of intensity exactly analogous to the changes of density in the air occasioned by its vibrations. Such was his discovery, and it was new. Reis never thought of it, and he failed to transmit speech telegraphically. Bell did, and he succeeded.

Dr. Van der Weyde copied Reis, and it was not until after Bell's success that he found out how to use a Reis instrument so as to make it transmit speech. The patent office was right in holding that James W. McDonough had been anticipated by Reis. The patents of Cromwell F. Varley, of London, were for "improvements in electric telegraphs." His purpose was to superpose upon the ordinary signal current another, which, by the action of the make-and-break principle of the telegraph, would do the work he wanted.

As to the alleged anticipation of Daniel Drawbaugh between three and four hundred witnesses were produced whose testimony was taken to establish the priority of his invention. No one of these witnesses could tell how Drawbaugh's instruments were originally constructed, or what the process was by which sound was transmitted when the instruments were in use. All that any of the witnesses could say was that they had used one or more of the instruments at Drawbaugh's shop, had heard sounds and sometimes spoken words through them, and that Drawbaugh told them the sound was carried on the wire by electricity. There was nothing whatever produced in print or in writing on the subject; not even a memorandum or a drawing of any kind. And there is nothing in the testimony to show that Drawbaugh ever told any one how his earlier instruments were made, or what his process was, until he was called as a witness in December, 1881, and explained it in his testimony. This was nearly twenty years after he had begun his experiments, nearly seven after he had made and used alleged "perfectly adjusted and finished magneto instruments," and more than five after microphones as good, or nearly as good, as those of Blake, which were not invented until 1878, had been constructed in his shop. It was also nearly six years after the date of Bell's patent, more than five after the success of Bell's discovery had been proclaimed at the Centennial Exposition in Philadelphia, four after his process had got into public use, three after it had become an established success, and two after he had brought his first suit for infringement. In the meantime, Bell's discovery had been heralded to the world, and Drawbaugh had had abundant means and ample opportunities to make his claim known. During part of this time he had treated his discovery as of secondary importance, and had devoted himself to the advancement of other inventions of his of comparatively small merit. In addition, the instruments of Drawbaugh were fairly tested in March, 1882, at the instance of the Bell Company, and failed to produce satisfactory results; when offered in evidence, they were in mere "remains." Two years afterward other reproductions were presented, differently constructed, and used in a different way. These would "talk," but they were neither made nor used in the same way as the original. These second experiments conclusively showed that the original instruments could not have done what the witnesses supposed they did, and that what they heard was produced by some other means than an electric speaking telephone. We do not doubt that Drawbaugh may have conceived the idea that speech could be transmitted by means of electricity and that he was experimenting upon that subject, but to hold that he discovered the art of doing it before Bell did would be to construe testimony without regard to the ordinary laws that govern human conduct. We therefore decide that the Drawbaugh defense has not been made out.

The charge that after Bell swore to his application on January 20, 1876, and after the application had been formally filed in the patent-office on February 14, 1876, an examiner, who got knowledge of the Gray caveat put in afterward on the same day, disclosed its contents to Bell's attorneys, and that they were allowed to withdraw the application, change it so as to include Gray's variable resistance method over Bell's signature, and over the jurat, and then restore the application to the files, thus materially altered, as if it were the original, and all this between February 14 and 19, is not sustained by the testimony.

Nor was Bell's claim as a whole, being for an electric telephone, in the construction of which the plate or diaphragm, the permanent magnet, the sounding box, the speaking tube, etc., or any of them, are used, and not for the several things in and of themselves, anticipated by the magnet in Hughes' printing telegraph, as described in Schellen's work.

The conclusion of the court then is that Bell's patent gives to him, and those who claim under him, the exclusive use of his art for the conveyance of articulate speech until the expiration of the statutory term of his patented rights.

Mr. Justice Bradley, delivering the opinion of the minority (three) of the court, said, in substance: Without expressing an opinion on other issues, the point on which we dissent relates to the defense made on the alleged invention of Daniel Drawbaugh. We think that Drawbaugh anticipated the invention of Bell, who, at most, is not claimed to have invented the speaking telephone prior to June 10, 1875; and that the evidence on this point is so overwhelming that it cannot be overcome. The question is one of *fact*, depending upon the weight of the evidence, and involves no question of law. . . We are satisfied that Drawbaugh produced, as early as 1869, an electrical instrument by which he transmitted speech, so as to be heard and understood, by means of a wire and the employment of variable resistance to the electrical current. This resistance was produced by causing the current to pass through pulverized charcoal, carbon, and other substances, acted upon by the vibrations of the voice in speaking. This was the whole invention as far as the principle of variable resistance is concerned. And we are also satisfied that as early as 1871 he reproduced articulate speech, at a distance, by means of a current of electricity, subjected by electrical induction to undulations corresponding to the

vibrations of the voice in speaking,—a process substantially the same as that which is claimed in Bell's patent.

Drawbaugh certainly had the principle, and accomplished the result. Perhaps without the aid of Bell the speaking telephone might not have been brought into public use to this day; but that Drawbaugh produced it there can hardly be a reasonable doubt. We do not question Bell's merits. He appreciated the importance of the invention, and brought it before the public in such a manner as to attract to it the attention of the scientific world. His professional experience and attainments enabled him to see, at a glance, that it was one of the great discoveries of the century. Drawbaugh was a different sort of a man. He did not see it in this halo of light. Had he done so, he would have taken measures to interest other persons with him in it, and to have brought it out to public admiration and use. He was only a plain mechanic; somewhat better instructed than most ordinary mechanics,—a man of more reading, of better intelligence. But he looked upon what he had made more as a curiosity than as a matter of financial, scientific, or public importance. This explains why he did not take more pains to bring it to public notice. Another cause of his delay was that he was ever indulging the hope of producing speech at the receiving end of the line loud enough to be heard across a room, like the voice of a person speaking in an ordinary tone. . . The proof amounts to demonstration, from the testimony of Bell himself, and his assistant, that he never transmitted an intelligible word through an electrical instrument, nor produced any instrument that would transmit an intelligible word, until after his patent had been issued; while, for years before, Drawbaugh had talked through his, so that words and sentences had again and again been distinctly heard. Bell was original, if not first. He preconceived the principle on which the result must be obtained by that forecast which is acquired from scientific knowledge; but in this, as in the actual production of the thing, he was, according to the preponderance of the evidence, anticipated by a man of far humbler pretensions. Drawbaugh invented the telephone without appreciating the importance and completeness of his invention. Bell subsequently projected it on the basis of scientific inference, and took out a patent for it. As the laws do not award a patent to one who was not the first to make an invention, we think that Bell's patent is void by the anticipation of Drawbaugh.

In 1887, the solicitor-general of the United States filed a bill in equity to have canceled the letters patent granted to Bell on the ground that they had been procured by fraud. The lower court held, on demurrer, that, as there was no express authority for it, the bill would not lie. The Supreme Court decided that such authority was not essential, that the duty of the government to protect the people against deception when valuable privileges were conferred upon individuals, whether by means of patents for land or for inventions, afforded a sufficient basis for entertaining the bill; and that Congress in providing (R. S. § 4920) a limited form of relief for private persons, in such cases, did not intend to take away the affirmative relief which has always existed in behalf of the United States.[1]

The employment of telephone companies is a public one — they are common carriers of messages, and they must therefore serve the community without discrimination.[2]

The use of patented property, devoted to a public use, is subject to control by State legislation, where the public welfare requires it. Discrimination by a telephone company against a telegraph company with respect to receiving messages is void as against public policy, and may be void as against a statute.[3]

A State may prescribe the maximum price a telephone company may charge for the use of an instrument. The property of the company being devoted to a public use is a subject of legislative regulation, although some of its appliances are patented under the Constitution and laws of the United States.[4]

A subscriber, by using profane or vulgar language, may forfeit his right to be supplied with an instrument.[5]

TELLER. One who tells or counts the moneys of a bank, received or paid out.[6]

Where the business of the bank is large, there may be a receiving teller and a paying teller.[6] See CASHIER.

TEMPERANCE; TEMPERATE. See DRUNKARD; INTEMPERATE; INTOXICATE; POLICY, 2; PROHIBITION, 2; SUMPTUARY.

TEMPEST. Strictly speaking, a storm of extreme violence, a current of wind rushing with great velocity.

Damage done by ice, at the time of high water, but in ordinary wind and weather, is not then the result of a tempest.[7]

TEMPORARY. That which is to last for a period of time, usually not long continued. Compare PERMANENT.

Power in the authorities of a city to close liquor shops "temporarily," is not well executed by an order closing them until further notice. The order, in such case, should prescribe a limited time.[8]

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[1] United States *v.* American Bell Telephone Co., 128 U. S. 315, 350 (1888), reversing Same *v.* Same, 32 F. R. 591 (1887).

[2] State *v.* Bell Telephone Co., 22 Alb. Law J. 363 (1880), Thayer, J.; Louisville Transfer Co. *v.* American Dist. Telephone Co., 24 *id.* 283 (1881); American Rapid Telegraph Co. *v.* Connecticut Telephone Co., 49 Conn. 352 (1881).

[3] State *v.* Bell Telephone Co., and Western Union Telegraph Co., 36 Ohio St. 296 (1880); Bell Telephone Co. *v.* Commonwealth *ex rel.* Baltimore & Ohio Telegraph Co., 17 W. N. C. 505 (Pa., 1886).

[4] Haughey's Case, 105 Ill. 250 (1885).

[5] Pugh *v.* Telephone Association of Cincinnati, 37 Alb. Law J. 163, 161 (1888).

[6] Mussey *v.* Eagle Bank, 9 Metc. 311 (1845).

[7] [Thistle *v.* Union Forwarding, &c. Co., 29 U. C. C. P. 84 (1878).

[8] State *v.* Strauss, 49 Md. 299 (1878).

TEMPUS. L. Time; limited time.

Nullum tempus occurrit regi. No time runs against the king. **Nullum tempus occurrit reipublicæ.** No time runs against the commonwealth. Lapse of time, at common law, will not prevent the sovereign from asserting a right; laches cannot be alleged against the state.

The sovereign is not included in statutes of limitations unless expressly named. But possession for sixty years is a bar even against the prerogative.[1]

It is a settled principle that the king is not barred unless named in the statute. The ground upon which the maxim rests is the principle of public policy (which belongs alike to all governments) that the public interests should not be prejudiced by the negligence of public officers to whose care they are confided. But statutes which regulate proceedings may include the government, without express reference to it.[2]

No presumption of payment against the government arises from mere lapse of time.[3]

The doctrine, as respects civil rights of action and prosecutions for offenses, has been generally qualified by legislation.[4]

Prior tempore, prior jure. Earlier in time, stronger in right. First in time, first in right. Priority gives precedence.

The principle applies where the equities are equal; when unequal, the superior equity prevails.[5]

A patentee's title rests entirely on priority of invention, *q. v.*

Priority in the drawing of a check gives the holder no preference of payment over checks subsequently drawn.

The principle is also illustrated in the priority allowed by attachment and lien laws.[6]

Tempore. In the time of.

TEN PINS. See GAME, 2.

TENANT.[7] In its largest sense, any one who holds lands, whatever the nature or extent of his interest.[8]

One who holds lands by any kind of title, whether for years, for life, or in fee.[9]

Almost all realty is supposed to be holden of some superior lord, in consideration of services to be rendered by the possessor. The thing held is styled the *tenement*, the possessor thereof the *tenant*, and the manner of possession a *tenure*, or *tenancy*.[1]

In popular language, "tenant" stands opposed to "landlord," and implies that the land, house, or other real property is not the tenant's own but another person's of whom he holds immediately; and this sense is recognized in jurisprudence, as when the law relating to "landlord and tenant" is spoken of. But, speaking broadly, within the understanding of the law, every possessor of landed property is a tenant, whether the property is absolutely his own or is leased of another person. A mere lodger may not be regarded as a tenant.[2]

Tenants are, or have been, distinguished, by terms referring to the nature of the estate held by them. At common law, the first three descriptive designations following were generic:

Tenants in common. Such as hold by several and distinct titles, but by unity of possession; because none knows his own severalty, and therefore all occupy promiscuously.[3]

This tenancy, says Blackstone, is found where there is a unity of possession merely, with, perhaps, an entire disunion of interest, title, and time. One tenant may hold in fee-simple, the other in fee-tail or for life; or, one may hold by descent, the other by purchase, or each by purchase from a different grantor; or, again, the estate of one may have been vested for fifty years, and that of the other for a single day. The only unity is that of possession: because no man can certainly tell which part is his own. The estate may be created by destroying the unity of title or interest in an estate in joint-tenancy or coparcenary, or by special limitation in a deed. The tenants may be compelled to make partition; but not so by early common law. They take by distinct moieties; no one has any entirety of interest: hence there is no survivorship between them. As they differ from estates in severalty only in having the possession blended, the estate is dissolved by uniting all interests in one tenant, or by partition of the interests.[4]

Tenants in common, says Kent, are persons who hold by unity of possession: they may hold by several and distinct titles, or by title derived at the same time, by the same deed or descent. They are seized *per my* and not *per tout*. In this country, the estate may be created by descent or by deed. The tenants are viewed as having distinct freeholds; and each conveys as if seized of the entirety. They sue separately as to realty, but join in actions relating to an indivisible thing, as, for trespass on the land, or for rent. Actions of waste and account lie between them.[5]

Joint-tenants. An estate in joint-tenancy is where lands and tenements are *granted* to

[1] 1 Bl. Com. 247; 3 *id.* 307.

[2] United States *v.* Knight, 14 Pet. 315 (1840); Fink *v.* O'Neil, 106 U. S. 280–89 (1882), cases.

[3] United States *v.* Thompson, 98 U. S. 489–90 (1878), cases.

[4] Broom, Max. 65. See 70 Ala. 519; 38 Ohio St. 86; 66 Pa. 228.

[5] Neslin *v.* Wells, 104 U. S. 441 (1881); 1 Story, Eq. § 64 *d*.

[6] 2 Kent, 123; Broom, Max. 363–64; 2 Bl. Com. 10, 12; 39 Minn. 287; 38 Ohio St. 96.

[7] F. *tenant*, holding: L. *tenere*, to hold.

[8] [Coles *v.* Marquand, 2 Hill, 449 (1842).

[9] Hosford *v.* Ballard, 39 N. Y. 151 (1868).

[1] [2 Bl. Com. 59.

[2] White *v.* Maynard, 111 Mass. 252 (1872).

[3] 2 Bl. Com. 191. See also 5 Conn. 365; 12 Allen, 36; 8 Minn. 431; 4 Hun, 200; 2 Utah, 297.

[4] 2 Bl. Com. 191–94. See also Tilton *v.* Vail, 42 Hun, 640 (1886).

[5] 4 Kent, 367–71.

two or more persons to hold in fee-simple, fee-tail, for life, for years, or at will.[1]

This tenancy or estate, says Blackstone, arises from the act of the parties, never from the act of the law. The tenants have unity of interest, title, time, and possession, that is, they have one and the same interest accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. One tenant cannot sue or be sued without joining the other; nor do any act to defeat or injure the other's estate; nor, at common law, have an action of waste or of account against his co-tenant. Upon the death of one tenant, the estate remains to the survivor. The estate is destroyed by severing any one of the unities.[2]

Joint-tenants, says Kent, are persons who own land by a joint title, created expressly by one and the same deed or will. They uniformly hold by "purchase." The estates need not be of the same duration, nature, or interest. The beneficial act of one enures to all tenants. By statute, one tenant may maintain an action of waste or of account against his co-tenant. They join and are to be joined in suits. They are seized *per my et per tout;* each has entire possession of every parcel and of the whole. Survivorship is the distinguishing incident; whence the early law, which was averse to the division of tenures, favored this species of tenancy. In this country, the estate is reduced in extent, and the incident of survivorship is generally abolished, except as to titles held by trustees and conveyances to husband and wife, which conveyances are rather conveyances to one person than strict joint-tenancies.[3]

Tenants in coparcenary. These always take and hold by *descent* as one heir.[4]

They have distinct estates, with right to possession in common; and each may alien his share. They resemble joint-tenants in having the same unities of title, interest, and possession. The seisin of one is generally the seisin of all.[4]

As estates, in this country, descend to all children equally, there is no substantial difference left between co-parceners and tenants in common.[5]

Personalty also may belong to its owners in joint-tenancy, and in common, but not in coparcenary. Thus, if a house is given to two persons absolutely, they are joint-owners. If the jointure be severed, as by either owner selling, the vendee and the remaining part-owner are tenants in common. For the encouragement of trade, partnership stock is considered as common and not as joint property, with no survivorship.[6]

Tenant at sufferance. See SUFFERANCE.

Tenant at will. One who holds lands as tenant at the will of the lessor.

A tenancy at will is one which may be determined at the will or pleasure of either party.[1]

Such tenant has no certain, indefeasible estate; nothing that he can assign. The estate is at the will of both parties, landlord and tenant; so that either one may determine his will, and quit connection with the other at pleasure. But if the tenant sows his land, and the landlord, before the grain is ripe, or before it is reaped, puts him out, the tenant shall have the implements, and free ingress and egress to cut and carry them away. But where the tenant voluntarily determines the will, the landlord has the profits of the land. The law is careful that no sudden determination by one party shall prejudice the other; and the courts lean against construing demises, where no certain term is mentioned, to be tenancies at will, but rather hold them to be tenancies from year to year.[2]

Tenant by curtesy. See CURTESY.

Tenant for life. See LIFE, Estate.

Tenant for years, or from year to year. See YEARS, Estate for.

Tenant from month to month. See MONTH.

Tenant in capite. See FEUD.

Tenant in dower. See DOWER.

Tenant in fee-simple. See FEE, 1 (2).

Tenant in fee-tail. See FEE, 1 (2); TAIL.

Tenant in severalty. See SEVERALTY.

Tenant paravail. See FEUD.

Terre-tenant. See TERRE.

Under tenant. See LEASE, Sublease.

See further CROP; DISCLAIMER, 1; EMBLEMENTS; ENTIRETY; JOINTURE; LEASE; MOIETY; PARTITION; SURVIVORSHIP.

TEND. If the answer to a question may tend to prove the matter alleged in the declaration, the question may be asked. It is not necessary that the testimony be sufficient to prove the matter.[3]

Evidence which tends to prove the issue on the part of either side must be submitted to the jury.[4]

Gross negligence tends to show fraud, *q. v.*

There is no difference in meaning between "tending" and "directly tending" to prove a fact.[5] See EVIDENCE, Relevant.

TENDER. 1, *v.* When either side traverses or denies the facts pleaded by his antagonist he is said to "tender an issue."[6]

2, *n.* A formal offer; a proffer which binds him who refuses it.

[1] 2 Bl. Com. 180.
[2] 2 Bl. Com. 180–87.
[3] 4 Kent, 357–66.
[4] 2 Bl. Com. 187–91.
[5] 4 Kent, 367, 366–67.
[6] 3 Kent, 25.

[1] Davis *v.* Murphy, 126 Mass. 145 (1879), Morton, J.
[2] 2 Bl. Com. 145–47. See also 4 Kent, 111–16; Johnson *v.* Johnson, 13 R. I. 468–70 (1881), cases, Durfee, C. J.
[3] Schuchardt *v.* Allens, 1 Wall. 368 (1863).
[4] Thompson *v.* Bowie, 4 Wall. 471 (1866); Hickman *v.* Jones, 9 *id.* 201 (1869).
[5] State *v.* Anderson, 10 Oreg. 461 (1882).
[6] 3 Bl. Com. 313.

The plea that the defendant has always been ready to pay the debt demanded, and, before action was begun, had tendered the amount to the plaintiff, which amount, with interest and accrued costs, the defendant brings into court for the plaintiff.[1]

May be by proffered delivery of a thing, of services, of an obligation; most commonly, is of *money*—actually produced, unless the creditor has dispensed with such production.[2]

Imports not merely readiness and ability to pay money, or to deliver a deed or other property or thing in question, but also actual production and offer of the thing itself, unconditionally, or as agreed to.[3]

In the case of a breach of an express warranty, the warrantee may sue without a return or tender of the goods. He is not obliged to rescind the sale.[4]

Misapprehension or confusion appears to have arisen from the mode of expression used in treating of the necessity of a tender or offer in cases of mutual and concurrent promises. "Tender" does not then mean the same as when the reference is to paying or offering to pay a debt due in money, where the money is offered to a creditor who is entitled to receive it and nothing further remains to be done; but, merely a readiness and willingness, accompanied with an ability to do the act which the agreement requires of the party making the tender, provided the other party will concurrently do the thing required of him, and a notice by the former to the latter of this readiness. Such readiness, ability, and notice, are sufficient evidence of, indeed constitute and imply, a "tender," that is, not an absolute, unconditional offer to do or to transfer anything at all events, but a conditional offer, dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement.[5]

See AMENDS; COVENANT; DEPOSIT, 2; RESCISSION; WARRANTY, 2.

Legal tender. (1) An offer to do a thing, conformably to the requirements of the law in the case.

(2) Money that may be offered in payment of a debt.

No *foreign coins* shall be a legal tender in payment of debts. The *gold coins* of the United States shall be a legal tender in all payments at their nominal value when not below the standard weight and limit of tolerance provided by law for the single piece, and, when reduced below such standard, shall be a legal tender at valuation in proportion to their actual weight; the *silver coins*, for any amount not exceeding five dollars in any one payment; the *minor coins*, for an amount not exceeding twenty-five cents in any one payment; *United States notes*, in payment of all debts, except for duties on imports and interest on the public debt; the same as to demand Treasury notes authorized by acts of July 17, 1861, c. 5, and February 12, 1862, c. 20; and the same as to Treasury notes authorized by acts of March 3, 1863, c. 73, and June 30, 1864, c. 172, for their face value excluding interest: *Provided*, that notes issued under the act last named shall not be a legal tender in payment or redemption of any notes issued by any bank intended to circulate as money.[1]

The act of June 9, 1879, provides, sec. 3, "that the present *silver coins* . . of smaller denominations than one dollar shall hereafter be a legal tender in all sums not exceeding ten dollars in full payment of all dues public and private."

Legal Tender Acts. By acts of February 25, 1862, July 11, 1862, and March 3, 1863, Congress authorized the issue of notes of the United States, declaring them a legal tender for all debts, except duties on imports and interest on the public debt.[2]

Legal Tender Decisions. There is no express grant of power, in the Constitution, to Congress to make *any* description of currency a legal tender in payment of debts. The making of notes or bills of credits a legal tender in payment of *pre-existing* debts is not a means appropriate, plainly adapted, or usually calculated to carry into effect any express power vested in Congress, and is inconsistent with the spirit of the Constitution—is prohibited by the Constitution. Prior to February 25, 1862, all contracts for the payment of money, not expressly stipulating otherwise, were contracts for the payment of *coin*, and must still be paid in coin, notwithstanding the legislation which makes United States notes a legal tender in payment of such debts.[3]

Contra. The Legal Tender Acts—chosen as a means to a proper end: to suppress rebellion and preserve the government—were constitutional, as appropriate and within the power of Congress "to declare war." The clause "to coin money" contains no implication that nothing but the precious metals can ever have the uses of money. The acts apply equally to pre-existing debts and to debts contracted subsequently to their passage.[4]

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[1] See 1 Steph. Plead. 247; 3 Bl. Com. 304.

[2] See Thomas *v.* Evans, 10 East, 101 (1808); Bakeman *v.* Pooler, 15 Wend. 638 (1836); Hunter *v.* Warner, 1 Wis. 147 (1853); Irvin *v.* Gregory, 13 Gray, 218 (1859).

[3] Holmes *v.* Holmes, 12 Barb. 144 (1851).

[4] Smeltzer *v.* White, 92 U. S. 395-96 (1875), cases; 4 Kent, 480.

[5] Smith *v.* Lewis, 26 Conn. 119-20 (1857), cases, Storrs, C. J.; Cook *v.* Doggett, 2 Allen, 441 (1861); Bruce *v.* Smith, 44 Ind. 9 (1873). See generally 26 Am. Law Reg. 745-58 (1878), cases; 20 Cent. Law J. 344-51 (1885), cases.

[1] R. S., Title XXXIX, §§ 3584-90, cases.

[2] See at length, 12 St. L. 345, 532, 709.

[3] Hepburn *v.* Griswold, 8 Wall. 603. Decided November 27, 1869; read January 29, 1870: 12 Wall. 528-29. Opinion by Chase, C. J., Nelson, Clifford, Field, and Grier, JJ., concurring; Miller, Swayne, and Davis, JJ., dissenting.

[4] Legal Tender Cases (Knox *v.* Lee; Parker *v.* Davis), 12 Wall. 457, 540-44. Decided May 1, 1871. Opinion by Strong, J., Miller, Swayne, Davis, and Bradley, JJ., concurring; Chase, C. J., Nelson, Clifford, and Field, JJ., dissenting. December 15, 1869, the resignation of Mr. Justice Grier had been accepted, the same to take effect February 1, 1870. December 20, 1869, the appointment of Edwin M. Stanton as a member of th

Congress has also the constitutional power to make the Treasury notes a legal tender in payment of private debts *in time of peace*, and such notes may be re-issued after having been received into the Treasury. The power "to borrow money on the credit of the United States" is the power to raise money for the public use on a pledge of the public credit, and may be exercised to meet present or anticipated expenses and liabilities. It includes the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form of stock, bonds, bills or notes. Congress has authority to issue these obligations in a form adapted to circulation from hand to hand in the ordinary transactions of commerce and business. To promote and facilitate the circulation of these obligations, to adapt them to use as currency, and make them more current in the market, it may provide for their reception in coin or bonds, and may make them receivable in payment of debts to the government. This was admitted by the judges who dissented from the decision in the *Legal Tender Cases*. The constitutional authority in Congress to provide a currency for the whole country is now firmly established. The Constitution prohibits the States from coining money, emitting bills of credit, or making anything but gold and silver coin a tender in payment for debts; but no intention can be inferred from this to deny to Congress either of these powers. . . The exercise of the power to issue bills of credit, making them a tender in payment of private debts, not being prohibited to Congress is included in the power expressly granted to borrow money on the credit of the United States. . .

Congress, as the legislature of a sovereign nation, being expressly empowered by the Constitution "to lay and collect taxes, to pay the debts and provide for the common defense and general welfare" and "to borrow money on the credit of the United States," and "to coin money and regulate the value thereof and of foreign coin;" and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people in the form of coin, Treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; "we are irresistibly impelled to the conclusion that the impressing upon the Treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of that instrument, 'necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States.' Such being our conclusion in matter of law, whether at any particular time, in war or in peace, it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterward passed upon by the court."[1]

TENEMENT. A word of greater extent than land, and though in popular acceptation it applies only to houses and other buildings, yet in its original, proper, and legal sense it signifies everything that may be holden, provided it be of a permanent nature: whether it be of a substantial and sensible, or of an unsubstantial, ideal kind.[2] Whence tenemental, tenementary.

Whatever may be holden in tenure.[3]

While frequently used in the sense of house or building, the enlarged meaning is land, or any corporeal inheritance, or anything of a permanent nature which may be holden.[4]

In modern use, a room let in a house, or such part of a house as is separately occupied by a single family or person, in contradistinction to the whole house; also, a part of a room occupied by one person, even though no partition separates his holding from that of another tenant.[5]

The modern meaning is doubtless traceable to associations with "tenant" and "tenancy."

In statutes against lewdness, liquor-selling, and other nuisances, may include a room connected with a shop, and forming no part of a dwelling-house.[6]

While a "building" is a tenement, a tenement may be something different from a building. The words have been used synonymously.[7]

Dominant tenement; servient tenement. The tenement to which is attached

court had been confirmed, but he died four days later. In pursuance of the act of April 10, 1869 (16 St. L. 44), which went into effect the first Monday of December following, the number of justices had been restored to nine and Justice Strong was commissioned February 18, and Justice Bradley, March 31, 1870. The court being thus reconstructed, a motion was made for a reconsideration of *Hepburn's Case*, and a re-argument was ordered (four judges dissenting). This was heard April 18, 1871, and the decision of May 1, 1871, rendered.

[1] Legal Tender Case (Julliard *v.* Greenman), 110 U. S. 421, 444, 449-50. Decided March 8, 1884. Opinion by Gray, J., Waite, C., J., Miller, Bradley, Harlan, Woods, Matthews, and Blatchford, JJ., concurring; Field, J., dissenting. See 1 Harv. Law Rev. 73-97 (1887); 2 Bancroft, Const. 139-37.

[2] 2 Bl. Com. 16-17, 59. See 3 Kent, 401; 5 Conn. 518; 73 Ill. 409; 13 N. Y. 159.

[3] Pond *v.* Bergh, 10 Paige, 157 (1843); Shep. Touch. 91.

[4] Sacket *v.* Wheaton, 17 Pick. 105 (1835), Wilde, J.

[5] [Commonwealth *v.* Hersey, 144 Mass. 298 (1887), Devens, J.; Young *v.* Boston, 104 *id.* 104 (1870); 44 L. T. 302; L. R., 10 Exch. 305.

[6] Commonwealth *v.* Cogan, 107 Mass. 212, 210-11 (1871).

[7] Commonwealth *v.* Bossidy, 112 Mass. 278 (1873).

an easement in an adjoining tenement is called the "dominant" tenement, and the tenement which is subjected to this service is called the "servient" tenement. See EASEMENT; HEREDITAMENT.

TENERE. L. To hold.

Tenendum. For holding; to hold. A word once in use to express the tenure by which an estate was to be enjoyed.[1] See DEED, 2.

Teneri. To be held; to be bound. The part of a bond in which the obligor declares himself "to be held and firmly bound" to the obligee.

Tenet. He holds. **Tenuit.** He held. Words once used to state the tenure in actions of waste; the latter, where the estate had ended and damages only were sought.[2]

TENOR. Holding: course; general meaning. See TENERE.

In pleading, imports an exact copy — that the instrument is set forth in the very words and figures.[3]

In popular use, the substance and effect of an instrument.[4] Compare PURPORT.

TENTERDEN'S ACT. See FRAUDS, Statute of.

TENURE. Holding; possession. See TENERE.

Tenure of land. The manner of possessing land held of a superior, in consideration of services to be rendered.[5]

Simply, the mode of holding an estate in land.

May import any kind of holding, from mere possession to owning the inheritance.[6]

Tenure is inseparable from the idea of property in land, according to the theory of the English law. All land in England is held mediately or immediately of the king. There are there no lands to which "tenure" does not strictly apply. So thoroughly does this notion pervade the common-law doctrine of real property that the king cannot grant land to which the reservation of tenure is not annexed. The idea also pervades, to a considerable extent, the law of realty in this country. The title to land is essentially allodial (*q. v.*), and every tenant in fee-simple has an absolute and perfect title, yet, in technical language, his estate is called an estate in fee-simple, and the tenure free and common socage, *q. v.* This technical language is very generally interwoven into the jurisprudence of the States, though no vestige of feudal tenure may remain.[1] See FEUD.

Tenure of office. The manner of holding or of exercising the duties of an office; also, the duration or term of office.[2]

The Constitution is silent with respect to the power of removal from office, where the tenure is not fixed. Offices not so fixed are held during good behavior, or during the life of the incumbent; or at the will of some department of the government, and subject to removal at pleasure. In the absence of express regulation the power of removal is incident to the power of appointment. The tenure of ancient common-law offices depended on ancient usage; but with us there is no ancient usage.[3] See BEHAVIOR; OFFICE, 2.

Tenure of Office Acts. The act of Congress of March 2, 1867 (14 St. L. 430), was repealed as to sections one and two, and amended, by act of April 5, 1869 (16 St. L. 6), and finally repealed entire by act of March 3, 1887 (24 St. L. 500) — the repeal not affecting "any officer heretofore suspended" under R. S. §§ 1767-72, "or any designation, nomination, or appointment heretofore made by virtue of the provisions thereof."[4]

TERM. 1. A word; an expression; a phrase; language: as, a term of art, a term of law or law term, technical terms. See TERMINUS, 3.

Sometimes used for expression or phrase: as, "the term 'entry for withdrawal;'"[5] "the term 'reasonable doubt;'"[6] "the term 'any former deceased husband.'"[7]

Terms of art, in the absence of parol testimony, are understood in the primary sense, unless the context shows a use in a particular sense, in which case the testimony of persons skilled in the art or science may be admitted to aid the court in ascertaining the true intent and meaning of the instrument.[8] See ART, 3.

2. A condition, stipulation, covenant, or obligation: as, the terms of a contract; granting a request on terms; imposing terms.

In its general signification, denotes a word, phrase or expression by which the definite meaning of lan-

[1] 2 Bl. Com. 298.

[2] 2 Greenl. Ev. § 652.

[3] Commonwealth *v.* Wright, 1 Cush. 65 (1848); People *v.* Warner, 5 Wend. 273 (1830); 5 Blackf. 458; 1 Mass. 208; 14 Ohio St. 61; 9 Yerg. 394; 1 East, 180; 7 Exch. 537, 561.

[4] Beeson *v.* Beeson, 1 Harr. 472 (Del., 1830).

[5] [2 Bl. Com. 59.

[6] [Richman *v.* Lippincott, 29 N. J. L. 59 (1860).

[1] 3 Kent, 487-88. Tenure in Scotland and England, 1 Law Quar. Rev. 175-88, 400-11 (1885); 2 *id.* 166-76 (1886).

[2] See People *v.* Walte, 9 Wend. 58 (1832); People *v.* Brundage, 78 N. Y. 407 (1879).

[3] *Exp.* Hennen, 13 Pet. 258-61 (1839), cases, Thompson, J.

[4] See same, R. S. §§ 1767-72; Impeachment of President Johnson (1868); 2 Am. Law Rev. 549; Embry's Case, 12 Ct. Cl. 455 (1876); 2 Story, Const. §§ 1537-47.

[5] 17 F. R. 230.

[6] 5 Cush. 320.

[7] 44 Ohio St. 440.

[8] Moran *v.* Prather, 23 Wall. 499 (1874), Clifford, J.; The John H. Pearson, 121 U. S. 469 (1887); 1 Greenl. Ev. § 285.

guage is conveyed. "Terms," in its restricted and legal sense, and as used chiefly in reference to contracts, means the conditions, limitations, and propositions which comprise and govern the acts which the parties agree expressly or impliedly to do or not to do. As employed in respect to a lease, embraces the covenants and conditions which impose, confer and limit the respective obligations and rights of the landlord and tenant. When "terms and conditions" are said to be annexed to "the term," "the term" means the estate granted, while the "terms and conditions" are the incidents to the grant.[1]

A court may refuse to grant a request absolutely, as, to dismiss an appeal, where there has been no citation to the appellee, and grant relief upon such terms as seem proper.[2]

3. An estate for years: the duration or continuance is bounded, limited, and determined — has a certain beginning and end.

Not merely the time specified in the lease by which the estate is created, but also the interest that passes by the lease.

Hence, the "term" may expire during the continuance of the "time," as, by surrender, or forfeiture.[3]

In a lease, the word may refer to the time during which the lessee is to occupy the premises, or to the estate or interest demised.[4] See TERMINUS, 2; LEASE.

The lessee is the termor, and his estate the *particular* estate, being but a small portion of the inheritance.

A term was outstanding or in gross when it was unattached to the inheritance, that is, was in the hands of another than the owner of the inheritance; and attendant when vested in a trustee for such owner.

Thus, suppose that the owner borrowed money on a lease for ten years, conditioned to terminate by an earlier day provided that by that day he returned the loan with interest, but failed to do this until a subsequent day: the lessee, at law, could keep possession for the rest of the ten years, although equity might require him to yield it up. The lessee, acting voluntarily, could "surrender" the term to the lessor, thereby "merging" it in the inheritance, or he could assign his interest to a third person as trustee for the benefit of the inheritance,— the latter course, which was generally preferred, making the term to "attend upon the inheritance" — a satisfied attendant term. Some terms were held to be attendant without assignment, and, to an extent, defeated intermediate alienations. A purchaser or mortgagor, who had no notice of an incumbrance, by acquiring the equitable title to the land by assignment of an outstanding term to a trustee for himself, could acquire title to the legal estate during the term. Our registry laws, which determine the rights of purchasers and mortgagors by notice and priority of record, relieve us of the intricacies of attendant terms. Statute 8 and 9 Vict. (1845), c. 112, § 2, abolished all such terms as soon as satisfied.[1]

4. The period of time during which a session of court is held.

Spoken of as *general* or *regular*, and *special;* as *adjourned, present, subsequent*, etc.

Terms of court are those times or sessions of the year which are set apart for the dispatch of business in the superior courts of common law.[2]

Their origin has been attributed to the canonical constitutions of the church; the four ordinary feasts of Hilary, Easter, Trinity, and Michaelmas, the names also of the four terms of the courts of common law in England, clearly indicate that that is the true origin. . . A term of court, as understood in this country, is a definite and fixed period, prescribed by law, for the administration of judicial duties. While a term may be extended by adjournment, a fixed term is not thereby enlarged.[3]

By the Judicature Act "term," in English practice, is superseded by the "sitting" of the court of appeal and of the high court of justice.[4]

In American practice the theory of terms of court is retained, but the word does not seem to designate a fixed period. Any continuous, authorized "sitting" or "session" is probably known, in most States, as a term.

A record is in the power of the court during the term at which it is made.[5]

At the next term the court cannot strike off a judgment on the ground of supposed want of jurisdiction. But the right to correct, at sight, mere clerical errors, so as to conform the record to the truth, always remains. And so, too, as to irregularities in notices, mandates, and similar proceedings. Any amendment permissible by the statute of jeofails, is proper at a subsequent term, and, in cases, even after writ of error brought. Thus a judgment entered by fraud may be annulled at any time. But relief for error in law is had only by means of a new trial, review, writ of error, appeal, or other mode provided by statute.[6]

Except upon bills of review in cases in equity, writs of error *coram nobis* in cases at law, or upon motions which, in practice, have been substituted for the latter remedy, no court can reverse or annul its decision for

[1] Hurd *v.* Whitsett, 4 Col. 84-90 (1878), Stone, J.; Beus *v.* Shaughnessy, 2 Utah, 500 (1880); Welsh *v.* Mehrback, 5 Hun, 449 (1875).

[2] Dayton *v.* Lash, 94 U. S. 112 (1876), cases; Railroad Co. *v.* Blair, 100 *id.* 662 (1879).

[3] [2 Bl. Com. 142-44. See 4 Kent, 87-95.

[4] Young *v.* Dake, 5 N. Y. 467 (1851); Finkelmeier *v.* Bates, 92 *id.* 178 (1883); Hurd *v.* Whitsett, 4 Col. 85 (1878); Sanderson *v.* City of Scranton, 105 Pa. 472 (1884).

[1] See 4 Kent, 87-94; 1 Washb. R. P. 311.

[2] Tidd, Practice, 105.

[3] Horton *v.* Miller, 38 Pa. 271 (1861).

[4] 3 Steph. Com. 489-96.

[5] Goddard *v.* Ordway, 101 U. S. 752 (1879), cases.

[6] Bank of United States *v.* Moss, 6 How. 38-39 (1848), cases, Woodbury, J.; Schell *v.* Dodge, 107 U. S. 630 (1883).

an error of fact or law, after the term at which rendered, unless for clerical mistakes; nor can any change be made which may substantially affect the decision.[1]

Courts of common law had power to vacate judgments during the term in which they were rendered, and the rule is still the same in all courts exercising jurisdiction in common-law cases. A term continues until the call of the next succeeding term, unless previously adjourned *sine die*.[2]

Judgments are considered as rendered on the first day of the term. There is a fiction that a term consists of but *one day*. This is tolerated for the purposes of justice. To antedate the judicial rejection of a claim, so as to give effect to a grant, does not promote the ends of justice.[3]

The time of a term's commencing is fixed by statute, and its end by the final adjournment of the court for that term. After the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist they can be corrected only by such proceeding, by writ of error or appeal, as may be allowed in the court which by law can review the decision. To this rule is the one exception of error *coram nobis*,[4] q. v.

When a cause is in progress the trial is not to be discontinued by the arrival of a new term.[5]

See CONTINUANCE, 2; NEXT; SESSION, 1; VACATION.

5. The period prescribed for holding an office.

The expression "term of office" uniformly designates a fixed and definite period of time.[6] See OFFICE, 2; TENURE.

TERMINATE. See AT; FROM; TO.

Termination. A voyage is terminated when the vessel arrives at the port of destination, and has been moored there in safety for twenty-four hours.

This does not necessarily terminate a risk on the cargo.[7]

TERMINER. See OYER AND TERMINER.

TERMINUS. L. 1. Bound, limit, end — in space or time. Whence co-terminous.

Terminus a quo. The end from which; the starting point; the beginning. **Termines ad quem.** The end to which; the point of ending; termination.

Apply, respectively, to the places of *beginning* and *ending* of ways, of risks in marine insurance, to transfers of title, etc.[1] See AT; FROM; TO.

2. An estate for years: since its existence is limited, begins and ends.

Interesse termini. Interest in (of) a term. Describes a right to the possession of an estate for years at a future time.

A bare lease does not vest an estate in the lessee. It merely gives him a right of entry, which is his interest in the term, or *interesse termini*. When he has actually entered, and thereby accepted the grant, the estate is vested in him, and he is possessed not properly of the land but of the term of years: the possession or seisin of the land still remaining in him who has the freehold.[2] See TERM, 3.

3. Ending: word, expression, term.

Ex vi termini. From the force of the word; from the meaning which inheres in the expression. Plural, *ex vi terminorum*.

Deed, bond, obligation, and like words import, *ex vi termini* (or *ex vi terminorum*), sealed instruments.[3]

TERMOR. See TERM, 3.

TERRA. See ONUS, Cum onere; SOLUM.

TERRE-TENANT. He who is in actual possession of a piece of land, as distinguished from the owner, real or alleged; also, but less frequently, the owner of the legal, as distinguished from the equitable, estate.[4]

When a mortgagor sells the land he has mortgaged, in pieces, for a full price, and at different times, the parts are liable for the debt in the inverse order of their alienation; and, before a decree of foreclosure will be entered, notice of the proceeding must be given to the terre-tenants.[5]

Statutes also provide for summoning terre-tenants in actions on judgments. Thus, if all the terre-tenants be not named in a *scire facias* to revive a judgment, the fact may, perhaps, be pleaded in abatement.[6]

TERRIER.[7] In old English law, a land-roll, or survey of lands, containing the number of acres, tenants' names, etc.[8]

Also, a detailed statement or inventory of the temporal possessions of the church.[9]

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[1] Morgan's Louisiana & Texas R. &c. Co. *v.* Texas Central R. Co., 32 F. R. 530 (1887), cases, Harlan, J.

[2] *Exp.* Lange, 18 Wall. 192 (1873), cases, Clifford, J.

[3] Newhall *v.* Sanger, 92 U. S. 766 (1875), cases.

[4] Bronson *v.* Schulten, 104 U. S. 415 (1881), cases, Miller, J.; Phillips *v.* Negley, 117 *id.* 672-75 (1886), cases.

[5] R. S. § 746.

[6] Speer *v.* Crawford, 8 Metc. *213 (Ky., 1860); People *v.* Brundage, 78 N. Y. 407 (1879), Church, C. J.

[7] Gracie *v.* Marine Ins. Co., 8 Cranch, 82 (1814), Marshall, C. J.

[1] See 2 Bl. Com. 504; 4 Kent, 413.

[2] [2 Bl. Com. 144: Coke, Litt. 46.

[3] 2 Bl. Com. 109; 17 How. 145; Baldw. 129; 57 Cal. 497; 2 Hill (N. Y.), 500.

[4] See 2 Bl. Com. 91, 328.

[5] Carpenter *v.* Koons, 20 Pa. 226 (1852), Black, C. J.; Nailer *v.* Stanley, 10 S. & R. 453 (1823); 13 W. N. C. 502; 31 Leg. Int. 257; 1 Johns. Ch. 447; 5 *id.* 235.

[6] See Cahoon *v.* Hollenbeck, 16 S. & R. 424 (1826); Colwell *v.* Easley, 83 Pa. 31 (1876); Penn. Act 1 June, 1887.

[7] F.: L. L. *terrarius liber*, land book.

[8] See Tomlins, Cowell, Law Dicts. In Termes de la Ley (1721) spelled "terrar."

TERRITORY. 1. The area of land or country within the jurisdiction of a State, municipality, or court.

The district within which a judge or magistrate has jurisdiction is his "territory," and his power in relation thereto, his territorial jurisdiction.[1]

Extra-territorial and **intra-territorial** refer to the effect given to a decree or statute *beyond*, as compared with *within*, the geographical limits of the jurisdiction of the court which pronounced the decree or of the body which enacted the statute.[2]

The decree of a court of admiralty, proceeding *in rem*, has extra-territorial validity.[3] See COMITY; JURISDICTION; SHIP, 2.

2. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[4]

"Territory," as here used, is merely descriptive of one kind of property, and is equivalent to "lands."[5]

Congress has the same power over it as over any other property belonging to the United States. This power is without limitation and is the foundation upon which the territorial governments rest.[6]

The reference is to the territory owned by the United States at the time of the adoption of the Constitution, June 21, 1788. Territory subsequently acquired is subject to the legislation of Congress as a mere incident to its ownership by the United States.[6]

The power of Congress over a territory extends to all rightful subjects and methods of legislation not denied by the Constitution, consistent with the spirit and genius of the same, and with the purpose for which the territory may have been acquired. The power to govern new territory, until it is fit to be admitted as a State, results from the acquisition.[7]

Territory Northwest of the Ohio. The Ordinance of July 13, 1787, for the government of the territory of the United States northwest of the Ohio river, was adopted by the Continental Congress when the Constitutional Convention was in session at Philadelphia. The territory consisted of seventeen millions acres between the Ohio river and the Lakes, and was acquired, by treaties, from Indian tribes. The Ordinance provides, among other things, that there should be "neither slavery nor involuntary servitude in the Territory, otherwise than in the punishment of crime." Compare CITIZEN, Amendment XIII.

In the territory northwest of the Ohio river, and as separate Territories were successively formed, Congress applied the principles of the Ordinance of 1787.[1] See SCHOOL.

The fact that the First Congress confirmed the Ordinance, did not give it effect in any State formed out of the original "territory," unless re-enacted by the authority of such State.[2] See under ORDINANCE, 2.

A portion of the public domain becomes an "organized Territory" when Congress provides a governmental system for it, consisting of a legislature, courts, a governor, etc.[3]

Within the meaning of the Constitution an organized Territory is not a "State," although the words may be used in that sense.[4]

Nor are its courts constitutional courts: they are legislative courts, created in virtue of the power vested in Congress to make all needful rules respecting the territory of the United States, or in virtue of the general right of sovereignty which exists in the government. In legislating for the Territories, Congress exercises the combined powers of the General and of a State government.[5]

The theory upon which the governments for portions of our territory have been organized has been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of the National authority, and with certain fundamental principles established by Congress. . . The fact that judges of the courts are appointed by the President, under certain acts, does not make their courts "courts of the United States." Their courts are but legislative courts of the Territories. Accordingly, jurors are not to be summoned, necessarily, as in the courts of the United States.[6]

The practice, pleadings, forms and modes of procedure, as well as the jurisdiction of the courts, are left to the legislative action of the Territorial assemblies and of the courts themselves. But Congress may establish such regulations as it deems expedient. Thus far Congress has merely instituted a general system of courts.[7]

In organizing a Territory, Congress may establish tribunals for the exercise of *admiralty* jurisdiction, or leave it to the local legislature to create such tribunals. In either case such courts are not, in strictness, courts of the United States: the jurisdiction is not part of the jurisdictional power, but is conferred in exercise of

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[1] [Phillips *v.* Thralls, 26 Kan. 781 (1882), Brewer, J.

[2] See 4 Wall. 497; 109 U. S. 536.

[3] 1 Whart. Ev. § 814.

[4] Constitution, Art. IV, sec. 3, cl. 2.

[5] United States *v.* Gratiot, 14 Pet. 537 (1840).

[6] Dred Scott *v.* Sandford, 19 How. 432–42 (1856), Taney, C. J.; American Ins. Co. *v.* Canter, 1 Pet. 542 (1828); Benner *v.* Porter, 9 How. 235 (1850); 16 Op. Att.-Gen. 115.

[7] Nelson *v.* United States, 30 F. R. 112 (1887).

[1] 1 Kent, 384; R. S. p. 13.

[2] Stroder *v.* Graham, 10 How. 94 (1850); Permoli *v.* First Municipality, 3 *id.* 610 (1845).

[3] See R. S. §§ 1839–95; Secombe *v.* Kittelson, 29 Minn. 559 (1882).

[4] See New Orleans *v.* Winter, 1 Wheat. 94 (1816); Campbell *v.* Read, 2 Wall. 198 (1864); Watson *v.* Brooks, 13 F. R. 540 (1882); The Ullock, 19 *id.* 211–12 (1883), cases; 12 *id.* 427, cases.

[5] American Ins. Co. *v.* Canter, 1 Pet. *546 (1828), Marshall, C. J.; Benner *v.* Porter, 9 How. 243 (1850).

[6] Clinton *v.* Englebrecht, 13 Wall. 440–49 (1871), cases, Chase, C. J.; 15 F. R. 712, 715.

[7] Hornbuckle *v.* Toombs, 18 Wall. 648 (1873).

the power to make needful rules respecting the public domain.[1]

A resident of a Territory is not a citizen of a State in the sense that a citizen of one State may sue a citizen of another State in the Federal courts.[2]

In ordaining government for the Territories all the discretion which belongs to legislative power is vested in Congress; and that extends to determining by law, from time to time, the form of the local government in a particular Territory, and the qualifications of those who shall administer it. The political rights of the people are franchises which they hold as privileges in the legislative discretion of Congress.[3] See LANDS, Public.

An act of Congress approved July 30, 1886 (24 St. L. 170), provides that the legislatures of the Territories now or hereafter to be organized shall not pass local or special laws in any of the following cases, that is to say:

Granting divorces.

Changing the names of persons or places.

Laying out, opening, altering, and working roads or highways.

Vacating roads, town-plats, streets, alleys, and public grounds.

Locating or changing county seats.

Regulating county and township affairs.

Regulating the practice in courts of justice.

Regulating the jurisdiction and duties of justices of the peace, police magistrates, and constables.

Providing for changes of venue in civil and criminal cases.

Incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village.

For the punishment of crimes or misdemeanors.

For the assessment and collection of taxes for Territorial, county, township, or road purposes.

Summoning and impaneling grand or petit jurors.

Providing for the management of common schools.

Regulating the rate of interest on money.

The opening and conducting of any election or designating the place of voting.

The sale or mortgage of real estate belonging to minors or others under disability.

The protection of game or fish.

Chartering or licensing ferries or toll bridges.

Remitting fines, penalties or forfeitures.

Creating, increasing, or decreasing fees, percentage, or allowances of public officers during the term for which said officers are elected or appointed.

Changing the law of descent.

Granting to any corporation, association, or individual the right to lay down railroad tracks, or amending existing charters for such purpose.

Granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever.

In all other cases where a general law can be made applicable, no special law can be enacted in any of the Territories by the legislatures thereof.

Sec. 2. That no Territory now or hereafter to be organized, or any political or municipal corporation or subdivision thereof, shall hereafter make any subscription to the capital stock of any incorporated company, or company or association having corporate powers, or in any manner loan its credit to or use it for the benefit of any such company or association, or borrow any money for the use of any such company or association.

Sec. 3. That no law of any Territorial legislature shall authorize any debt to be contracted by or on behalf of such Territory except in the following cases: To meet a casual deficit in the revenues, to pay the interest upon the Territorial debt, to suppress insurrections, or to provide for the public defense, except that in addition to any indebtedness created for such purposes, the legislature may authorize a loan for the erection of penal, charitable or educational institutions, if the total indebtedness of the Territory is not thereby made to exceed one per centum upon the assessed value of the taxable property as shown by the last general assessment. And nothing in this act shall be construed to prohibit the refunding of any existing indebtedness of such Territory or of any political or municipal corporation, county, or other subdivision therein.

Sec. 4. That no political or municipal corporation, county, or other subdivision in any of the Territories shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county, or subdivision, to be ascertained by the last assessment for Territorial and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void: That nothing in this act shall be so construed as to affect the validity of any act of any Territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law; nor to prevent any such legislature from legalizing the acts of any county, municipal corporation, or subdivision of any territory as to any bonds heretofore issued or contracted to be issued.

Sec. 5. That section 1889, title 23, of the Revised Statutes be amended to read as follows: "The legislative assemblies of the several Territories shall not grant private charters or special privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, and for conducting the business of insurance, banks of discount and deposit (but not of issue), loan, trust, and guarantee associations, and for the construction or operation of rail-roads, wagon-roads, irrigating

[1] City of Panama, 101 U. S. 460 (1879).

[2] New Orleans v. Winter, 1 Wheat. 91 (1816); Barney v. Baltimore, 6 Wall. 287 (1867); Cissel v. McDonald, 16 Blatch. 153 (1879), cases; Darst v. Peoria, 13 F. R. 561 (1882).

[3] Murphy v. Ramsey, 114 U. S. 44-45 (1885), cases.

See, as to Alaska, R. S. §§ 1954-76; as to Arizona, Dakota, Idaho, Montana, New Mexico, Utah, Washington, and Wyoming, R. S. §§ 1896-1953, and these titles in the index thereto, and in the indexes to the Statutes at Large since 1878. As to Utah especially, see POLYGAMY.

ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association."

Sec. 6. That nothing in this act shall be construed to abridge the power of Congress to annul any law passed by a Territorial legislature, or to modify any existing law of Congress requiring that the laws of any Territory shall be submitted to Congress.

Sec. 7. That all acts and parts of acts hereafter passed by any Territorial legislature in conflict with the provisions of this act shall be null and void.

See further COURTS, United States; SCHOOL; TREATY.

TERROR. See RIOT; ROBBERY.

TEST. When the identity of anything is once established, other things, as to which there is doubt, may be compared with it as the test or standard, to ascertain whether they belong to the same class or not.

Thus, to permit a signature to be shown to the jury as a test-paper its genuineness must first be directly proved.[1] See HANDWRITING.

Test Act. Statute of 25 Geo. II (1752), c. 2, enacting that all persons holding office, receiving pay from or holding a place of trust under the crown, should take the oath of allegiance and supremacy, subscribe a declaration against transubstantiation, and receive the sacrament, according to the usage of the Church of England, within six months after appointment.

Repealed by 9 Geo. IV (1829), c. 17, as to receiving the sacrament, and a new declaration substituted.[2]

The English Test Acts related to matters of opinion, most of them to religious opinions. The meaning attached to the word "test" in our constitutions was derived from these acts.[3] See BALLOT; RELIGION.

Test oath. An oath of loyalty toward the existing government.

In England and France, test oaths have been limited to an affirmation of present belief or disinterestedness toward the government, with no reference to past conduct. . . The clauses in the constitution of Missouri which require clergymen, before they may exercise their profession, to take an oath that they have not committed designated acts, some of which at the time were innocent in themselves, constitute a bill of attainder, and an *ex post facto* law, forbidden by the Federal Constitution.[4]

TEST'. See TESTIS, Test'.

TESTABLE. Having capacity to make a will; also, capable of being given by will. Opposed, *intestable*. See TESTIS.

[1] Depue *v.* Place, 7 Pa. 430 (1848).

[2] See 4 Bl. Com. 59.

[3] Attorney-General *v.* Detroit Common Council, 58 Mich. 217-18 (1885).

[4] Cummings *v.* Missouri, 4 Wall. 318 (1866), Field, J.

Testacy. The condition, in law, of having made a valid will for the disposition of the maker's estate after death. Opposed, **intestacy**: dying without leaving a valid will.

Testament. Written or oral instructions, properly "witnessed" and authenticated, according to the pleasure of the deceased, for the disposition of his effects. Styled his *will* by way of emphasis.[1]

Originally, a "testament" concerned personalty only, and a "devise" or "will" realty. Later, the general expression for an instrument embracing either or both species of property was "last will and testament," or simply a "will." The terms are now interchanged.[2]

A testament, according to both Justinian and Coke, was so called because it is a *testatio mentis*, a witnessing to one's intent. This derivation "savors too much of the conceit." It is, rather, a substantive from *testari*, to be a *testis*, a witness, to bear witness. The definition of the old Roman lawyers was: *testamentum voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit*, a testament is the legal expression of one's will as to what he after his death wishes done.[3] See TESTAMENTUM, p. 1027.

Testamental. Pertaining to a testament or will.

Testamentary. (1) Connected with, relating or belonging to, the making of a will or of a will as made: as, testamentary capacity or power; a testamentary cause, gift, matter, purpose, use; a testamentary paper; letters testamentary.

(2) Named, appointed, or created in or by one's will: as, a testamentary heir, guardian, trustee.

Post-testamentary. Referring (1) to a child: born after its parent has made his last will; (2) to property: acquired after a will, or the last will, was made.

Testate. (1) Having made a valid will; leaving a will: as, he died testate.

(2) Disposed of by will: as, testate property, or estates.

Opposed, **intestate**: without leaving a will; not disposed of by will. Said of the fact, and descriptive of the person himself as distinguished from a "testator."

Testator. Any person who makes a will; specifically a man, as distinguished from **testatrix**, a woman, who has made a will.

[1] [2 Bl. Com. 12, 489, 499.

[2] [2 Bl. Com. 490; 4 Kent, 501; 21 Wend. 426.

[3] 2 Bl. Com. 499; 12 Barb. 153; 4 Kent, 501, b.

One may die testate as to a part, and intestate as to the rest, of his property.

See generally INFLUENCE; INSANITY, 2 (5); LETTER, 4; REPRESENTATIVE (1); WILL, 2.

TESTAMENTUM. See under TESTIS.

TESTATUM; TESTE; TESTIS. See under TESTIS.

TESTIFY. To bear witness to; to give testimony in a judicial inquiry. See TESTIS.

Testimony. A witnessing: the declaration of a witness as to a fact; a statement in evidence made by a witness; whatever is admitted as evidentiary of the truth in a cause, whether competent or incompetent as proof, and inclusive of writings and records of all kinds.

"Testimony" is the statement or declaration of a witness; it is merely a species or class of "evidence." Evidence includes all testimony, while testimony does not include all evidence. Testimony may not be evidence.[1]

Testimony consists in what is not proved as well as in what is proved. When the act of withholding testimony raises a violent presumption that a fact not clearly proved or disproved exists, the court may allude to the act as a circumstance strengthening the proof.[2]

A bill to "perpetuate testimony" is a bill filed in a court of equity to preserve testimony in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation; as, the testimony of an aged or sick person about to move out of the jurisdiction. The testimony may respect a title or claim to realty or personalty, and be used to support an action or a defense. Analogous are bills to "take testimony *de bene esse*," and bills to take the testimony of persons resident abroad, to be used in suits actually pending.[3]

See further DEPOSITION; DISCOVERY, 3, 6; EVIDENCE; PERPETUATE; STENOGRAPHER; WITNESS.

TESTIS. L. A witness. *Testari:* to be a witness, bear witness to; to be witnessed, shown, certified.

Derivatives: attest, contest, protest, testify, testimony, testacy, testator, testament, intestate.

Nemo testis esse debet in propria sua causa. No one should be a witness in his own cause. One cannot testify in his own behalf.

This common-law rule has been very generally abrogated.[4] See further WITNESS.

[1] See McDonald *v.* Elfes, 61 Ind. 234 (1878); 13 *id.* 389; 17 *id.* 272, 95; 18 *id.* 443; 63 Iowa, 235.

[2] Frick *v.* Barbour, 64 Pa. 121 (1870).

[3] 2 Story, Eq. §§ 1505, 1513; 3 Bl. Com. 450. As to contracts for the production of testimony, see Cobb *v.* Cowdery, 40 Vt. 25 (1867), cases: 94 Am. Dec. 375-78, cases.

[4] 1 Greenl. Ev. §§ 128, 311, 331, 333, 339, 340, 343, 349, 362, 379, 386, 390, 411, 587.

Test'. An abbreviation of *testis*, a witness, or of *teste*, being a witness.

The attestation of the foreman of a grand jury that a bill has been found or ignored may be certified in Pennsylvania in the words "*test. pro reipublicæ*, A—— B——."

Testamentum. A will of personalty; a will of any species of property.

Cum testamento annexo. With the will annexed — to letters of administration, *q. v.*

Ex testamento. From a will; under a will; by force or virtue of a will. Opposed, *ab intestato:* from an intestate. Expressions used to indicate the origin of property.

Omne testamentum consummatum morte est. Every will is perfected by the death: a will is of no effect till after the death of the maker — up to the last moment of life is ambulatory, *q. v.*

Testamentum inofficiosum. An undutiful will; a will made in disregard of the obligations of nature or parentage.

The Romans set aside testaments as *inofficiosa*, that is, deficient in natural duty, if they disinherited "children" without assigning sufficient reason. But if a child received any legacy, though ever so small, it was proof that the testator had not lost his memory or reason, which, otherwise, the law presumed, and no contest of the will was allowed. From this has arisen the groundless notion that to disinherit an heir he must be left a shilling or some other express legacy.[1]

"Children" meant natural and domestic heirs. They were non-disinheritable because considered as having a property in the father's effects, and as entitled to the management of his estate. An action, called *querela inofficiosi testamenti*, was introduced to rescind any such will, made without just cause. But the parent, by charging his estate with debts, could render succession unprofitable.[2]

Testandi. See ANIMUS.

Testatum. It is witnessed, or testified.

At common law, when a defendant who was to be arrested on a *capias* could not be found within the sheriff's bailiwick the writ was returned, and another writ, called the *testatum capias*, was directed to the sheriff of the county where the defendant was supposed to be, reciting the former writ, and that "'it is testified' that the defendant lurks in your bailiwick," and then commanded that he be taken, as in the case of the former *capias*. At present, when the action is brought in one county and the defendant lives in another, to save trouble, time, and expense it is usual to make out a *testatum* at first, supposing a former writ to have been granted.[3]

A *testatum* execution is a writ of execution (either a *fieri facias* or a *capias ad respondendum*) issued

[1] 2 Bl. Com. 502; Hadley, Rom. Law, 317.

[2] 2 Kent, 327; 2 Addams, 449; 3 *id.* 207.

[3] 3 Bl. Com. 282-83.

into another county than that in which the record remains, to secure satisfaction out of the property there. The writ formerly concluded with the words "Wherefore, on behalf of the plaintiff, 'it is testified' in our said court that the defendant has goods, etc., within your bailiwick." In England, since 1852, the *testatum* clause in the second writ (now the only writ issued) is omitted.[1]

Teste. Being witness; witnessed by. The date of the issue of a writ.[2]

Originally, the initial word of the last clause of writs, when expressed in Latin, setting forth that each particular writ was issued by authority of the official whose signature was affixed — the sovereign or the chief justice of the court.

The corresponding clause in a writ is now called the *teste*, and the writ itself is said to be "tested."

Writs and processes issuing from the Supreme or a circuit court shall bear *teste* of the Chief Justice, or, if that office be vacant, of the associate justice next in precedence. Writs and processes issuing from a district court shall bear *teste* of the judge, or, if the office be vacant, of the clerk thereof.[3]

Testes. Witnesses.

Trial *per testes*, by witnesses, described (1) the action of an executor in producing the witnesses to a contested will in court, and there proving the execution of the instrument;[4] (2) a trial without the intervention of a jury, by testimony presented to a judge, as opposed to a trial by combat, ordeal, or the oath of parties alone.[5]

Testimonium. Witnessing; attestation.

The *testimonium* clause of an instrument is the clause at the end beginning "In witness whereof."[6]

THANKSGIVING. See HOLIDAY.

THAT. See THIS.

That is to say. See WIT.

THE. Particularizes the subject spoken of. *The* bill of scandal may be very different from *a* bill of scandal.[7] See A, 4.

THEATER. A house in which dramatic compositions are spoken or recited by "actors."[8]

Not necessarily more than a stage on which actors play and a room in which acting is done and seen; not, then, necessarily, a place where valuable goods are stored.[9]

Any edifice used for the purpose of dramatic or operatic or other representations, plays, or performances, for admission to which entrance-money is received, not including halls rented or used occasionally for concerts or theatrical representations.[1]

A negro minstrel performance is a "theatrical entertainment;"[2] ballet dancing is an "entertainment of the stage,"[3] but tumbling may not be;[4] and an equestrian pageant or circus is a "theatrical performance."[5]

Where the question was whether or not the performance of an opera may properly be regarded as a theatrical exhibition, within the meaning of a statute providing that no "theatrical exhibition shall be allowed without a license first had and obtained," the court said that a theatrical exhibition must be either such as pertains to the theater or to the drama for the representation of which the theater is designed. A drama is a story represented by action, and while it is ordinarily designed to be spoken, it may be represented by pantomime. An opera is a musical drama. In the former the actor observes the rules of rhetoric and of oratory, in the latter he employs his powers of music, vocal and instrumental. The ordinary theater is adapted to the performance of the opera, and this form of exhibition, especially the light opera and opera comique, in these days is a prominent feature of theater work.[6]

Contracts for the exclusive services of distinguished artists in theatrical representations are personal and peculiar. Damages for violation of such a contract is not capable of definite determination, and a violation may be restrained by injunction — except where the damages have been liquidated by agreement.[7]

See DRAMA; RIGHT, 2, Civil Rights Acts; TICKET, Theater.

THEFT. The fraudulent taking of corporeal personal property belonging to another, from his possession, or from the possession of some one holding the same for him, without his consent, with intent to deprive the owner of the value of the same and to appropriate it to the use or benefit of the person taking.[8]

The popular name for larceny,[9] *q. v.*

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[1] 1 Arch. Pract. 376.
[2] 3 Bl. Com. 275, 282; 1 *id.* 179; 4 Yerg. 27.
[3] Act 8 May, 1792: R. S. §§ 911-12.
[4] 2 Bl. Com. 508; 2 Story, Eq. § 1516.
[5] 3 Bl. Com. 336.
[6] Ladd *v.* Ladd, 8 How. 36 (1850).
[7] Sharff *v.* Commonwealth, 2 Binn. *519, 516 (1810).
[8] Rowland *v.* Kleber, 1 Pittsb. 71 (1853).
[9] Lee *v.* State, 56 Ga. 478 (1876).

[1] Revenue Act 13 July 1866, § 9: 14 St. L. 126.
[2] Taxing District *v.* Emerson, 4 Lea, 312 (1880). As to minstrelsy, see generally, Mayor, etc. *v.* Eden Musee Co., 34 Alb. Law J. 164 (N. Y., 1886).
[3] Gallini *v.* Laborie, 5 T. R. 242 (1793); Wigan *v.* Strange, L. R., 1 C. P. 175 (1865).
[4] The King *v.* Handy, 6 T. R. 287 (1795).
[5] Cheney *v.* Stetson, Mass. Super. Ct. (1878).
[6] Bell, Treasurer of Philadelphia, *v.* Mahn, Sup. Ct. Pa. (1888): Act 16 April, 1845.
[7] McCaull *v.* Braham, 16 F. R. 37, 40 (1883), cases; *id.* 42-49, cases.
[8] Quitzow *v.* State, 1 Tex. Ap. 68 (1876): Pasc. Dig. Art. 2381; 8 *id.* 138; 14 *id.* 234, 575; 37 *id.* 338; 20 *id.* 171 (1886); 4 Bl. Com. 229.
[9] See People *v.* Donohue, 84 N. Y. 442-43 (1881).

Thief. In a policy upon the cargo of a vessel, the word "thieves" is broad enough to cover acts of compound and simple larceny.[1]

See COMPOUND, 1 (4); HUE AND CRY; MAINOR; SLANDER, 1.

THELLUSSON ACT. See ACCUMULATION.

THEN. As an adverb of time, means "at that time," referring to a time specified, past or future. It has no power of itself to fix a time; it refers to time already fixed.[2]

As an adverb of contingency, means "in that event."[3]

Although, strictly, an adverb of time, it often intends an event or contingency, and is equivalent to "in that event," or "in that case." In this sense it designates a limitation of an estate, or a future contingency on which it is made to depend. Thus employed, it is a word of reference, not indicating any particular point of time.[4] See REMAINDER; WHEN.

Then and there. In an indictment, refer to some foregone averment by which their effect is determined. If that is a single act, and the indictment avers that "then and there" another act occurred, the necessary import is that the two acts were precisely co-existent, and the word "then" refers to a precise time. When the antecedent averment fixes no precise time, "then," used afterward, of course fixes no definite time.[5]

When time and place have once been named with certainty it is sufficient to refer to them afterward by the words "then and there:" the effect being the same as if the time and the place were repeated.[6]

THENCE. In a deed, preceding each course given, imports that the following course is continuous with the one before it.[7]

THEORY. See EXPERT; HYPOTHESIS.

THERE. See THEN AND THERE.

THEREFORE. Compare SO. See SUIT, 1.

THEREIN. In the expression "vacate the judgment in said action, and all proceedings therein," held to refer to the action.[1]

A woman, in an ante-nuptial contract, agreed to accept money in satisfaction "of her rights of dower and inheritance" in the "estate" of the husband, and relinquish "all claim therein" as widow. Held, that "therein" referred to "dower" and "inheritance," and not to "estate."[2]

THEREOF. In a deed of trust, "to secure the payment of said notes at the maturity thereof," held to refer to the notes.[3]

THEREON. The description of a voyage to a port on the north side of Cuba, "with the liberty of a second port thereon," was held to mean that the second port was to be on the side already specified, and that "thereon" meant "on the same side."[4]

THEREUPON. Without delay or lapse of time; as, in a minute that a committee, having made its announcement, a motion was "thereupon made" and carried.[5]

In a declaration, was taken to mean "in consideration thereof," where the context seemed to require it.[6]

THIEF. See THEFT.

THING. Subject-matter; substance; effects; any object that may be possessed.

The objects of dominion or property are things — real and personal. **Things real** are such as are permanent, fixed, immovable, which cannot be carried out of their place; as, lands and tenements. **Things personal** are goods, money, and all other movables, which may attend the owner's person wherever he thinks proper to go.[7]

"Immovable things, as land and houses, and the profits issuing out of the same, were the principal favorites of our first legislators: such property was imagined to be lasting, and would answer to posterity the pains their ancestors employed. Those legislators entertained a low and contemptuous opinion of all personal estate, it being a transient commodity. The amount of it was indeed comparatively trifling, during the scarcity of money and the ignorance of luxurious refinements which prevailed in the feudal ages. Hence it was that a *tax* of the fifteenth, tenth, or larger proportion of all the movables of the subject was frequently laid without scruple; and hence may be derived the frequent *forfeitures* inflicted by the com-

[1] American Ins. Co. *v.* Bryan, 1 Hill, 32 (N. Y., 1841). See also Spinetti *v.* Atlas Steamship Co., 80 N. Y. 71, 77-78 (1880), cases.

[2] Mangum *v.* Piester, 16 S. C. 329 (1881), Simpson, C. J.; Dove *v.* Tarr, 128 Mass. 40 (1879).

[3] Pintard *v.* Irwin, 20 N. J. L. 505 (1845).

[4] Hall *v.* Priest, 6 Gray, 24 (1856), Bigelow, J.; Ash *v.* Coleman, 24 Barb. 647 (1857); Busby's Appeal, 61 Pa. 116 (1869); Cresson's Appeal, 76 *id.* 24 (1874); Thomson *v.* Ludington, 104 Mass. 193 (1870); Newberry *v.* Hinman, 49 Conn. 132 (1881); Gibson *v.* Hardaway, 68 Ga. 378 (1882); Stook's Appeal, 20 Pa. 352 (1853); McArthur *v.* Scott, 113 *id.* 380 (1885), cases; Farnam *v.* Farnam, 53 Conn. 279, 296 (1885).

[5] Edwards *v.* Commonwealth, 19 Pick. 126 (1837), Shaw, C. J.; State *v.* Willis, 78 Me. 74 (1886); 12 Allen, 152, cases; 100 Mass. 16; 1 Mo. Ap. 3; 74 Me. 221; 1 Bish. Stat. Proc. § 413, cases.

[6] State *v.* Cotton, 24 N. H. 146 (1851); State *v.* Willis, 78 Me. 74 (1885).

[7] Flagg *v.* Mason, 141 Mass. 66 (1886).

[1] Cummings *v.* Tabor, 61 Wis. 191 (1884).

[2] Mahaffy *v.* Mahaffy, 61 Iowa, 679 (1883); 63 *id.* 64 (1884).

[3] Bridges *v.* Ballard, 62 Miss. 241 (1884).

[4] Nicholson *v.* Mercantile Ins. Co., 106 Mass. 402 (1871).

[5] Putnam *v.* Langley, 133 Mass. 205 (1882).

[6] Bean *v.* Ayers, 67 Me. 487 (1878).

[7] 2 Bl. Com. 16, 384.

mon law of all of a man's goods and chattels."[1] See PROPERTY; RES; SLAVERY.

THINK. To believe, consider, esteem.

A finding by a jury that they "think" that certain horses were not struck by a particular train was held to sufficiently express the finding of the fact.[2]

See DISCRETION, 2; INTENTION; MALICE; PREMEDITATE.

THIRD or THIRDS. See DOWER.

Third person. See STRANGER.

THIS. Used of things before stated, refers to the thing last mentioned, while "that" refers to the thing first mentioned; but "these others" refers to others than those just mentioned.[3] Compare HIC.

THOROUGHFARE. See ROAD, 1; STREET; WAY.

THOUGHT. See THINK.

THREAD. The middle line of a stream or highway. See FILUM; RIPARIAN; STREET.

THREAT. A threat or menace of bodily hurt, through fear of which a man's business is interrupted, is inchoate violence.[4]

A menace of destruction or injury to one's life, reputation, or property.

A person (a tramp) who has entered a house against the will of the occupant, may "threaten" to injure another by acts as well as by words. The test in such case is as to what the occupant had reasonable ground to believe were the intruder's intentions from his conduct.[5]

On a trial for homicide when the question whether the prisoner or the deceased commenced the encounter is in doubt, the accused may prove threats of violence made against him by the deceased, though not brought to the knowledge of the prisoner.[6]

A person whose life (or whose family) has been threatened by another, whom he knows or has reason to believe has armed himself with a deadly weapon for the avowed purpose of taking his life or inflicting great personal injury upon him, may reasonably infer, when a hostile meeting occurs, that his adversary intends to carry the threat into execution. A previous threat alone, however, unless coupled at the time with an apparent design then and there to carry it into effect, will not justify a deadly assault; there must be such a demonstration of an immediate intention to execute the threat as to induce a reasonable belief that the party threatened will lose his life or suffer serious bodily injury unless he immediately defends himself against the attack. But a previous threat alone is not enough: the party may have relented or abandoned his purpose, or his courage may have failed, or the threat may have been idle gasconade, made without any purpose to execute it. Generally speaking, the threat must have been communicated to the accused — to influence his action.[1]

The remoteness of the threat from the time of the homicide is a circumstance for the *jury* to consider, even where the threat was made thirty years prior to the killing.[2]

A threat to commit a crime, by another than the person on trial, is not admissible on the part of the accused, unless part of the *res gestæ*, or a link in a chain of evidence connecting with the crime itself.[3]

See DEFENSE, 1; CONFESSION, 2; CONSENT; DURESS.

Threatened injury. See INJUNCTION.

Threatening letter. A letter sent to a person threatening to accuse him of a crime, with a view to extort money, chattels, or other property.[4]

Such letter may also threaten to libel or to kill the person addressed.

When the threat is to accuse of a crime the indictment need not specify the particular crime: for the prisoner may intentionally leave that in doubt. Nor need the threat be to accuse before a judicial tribunal.[5] See BLACKMAIL.

THROUGH. In an act providing that no road shall be laid out "through" the grounds of a cemetery company, held to mean "over."[6]

A general warranty, in a deed of conveyance, to defend the possession of the premises against claims made "through or by" the grantor estops his heirs and subsequent grantees from claiming an interest in the premises.[7]

THRUST. "Thrusting" a person with a dangerous weapon will include thrusting with an iron bolt, rod, or pin, whether the point be sharp or not.[8]

TICHBORNE CASE. See PERJURY; PERSONATE; SENTENCE, Cumulative.

TICKET. The meaning, in a statute, is a matter of construction: the word itself has no determinate signification; — for there are

[1] 2 Bl. Com. 384.

[2] Martin *v.* Central Iowa R. Co., 59 Iowa, 414 (1882).

[3] Russell *v.* Kennedy, 66 Pa. 251 (1870).

[4] 3 Bl. Com. 120.

[5] People *v.* Deacons, 109 N. Y. 381 (1888): N. Y. Laws 1885, ch. 490, § 2.

[6] Wiggins *v.* People, 93 U. S. 465, 485 (1876), cases

[1] People *v.* Scoggins, 37 Cal. 688–84 (1869), Crockett, J.; People *v.* Iams, 57 *id.* 126–27 (1880); People *v.* Campbell, 59 *id.* 247–51 (1881), cases; United States *v.* Leighton, 4 Dak. T. 31 (1882).

[2] Goodwin *v.* State, 96 Ind. 552 (1884): 4 Cr. Law Mag. 583, cases.

[3] State *v.* Beaudet, 53 Conn. 542–51 (1885), cases.

[4] [4 Bl. Com. 137, 126.

[5] See 2 Bish. Cr. L. § 1200; 2 Whart. Cr. L. § 1664; 3 Cr. L. Mag. 720; 26 Iowa, 122; 34 Me. 71; 68 *id.* 473; 126 Mass. 55; 12 Allen, 447; 68 Mo. 66; 2 Barb. 427; 38 Ohio St. 318.

[6] Hyde Park *v.* Cemetery Association, 119 Ill. 147 (1886).

[7] Traver *v.* Baker, 15 F. R. 191 (1883).

[8] State *v.* Lowry, 33 La. An. 1224 (1881).

lottery tickets, play-house tickets, admission tickets at public exhibitions and private parties, tickets to seats on a stage, tickets for passage on boats, etc.[1]

Lottery ticket. See LOTTERY.

Railroad ticket. A token or voucher, adopted for convenience, showing that the passenger has paid his fare from one place to another: generally it does not contain, and ordinarily it is not intended to contain, a contract, but is a receipt for money only.[2]

Issued to a passenger, is a receipt for the passage money, and may be assigned by delivery so as to give a right of action for the value of unused coupons.[3]

That a discount will be made, when purchased before entering the car, is a reasonable regulation. A company is not bound to keep its office open after the time advertised for the departure of the train.[4]

The sale of a ticket is an undertaking that due care for safety will be used in managing trains and maintaining the road.[5]

See further CARRIER, Of passengers; COUPON-TICKET; TIME-TABLE.

Ticket of leave. Under English laws, a convict, particularly one sent to a penal settlement, for continued good conduct may have a license, called "a ticket of leave," to be at large; amounting, practically, in cases, to a remission of the sentence, within the conditions prescribed. Whence *ticket-of-leave man.*

The conditions are that the holder shall preserve his license, and produce it when called for by any officer of the peace; shall abstain from violating the laws; shall not associate with bad characters; and shall not lead an idle or dissolute life.

Ticket to a theater. The lawful holder of a ticket to a seat in a theater has more than a mere license; his right is rather in the nature of a lease, entitling him to peaceable ingress and egress, and exclusive possession of the designated seat during the performance.[1]

The proprietor of a theater is not bound to sell any chosen seat, for a period of opera, to the person who first presents himself at the advertised hour for the sale of seats.[2]

See DRAMA; THEATER.

TIDE. To be tidal water it is not necessary that water should be salt, but the spot must be one where the tide, in the ordinary course of things, flows and reflows.[3]

In England there is no navigable stream beyond the ebb and flow of the tide. There, therefore, tide-water and navigable water are synonymous terms, and mean nothing more than public rivers. Hence the established doctrine in that country that admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters. And so, in early days in this country, a public river was defined as a tide-water river, without examination whether that definition was as applicable here as in England, the navigable waters then thought of being tide-waters on the Atlantic coasts, rather than the great lakes with their tributaries.[4]

See ADMIRALTY; LAKES; NAVIGABLE.

TIE. See VOTE.

TIES. See TIMBER.

TIGHT. Has no strictly technical signification.

1. In a claim for a patent to fit a vessel for sweating tobacco, means sufficiently tight to subserve the purpose of the invention; and an imitation less tight than the original is not thereby saved from the charge of infringement.[5]

2. Referring to an instrument of writing, see SHARP.

TILES. See COPYRIGHT.

TILL. See UNTIL.

TILLAGE. Husbandry; the cultivation of the land, particularly by the plow. See AGRICULTURE.

That is the meaning in the act of June 3, 1878 (20 St. L. 89), which permits a settler on the public lands to cut timber on his claim in order to prepare the land for tillage. He may not cut timber merely for the purpose of selling it.[6]

TIMBER. Generically, only such trees as are used in building ships or dwellings. When the trunk of a tree is severed from the root and felled to the earth it becomes "tim-

[1] [Allaire v. Howell Works Co., 14 N. J. L. 23 (1833), Hornblower, C. J. See generally 1 Harv. Law Rev. 17-26 (1887), cases.

[2] [Rawson v. Pennsylvania R. Co., 48 N. Y. 217 (1872); Earl, C.; Gordon v. Manchester, &c. R. Co., 52 N. H. 599 (1873); Logan v. Hannibal, &c. R. Co., 77 Mo. 66 (1883).

[3] Hudson v. Kansas Pacific R. Co., 18 Rep. 295 (1883): 9 F. R. 879. H. was a "ticket broker," and the railroad company refused to redeem tickets held by him.

[4] Swan v. Manchester, &c. R. Co., 132 Mass. 116 (1882), cases.

[5] Little v. Dusenberry, 46 N. J. L. 643 (1884), cases; Richmond, &c. R. Co. v. Ashby, 79 Va. 133 (1884). See generally Redf., Wood, Railw., Index "Ticket;" 9 Am. & Eng. R. Cases, 314-15, cases.

[1] Drew v. Peer, 93 Pa. 242 (1880); McCrea v. Marsh, 12 Gray, 213 (1858)—"a license, legally revocable."

[2] Pearce v. Spalding, 12 Mo. Ap. 141 (1882).

[3] Reece v. Miller, 8 Q. B. D. 630 (1882), Grove, J.

[4] The Genesee Chief, 12 How. 454-55, 457 (1851), Taney, C. J.; The Hine, 4 Wall. 555 (1866).

[5] Robinson v. Sutter, 8 F. R. 830 (1881).

[6] United States v. Willims, 18 F. R. 475, 478 (1883). See Vigar v. Dudman, L. R., 6 C. P. 478 (1871).

ber" or "lumber" according to the use to which it can be applied.[1]

The body, stem or trunk of a tree, or the larger pieces or sticks of wood which enter the frame-work of a building or other structure, excluding the plank, boards, shingles or lath used to complete the structure.[2]

In a contract for cutting and removing certain kinds of trees, held to refer to trees standing or felled and lying in their natural condition upon the ground, and not to include "railroad ties" made out of the trees.[3]

The particular meaning depends upon the connection in which the word is used or the calling of the person by whom it is used.[4]

In the act of Congress of March 2, 1831 (R. S. § 2461), making it a crime to cut timber on lands of the United States for purposes of sale rather than of cultivation, "timber" refers to trees prepared for transportation, such as saw logs or lumber in bulk; [1] includes trees of any size that may be used in any kind of manufacture or the construction of any article. It matters not to what purposes the trees are applied after being cut, if converted to the use of the accused.[5]

The homesteader may use or dispose of timber as an *incident* to his settlement, cultivation and improvement. He has only those rights in or over the property which are necessary to perfecting his title.[6]

Boxing pine trees for turpentine is not forbidden, where they are not upon lands reserved for the uses of the navy, and there is no intent to export, dispose of, use, or employ the trees or timber.[6]

An act approved June 4, 1888 (25 St. L. 166), amending R. S. § 5388, provides that every person who unlawfully cuts or wantonly destroys any timber standing upon land which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under authority of the United States, shall pay a fine of not more than five hundred dollars or be imprisoned not more than twelve months, or both, in the discretion of the court.

In a contract for the purchase of "timber" the purchaser acquires no title to trees suitable only for fire-wood or cord-wood.[7]

An indictment for carrying away fence rails will not lie under a statute punishing cutting and carrying away timber.[8]

When the title to land remains in a State timber cut upon the land belongs to the State. While the timber is standing it constitutes a part of the realty; severed from the soil, its character is changed — it becomes personalty, but its title is not affected: it continues to be the property of the owner of the land, and can be pursued wherever it is carried: All the remedies are open to the owner which the law affords in other cases of wrongful removal of personalty.[1]

Timber unlawfully cut by one of two owners of land may not become personalty as to the other owner unless he elects to treat it as personalty.[2]

That which was real estate continues real until the owner of the freehold elects to give it a different character.[3]

Where the plaintiff, in an action for timber cut and carried away from his land, recovers damages, the rule for assessing them against the defendant is: (1) Where he is a willful trespasser, the full value of the property at the time and place of demand, or of suit brought, with no deduction for his labor and expense. (2) Where he is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which he and his vendor have added to its value. (3) Where he is a purchaser without notice of wrong from a willful trespasser, the value at the time of such purchase.[4]

See ADJACENT; LOGS; MORTGAGE; OPERATE; STUMP; USE, 2; WASTE, 2; WOODS.

TIME. Has no distinctly technical signification.

"Present time" usually means a period of some considerable duration — a period within which certain transactions are to take place. "Future time" means a period to come after such present time, and after the period when such transactions have actually taken place.[5]

Time-bargain. A contract for the sale and delivery of stock at a future day, the vendor intending to purchase the stock before the day of delivery. See FUTURES.

Time, cooling. See COOLING.

Time immemorial, or out of mind. Time beyond legal memory, *q. v.*

In California, seems to be five years.[6]

Time policy. A policy of marine insurance in which the risk is limited, not to a

[1] United States *v.* Schuler, 6 McL. 37 (1853), Wilkins, J.

[2] Babka *v.* Eldred, 47 Wis. 192 (1879), Lyon, J.: Lien Act, 1862; 22 Wis. 669 — "shingles."

[3] Hubbard *v.* Burton, 75 Mo. 67 (1881).

[4] United States *v.* Stores, 14 F. R. 825 (1882), Locke, D. J.; The Timber Cases, 11 *id.* 51 (1881).

[5] United States *v.* Murphy, 32 F. R. 379 (1887), cases; United States *v.* Ball, 31 *id.* 667 (1887).

[6] Leatherbury *v.* United States, 32 F. R. 780 (1887).

[7] Nash *v.* Drisco, 51 Me. 418 (1864).

[8] McCauley *v.* State, 43 Tex. 374 (1875).

[1] Schulenberg *v.* Harriman, 21 Wall. 64 (1874), Field, Judge. See also Nelson *v.* Graff, 12 F. R. 889, 391 (1882), cases; Putnam *v.* Lewis, 133 Mass. 264 (1882).

[2] Duff *v.* Bindley, 16 F. R. 178 (1883).

[3] Rogers *v.* Gilinger, 30 Pa. 187-89 (1858), cases, Strong, J.; Leidy *v.* Proctor, 97 *id.* 492 (1881).

[4] Bolles Wooden-ware Co. *v.* United States, 106 U. S. 432 (1882), cases, Miller, J. See also United States *v.* Mills, 9 F. R. 684 (1881); United States *v.* Williams, 18 *id.* 475 (1883): Act 3 June, 1878 (20 St. L. 89), for the Pacific States; United States *v.* Leatherberry, 27 F. R. 606 (1886).

[5] State *v.* Rose, 30 Kan. 506 (1883), Valentine, J.

[6] Kripp *v.* Curtis, 71 Cal. 66 (1886); *ib.* 456; 70 *id.* 347.

voyage, but to a period of time. See INSURANCE, Policy of.

Time the essence of a contract. The general doctrine in equity is that "time is not of the essence of a contract."

It often is of the essence as to contracts for the purchase and sale of realty, so that equity will not interfere in behalf of either party. It may be made of the essence by express stipulation, or arise by implication from the nature of the property, or from the avowed object of the seller or purchaser.[1]

But in the contracts of merchants time is of the essence.[2]

Time is not, in equity, of the essence of a contract unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. It is regarded so far as it respects good faith and diligence; but if circumstances of a reasonable nature have disabled a party from a strict compliance; or if he comes, *recenti facto*, to ask for a specific performance, the suit is treated with indulgence, and generally with favor; but, in such cases, it should be clear that the remedies are mutual; that there has been no change of circumstances affecting the character or justice of the contract; that compensation for the delay can be fully made; that he who asks a specific performance is in a condition to perform his part of a contract; and that he has shown himself ready, desirous, prompt and eager to perform the contract.[3]

The doctrine was formerly carried to an unreasonable extent; in modern times it has been more guardedly applied. Time may be made of the essence by clear manifestation of the intent of the parties, by subsequent notice from one party, by laches in the party seeking to enforce the contract, by change in the value of land, or other circumstance which would make a decree for specific performance inequitable.[4] See PERFORMANCE, Specific.

Time, reasonable. What constitutes reasonable time in a particular case must be arrived at by a consideration of all the elements which affect that question; as, when a beneficiary seeks to avoid a sale by his trustee.[5]

What is reasonable time is nowhere so determined as to furnish a rule applicable to all cases. The question is to be answered in view of the particular circumstances of each case; as, where an adult would disaffirm a contract made during his infancy.[1]

Where a demand or a notice is necessary before an action can be brought, and the time is not definitely fixed, reasonable time is allowed. What this is necessarily depends upon circumstances.[2]

In computing time, "until," "from," "between," and like words generally exclude the day to which the word relates; but this rule yields to apparent intention.[3]

In the interpretation of contracts, where time is to be computed from a particular day or event, as when an act is to be performed within a specified period "from" or "after" a day named, the rule is to exclude the day thus designated and to include the last day of the specified period.[4]

Cases may be found in which it is held, where an act is required by statute to be done a certain number of days at least before a given event, that the time must be reckoned excluding the day of the act and that of the event. But there is no case in which it has been held that both the day of the act and the day of the event shall be included. There are cases which hold that, where the computation is to be made from an act done, the day on which the act is done is to be included. Exceptions exist to that rule, and there are many cases which hold that the last day is included and the first excluded. Different rules prevail in different jurisdictions.[5] See further DAY, page 312.

See AFTER; AT; AT LEAST; BETWEEN; BY; FOREVER; FOR; FORTHWITH; IMMEDIATELY; PERIOD; SHORTLY; SOON; THEN; THEREUPON; UNTIL; WHEN; WITH; — DAY; MONTH; WEEK; YEAR; — COMMENCE; DATE; DELAY; DESCRIPTION, 4; FRAUD; INDICTMENT; LACHES; LIMITATION, 3; PREMEDITATE; RELATION, 1; STALE; TEMPORARY; TENANT; TERM, 3, 4. Compare NUNC; TEMPUS.

Time-table. A railroad company is liable for damage resulting to a passenger for a negligent failure to run its trains according to its time-tables; but there must be proof of negligence. Neither a time-table nor an advertisement is a warrant of punctuality.[6]

Reasonable notice must be given of a change of time.[7]

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[1] Taylor *v.* Longworth, 14 Pet. 174 (1840), cases, Story, J.; Secombe *v.* Steele, 20 How. 104 (1857); Ahl *v.* Johnson, *ib.* 520–21 (1857); Holgate *v.* Eaton, 116 U. S. 40 (1885); Brown *v.* Guarantee Trust Co., 128 *id.* 414 (1888); 30 Minn. 339; 18 Pa. 95; 76 Va. 517.

[2] Norrington *v.* Wright, 115 U. S. 208 (1885), cases, Gray, J.; Cleveland Rolling Mill Co. *v.* Rhodes, 121 *id.* 261 (1887), cases.

[3] 2 Story, Eq. § 776; Smith *v.* Cansler, 83 Ky. 367, 374 (1885).

[4] Carter *v.* Phillips, 144 Mass. 103 (1887), following Barnard *v.* Lee, 97 *id.* 93 (1867); Lumber Co. *v.* Horrigan, 36 Kan. 389–90 (1887), cases.

[5] Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 591 (1875).

[1] Sims *v.* Everhardt, 102 U. S. 309 (1880), cases, Strong, J. See also *Re* Estate of Weston, 91 N. Y. 508 (1883); Gilfillan *v.* Union Canal Co., 109 U. S. 404 (1883); 18 Cent. Law J. 235–39 (1884), cases; 27 *id.* 376–80 (1888), cases; 10 Wall. 129; Baldw. 331; 6 McLean, 295; 1 Newb. 171; 71 Ala. 167; 3 Col. 540; 59 Iowa, 458; 101 Mass. 469; 26 Mich. 195; 30 Minn. 415; 77 Pa. 298; 55 Vt. 376; 11 Wis. 417.

[2] Atchison, &c. R. Co. *v.* Burlingame Township, 36 Kan. 634–35 (1887), cases.

[3] Kendall *v.* Kingsley, 120 Mass. 95 (1876), cases.

[4] Sheets *v.* Selden, 2 Wall. 190 (1864), cases.

[5] Dutcher *v.* Wright, 94 U. S. 559–61 (1876), cases.

[6] See Whart. Neg. § 662, cases; Angell, Carriers, 527 *a*; Gordon *v.* Manchester, &c. R. Co., 52 N. H. 596, 600 (1873), cases; 2 Wood's Ry. Law, 1174; 9 Am. & Eng. R. Cases, 315.

[7] Sears *v.* Eastern R. Co., 14 Allen, 437 (1867), cases.

Timely. See DUE, 2; NOTICE.

TIMET. See QUIA TIMET.

TINCTURES. See LIQUOR.

TIPPLING-HOUSE. A place of public resort where spirituous, fermented, or other intoxicating liquors are sold and drank in small quantities, without a license therefor.[1]

A public drinking house — where intoxicating liquor is either sold by drams to the public or else is given away, and imbibed.[2]

TIPSTAFF. (Plural, tipstaves.) 1. An officer appointed to attend upon the judges of the king's courts with a *staff* or rod *tipped* with silver as a sign of authority, and to take into charge persons committed by the court.[3]

2. An officer who waits upon a court in session, preserving order, caring for jurors and juries, serving processes, etc. Compare BAILIFF, 2; CRIER.

TITHE. The tenth part.

Almost all the tithes of England have been commuted into rent charges, under statute of 6 and 7 Wm. IV (1836), c. 71, and amendments thereto.[4]

TITLE.[5] 1. The means whereby the owner of land has the just possession of his property.[6]

Titula est justa causa possidendi id quod nostrum est: a title is the just right of possessing that which is our own;[7] the lawful cause or ground of possessing that which is ours.[8]

In ordinary acceptation, the right to or ownership in land. Having title to a farm means owning it; which corresponds with the legal meaning. He who has possession, the right of possession, and the right of property has a perfect title.[9]

A person may have a title to property although he is not the absolute owner. If he has the actual or constructive possession, or the right of possession, he has a title.[1]

Within the meaning of the rule that a tenant is estopped from alleging that his landlord has no "title," means paramount right of possession.[2]

In modern use includes *personalty* as well as realty, and may be defined to be such claim to the exclusive control and enjoyment of a thing as the law will enforce. The word points to the right rather than to the actuality of ownership. In the definition in old books "means" seems to refer to remedies or acts for obtaining possession.[3]

Titles are, or have been, acquired by abandonment, accession, accretion, confusion, contract, creation, descent, devise or bequest, eminent domain, escheat, execution, forfeiture, gift, grant, judicial decree, marriage, occupancy, possession, prerogative, prescription, purchase, succession, will, *qq. v.*

Absolute title. This cannot exist at the same time in different persons or in different governments. To be "absolute" it must be exclusive, or, at least, exclude all others not compatible with it.[4]

Abstract or brief of title. See ABSTRACT, 2.

Adverse title. See POSSESSION, Adverse; WARRANTY, 1; WATER.

Apparent title. See APPARENT, 2.

Doubtful title. See *Marketable Title.*

Good title; perfect title; unincumbered title. A "perfect title" is a title good in law and in equity.[5]

A "good unincumbered title" imports an estate without any prior claim, to continue forever, and having no qualification or condition in regard to its continuance.[6]

When an agreement to convey a title is silent as to the character of the title, and there is no evidence indicating the character intended, an implication arises that the title is to be a good one, and therefore free from incumbrance.[7] See *Marketable Title;* DEED, 2.

Legal title. A right in the nature of ownership cognizable by, and enforceable in, a court of law. **Equitable title.** A title available or enforcible in a court of equity.

Thus, the legal title to land conveyed remains in the vendor until all the purchase-money has been paid; while the vendee acquires an equitable title only. As the payments by the vendee increase his

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[1] Emporia *v.* Volmer, 12 Kan. 628 (1874), Brewer, J.

[2] Minor *v.* State, 63 Ga. 318 (1879); Koop *v.* People, 47 Ill. 329 (1868); Morrison *v.* Commonwealth, 7 Dana, *219 (1838).

[3] [Jacob's Law Dict.

[4] See 2 Bl. Com. 34–32.

[5] F. *title;* L. *titulus,* superscription; bill, placard, notice.

[6] 2 Bl. Com. 195.

[7] 1 Coke, Inst. 345 *b;* 2 Bl. Com. 195; 34 Cal. 385; 4 Conn. 55; 11 N. J. L. 62; 81 Va. 383.

[8] Merrill *v.* Agricultural Ins. Co., 73 N. Y. 456 (1878); 6 Hill, 537; 33 Ill. 456; 3 Tex. 468; 81 Va. 383; 3 Washb. R. P. 399.

[9] [Shelton *v.* Alcox, 11 Conn. *249 (1836), Williams, C. J.; 2 Bl. Com. 195; 1 Kent, 177–78; 4 *id.* 373–74.

[1] Roberts *v.* Wentworth, 5 Cush. 198 (1849).

[2] Rodgers *v.* Palmer, 33 Conn. 156 (1865).

[3] [Abbott's Law Dict.]

[4] Johnson *v.* M'Intosh, 8 Wheat. 588 (1823), Marshall, Chief Justice.

[5] [Warner *v.* Middlesex Mut. Assur. Co., 21 Conn. 449 (1852).

[6] Gillespie *v.* Broas, 23 Barb. 375 (1856).

[7] Newark Sav. Institution *v.* Jones, 37 N. J. E. 451 (1883).

equitable interest increases; and when the price has been fully paid the entire title is vested in him and he can compel a conveyance of the legal title. The vendor is a trustee of the legal title to the extent of the payments.[1]

A legal title to real estate acquired subsequent to the lease by a lessor owning the equitable title inures to the benefit of the lessee.[2]

In the Federal courts, a party who claims a legal title must proceed at law; and a party whose title or claim is equitable must follow the forms and rules of equity as prescribed by the Supreme Court under the act of 1842.[3]

"The mistake in this case does not appear to have been discovered by Smith [who purchased from the United States a certain S. E. ¼ section of land, erroneously described by the register as the S. W. ¼ section, which had been previously entered by another] or by those claiming under him, until after Widdicombe had got his patent, and after they had been in the undisputed enjoyment for thirty-five years of what they supposed was their own property under a completed purchase with the price fully paid. Widdicombe, being a purchaser with full knowledge of their rights, was in law a purchaser in bad faith; and as their equities were superior to his they were enforceable against him, even though he had secured a patent vesting the legal title in himself. Under such circumstances, a court of chancery can charge him as a trustee, and compel a conveyance which shall convert the superior equity into a paramount legal title. The cases to this effect are many and uniform. The holder of a legal title in bad faith must always yield to a superior equity. As against the United States his title may be good, but not as against one who had acquired a prior right from the United States in force when his purchase was made and under which his patent issued. The patent vested him with the legal title, but it did not determine the equitable relations between him and third persons."[4] See LIEN, Equitable, Vendor's; TACKING.

Marketable title. Such title as a court of equity would require a purchaser to accept.

A purchaser cannot be compelled to accept a *doubtful* title, or one which the court cannot warrant to him; the question being, not whether the title is good, but whether it is clearly so. A title is "doubtful" when its condition invites litigation. A purchaser cannot be compelled to take such a title, if he thereby exposes himself to a law-suit. When doubts are raised by extrinsic circumstances, which neither the purchaser nor the court can satisfactorily investigate for want of means, the court will refuse its aid; when the means of inquiry are offered, and the result is satisfactory, performance will be enforced.[1]

A possibility of a contest is not sufficient: it must be considerable and rational; such doubt as would induce a prudent man to pause and hesitate, and as would produce a *bona fide* hesitation in the mind of a chancellor.[2]

Equity will not decree specific performance where that would compel the defendant to accept a doubtful title. The purchaser has a right to a marketable title. He may not refuse to perform the contract because a fanciful or speculative doubt as to its validity may be suggested. But a title open to a reasonable doubt is not marketable, and, unless the defect is such that substantial justice can be done by allowing compensation, the purchaser will not be subjected to the contingency of being disturbed, or of having his title successfully challenged when he comes to part with it. In such actions, unless the party is present in whom the outstanding right is vested, the court will not undertake to cure infirmities by deciding a disputed question, of fact or law, but will refuse to decide for or against the validity of the title.[3]

The doctrine of constructive notice has been most generally applied to the examination of titles to real estate. It is the duty of a purchaser to investigate the title of the vendor, and to take notice of any adverse rights or equities of third persons which he has the means of discovering and as to which he is put on inquiry. If he makes all the inquiry which due diligence requires, and still fails to discover the outstanding right, he is excused; but if he fails to use due diligence, he is chargeable, as a matter of law, with notice of the facts which the inquiry would have disclosed.[4] See INQUIRY, 1.

Paper title. "Color of title" is not synonymous with "claim of title:" for to the former a paper title is requisite, while the latter may exist wholly in parol.[5]

Title-deed. Deeds evidencing one's right to land are his "title-deeds," otherwise called his muniments (*q. v.*) of title.

An equitable mortgage is effected by a deposit of title-deeds. A mortgagee who allows his mortgagor to retain the title-deeds, and to raise money on a second mortgage by concealing the first mortgage, will be postponed to the second incumbrancer. See MORTGAGE, Equitable.

See generally ACQUIRE; CHAIN; CLOUD; COLOR, 2; CONVEYANCE, 2; COVENANT; DESCEND; DEVOLUTION, 2; EJECTMENT; FAILURE; PASS, 1, 5; PATENT, 2; POSSESSION; PRESCRIPTION, 3; QUIET, 2; RELATION, 1; SEISIN; SLANDER, 2; TENANT; TRANSFER.

[1] Jennisons *v.* Leonard, 21 Wall. 309 (1874); Cordova *v.* Hood, 17 *id.* 5-6 (1872), cases; Lewis *v.* Hawkins, 23 *id.* 125-27 (1874), cases.

[2] Skidmore *v.* Pittsburgh, &c. R. Co., 112 U. S. 33 (1884); Gregory *v.* Peoples, 80 Va. 357 (1885).

[3] R. S. § 913; Hunt *v.* Hollingsworth, 100 U. S. 103 (1879).

[4] Widdicombe *v.* Childers, 124 U. S. 404 (1888), cases, Waite, C. J.

[1] Kostenbader *v.* Spotts, 80 Pa. 434-35, 437 (1876), cases, Gordon, J.

[2] Stapylton *v.* Scott, 16 Ves. 272 (1809), Eldon, Ld. Ch.; 21 Cent. Law J. 164 (1885).

[3] Adams *v.* Valentine, 33 F. R. 2-3 (1887), cases, Wallace, J.; Jeffries *v.* Jeffries, 117 Mass. 187 (1875); Chesman *v.* Cummings, 142 *id.* 67-68 (1886), cases.

[4] Parker *v.* Conner, 93 N. Y. 124 (1883), Rapallo, J

[5] Hamilton *v.* Wright, 30 Iowa, 486 (1870).

2. As applied to a literary production: a heading, caption, name or designation given to the document or work as a whole or to one of its larger divisions.

Title of a book. In copyright law, the name by which a book or other literary composition is known.

The theory of the copyright statutes is that every book must have a title, a name or designation — something short and convenient by which it may be identified; that that name must appear on it, or in it, when published, on a title-page or its equivalent; and that such title or page must have been deposited, before the publication of the book, in the designated office. The copyright to be protected is the copyright in the book. A printed copy of the title of the book is required to be deposited, before publication, only as a designation of the book to be copyrighted. The title is "a mere appendage, which only identifies, and frequently does not in any way describe, the literary composition itself, or represent its character." The title alone is never protected separate from the book which it designates.[1] See COPYRIGHT; PRINTED.

Title of a cause. The distinctive designation of a cause, giving the style of the court, the venue, names of plaintiff or petitioner and defendant, and, perhaps, also the calendar or docket number of the case.

Title of a paper or ***pleading.*** The title of an affidavit, of a declaration, pleading or other paper filed, or to be filed, in a suit, means the title of the proceeding as written at the head of such paper. Whence "to entitle" a case, cause, pleading. See CAPTION, 2; VENUE; VERSUS.

Title of an act, bill, or statute. The language, at the beginning, in which its general nature or purpose is declared or indicated, and by which it is distinguished from other statutes, or from other chapters of the same statute-book, or even from other parts or chapters of the same enactment or bill.

The title of an act furnishes little aid in the construction of its provisions. Formerly, in the English courts, it was regarded as no part of the act: it was framed by a clerk of the House in which the act originated, as a convenient means of reference. At the present day it constitutes a formal part of the act: it cannot be used to extend or to restrain positive provisions contained in the body of the act. Where the meaning of these is doubtful, resort may be had to it, but even then it has little weight: it is seldom the subject of special consideration by the legislature.[2] Compare PREAMBLE.

The constitutions of the States provide that no bill or act, except general appropriation bills, shall contain more than one subject, and that that subject shall be clearly expressed in the title of the bill or act.

The title of a statute need not index all the contents of the enactment, but it should fairly suggest the related subjects — give such notice of the general subject as will lead to inquiry into the contents. Provisions not covered by the title will be declared void. If a supplement is germane to the original act it may suffice to style it a "supplement" to such original.[1]

The purpose is to secure a separate consideration of every subject presented for legislative action, and a conspicuous declaration of that action. Substantial unity in the statutable object is all that is required.[2]

If the several sections are germane to the subject-matter, which is described in the title, the statute embraces a single subject. The title need not give an abstract of the contents nor specify the means by which the general purpose is to be accomplished. Particular sections may be rejected, if the integrity of the act remains.[3]

The provision is directed against the practice of embodying numerous objects in one act, thus passing measures which would not be discovered by reading the title only. The requirement that all bills shall be read at length before final passage gives an additional safeguard against fraudulent legislation, and makes it unnecessary, except in special cases, to construe the provision with strictness.[4]

The objections should be grave, the conflict between the statute and the constitution palpable, before the judiciary disregard an enactment upon the sole ground that it embraces more than one object, or, if but one object, that it is not sufficiently expressed by the title.[5]

The purpose is met when a law has but one general object, fairly indicated by the title. To require every end and means necessary or convenient for the accomplishment of the general object to be provided for by a separate act relating to that alone would be unreasonable and render legislation impossible.[6] See GRANT, 3.

3. Such right of action as a plaintiff relies upon, alleges or proves. See DECLARATION, 2.

4. In the law of trade-marks, a title may become the subject of property; as, by long

[1] Donnelley *v.* Ivers, 18 F. R. 594-95 (1883), cases, Blatchford, J.

[2] Hadden *v.* The Collector, 5 Wall. 110 (1866); United States *v.* Union Pacific R. Co., 91 U. S. 82 (1875); People *v.* Davenport, 91 N. Y. 585 (1883), cases; Wilson *v.* Spaulding, 19 F. R. 306 (1884).

[1] State Line & Juniata R. Co.'s Appeal, 77 Pa. 431 (1875), cases.

[2] Rader *v.* Union Township, 39 N. J. L. 512 (1877), Beasley, C. J. Approved, 107 U. S. 155, *infra*.

[3] Baltimore *v.* Reitz, 50 Md. 579 (1878).

[4] Henderson *v.* Jackson County, 2 McCrary, 619 (1881).

[5] Montclair *v.* Ramsdell, 107 U. S. 155 (1882).

[6] Cooley, Const. Lim. *144, cases; Klein *v.* Kinkead, 16 Nev. 202 (1881), cases; Mahomet *v.* Quackenbush (Ill.), 117 U. S. 513 (1886), cases; Otoe County *v.* Baldwin (Neb.), 111 *id.* 16 (1883), cases; Ackley School District *v.* Hall (Iowa), 113 *id.* 142 (1885), cases; Carter County *v.* Sinton (Ky.), 120 *id.* 522-23 (1887), cases.

and prior use or by registration and notice under statutes. See TRADE-MARK.

5. As used with reference to the naval and military service, "title" is the name by which an office, or the holder of an office, is designated and distinguished, and by which the officer has a right to be addressed.[1]

"Grade" is one of the divisions or degrees in the particular branch of the service, according to which officers therein are arranged; "rank" is the position of officers of different grades or of the same grade, in point of authority, precedence, or the like, of one over another. Sometimes "rank" is used as synonymous with "grade," and the title of an officer (*e. g.*, admiral, or vice-admiral) may denote both his grade and rank,[1] *q. v.*

6. An addition to one's name; as, a title of office, of honor, or nobility. See ADDITION, 2.

In England, titles of nobility are hereditary.

"No Title of Nobility shall be granted by the United States: And no Person Holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[2]

"No State shall . . grant any Title of Nobility."[3]

Titles of nobility were thought inconsistent with the theory of republican institutions, which is perfect equality of rights. The first provision quoted anticipates and prevents foreign influence in the affairs of government.[4] See MINISTER, 3; NATURALIZATION, 'Fourth;" RANK.

TITULUS. See TITLE, 1.

TO. A term of exclusion, unless by necessary implication it is used in a different sense.[5]

Has no precise legal meaning; may signify "within" or "into:" as, where a road is chartered to run "to a city."[6]

As commonly used, conveys the idea of moving toward and reaching a specified point; and the meaning is not satisfied unless the point or object is actually attained. But the word sometimes embraces a part of this idea only, or it is simply a word of direction, as we say "to the north" when we mean in that direction merely, or as in the army an officer might command a wounded man, or impedimenta, to be taken to the rear. In many cases the meaning is nearly synonymous with "toward."[1] Compare AT, 2; FROM.

To let. See LEASE, Let.

To wit. See WIT.

TOBACCONIST. Any person, firm, or corporation whose business it is to manufacture cigars, snuff, or tobacco in any form.[2]

TOIL. See LABOR, 1.

TOKEN.[3] In a statute punishing false pretenses: a sign, mark, symbol. "Written token" will include matter printed or lithographed.[4]

Tokens are public or general, or privy; and, either false or true.

Cheating by a false token is by any material device that may be used to perpetrate the offense of obtaining property by false pretenses.[5] *q. v.*

A bank check is a false token when the drawer knows that he has no funds with which to meet it, nor credit upon which he can draw.[6]

TOLL.[7] 1, *v.* To bar, defeat, take away: as, to toll an entry into lands; entry tolls the statute of limitations. Tolled: removed, barred.

2, *n.* A Saxon word, originally signifying a payment in towns, markets, or fairs for goods and cattle bought and sold there. Now, popularly applied to the charges which canal and railroad companies make for transporting goods.[8]

The legal meaning is, a tribute or custom paid for passage, not for carriage — always something taken for a liberty or privilege, not for a service; and such is the common understanding.[9]

Thus, the tolls taken by a turnpike or canal company do not include charges for transportation; such tolls are merely an excise to be paid for using the way.[9]

In common-law usage, "toll" applies to a large class of dues and exactions in the nature of fixed rights, and which cannot lawfully be exceeded. It is almost universally connected with some franchise, which involves duties as well as privileges of a public or private nature. The right to receive fixed tolls is found in fairs, markets, mills, turnpikes, ferries,

[1] Commission of Pay-Inspector in the Navy, 16 Op. Att.-Gen. 416 (1880), Devens, A.-G.; R. S. § 1480; Relative Rank of Assistant Surgeons, 16 Op. Att.-Gen. 651 (1880).

[2] Constitution, Art. I, sec. 9, cl. 8.

[3] *Ibid.* sec. 10, cl. 1.

[4] 2 Story, Const. §§ 1350–52, 1400.

[5] Montgomery *v.* Reed, 69 Me. 514 (1879): 13 *id.* 201; 52 *id.* 256; Thomas *v.* Hatch, 3 Sumn. 178–79 (1838).

[6] Farmers' Turnpike *v.* Coventry, 10 Johns. *392 (1813); 6 Paige, 561; Hazlehurst *v.* Freeman, 52 Ga. 246 (1874); McCartney *v.* Chicago & Evanston R. Co., 112 Ill 626 (1884), cases.

[1] Moran *v.* Lezotte, 54 Mich. 87 (1884), Cooley, C. J.

[2] Revenue Act 13 July, 1866, § 9: 14 St. L. 120; 1 Hughes, 326.

[3] A. S. *tacen*, pointing out, indicating.

[4] Jones *v.* State, 50 Ind. 476 (1875), cases, Buskirk, J.

[5] People *v.* Johnson, 10 Johns. *292 (1815).

[6] People *v.* Donaldson, 70 Cal. 118 (1886), cases.

[7] Probably allied to tale, tally: tell, account.

[8] Pennsylvania Coal Co. *v.* Delaware, &c. Canal Co., 29 Barb. 592 (1859).

[9] Boyle *v.* Philadelphia, &c. R. Co., 54 Pa. 314 (1867), Strong, J.; Pennsylvania R. Co. *v.* Sly, 65 *id.* 210 (1870), Sharswood, J.

bridges, and many other classes of interests where the owner of the franchise is obliged to accommodate the public and the public are protected from extortion by an obligation to pay regular dues.[1]

Neither by the common law of England, by its statutes, nor by customary usage there or in the United States, is the word limited to compensation for the use of a road, a way, a mill, or a ferry, where the moving power comes from the party using it; but, on the contrary, it is and always has been applied to compensation for such use when the thing used, and the motive power by which it was used, came from the party charging the toll, as well as when it came from the party paying it. It is, therefore, a word properly used to express the charges made by railroad companies for transportation of persons or property in the manner which is now usual, if not universal.[2]

Tollage. The sum charged as toll; also, the franchise under which the charge is made.

Toll-thorough. A sum demanded for a passage through an highway, or for a passage over a ferry, bridge, etc., or for goods which pass by such a port in a river.[3]

Toll-traverse. A toll granted and claimed for going over the land of a grantee.[4]

See BRIDGE; STREET; TURNPIKE.

TOMB. See BURIAL; SEPULCHER.

Tombstone. See HEARSAY.

TON. In weight: sometimes two thousand pounds avoirdupois;[5] sometimes two thousand two hundred pounds.[6]

In measurement: forty cubic feet.[7]

Tonnage. (1) A custom or impost paid to the king for merchandise carried out or brought in in ships, or such like vessels, according to a certain rate upon every ton.

(2) In our law, "internal cubical capacity in tons of one thousand cubic feet each."[8]

In commercial designation, the number of tons burden a ship or vessel will carry, as ascertained by official admeasurement and computation prescribed by public authority.[9]

Tonnage tax. A tax or duty on tonnage;[1] a duty levied on a vessel according to its tonnage or capacity.[2]

A tonnage tax is imposed, whatever the subject, solely according to the rule of weight, either as to capacity to carry or as to the actual weight of the thing itself.[3]

The registered tonnage of vessels is ascertained by rules provided by acts of Congress; otherwise, registered tonnage would be a variable quantity, dependent upon State statutes or local usages.[4]

"No State shall, without the Consent of Congress, lay any Duty of Tonnage."[5]

Taxes levied, as on property, by a State, upon vessels owned by its citizens, and based upon a valuation of the same, are not prohibited. But taxes cannot be imposed "at so much per ton of the registered tonnage."[1]

It is not only a *pro rata* tax which is prohibited, but any duty on a ship, whether a fixed sum upon its whole tonnage, or a sum ascertained by comparing the amount of tonnage with the rate of duty.[6]

For the use of wharves, piers, and similar structures a reasonable compensation may be charged to each vessel, care being taken not to cover a violation of the foregoing prohibition. A tax for the privilege of arriving, stopping, or departing is unconstitutional.[7]

A tax upon a boat as an instrument of navigation, and not as a tax upon the property of a citizen of the State, is invalid.[8]

A State, as a police regulation, may impose a license tax, directly or indirectly, upon the business of keeping ferries between landings in different States. Such exaction is not a duty of tonnage if it is not graduated by the tonnage of the boats or by the number of times they land within the State.[9]

Whether a charge is a charge of wharfage or a duty of tonnage must be determined by the terms of the regulation which imposes it. A "duty of tonnage" is a charge for the privilege of entering, or trading or lying in, a port or harbor; "wharfage," a charge for the use of a wharf. Whether the exaction is one or the other is a question of fact and law, and not of intent.[9]

See COMMERCE; WHARFAGE.

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[1] McKee *v.* Grand Rapids &c. R. Co., 41 Mich. 279 (1879), Campbell, C. J.

[2] Lake Superior, &c. R. Co. *v.* United States, 93 U. S. 458-59 (1876), Miller, J. See also 29 Ohio St. 552; 12 Ct. Cl. 58; 22 E. L. & E. 526; 105 E. C. L. 60; 12 East, 340.

[3] County Commissioners *v.* Chandler, 96 U. S. 208 (1877): Comyns' Digest.

[4] Markets Company *v.* Neath, &c. R. Co., L. R., 7 C. P. 566 (1872).

[5] See 1 N. Y. Rev. St. 609, § 35; 9 Paige, 188; 40 N. Y. 262; 29 Pa. 27; 3 Wall. Jr. 46.

[6] See Act of Congress, 30 Aug. 1842, c. 270, s. 20.

[7] Roberts *v.* Opdyke, 40 N. Y. 262 (1869).

[8] Inman Steamship Co. *v.* Tinker, 94 U. S. 243 (1876): R. S. § 4153.

[9] [State Tonnage Tax Cases, 12 Wall. 294-95, 204 (1870), Clifford, J.; Transportation Company *v.* Wheeling, 99 U. S. 284 (1878).

[1] [State Tonnage Tax Cases, *ante*.

[2] The North Cape, 6 Biss. 509-15 (1876), Blodgett, J.

[3] Inman Steamship Co. *v.* Tinker, 94 U. S. 243 (1876): R. S. § 4153.

[4] Beck *v.* Phœnix Ins. Co., 16 Hun, 345 (1878).

[5] Constitution, Art. I, sec. 10, cl. 3.

[6] Steamship Co. *v.* Portwardens, 6 Wall. 35 (1867).

[7] Cannon *v.* New Orleans, 20 Wall. 577 (1874); Peete *v.* Morgan, 19 *id.* 581 (1873).

[8] Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 374, 376 (1882), cases; Transportation Co. *v.* Wheeling, 99 *id.* 273 (1878).

[9] Transportation Co. *v.* Parkersburg, 107 U. S. 696 (1882), Bradley, J. See also Huse *v.* Glover, 119 *id.* 549 (1886).

TONTINE.[1] In French law, a partnership composed of the recipients of perpetual or life annuities or benefits, the portions of those who die accruing to the survivors.

A species of life annuity, propounded by Lorenzo Tonti, about 1650, as a mode by which governments might obtain loans. The general idea is that property is loaned, owned, or invested for the benefit of a certain number of persons, who at first receive its income, the share of a deceased member increasing the sum divisible among the survivors; the last survivor taking the whole income or principal, as the case may be.

A company which issues a policy on the tontine or "ten years dividend system" is in no sense a trustee of any particular fund for policy-holders; their relation is that of debtor and creditor, and the assured is not entitled, at the end of the term, to an accounting, in the absence of evidence of wrong-doing or mistake on the part of the company.[2]

TOOL. "An instrument of manual operation, particularly such as is used by farmers and mechanics.[3]

The statutes of some States exempt from execution the tools or implements belonging to a debtor which are necessary to his trade or business.

Where the language of the statute was "tools of the debtor necessary for his trade or occupation," the court said "The design and effect of the law are to secure to *handicraftsmen* the means by which they are accustomed to obtain subsistence in their respective occupations. The exemption is not limited to tools used by the tradesman with his own hands, but comprises such, in character and amount, as are necessary to enable him to prosecute his appropriate business in a convenient and usual manner; and the only rule by which it can be restricted is that of good sense and discretion in reference to the circumstances of each case."[4]

The object of such laws is to secure to the debtor the means of *laboring* at his trade or profession, the tools and instruments required by him in his own *manual labor*.[5]

The following articles have been decided to be included within such laws: the abstracts of titles and iron safe of a conveyancer;[6] a barber's chair;[7] cheese vats, presses, and knives;[8] a cornet,[9] a violin,[9] a piano;[9] dentist's instruments;[9] surgeon's instruments;[9] a fish net and boat;[7] a hunter's gun;[9] a journeyman jeweler's tools;[9] a merchant's books and safe;[10] a plow, harrow, and drag,[11] and like articles;[12] a printing press, cases, and type;[13] a shovel, ax, fork, and hoe;[14] watches.[15]

Not included: a threshing-machine;[16] the blocks of an oil-cloth printer;[17] a lawyer's library;[16] the machinery and implements constituting an extensive factory.[18]

See BAGGAGE; EXEMPTION; IMPLEMENT; MECHANIC; TRADE.

TOOTH. See MAYHEM.

TORNADO. See LIGHTNING.

TORPEDO. See FIREWORKS.

A train of cars passed over, leaving unexploded, a signal torpedo, which was picked up by a boy at a point where the public were accustomed to cross the track as the railroad authorities knew. While attempting to open the torpedo it exploded and injured a companion, the plaintiff. *Held*, that the plaintiff could recover damages; and that the fact that the torpedo had been used contrary to rules did not exempt the company from liability.[19]

TORT.[21] 1. Fr. Improper, unlawful conduct; wrong.

De son tort. Of his own wrong; by action not authorized by law.

Applied to a person who, without proper authority, takes upon himself to act as executor by intermed-

[1] In the sense of a resort for merchants, see 2 McMaster's Hist. Peop. U. S. 236.

[2] Uhlman *v.* New York Life Ins. Co., 109 N. Y. 421 (1888), distinguishing and limiting Bogardus *v.* Same, 101 *id.* 328, 338 (1886).

[3] Oliver *v.* White, 18 S. C. 241 (1882).

[4] Howard *v.* Williams, 2 Pick. 83 (1824), Lincoln, J. See also Healy *v.* Bateman, 2 R. I. 456 (1853).

[5] Boston Belting Co. *v.* Ivens, 28 La. An. 696 (1876), Howell, J.

[6] Davidson *v.* Sechrist, 28 Kan. 324 (1882).

[7] Allen *v.* Thompson, 45 Vt. 473 (1873).

[8] Fish *v.* Street, 27 Kan. 271 (1882).

[9] Baker *v.* Willis, 123 Mass. 195 (1877).

[10] Goddard *v.* Chaffee, 2 Allen, 395 (1861).

[11] Amend *v.* Murphy, 69 Ill. 338 (1873).

[12] Maxon *v.* Perrott, 17 Mich. 334 (1868).

[13] Whitcomb *v.* Reid, 31 Miss. 569 (1856); Robinson's Case, 3 Abb. Pr. 467 (1856).

[14] Sammis *v.* Smith, 1 N. Y. Sup. Ct. 446 (1873).

[15] Choate *v.* Redding, 18 Tex. 580 (1857).

[16] Howard *v.* Williams, 2 Pick. 83 (1824).

[17] Harrison *v.* Mitchell, 13 La. An. 260 (1858).

[18] Wilkinson *v.* Alley, 45 N. H. 551 (1864).

[19] Dalley *v.* May, 5 Mass. *313 (1809); Garrett *v.* Patchin, 29 Vt. 248 (1857); Pierce *v.* Gray, 7 Gray, 68 (1856).

[20] Patten *v.* Shepard, 4 Conn. 453 (1823); Smith *v.* Osburn, 53 Iowa, 475 (1880); Jenkins *v.* McNall, 27 Kan. 532 (1882). *Contra*, Buckingham *v.* Billings, 13 Mass. *86 (1816); Danforth *v.* Woodward, 10 Pick. 427 (1830); Oliver *v.* White, 18 S. C. 241 (1882).

[21] Pierce *v.* Gray, 7 Gray, 68 (1856).

[16] Rothschild *v.* Boelter, 18 Minn. 369 (1872); Bitting *v.* Vandenburgh, 17 How. Pr. 82 (1859).

[16] Johnson *v.* Barrett, 34 Barb. 364 (1861); Seeley *v.* Gwillim, 40 Conn. 109 (1873).

[17] Richie *v.* McCauley, 4 Pa. 471 (1845).

[16] Lenoir *v.* Weeks, 20 Ga. 596 (1856).

[18] Boston Belting Co. *v.* Ivens, 28 La. An. 596 (1876).

[19] Harriman *v.* Pittsburgh, &c. R. Co., 45 Ohio St. 11, 19 (1887), citing many cases on negligence.

[21] L. *tortus*, twisted, bent, wrung.

dling with the goods of the deceased;[1] also, to a trustee who, of his own authority, enters into the possession, or assumes the management of property which belongs beneficially to another.[2] See further EXECUTOR.

Nul tort. No wrong done: the general issue in a real action.[3]

2. Eng. An injury done, to one's person or property, by another. A private wrong, or civil injury.[4]

Actual legal damage to the plaintiff, and a wrongful act committed by the defendant.[5]

An unlawful act done in violation of the legal rights of some one.[6]

An invasion of the legal rights of another accompanied by damages.[7]

Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. An omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. That legal duty may arise from circumstances not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and to refrain from invading them by force or fraud.[8]

Actual loss is not now invariably necessary. If a legal right has been violated, the law will presume damage, so far as to allow an action, and refer the question of the amount to the judgment of a jury. But if no legal right is infringed, no action is maintainable, however great the loss.[9] See further INJURY.

Used with reference to admiralty jurisdiction, "tort" is not confined to injuries committed by direct force. It includes, also, wrongs suffered in consequence of the neglect or malfeasance of another, where the remedy at common law is by an action on the case.[10]

Tort-feasor. One who commits a tort; a wrong-doer.

Tortious.[11] Of the nature of a tort; having the elements of a civil or private injury; wrongful in law.

The acts which constitute torts are injuries to one's person, property, or reputation; more particularly: assault and battery; conspiracy; conversion; deceit; enticement and seduction; false imprisonment; infringement of a copyright, patent, or trade-mark; malicious prosecution; negligence; nuisance; slander and libel; trespass on land; violation of the right of support, and of water-rights; damage by animals; damages from unlawful sales of liquor,—any violation of a right or breach of a duty causing damage to a person who is himself without fault. The right or duty may exist at common law or be created by statute.[1]

The common-law forms of action founded upon tort are: detinue, replevin, trespass, trespass on the case, trover. The most common remedy has been action on the case.

The *employer* is liable for a wrong done, whether through negligence or malice, by his employee when engaged in the performance of a duty which the employer owes to the person injured. For example, if a railroad company does not protect female passengers on its trains from assault by its own trainmen, it may be made to pay damages.[2]

The result of the cases is that for an act done by the agent of a *private corporation*, in the course of its business and of his employment, the corporation is responsible, as an individual under similar circumstances.[3]

A corporation is liable for every wrong it commits — the doctrine of *ultra vires* having no application — whether for assault and battery, fraud and deceit, false imprisonment, malicious prosecution, or libel. It may even be indicted for misfeasance or non-feasance touching duties imposed upon it in which the public are interested.[4]

As to *municipal corporations*, some cases hold that the adoption of a plan for an authorized work is a judicial act, and that if injury arises from the execution of that plan no liability exists; other cases, that for negligent exercise of a public good in itself, or for

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[1] Brown *v.* Leavitt, 26 N. H. 495 (1853): 2 Leigh, N. P. 357; Emery *v.* Berry, 28 *id.* 481 (1854).

[2] Morris *v.* Joseph, 1 W. Va. 259 (1866): Hill, Trustees, 246.

[3] 3 Bl. Com. 305.

[4] [3 Bl. Com. 117, 2.

[5] [Rex *v.* Pagham Commissioners, 15 E. C. L. 361 (1828), Bayley, J.

[6] Langford *v.* United States, 101 U. S. 345 (1879), Miller, J.

[7] Chesley *v.* King, 74 Me. 173 (1882), Barrows, J.

[8] Rich *v.* N. Y. Central & Hudson River R. Co., 87 N. Y. 390, 398 (1882), Finch, J.

[9] Addison, Torts, 2.

[10] Philadelphia, &c. R. Co. *v.* Towboat Co., 23 How. 215 (1859), Grier, J.

[11] Tor'-shus. Tortuous is obsolete.

[1] See Addison, Torts, §§ 53–77; Cooley, Torts, 650; Underhill, Torts, 20.

[2] Craker *v.* Chicago & Northw. R. Co., 36 Wis. 657, 668–79 (1875), cases, Ryan, C. J. The plaintiff, a school teacher, recovered $1,000 damages from the defendant, for the insult and assault of a conductor who kissed her some five or more times. See New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 645 (1887), cases; as to malicious torts by agents, 26 Am. Law Reg. 609–20 (1887), cases; 1 Law Quar. Rev. 207–24 (1885), cases.

[3] Philadelphia, &c. R. Co. *v.* Quigley, 21 How. 210 (1858), cases; Baltimore & Potomac R. Co. *v.* First Baptist Church, 108 U. S. 330 (1883); Salt Lake City *v.* Hollister, 118 *id.* 261–63 (1886), cases; Denver, &c. R. Co. *v.* Harris, 122 *id.* 597, 608 (1887), cases; Woodward *v.* Webb, 65 Pa. 259 (1870), cases.

[4] Nat. Bank of Carlisle *v.* Graham, 100 U. S. 702 (1879), cases; Wheeler & Wilson Manuf. Co. *v.* Boyce, 36 Kan. 353 (1887), cases; 25 Am. Law Reg. 763–68 (1886), cases.

mere negligence in the care of its streets or other works, it cannot be charged. But the authorities establishing the contrary doctrine, that a city is responsible for its mere negligence, are so numerous and so well considered that the law must be deemed settled in accordance with them.[1]

For a failure to exercise governmental powers municipal corporations are not liable: as, for a failure to provide appliances for extinguishing fires, to supply an adequate force of police officers, to enforce the laws of the State or its own ordinances.[2]

The rule is well settled that where power is conferred on a city to make improvements and keep them in repair, the duty to make them is *quasi* judicial and discretionary, and for a failure to exercise this power or an erroneous estimate of the public needs, no civil action can be maintained. But where the discretion has been exercised, the duty of maintaining the improvement is ministerial, and for neglect to perform such a duty an action by a party injured will lie.[3] See SEWER.

A private action does not lie against a city, at common law, for the non-performance or the negligent performance of a public duty imposed by a general statute without its request, unless the city receives or is entitled to receive some privilege or profit in consideration of the duty.[4]

A government is not responsible for the wrongful acts of its officers.[5]

It does not guarantee the fidelity of any officer or agent whom it employs. To do so would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of public interests. The head of a department, or other superior functionary, is in the same position.[6]

By the maritime law, a vessel, as well as the owners, is liable for damages caused by its tort.[7]

See ADMIRALTY; AGENT; CARE; CARRIER; CASE, 3; CAUSE, 1 (1); CONTRIBUTION; CRIME; DAMAGES; DELICT; GUILT; INTEREST, 2 (3); JUDGMENT; NEGLIGENCE; RATIFICATION; ULTRA VIRES; WAIVER; WRONG. Compare DELICTUM.

[1] Barnes *v.* District of Columbia, 91 U. S. 551 (1875), cases; Weightman *v.* Corporation of Washington, 1 Black, 50 (1861).

[2] City of Lafayette *v.* Timberlake, 88 Ind. 331 (1882), cases; Robinson *v.* City of Evansville, 87 *id.* 334 (1882), cases.

[3] Urquhart *v.* City of Ogdensburg, 91 N. Y. 71 (1883), cases.

[4] Wixon *v.* City of Newport, 13 R. I. 458-59 (1881), cases.

[5] Hart *v.* United States, 95 U. S. 318 (1877), cases.

[6] Robertson *v.* Sichel, 127 U. S. 515 (1888), cases. *Held*, that the plaintiff, a collector of customs, was not personally liable for the negligence of a subordinate in leaving a trunk on a pier, where it was destroyed by fire: there being no evidence connecting plaintiff with the negligence, or that the subordinate was not competent.

[7] Sherlock *v.* Alling, 93 U. S. 108 (1876). On assigning actions for torts, see 24 Am. Law Reg. 730-34 (1885), cases.

TORTURE. In statutes protecting animals from cruelty: gross abuse, inhuman treatment, unjustifiable physical pain or suffering inflicted.[1]

In an indictment for torturing a horse, the means used must be alleged so that the court can see that such means have the inevitable and natural tendency to produce the effect in which the crime consists. Torture is pain, anguish, extreme pain or anguish of body or mind, pang, agony, torment; in the statute of Missouri, some violent, wanton, and cruel act necessarily producing pain and suffering. Tying brush and boards to a horse's tail is not necessarily torture.[2] See CRUELTY, 3; RACK.

TOTAL. See FAILURE; LOSS, 2; PROHIBITION, 2.

TOTIDEM. See VERBUM, Totidem.

TOTIES QUOTIES. L. As often as (it may be or may happen).

Where alimony was ordered to be paid in quarterly installments, in case it was not so paid execution was to issue *toties quoties*.[3]

TOUCH. A vessel touches at a port when she calls there for orders or a cargo. The opposite word is "stay."[4]

If there be liberty granted by the policy of insurance "to touch" or "to touch and stay" at an intermediate port on the passage, the insured may trade there, when consistent with the object and furtherance of the adventure, provided it produces no unnecessary delay, nor enhances nor varies the risk.[5] See DEVIATION.

TOUT. See SEMPER.

TOW-BOAT. See VESSEL.

The weight of authority is that the owner of a steamboat engaged in the business of towing is not a common carrier.[6]

Towage. Drawing a vessel or other craft through the water from one place to another; also, the compensation or price for such service.

A tug-boat (*q. v.*) is not a common carrier. Her captain or pilot must exercise reasonable skill and

[1] See 1 N. Y. Laws, 1867, c. 375; Laws, 1874, c. 12.

[2] [State *v.* Pugh, 15 Mo. *511 (1852), Ryland, J.

[3] Barber *v.* Barber, 21 How. 586 (1858).

[4] *Re* George Moncan, 8 Saw. 353 (1882); Chinese Immigration Act, 6 May, 1882, § 3.

[5] 3 Kent, 314, cases.

[6] See Caton *v.* Rumney, 13 Wend. 389 (1835); Alexander *v.* Greene, 3 Hill, 19 (1842); Wells *v.* Steam Nav. Co., 2 N. Y. 206 (1849); Leonard *v.* Hendrickson, 18 Pa. 41 (1851); Varble *v.* Bigley, 14 Bush, 702 (1879), cases. *Contra*, Smith *v.* Pierce, 1 La. *354 (1830); Adams *v.* New Orleans Steam Tow-boat Co., 11 *id.* *47 (1837); Walston *v.* Myers, 5 Jones L. 176 (N. C., 1857). *Quære*, White *v.* The Mary Ann, 6 Cal. 470 (1856); Ashmore *v.* Pennsylvania Steam Towing Transp. Co., 29 N. J. L. 184 (1860), cases.

care; the want of either will render her liable for all the damages resulting.[1]

A "towage service" is rendered a vessel for the purpose of expediting her voyage, without reference to any circumstance of danger. A "salvage service" is designed to relieve the vessel from some distress or danger, present or apprehended.[2]

In the absence of a contract, the towing of a vessel in peril or disabled is salvage; but as a convenient word to distinguish an ordinary case of contract from one of salvage "towage" is often used. The increased use of tugs, and their rivalry, have operated to reduce the value of a salvage service in most ports to something not much beyond the price of a towage contract contingent upon success. Competition has established what might be called a *quantum meruit* for cases of this kind.[3]

TOWARD. In the expression "insulting language toward a female relation," does not mean to, but about, respecting.[4] See To.

TOWER OF LONDON. See RACK.

TOWN; TOWNSHIP. "Town" is from the Anglo-Saxon *tun*, an inclosure: a garden inclosed by a hedge, or a collection of houses inclosed by a wall. Its customary usage in England denoting a collection of houses or a hamlet, between a village and a city, or its stricter legal or civil meaning denoting a civil corporation of larger territory, which might include a village or a city, are somewhat foreign to the use of the word, and the civil and territorial subdivision or organization which it signifies, in this country. Its first use here was to define the original or primary civil or governmental organizations of the early colonists in New England.[5]

The word has become generic, comprehending the several species of cities, boroughs, and common towns. A city is a town incorporated, and a "town" may include a city.[6]

In New England, towns having been the first local civil governments, antecedent to the formation of counties, the counties were made out of the towns. In the Western States, when an organic law is first made for the government of the whole territory, or a constitution is formed for the whole State, counties are formed first, and towns within them afterward; but the original meaning of a town as "a subdivision of a county" remains the same.[1]

In some parts of the United States, "town" signifies a civil division of a county, irrespective of incorporation or powers of government: such as is elsewhere called a "township;" in other parts, a species of municipality more highly organized than a "village," and less so than a "city." In instances, the word means a territorial division only, to avert which construction "incorporated town" is used.[2]

According to the dictionaries the word "town" signifies any walled collection of houses. (Johnson.) But that is its antique meaning. By modern use it is said to be applied to an undefined collection of houses, or habitations; also to the inhabitants; emphatically to the metropolis. (Richardson.) Again, a town is any collection of houses larger than a village; or any number of houses to which belongs a regular market, and which is not a city. (Johnson, Webster, Ogilvie.) The same authorities define a "village" as a small collection of houses in the country, less than a town. . . In New England and New York, towns are the political units of territory, into which the country is subdivided, and answer, politically, to parishes and hundreds in England, but are vested with greater powers of local government. In Delaware, the counties are divided into hundreds, "town" and "village" being indiscriminately applied to collections of houses. In Maryland and most of the Southern States, the political unit of territory is the county, though this is sometimes divided into parishes and election districts for limited purposes; and "town" is used in a broad sense to include all collections of houses from a city down to a village. In New Jersey, Pennsylvania, Ohio, Indiana, Michigan, and Illinois, the subdivisions of a county, answering to the towns of New England and New York, are called townships, though "town" is also applied to them in Illinois. In these States "town" and "village" are indiscriminately applied to large collections of houses less than a city.[3]

The system of survey of government lands, established in 1796, divided territory into townships six miles square, and these again into sections each a mile square.[4]

See BOROUGH; BY-LAW, 1; CITY; SCHOOL; PUEBLO; VILLAGE.

TRACING. A mechanical copy or *fac simile* of an original, produced by following

[1] The Cummings, 18 F. R. 178 (1883), cases; The Margaret, 94 U. S. 497 (1876), cases.

[2] M'Connochie *v.* Kerr, 9 F. R. 58 (1881), cases, Brown, D. J.

[3] Baker *v.* Hemenway (The City of Valparaiso), 2 Low. 503 (1876), cases.

[4] Hudson *v.* State, 6 Tex. Ap. 575 (1879).

[5] Chicago & Northwestern R. Co. *v.* Town of Oconto, 50 Wis. 193-94 (1880), Orton, J.

[6] 1 Bl. Com. 114; Odegaard *v.* City of Albert Lea, 33 Minn. 351 (1885), cases; 24 Ind. 287; 54 N. H. 53; 40 N. J. L. 4; 6 Daly, 355; 3 R. I. 256; 40 Wis. 44.

[1] Chicago & Northwestern R. Co. *v.* Town of Oconto, *ante*.

[2] [Abbott, Law Dict.; 82 Ill. 119; 50 *id.* 453; 55 *id.* 346; 46 Ill. 256; 30 Minn. 189; 40 N. H. 173; 12 N. J. E. 299; 17 Ohio St. 271; 13 R. I. 85; 40 Wis. 124; 15 F. R. 846.

[3] Town of Enfield (Illinois) *v.* Jordan, 119 U. S. 684-86 (1887), Bradley, J.

[4] Act of Congress 18 May, 1796, § 2: 1 St. L. 464.

its lines, with a pen or pencil, through a transparent medium called tracing paper.[1]

TRACK. See EXTEND; RAILROAD.

TRACT. Does not imply anything as to the size of the parcel of land.[2] See PARCEL, 2.

TRADE. Generally, equivalent to occupation, employment, or business, whether manual or mercantile; any occupation, employment, or business carried on for profit, gain, or livelihood, not in the liberal arts or in the learned professions.[3]

The business or occupation which a person has learned and carries on for procuring subsistence, or for profit; particularly, a mechanical employment, distinguished from the liberal arts and learned professions, and from agriculture.[4]

In its broadest signification, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally.[5]

In the expression "implements of a debtor's trade" the reference is to the business of a mechanic,—carpenter, blacksmith, silversmith, printer, or the like.[6]

Trader; tradesman. Primarily, one who trades. But "tradesman" usually means a shopkeeper.[7]

Trader. One who buys and sells goods; "one who makes it his business to buy merchandise, or goods and chattels, and sell the same for a profit."[8]

One who sells goods substantially in the form in which they are bought. Any general definition would fail to suit all cases; each case has its peculiarities.[9]

In England, applied to small shopkeepers; in the United States, rarely to persons engaged in buying and selling, generally to mechanics and artificers of every kind, whose livelihood depends upon the labors of their hands.[1]

Tradesman. Cannot be restricted to mean traders, in the large sense of our bankrupt laws. Most often synonymous with shopkeeper.[2]

Was imported from the English bankrupt act, and refers to a smaller merchant or shopkeeper.[3] See MERCHANT; PEDDLER.

An agreement in general restraint of trade is illegal and void. An agreement which operates merely in *partial* restraint is good, provided it be not unreasonable and there be a consideration to support it. In order that it may not be unreasonable, the restraint must not be larger than is required for the necessary protection of the party with whom the contract is made. The application of the rule is somewhat difficult. A contract not to exercise a trade in a particular State is generally held to be invalid, on the ground that it would compel a man to transfer his residence and allegiance to another State in order to pursue his vocation. The cases are to be judged according to their circumstances. The grounds of the rule are, further: the injury to the public by being deprived of the restricted party's industry; and the injury to the party himself by being prevented from supporting himself and his family. Both these evils occur when the contract is *general*—not to pursue the trade at all, or in the entire country. But if neither evil ensues, and the contract is founded on a valuable consideration and a reasonable ground of benefit to the other party, it is free from objection. A stipulation by a vendee of any trade, business, or establishment, that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as not to interfere with the value of the trade, business, or thing purchased, is reasonable and valid. So also is a stipulation by a vendor of an article to be used in a business in which he is himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with his business. The point of difficulty is to determine what is a reasonable distance. This must depend upon the circumstances of the particular case. If the distance be such that the business cannot possibly be affected, the stipulation is unreasonable.[4]

It was one of the most ancient rules of the common law that all contracts in restraint of trade were void. This was settled law in England as early as 1415, and its courts would not then tolerate the least infraction of the rule. It was enforced with severity, and doubtless grew out of the law of apprenticeship, under which no one could earn a livelihood at any trade until after long service, and then he must continue in the

[1] Chapman *v.* Ferry, 18 F. R. 540 (1883), Deady, J.

[2] Edwards *v.* Derrickson, 28 N. J. L. 45 (1859).

[3] [The Nymph, 1 Sumn. 518 (1834), Story, J.

[4] [Whitcomb *v.* Reid, 31 Miss. 569 (1856): Webster.

[5] May *v.* Sloan, 101 U. S. 237 (1879), Bradley, J.

[6] Atwood *v.* De Forest, 19 Conn. *517 (1849), Hinman, J.: 40 *id.* 109; 44 *id.* 99 (1876); 11 Metc. 79; 6 Gray, 298; 23 Iowa, 359.

[7] *Re* Ragsdale, 7 Biss. 155 (1876), Gresham, J.

[8] [*Re* Smith, 2 Low. 70 (1871); 80 N. C. 479; 4 B. & A. 514.

[9] Sylvester *v.* Edgecomb, 76 Me. 500 (1884), Peters, Chief Justice.

[1] Richie *v.* McCauley, 4 Pa. 472 (1846), Bell, J.

[2] *Re* Coté, 2 Low. 376-77 (1874), Lowell, J.; *Re* Smith, *ib.* 70 (1871); 9 Bened. 66, 309, 311.

[3] *Re* Stickney, 5 Dill. 91 (1878), Dillon, Cir. J.; R. S. § 5110.

[4] Oregon Steam Navigation Co. *v.* Winsor, 20 Wall. 66-69 (1873), cases, Bradley, J.

one adopted or have none. For two hundred years the rule existed, without exception, that all contracts in restraint of trade were void. It was qualified, however, as the law of apprenticeship broadened; and a distinction was then drawn by the cases of *Broad* v. *Jollyfe*, 3 Cro. Jac. 596 (1623), and *Mitchel* v. *Reynolds*, 1 P. Wms. 181 (1711), between a general and a limited restraint of trade. Other decisions followed, until it became the settled English rule that while a contract not to do business anywhere is void, one stipulating not to do so in a particular place, or within certain limits, is valid. This has always been the rule in this country, and the wisdom of it cannot be doubted. It is eminently suited to the genius of our institutions. It prevents building up monopolies and the creation of exclusive privileges. Contracts in general restraint of trade produce them; they tend to destroy industry and competition, thus enhancing prices and diminishing the products of skill and energy; they impair the means of livelihood and injure the public, by depriving it of the services of men in useful employments. This reasoning, however, does not apply to such contracts as impose a special restraint; as, not to carry on trade at a particular place, or with certain persons, or for a limited reasonable time. Indeed, a particular trade may be promoted by being limited for a short period to few persons, and the public benefited by preventing too many from engaging in the same calling at the same place. If, therefore, the limitation be a reasonable one, it will be upheld.[1]

A contract not to engage in a business, directly or indirectly, for five years, may not extend to isolated acts, or to occasional services voluntarily rendered in good faith for the accommodation of another; nor will it include a subordinate employment not affecting the management of the business nor directly influencing custom.[2]

A covenant to retire from business "so far as the law allows" was held to be too vague to be enforced.[3]

See ART, 3; BUSINESS; COMBINATION, 2; CONDITION; DISTRESS; MANUFACTURE; MONOPOLY; TOOLS.

See especially TRUST, 2.

Trade-dollar. See COIN.

[1] Sutton *v.* Head, 85 Ky. — (1888), cases. The grantee under a deed containing a condition that intoxicating liquors should not be retailed on the premises claimed that the contract was in restraint of trade, and void.

[2] Nelson *v.* Johnson, 38 Minn. — (1888), cases.

[3] Davies *v.* Davies, 58 Law T. R. 209 (1887).

See generally Oregon Steam Nav. Co. *v.* Hale, 1 Wash. T. 284 (1870), cases; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. 184–85 (1871), cases; Smith's Appeal, 113 *id.* 590 (1886); Albright *v.* Teas, 37 N. J. E. 171 (1883); Mandeville *v.* Harman, 42 *id.* 185 (1886), cases; Diamond Match Co. *v.* Roeber, 106 N. Y. 473 (1887), cases; Sharp *v.* Whiteside, 19 F. R. 156, 164 (1883); Rousillon *v.* Rousillon, 37 Eng. R. 39, 49–53 (1880), cases; 26 Alb. Law J. 284 (1882), cases; 35 *id.* 165, 282 (1887), cases; 19 Cent. Law J. 202–8 (1884), cases; 26 *id.* 595–99 (1888), cases; 24 Am. Law Reg. 217–30, 281–96 (1885), cases; 26 *id.* 389–91 (1887), cases; 18 Cent. Law J. 387–89 (1884),—Irish Law Times; 92 Am. Dec. 751–65, cases.

Trade-fixture. See FIXTURE.

Trade-talk. See COMMENDATIO, Simplex.

TRADE-MARK. A mark by which one's wares are known in trade.[1]

A word, mark, or device adopted by a manufacturer or vendor to distinguish his production from other productions of the same article.[2]

Every one is at liberty to affix to a product of his own manufacture any symbol or device, not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any excellence he may have given the product. The symbol or device thus becomes a sign to the public of the origin of the goods, and an assurance that they are the genuine article of the original producer.[3]

But letters or figures, which indicate quality merely, and which cannot indicate, by their own meaning or by association, origin or ownership, cannot be appropriated: as, for example, "A. C. A. ticking."[3]

May consist of a name, a device, or a peculiar arrangement of words, lines, or figures, in the form of a label, which has been adopted and used by a person in his business to designate goods of a particular kind manufactured by him, and which no other person has an equal right to use.[4]

Numbers arbitrarily chosen will be protected as trade-marks, unless they are already in use by another person and known to the trade.[5]

Words or devices may be adopted as trade-marks which are not the original inventions of him who adopts them. Property in them has little analogy to that in copyrights or in patents for inventions. Words in common use, with some exceptions, may be adopted, if, at the time, they are not employed to designate the same, or like articles. The office of a trade-mark is to point out distinctively the origin, or ownership of the article. Unless the mark so points to the origin or ownership, neither can he who first adopted it be injured by any appropriation of it by others nor can the public be deceived. No one can use exclusively a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself; otherwise

[1] [Shaw Stocking Co. *v.* Mack, 12 F. R. 710 (1882); 14 *id.* 252; 31 *id.* 280.

[2] Hostetter *v.* Fries, 17 F. R. 622 (1883), Wallace, J.

[3] Amoskeag Manuf. Co. *v.* Trainer, 101 U. S. 53, 56 (1879), Field, J. Compare Menendez *v.* Holt, *post*.

[4] Gilman *v.* Hunnewell, 122 Mass. 147 (1877), Gray, C. J. See also Smith *v.* Walker, 57 Mich. 474 (1885); 45 Cal. 478; 54 Ill. 456; 97 Mass. 297; 1 Mo. Ap. 310; 51 N. Y. 193; 61 *id.* 228; 2 Saw. 86.

[5] American Button Co. *v.* Anthony, Sup. Ct. R. I. (1887): 26 Am. Law Reg. 173 (1888); *ib.* 176–79, cases.

the public would be injured, for competition would be destroyed. Neither can a generic name, nor a name merely descriptive of an article of trade, its qualities, ingredients, or characteristics, be employed as a trade-mark and the exclusive use be protected. Nor can geographical names, designating districts of the country, be so appropriated: they cannot point to a personal origin or ownership; besides, their appropriation would result in mischievous monopolies. Hence, no one can exclusively use the expressions "Pennsylvania wheat," "Kentucky hemp," "Virginia tobacco," "Lackawanna coal," "Brooklyn white lead," or "Akron cement." It is only when the adoption or imitation of any such geographical name amounts to a false representation that there is any title to relief.[1]

A combination of words from a foreign language, in order to designate merchandise as of a certain standard and uniformity of quality, may be protected as a trade-mark.[2]

A party is not, in general, entitled to the exclusive use of a name, merely as such, without more. Instead of that he cannot have such a right, even in his own name, as against another person of the same name, unless the latter uses a form of stamp or label so like that used by the complaining party as to represent that the goods of the former are of the latter's manufacture.[3]

There is a general consensus of opinion that the use of a personal name in a fair, honest, and ordinary business manner cannot be prevented, even if damage results therefrom. The cases in which uses have been regulated exhibit a conscious, intentional, fraudulent misrepresentation, or such a combined use of the name with other marks, characters, figures, or form and arrangement of circulars, advertisements, etc., as amounts to a false representation, in which latter case only the combination has been enjoined.[4]

No person can appropriate to himself exclusively any word or expression properly descriptive of an article, its qualities or ingredients. Whether a name is descriptive or arbitrary depends upon the circumstances of each case.[5]

The exclusive right to any authorized trade-mark has long been recognized by common law, the chancery courts, and State statutes. It is a property right, for the violation of which damages may be recovered, and the continuance of the violation enjoined. The whole system of trade-mark property, and the remedies for its protection, existed before any act of Congress providing for the registration of trade-marks in the patent-office. . . A trade-mark is neither an invention, a discovery, nor a writing. At common law the exclusive right to it grew out of its *use*, not from its mere adoption. It is simply founded on priority of appropriation. Like the great body of the rights of person and of property, property in trade-marks rests on the laws of the States. If an act of Congress can be extended, as a regulation of commerce, to trade-marks, it must be limited to their use in "commerce with foreign nations, and among the several States, and with the Indian tribes." The legislation of August 14, 1876 (19 St. L. 141), is not a regulation thus limited, but embraces all commerce, including that between citizens of the same State, and, since it cannot be confined to such commerce as is subject to the control of Congress, it is void for want of constitutional authority.[1]

The act of Congress of March 3, 1881, provides, sec. 1, that: "Owners of trade-marks used in commerce with foreign nations, or with the Indian tribes, provided such owners shall be domiciled in the United States, or located in any foreign country, or tribes which by treaty, convention or law, affords similar privileges to citizens of the United States, may obtain registration of such trade-marks (1) by causing to be recorded in the patent-office a statement specifying the name, domicil, location, and citizenship of the party applying; the class of merchandise and the particular description of goods comprised in such class to which the particular trade-mark has been appropriated; a description of the trade-mark itself, with fac similes thereof, a statement of the mode in which the same is applied and affixed to goods, and the length of time during which the trade-mark has been used; (2) by paying into the treasury of the United States the sum of twenty-five dollars, and complying with such regulations as may be prescribed by the commissioner of patents."

Sec. 2. "That the application prescribed in the foregoing section must, in order to create any right in favor of the party filing it, be accompanied by a written declaration verified by the person, or by a member of a firm, or by an officer of a corporation applying, to the effect that such party has at the time a right to

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[1] Delaware & Hudson Canal Co. *v.* Clark, 13 Wall. 322-27 (1871), cases, Strong, J., deciding that "Lackawanna Coal" could not be made a trade-mark. See Evans *v.* Von Laer, 32 F. R. 153 (1887) — "Motserrat Lime-Fruit Juice;" Goodyear Case, 128 U. S. 598 (1888).

[2] Menendez *v.* Holt, 128 U. S. 520 (1888), holding that "La Favorita Flour" could be used as a trade-mark, and not come within the rule in Amoskeag Manufacturing Co. *v.* Trainer, *ante*.

[3] McLean *v.* Fleming, 96 U. S. 252 (1877), cases, Clifford, J. See also Faber *v.* Faber, 49 Barb. 358 (1867); Meneely *v.* Meneely, 62 N. Y. 430 (1875), cases; Gilman *v.* Hunnewell, 122 Mass. 148 (1877), cases; Rogers Manuf. Co. *v.* Rogers & Spurr Manuf. Co., 11 F. R. 495 (1882), cases.

[4] Rogers *v.* Rogers, 53 Conn. 156 (1885), cases; Rogers Manuf. Co. *v.* Simpson, 54 *id.* 527, 565-69 (1886), cases; Brown Chemical Co. *v.* Meyer, 31 F. R. 454 (1887), cases; Massam *v.* Thorley's Cattle Food Co., 37 Eng. R. 71-99 (1880), cases.

[5] Selchow *v.* Baker, 93 N. Y. 63-64 (1883), holding that "Sliced Animals," applied to games for children, could be appropriated.

[1] Trade-Mark Cases, 100 U. S. 82, 92-99 (1879), Miller, J. One Steffens was indicted for counterfeiting the trade-mark of Mumm & Co., of Rheims, France, contrary to the fourth and fifth sections of the act of August 14, 1876; one Wittemann, for imitating the trade-mark of the makers of a "Pelper Heidsick" champagne wine, of the same place; and one Johnson, for imitating the trade-mark "O K" of a brand of whiskey.

the use of the trade-mark to be registered, and that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that such trade-mark is used in commerce with foreign nations or Indian tribes, as above indicated; and that the description and fac similes presented for registry truly represent the trade-mark sought to be registered."

Sec. 3. "That the time of the receipt of any such application shall be noted and recorded. But no alleged trade-mark shall be registered unless the same appears to be lawfully used as such by the applicant in foreign commerce or commerce with Indian tribes as above mentioned or is within the provision of a treaty, convention, or declaration with a foreign power; nor which is merely the name of the applicant; nor which is identical with a registered or known trade-mark owned by another and appropriate to the same class of merchandise, or which so nearly resembles some other person's lawful trade-mark as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers. In an application for registration the commissioner of patents shall decide the presumptive lawfulness of claim to the alleged trade-mark; and in any dispute between an applicant and a previous registrant, or between applicants, he shall follow, so far as the same may be applicable, the practice of courts of equity of the United States in analogous cases."

Sec. 4. Certificates of registry are issued in the name of the United States, under the seal of the department of the interior, and signed by the commissioner of patents. Copies of trade-marks, statements, and certificates of registry are evidence in suits.

Sec. 5. A certificate of registry shall remain in force for thirty years from its date; except as to trade-marks protected under the laws of a foreign country for a shorter period, in which case the certificate shall cease to have force here at the time the mark ceases to be exclusive property elsewhere. Within six months prior to the end of the first thirty years, registration may be renewed on the same terms, and for a like period.

Sec. 6. Applicants are entitled to credit for fees paid under former acts.

Sec. 7. "Registration of a trade-mark shall be *prima facie* evidence of ownership. Any person who shall reproduce, counterfeit, copy or colorably imitate any trade-mark registered under this act and affix the same to merchandise of substantially the same descriptive properties as those described in the registration, shall be liable to an action on the case for damages for the wrongful use of said trade-mark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of such trade-mark used in foreign commerce or commerce with Indian tribes, as aforesaid, and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful act; and courts of the United States shall have original and appellate jurisdiction in such cases without regard to the amount in controversy."

Sec. 8. "No action shall be maintained under the provisions of this act in any case when the trade-mark is used in any unlawful business, or upon any article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise, or under any certificate of registry fraudulently obtained."

Sec. 9. Any person who procures the registry of a trade-mark by any false or fraudulent representation or means shall be liable to pay any damages sustained in consequence, to the injured party, by an action on the case.

Sec. 10. The act does not give cognizance to any court of the United States in a suit between citizens of the same State "unless the trade-mark is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe."

Sec. 12. The commissioner of patents is authorized to make rules and regulations for the transfer of rights to trade-marks.

Sec. 13. "Citizens and residents of this country wishing the protection of trade-marks in any foreign country, the laws of which require registration here as a condition precedent to getting such protection there, may register their trade-marks for that purpose as is above allowed to foreigners, and have certificate thereof from the patent-office."[1]

The act of August 5, 1882, provides that nothing contained in the foregoing act "shall prevent the registry of any lawful trade-mark rightfully used by the applicant in foreign commerce or with Indian tribes at the time of the passage of said act."[2]

Search-warrants for counterfeit dies, plates, trade-marks, colorable imitations, labels, wrappers, empty cases, bottles, etc., upon oath of knowledge or belief that the same are in the possession of any person for deception and fraud, or that originally genuine trade-marks are not so defaced or destroyed as to prevent fraudulent use, are issuable by a judge of the district or circuit court, or a commissioner of a circuit court. Further proceedings are as under the law relating to search-warrants, *q. v.* After proof made, the articles seized are to be destroyed.[3]

A trade-mark is an entirety, and incapable of exclusive use at different places by more than one independent proprietor. Right thereto is forfeited, if deceptively used to designate a spurious article. Relief is given for infringement upon the ground that one man is not allowed to offer his goods for sale, representing them as the manufacture of another. Two marks are substantially the same when the resemblance is such as to deceive ordinary purchasers, giving such attention as people usually give, and to cause them to purchase one manufacture supposing it to be the other.[4]

[1] 21 St. L. ch. 128, pp. 502–4. See act 14 Aug. 1876: 1 Sup. R. S. 241; R. S. Title IX, ch. 2, §§ 4937–47.

[2] 22 St. L. ch. 393, p. 298.

[3] Act 14 Aug. 1876: 1 Sup. R. S. 241–42. Prior to that was the act of 8 July, 1870.

[4] Gorham Manuf. Co. *v.* White, 14 Wall. 528, 511 (1871), Strong, J.; McLean *v.* Fleming, 96 U. S. 245 (1877); Manhattan Medicine Co. *v.* Wood, 4 Cliff. 478, 488 (1878) cases; Singer Manuf. Co. *v.* Loog, 48 L. T. 3 (1882).

To constitute an infringement, exact similitude is not required. If the form, marks, contents, words, or the special arrangement of the same, or the general appearance of the alleged infringer's device, is such as would be likely to mislead one in the ordinary course of purchasing the goods, and induce him to suppose that he was purchasing the genuine article, the similitude is such as entitles the injured party to equitable protection, if he takes reasonable measures to assert his rights, and to prevent their continued invasion.[1]

"Cellonite" is enough like "celluloid" to mislead the ordinary purchaser. The fact that a registered word becomes a common appellative cannot impair rights acquired in it. Others may use the word to designate the product, but not as a trade-mark.[2]

The owner of a trade-mark which is affixed to articles manufactured at his establishment may, in selling the latter, transfer to the purchaser the right to use the trade-mark.[3]

A partnership trade-mark is part of the good-will and an asset of the firm, salable, on dissolution, like any other asset. After dissolution, either partner may continue to use the mark, unless he has divested himself of such right. But neither, except by agreement, can use the name of the other.[4]

As an abstract right, apart from the article manufactured, it cannot be sold, for the transfer would be productive of fraud upon the public; but in connection with the article produced, it may be bought and sold like other property, individual or partnership.[5]

Where consent by the owner (a former partner) to the use of his trade-mark by another (a new partner) is to be inferred from his knowledge and silence merely, "it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license."[6]

TRADES-UNIONS. A combination by employers or employees to regulate the price of labor is, within limits, valid at common law; but, carried to violence in any phase, is illegal.[7]

Statute 6 Geo. IV (1826), c. 129, placed such combinations, on the part of the employers chiefly, under a rigorous restraint, making criminal threats to force a workman to leave his employment.[8]

Under statutes 22 Vict. (1859), c. 34, 32 and 33 Vict. c. 61, and 34 and 35 Vict. c. 31, trades-unions are recognized as legal associations, with objects they may endeavor to secure by pecuniary and other means of supporting strikes, and the like, so long as they do not resort to open or secret violence, or to threats, intimidation, rattening, or the like.[1] See BOYCOTTING; COMBINATION, 2; CONSPIRACY; STRIKE, 2.

TRADITION. See DELIVERY, 1, 4.

TRAFFIC. The passing of goods or commodities from one person to another for an equivalent in goods or money; and a "trafficker" is one who traffics — a trader, a merchant.[2]

It is as much traffic to deal in a commodity by wholesale as at retail.[3] See CARRIER; COMMERCE.

TRAIN. See NEGLIGENCE; OBSTRUCT, 1; PASSENGER; RAILROAD.

TRAITOR. See TREASON.

TRAMP. A wandering, homeless vagabond.

Tramps are "persons who rove about from place to place begging, and all vagrants living without visible means of support who stroll over the country without lawful occasion."[4] See VAGRANT.

TRAMWAY. See DRAYAGE.

TRANSACTION. Whatever may be done by one person which affects another's rights, and out of which a cause of action may arise.[4]

Is broader than "contract." A contract is a transaction, but a transaction is not necessarily a contract.[5]

In a statute limiting counter-claims to demands arising out of the same transaction: some commercial or business negotiation; not, a wrong of violence or fraud.[6] See RELATION, 1; RES, Gestæ.

TRANSCRIPT.[7] 1, *n.* A copy of an original record.[8]

A transcript of a record on appeal or writ of error is only a copy of the record.[9]

2, *v.* To copy or to copy officially. Whence transcripted. See COPY.

TRANSFER. 1, *v.* To take from one court to another; to remove, *q. v.*

To convey or pass over the right of one person to another.[10]

[1] McLean *v.* Fleming, 96 U. S. 253 (1877), cases, Clifford, J. See also Manhattan Medicine Co. *v.* Wood, 4 Cliff. 478 (1878), cases; Alexander Brothers *v.* Morse, 14 R. I. 153 (1884); Goodyear Case, 128 U. S. 604 (1888).

[2] Celluloid Manuf. Co. *v.* Cellonite Manuf. Co. 32 F. R. 94 (1887).

[3] Kidd *v.* Johnson, 100 U. S. 620 (1879), cases.

[4] Hazard *v.* Caswell, 93 N. Y. 264–65 (1883), cases.

[5] Morgan *v.* Rogers, 19 F. R. 597 (1884), cases. See generally 12 F. R. 704–6, 717–19 (1882), cases; 18 Cent. Law J. 107–8 (1884), cases; on assigning, Hoxie *v.* Cheney, 143 Mass. 592 (1887), cases.

[6] Menendez *v.* Holt, 128 U. S. 524 (1888), cases.

[7] *Rex v.* Batt, 25 E. C. L. *425 (1834).

[8] Walsby *v.* Anley, 107 E. C. L. *521 (1861).

[1] Regina *v.* Druitt *et al.*, 10 Cox, Cr. C. 600 (1867); Regina *v.* Shepherd, 11 *id.* 325 (1869).

[2] Senior *v.* Ratterman, 44 Ohio St. 673 (1887), Spear, J.; Ohio Const., Sch. 18; Dow Law — Act 14 May, 1886.

[3] N. Y. Act 1885, ch. 490, § 2.

[4] Scarborough *v.* Smith, 18 Kan. 406 (1877), Valentine, Judge.

[5] Roberts *v.* Donovan, 70 Cal. 113 (1886); Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 389 (1858).

[6] Barhyte *v.* Hughes, 33 Barb. 321 (1861), Clerke, J. See also 17 F. R. 631; 49 E. C. L. *537.

[7] L. *trans-scriptum*, copied from one to another.

[8] Dearborn *v.* Patton, 4 Oreg. 60 (1870), Prim, C. J.

[9] Cavender *v.* Cavender, 3 McCrary, 384 (1882).

[10] Innerarity *v.* Mims, 1 Ala. 669 (1840). See 2 Bl. Com. 10.

2, n. There is no meaning of the word which carries the idea of an act of extinction, or any other idea than that of the bearing over of a right or title to property in a thing from one to another.[1]

In a declaration on a note, implies a passing of the beneficial interest, but not necessarily of the legal title.[2]

Foreclosure of a mortgage and the becoming absolute of the title in the mortgagee by the failure to redeem constitute a "transfer" of the property, in the sense of a statute providing that the real estate of any tax-payer shall be liable until a transfer thereof is made.[3]

Transferable. Includes every means by which property may be passed from one person to another.[4] Also spelled transferrible.

Non-transferable. Not admitting of transfer to another person.

Transferrer or **transferror.** He by whom a transfer, an assignment, or a conveyance is made. **Transferee.** The recipient in any such case.

See further ABANDON, 1; ASSIGN, 2; BEARER; CONVEYANCE, 2; DELIVERY, 1; INDORSE, 2; SECURITY; STOCK, 3; TRANSFERRE.

TRANSFERRE. L. To convey over; to make over, assign, convey, transfer.

Nemo plus juris ad alium transferre potest quam ipse habet. No one more right to another can transfer than he himself possesses. One cannot sell, grant, or give away a right or interest superior to that vested in him.[5] Compare DARE, Nemo dat, etc.

But the holder of negotiable paper who cannot himself recover upon it as against the rightful owner, by transferring it in good faith, for value, and before it is due, may make it available in the hands of his assignee. And a consignor, by indorsing and delivering the bill of lading to the consignee, puts it in the power of the latter to transfer property to a *bona fide* purchaser for value, and thus defeat his own original right of stoppage *in transitu*. See LADING, Bill of; NEGOTIATE, 2.

TRANSGRESSION. See CRIME; TRESPASS.

TRANSIENT. Going or passing over; moving about.

Transient foreigner. One who visits a country without intention of remaining.[1]

Transient person. Not exactly a person on a journey from one known place to another, but rather a wanderer ever on the tramp.[2]

Transitive. Passing over to another.

A transitive, as opposed to an *intransitive*, covenant, is an obligation which devolves also upon the covenantor's representatives.

Transitory. Following the person.

A transitory, as distinguished from a *local*, action, rests upon a transaction which might have taken place anywhere. See ACTION, 2; TRANSIRE.

TRANSIRE. L. To go across; to pass over, pass to another person, place, thing, or state.

A *transire* is a custom-house permit to let goods pass or be removed.

Transit in rem judicatam. It passes into a matter adjudicated, *q. v.*

Transit terra cum onere. Land passes with the burden — is conveyed subject to its incumbrance. See ONUS, Cum onere.

Transitu. See STOPPAGE, In transitu.

TRANSLATION. The act of rendering or the fact of being rendered into another language; also, that which is so rendered.

1. The testimony of a witness who cannot make himself understood in English is delivered aloud in open court to a sworn interpreter, who translates the oath, the questions and answers.[3]

2. When language which is alleged to be defamatory is expressed in a foreign tongue, the plaintiff should file a translation, except as to words which have become anglicised — and the court may define these to the jury.[4]

The words should be set out in the foreign language, and followed by a translation averred to be correct.[5]

3. A translator may copyright his translation. It is no infringement of the copyright to translate a work which the author has already had translated and copyrighted.[6]

TRANSMISSION. See DESCENT.

TRANSPORT. To carry, convey,[7] from one place to another.

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[1] Sands *v.* Hill, 55 N. Y. 22 (1873), Folger, J.; Robertson *v.* Wilcox, 36 Conn. 429 (1870).

[2] Montague *v.* King, 37 Miss. 443 (1859), Handy, J.

[3] Waterbury Savings Bank *v.* Lawler, 46 Conn. 244 (1878), Loomis, J. See generally, on the transfer of land, 2 Am. Law Rev. 12-32 (1886).

[4] Gathercole *v.* Smith, 17 Ch. Div. 9 (1881), Lush, L. J.

[5] 10 Pet. 161, 175; 64 Pa. 371.

[1] Yates *v.* Iams, 10 Tex. 170 (1853), Hemphill, C. J.

[2] Middlebury *v.* Waltham, 6 Vt. 208 (1834), Mattocks, J.

[3] See Amory *v.* Fellowes, 5 Mass. 225 (1809).

[4] See Gibson *v.* Cincinnati Inquirer, 2 Flip. 125 (1877), Odgers, Sl. & Lib. 109-10, cases.

[5] Pelzer *v.* Benish, 67 Wis. 291 (1886); 61 *id.* 626.

[6] Stowe *v.* Thomas, 2 Wall. Jr. 547, 566, 568 (1853); Emerson *v.* Davies, 3 Story, 780 (1845); Shook *v.* Rankin, 6 Biss. 477 (1875).

[7] United States *v.* Sheldon, 2 Wheat. 120 (1817).

Transportation. Carrying or sending to another place or country.

1. May include other modes of moving or removing property than by "carrying," as that word is ordinarily understood.

Thus, it will include taking petroleum from one place to another by means of pipes laid under ground.[1]

In the Inter-State Commerce Act of February 4, 1887, "includes all instrumentalities of shipment or carriage." See COMMERCE; TAX, 2.

2. Sending a convict to another country as punishment.[2] See SERVITUDE, 1, Penal.

TRAVEL. Has no precise or technical meaning when used without limitation. Its primary and general import is to pass from place to place, whether for pleasure, instruction, business, or health.[3]

The length of the journey or its continuance does not destroy the character of the occupation.[4]

1. The purpose for which towns are compelled to construct highways and bridges and keep them in repair is to promote the comfort and convenience and insure the safety of "travelers"—persons who have lawful occasion to pass over them upon business or for pleasure. "Travelers," in this connection, is to be interpreted in the light of knowledge common to all, gained from observation and experience, as to the manner in which people are accustomed to use highways; that is, is to be so interpreted as to permit a convenient and beneficial use.[5]

In a statute giving a right of action for an injury caused by defects in a highway, "traveler" means every one, whatever his age or condition, who has occasion to pass over the highway for any purpose of business, convenience, or pleasure, irrespective of the motive or object with which a way is thus used, if it be not unlawful. Not, then, a gymnast performing feats, nor a boy sliding down a hill.[6]

Walking for exercise is not traveling.[6]

2. Within the meaning of a law allowing a person traveling to carry concealed weapons, the traveling must be on a journey—beyond the ordinary habit, business, or duties of the person and beyond the circle of his friends or acquaintances.[7]

3. One who has been carried by steamboat, and walks eight miles from the landing to his home, is not, while walking, within the meaning of a policy of insurance, "traveling by public or private conveyance."[1]

4. As to what is traveling within the meaning of Sunday laws, see SUNDAY.

See also ACCIDENT; GUEST; INN; JOURNEY; OBSTRUCT, 1; OPEN, 1 (7); ROAD, 1; WAY, Public.

TRAVERSE.[2] Denial; denial of a fact alleged by one's opponent, or of an allegation in an indictment.[3]

A traverse is a denial on one side of some matter of fact before alleged on the other side; and regularly tenders an issue of fact. It applies to the declaration, plea, replication, or other pleading. The general issue is but a compendious traverse of the whole complaint. A technical traverse is preceded by introductory affirmative matter — matter of inducement; as that is general or special so is the traverse. An example of a "general technical traverse" is a replication *de injuria;* an example of a "special technical traverse" is a traverse beginning with the words *absque hoc*, without this, or *et non*, and not. A common traverse is simply a direct denial, in common negative language. This is the more eligible mode, since it is simple, direct, and produces an issue sooner. It always concludes to the country, *q. v.;* whereas, the *absque hoc* traverse concludes, in most cases, with an averment.

Illustration of a traverse *absque hoc:* Plea — A devised to me, B. Replication — A died intestate, and his title is in me, C, his heir: *absque hoc*, A devised to B. Here the averment of intestacy and heirship introduces the special traverse, and the "absque hoc" denies the devise in the words in which it is alleged.

A traverse *absque tali causa*, without such cause, is, at common law, a traverse of a plea in tort. It denies the matter pleaded and avers that the defendant of his own wrong (*de injuria sua propria*) and "without such excuse" (*absque tali causa*) as is set forth in his plea, committed the trespass. This formula was devised as an abridgment of the replication.[4] See further REPLICATION, De injuria.

Traverse jury. A common jury, which finds the fact in dispute, as opposed to the grand jury, *q. v.*

Traverse of office. Proving that an inquisition made by an escheator is defective or not true. See INQUEST, Of office.

TREASON.[5] Betrayal, treachery, breach of faith or allegiance.[6]

Traitor. One who breaks faith, or betrays a trust; one guilty of treason.

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[1] Columbia Conduit Co. *v.* Commonwealth, 90 Pa. 307 (1879); 93 U. S. 185; 94 *id.* 1, 6.

[2] [4 Bl. Com. 371, 377.

[3] Lockett *v.* State, 47 Ala. 45 (1872), Peters, J.

[4] Ward *v.* North Haven, 43 Conn. 154 (1875), Pardee, Judge.

[5] Blodgett *v.* Boston, 8 Allen, 240 (1864), Bigelow, C. J. See also 59 Me. 217; 63 *id.* 468; 67 *id.* 167; 107 Mass. 347; 110 *id.* 21; 58 N. H. 14, 431, cases.

[6] Hamilton *v.* Boston, 14 Allen, 475 (1867), cases, Gray, J.; Baker *v.* Worcester, 139 Mass. 74 (1885).

[7] Gholson *v.* State, 53 Ala. 530 (1875); Coker *v.* State, 63 *id.* 95 (1879); Carr *v.* State, 34 Ark. 448 (1879); Rice *v.* State, 10 Tex. Ap. 288 (1881); Smith *v.* State, 42 Tex. 464 (1875); Burst *v.* State, 89 Ind. 128 (1883); 25 Am. R. 654-56, cases.

[1] Ripley *v.* Insurance Co., 16 Wall. 336 (1872).

[2] *Trăv'-erse.* F. *traverser*, to thwart: L. *trans-versus*, turned across.

[3] [3 Bl. Com. 313; 4 *id.* 351.]

[4] See Gould, Plead. 349-53; Stephen, Pl. 163, 264; 18 N. J. L. 352; 29 *id.* 513; 55 Vt. 261.

[5] F. *traison:* L. *traditio*, giving over, surrendering.

[6] [4 Bl. Com. 75.

Treason may exist only as between allies: it is a general appellation to denote not only offenses against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation, and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of the superior. Therefore, for a wife to kill her husband, a servant his master, an ecclesiastic his ordinary, these being breaches of the lower allegiance of private and domestic faith, are denominated **petit treasons.** But when disloyalty attacks majesty itself it is called, by way of distinction, **high treason,** equivalent to the *crimen læsæ majestatis* of the Romans.[1]

High treason is the most heinous civil crime a man can commit. If indeterminate, this alone is sufficient to make any government degenerate into arbitrary power. By the ancient common law great latitude was left to the judges to determine what was treason: whereby the creatures of tyrannical princes had opportunity to create constructive treasons; that is, to raise, by forced and arbitrary constructions, offenses into the crime of treason which were not suspected to be such. To prevent this, the Statute of Treasons, 25 Edw. III (1352), c. 2, defined what offenses should be held to be treason. All kinds are now comprehended under seven branches.[2] . . The third species is "levying war against our lord the king, in his realm." This may be done by taking arms, not only to dethrone the king, but under pretense to reform religion or the laws, or to remove evil counsellors, or other grievances, real or pretended. To resist the king's forces by defending a castle against them is levying war; so is an insurrection with a design to pull down all enclosures, all brothels, etc., the universality of the design making it a rebellion against the state, an usurpation of the powers of government, an insolent invasion of the king's authority. But a tumult with a view to pull down a particular house amounts at most to a *riot*, this being no general defiance of public government.[3] . . The fourth species is "adhering to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere." This must likewise be proved by some overt act, as by giving them intelligence, sending them provisions, selling them arms, treacherously surrendering a fortress, or the like. By "enemies" are here understood the subjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, invading our coasts without open hostilities between their nation and ours, and without commission from any prince or state at enmity with the crown, giving them any assistance is also clearly treason. But to relieve a "rebel" fled out of the kingdom is no treason; for the statute is taken strictly, and a rebel is not an "enemy;" an enemy being always the subject of some foreign prince, and owing no allegiance to the crown of England. And if a person be under actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with rebels or enemies in the kingdom, provided he leaves them whenever he has a safe opportunity.[1]

Another species of high treason, under the statute, was counterfeiting the king's seal or his coin,—an offense reduced to felony by 2 Will. IV (1832), c. 34.[2]

The consequences of conviction of high treason were: death by hanging (anciently, decapitation and quartering); attainder, and forfeiture of estate, with corruption of the blood of descendants.[3]

"Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."

"No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

"The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."[4]

By the last clause, the cruel feature of the old law, which punished the traitor in the persons of his descendants, was forever removed.

Act of April 30, 1790, c. 9, § 1, provides that every person owing allegiance to the United States, who levies war against them, or adheres to their enemies, giving them aid and comfort, is guilty of treason; and shall suffer death, or, at the discretion of the court, shall be imprisoned at hard labor for not less than five years, and fined not less than ten thousand dollars, to be collected of such property as is owned at the time of committing such treason; with incapacity to hold office under the United States.[5]

The principal treasonable offenses are: misprision of treason; inciting or engaging in rebellion or insurrection; criminal correspondence with foreign governments; seditious conspiracy; recruiting men to serve, and enlisting to serve, against the United States.[6]

Treason, being a breach of allegiance, can be committed only by him who owes allegiance, perpetual or temporary.[7]

Having been defined by the Constitution, Congress can neither extend nor restrict the crime; its power

[1] 4 Bl. Com. 75-76.
[2] 4 Bl. Com. 75-76, 203.
[3] 4 Bl. Com. 81-82.

[1] 4 Bl. Com. 82-83.
[2] 4 Bl. Com. 83-84, 89.
[3] 4 Bl. Com. 92-93. See Trial of Sidney, 9 St. Tr. 817 (1683).
[4] Constitution, Art. III, sec. 3.
[5] R. S. §§ 5331-32.
[6] R. S. §§ 5333-38.
[7] United States v. Wiltberger, 5 Wheat. 97 (1820).

is limited to prescribing the punishment. In it all are principals.[1]

A mere conspiracy by force to subvert the established government is not treason: there must be an actual levying of war — men assembled with intent to effect by force a treasonable purpose. Then, all who perform any act, however minute or remote from the scene of action, and who are actually leagued in the general conspiracy, are traitors. In every case proof of some overt act is absolutely necessary; an intention to commit the crime is distinct from actual commission.[2]

A person may commit treason toward the State in which he resides, since he also owes allegiance to it. The definitions and laws of the various States follow, in substance, the foregoing definition, enactments, and constructions. A notable case was the trial, conviction, and execution of John Brown, in Virginia, in 1860.[3]

See further AID AND COMFORT; ATTAINDER; ENEMY; FELONY; LEVY, 1; REBEL; SEDITION; WAR.

TREASURE-TROVE.[4] Where any money, coin, gold, silver, plate, or bullion is found hidden *in* the earth, or other private place, the owner thereof being unknown.[5]

At common law, treasure-trove belonged to the king; treasure found upon the earth to the finder.[6]

Though commonly defined as gold or silver hidden in the ground, includes their paper representatives. And it is not now necessary that the hiding be in the ground. The civil law gave the treasure to the finder, according to the law of nature.[7]

See CORONER; FIND, 1.

TREASURY. See COMPTROLLER.

TREATY.[8] By the general law of nations, is in the nature of a contract between two nations, not a legislative act.[9]

A contract between two or more independent nations.[10]

Contracts between states may be called conventions or treaties. . . Treaties, allowed by the law of nations, are unconstrained acts of independent powers, placing them under an obligation to do something which is not wrong.[1]

The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[2]

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[3]

The Constitution, and the laws of the United States made in pursuance thereof, "and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."[4]

The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it; consequently, it was designed to include those subjects which in the ordinary intercourse of nations had usually been made subjects of regulation and treaty, and which are consistent with the nature of our institutions, and the distribution of powers between the general and State governments. The recognition and enforcement of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the general government.[5]

The power to make treaties includes the power to acquire territory by treaty, and thus to legislate over such territory.[6]

A treaty does not generally effect, of itself, its object; it is carried into execution by the sovereign power of the parties. In the United States, however, a different principle is established. Our Constitution declares a treaty to be part of the supreme law of the land; and it is, consequently, regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial, department; and the legislature must execute the contract before it can become a rule of the court.[7]

Admitting of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred. The treaty-

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[1] United States *v.* Greathouse, 4 Saw. 457 (1863), Field, J.

[2] See *Exp.* Bollman, 4 Cranch, 75, 126 (1807), Marshall, C. J.; United States *v.* Burr, 1 Bur. Tr. 14, 2 *id.* 405; 4 Cranch, 470, 126 (1807), Marshall, C. J. Early cases in the court of oyer and terminer of Philadelphia county (Sept. session, 1778), see 1 Dall. 33-34. Charges to Juries, 1 Story, 614, 2 Wall. Jr. 134, 4 Blatch. 518, 5 Pa. L. J. 55. See Fries' Case, 1 Whart. St. Tr. 610; *ib.* 102, 458; 2 Wall. Jr. 139; 3 Wash. 234; 20 Wall. 92; 16 *id.* 147; 92 U. S. 202; 93 *id.* 274; 3 Story, Const. § 667; 2 Bancroft, Const. 149-50.

[3] See also People *v.* Lynch, 11 Johns. *552 (1814).

[4] F. *trove*, found.

[5] 1 Bl. Com. 295; 74 Me. 456.

[6] 1 Bl. Com. 295.

[7] Huthmacher *v.* Harris, 38 Pa. 499 (1861); 2 Kent, 357-58.

[8] F. *traité: traiter*, to treat, manage, settle.

[9] Foster *v.* Neilson, 2 Pet. *314 (1829), Marshall, C. J.

[10] Whitney *v.* Robertson, 124 U. S. 194 (1888), Field, J.

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[1] Woolsey, Int. Law, §§ 101, 102.

[2] Constitution, Art. II, sec. 2, cl. 2.

[3] Constitution, Art. III, sec. 2, cl. 1.

[4] Constitution, Art. VI, cl. 2.

[5] Holmes *v.* Jennison, 14 Pet. 569 (1840), Taney, C. J., deciding that the power to make extradition (*q. v.*) treaties is in the national government only; *ib.* 572.

[6] American Ins. Co. *v.* Canter, 1 Pet. 511, 542 (1828).

[7] Foster *v.* Neilson, 2 Pet. *314 (1829); United States *v.* Arredondo, 6 *id.* 691 (1832); Garcia *v.* Lee, 12 *id.* 511 (1838).

making clause of the Constitution is retroactive as well as prospective.[1]

While a treaty cannot change the Constitution, it may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.[2]

The power given the judiciary to decide on the validity of a treaty is restricted to its necessary validity, resulting from the treaty having been made by persons authorized for purposes consistent with the Constitution. Voluntary validity is the validity which a treaty, voidable by reason of violation, continues to retain by the silent volition of the nation. The principles which govern the necessary validity are of a judicial nature; the principles on which its voluntary validity depends are of a political nature.[3]

Whether those with whom the President has dealt had proper authority from their own government, and whether that government could give the right it has assumed by the treaty to transfer, are political questions; the judiciary cannot inquire into them.[4]

New treaties are to be published in a newspaper of the District of Columbia.[5]

"There would no longer be any security," says Vattel, "no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other and to perform their promises." And as sovereign nations, acknowledging no superior, cannot be compelled to accept an interpretation, however just and reasonable, "the faith of treaties constitutes in this respect all the security of contracting powers." "Treaties of every kind," says Kent, "are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith." Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. . . When the avowed purpose of an act of Congress is to faithfully execute a treaty, any interpretation of its provisions will be rejected which imputes to Congress an intention to disregard the plighted faith of the government. The courts ought, if possible, to adopt that construction which recognizes and saves rights secured by the treaty. Repeals by implication are never favored.[6]

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. With all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . A treaty is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. . . So far as a treaty can become the subject of judicial cognizance, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.[1]

For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If a treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty upon the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department it may present its complaint to the executive head of the government, and take such other measures as it may deem essential to the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance.[2] See ADDENDA, p. 1130.

See COURT, United States Supreme; INDIAN.

TREBLE. See COSTS; DAMAGES.

TREBUCKET. See SCOLD.

[1] Hauenstein *v.* Lynham, 100 U. S. 487-90 (1879), cases.

[2] The Cherokee Tobacco, 11 Wall. 621 (1870), cases.

[3] Jones *v.* Walker, 2 Paine, 696-98 (1825?), Jay, C. J.

[4] Doe *v.* Braden, 16 How. 657 (1853), Taney, C. J.; Fellows *v.* Blacksmith, 19 *id.* 372 (1856), cases.

[5] Act 31 July, 1876, par. 2: 1 Sup. R. S. 284; *ib.* 589.

[6] Chew Heong *v.* United States, 112 U. S. 539-40, 549 (1884), Harlan, J.; Vattel, b. 2, ch. 12, 17; 1 Kent, 174.

[1] Head Money Cases (Edye *v.* Robertson; Cunard Steamship Co. *v.* Same), 112 U. S. 598-99, 597 (1884), cases, Miller, J.; United States *v.* Rauscher, 119 *id.* 418-19 (1886). See also *Re* Ah Lung, 18 F. R. 29 (1883), cases.

[2] Whitney *v.* Robertson, 124 U. S. 194 (1888), Field, J. An act under which duties on certain sugars from San Domingo are collected was passed after a treaty on the subject with the Dominican republic. *Held*, if there was conflict between the treaty and the statute, the latter must control. See also Taylor *v.* Morton, 2 Curt. 459 (1855). On the treaty-making power, see 20 Am. Law Rev. 513-27 (1886).

TREE. See AT, 2; BOUNDARY; CROP; EMBLEMENTS; FIXTURES; LAND; LOGS; PERSONALTY: STUMP: TIMBER.

Overhanging branches are a nuisance; and the person over whose land they hang may cut them off, or have his action for damages and an abatement of the nuisance. He cannot cut down the trees, nor remove the roots further than they produce damage.[1]

TRESPASS.[2] In its largest sense, any transgression or offense against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property.[3]

In Blackstone's commentaries, in some connections, means misdemeanor.[4]

Also, a form of action, at common law, to recover damages for any wrongful use of force.

Beating another is a trespass, for which an action of **trespass vi et armis** (with force and arms) in assault and battery will lie; taking or detaining a man's goods is a trespass, for which a similar action, or an action on the case in trover and conversion, is given by the law; so, also, non-performance of a promise or undertaking is a trespass, upon which an action of trespass on the case in *assumpsit* is grounded.

In general, any misfeasance or act of one man whereby another is injuriously treated or damnified is a transgression or trespass in its largest sense: for which whenever the act itself is directly and immediately injurious to the person or property of another, and therefore necessarily accompanied with some force, an action of trespass *vi et armis* will lie; but, if the injury is only consequential, a special action of trespass on the case will lie.[5]

Trespass on the case is a universal remedy, given for all personal wrongs and injuries without force or unaccompanied by force; so called because the plaintiff's whole case or cause of complaint is set forth at length in the original writ.[6]

In the sense of a wrong to a man's lands, tenements, or hereditaments, trespass signifies no more than an entry on another man's ground without lawful authority, and doing some damage, however inconsiderable, to his real property.[7]

The *quantum* of satisfaction is determined by considering how far the offense was willful or inadvertent, and by estimating the value of the actual damage sustained. Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close, *q. v.* But, to be able to maintain an action for the trespass, one must have a property, absolute or temporary, in the soil, and actual possession by entry: having the freehold is not enough. A man is also answerable for trespasses by his cattle,[1] or fowls, as see DAMAGE-FEASANT.

In trespasses of a permanent nature, where the injury is renewed, the declaration may allege the injury as committed by continuation from one day to another,[2] as see CONTINUANCE, 1.

In some cases entry on another's land or into his house is not accounted trespass; as, an entry to demand or pay money there payable, or to execute in a legal manner the process of the law. The keeper of a public house gives a general license to enter his doors. A landlord may justify entering to distrain for rent; and a reversioner to see if any waste be committed on the estate, from the apparent necessity of the thing. But in such cases, where a man misdemeans himself or makes an ill use of the authority with which the law entrusts him, he shall be accounted a trespasser *ab initio;* as, if one comes into a tavern and will not go out in a reasonable time, this wrongful act affects and has relation back to his first entry, and makes the whole a trespass. But a bare non-feasance, as, not paying for an accommodation received at an inn, is only a breach of contract.[3]

A mere omission of duty, or neglect to do what another has a right to exact, or any other mere non-feasance, does not amount to such an abuse of authority as will render the party a trespasser *ab initio.* Not doing a thing is not a trespass.[4]

The criterion of "trespass" is force directly applied.[5]

The force may be such as is implied in law. As the law always implies force where the injury is immediate to the person or property of another, the substantial distinction between actions of "trespass" and "case" is between direct and immediate, and mediate or consequential, injuries.[6]

In its widest scope, trespass on property is any injury to property. Its synonym in law-Latin was *transgressio:* any infraction of a legal right. In this sense it comprehends not only forcible wrongs, where the damages are direct and immediate, but also acts which are tortious in their consequences.[7]

Where the defendant fired a pistol, the ball from which glanced and hit the plaintiff, and it was found that the injury was unintentional but the result of culpable negligence in the defendant, it was held that

[1] Grandona *v.* Lovdal, 70 Cal. 162 (1882); 107 Mass. 234; 16 S. & R. 390; Wood, Nuis. § 112.

[2] F. *trespasser,* to pass over or beyond.

[3] 3 Bl. Com. 208.

[4] 1 Bishop, Cr. L. §§ 568-69, 625; State *v.* Watts, 48 Ark. 58 (1886).

[5] 3 Bl. Com. 208; 34 Ala. 554.

[6] 3 Bl. Com. 122.

[7] 3 Bl. Com. 209-12; 9 Ill. 170.

[1] 3 Bl. Com. 209-12; 9 Ill. 170.

[2] 3 Bl. Com. 112.

[3] 3 Bl. Com. 212-14.

[4] Averill *v.* Smith, 17 Wall. 91 (1872), cases.

[5] Smith *v.* Rutherford, 2 S. & R. *360 (1816).

[6] Jordan *v.* Wyatt, 4 Gratt. 153 (1847).

[7] Ten Eyck *v.* Runk, 31 N. J. L. 429-30 (1866), Beasley, C. J. On trespass and negligence, see 14 Am. Law Rev. 1-35 (1880), cases.

trespass *vi et armis* would lie: the injury was the direct and immediate result of the motion recklessly given to the bullet.[1]

See further CASE, 3; CONTRIBUTION; DAMAGES, Exemplary; JOINT AND SEVERAL; MALICE; REPLEVIN; TORT, 2; WAIVER.

TRIAL. The examination of the matter of fact in issue.[2]

In its general use, the investigation and decision of a matter in issue between parties before a competent tribunal; including all the steps taken in the case from submission to the jury to the rendition of judgment. In its restricted sense, the investigation of the facts only.[3]

The examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue.[4]

A judicial examination of the issues, whether of law or fact, in an action or proceeding.[5]

In acts of Congress regulating the removal of causes, a trial by jury of an issue which will determine the facts in an action of law; "final hearing" meaning the hearing of the cause upon its merits by a judge sitting in equity.[6]

The hearing of a demurrer is a "trial," within the act of March 3, 1887.[7]

The trial of a case is not any trial, but the final trial — the one that stands as a thing accomplished in the case.[8]

In criminal law, an actual trial by a jury; not, the arraignment, and pleadings preparatory thereto.[9] See ARRAIGN.

In civil cases, trials are by record, by inspection, by certificate, by witnesses, and by a jury, *qq. v.*

Mistrial. An erroneous or fatally irregular trial, due to disqualification in a juror or jurors or in the judge, or to an incurable defect or deficiency in the pleadings.[10]

Where a jury is discharged without a verdict, the proceeding is properly a "mistrial;" the proceeding has miscarried, and the consequence is no trial at all.[1]

New trial. A re-trial awarded for defeat of justice happening at the former trial, by surprise, inadvertence, or misconduct.[2]

A re-examination, before a court and jury, of an issue in fact which has been tried at least once before.[3]

A re-examination of an issue of fact in the same court, after a trial and decision by a jury, court, or referee.[4]

Has always been used in the sense of a complete re-trial of a cause, except in instances. Being a re-trial of the facts of a case, defined as a "re-examination of an issue in fact."[5]

The cause is in the same condition as if no judgment had been rendered, so that the action is in no sense "new," but identically the original suit. The error is extirpated, and everything else is in *statu quo*.[6]

A motion for a new trial is addressed to the discretion of the court, and the court's action is not reviewable.[7]

To justify granting a new trial, there must be more than a strong preponderance of evidence in favor of the defeated party; it must be so palpable that the jury have erred as to suggest that the verdict was the result of misapprehension or partiality.[8]

The statute conferring jurisdiction upon the Federal courts to grant new trials expressly provides that such power should be exercised "for reasons for which new trials have been usually granted in courts of law." This provision applies only to jury trials, and is directory to the courts, to be governed by the rules and principles of the common law. The courts of common law have usually granted new trials: when the verdict is against the weight of the evidence, or contrary to law; when excessive or manifestly insufficient damages have been awarded; for the admission of illegal evidence, or the rejection of competent evidence; when a party has been deprived of evidence by accident, and without fault on his part, or is taken by surprise in a matter that he could not reasonably anticipate; for misdirection upon material questions of law, or for serious irregularity in the trial or misconduct of the jury; for unfair conduct of the prevailing party; when manifest injustice has been done; when

[1] Welch *v.* Durand, 36 Conn. 183, 185-86 (1869). See also Morris *v.* Platt, 32 *id.* 75, 87 (1864).

[2] 3 Bl. Com. 330; 9 F. R. 437.

[3] [Jenks *v.* State, 39 Ind. 9-10 (1872), Buskirk, C. J.; Bruce *v.* State, 87 *id.* 453 (1882).

[4] Tregambo *v.* Comanche Mining Co., 57 Cal. 505 (1881), McKee, J. See also 2 Fla. 573; 63 Mo. 444; 2 Hun, 444; 54 Wis. 545.

[5] Ohio Rev. St. 5127; 44 Ohio St. 528.

[6] Minnett *v.* Milwaukee, &c. R. Co., 3 Dill. 464 (1875), Nelson, J.; Home Life Ins. Co. *v.* Dunn, 19 Wall. 225 (1873); Vannevar *v.* Bryant, 21 *id.* 43 (1874); 112 Mass. 339; 20 Ohio St. 181; 40 Ind. 179.

[7] Lookout Mountain R. Co. *v.* Huston, 32 F. R. 711 (1887), cases; Laidly *v.* Huntington, 121 U. S. 179 (1887).

[8] Fisk *v.* Henarie, 32 F. R. 427 (1887).

[9] United States *v.* Curtis, 4 Mas. 236-37 (1826), Story, J.

[10] See Wilbridge *v.* Case, 2 Ind. 37 (1850); 4 Blackf. 309.

[1] Fisk *v.* Henarie, 32 F. R. 427 (1887), Deady, J.

[2] [3 Bl. Com. 387.

[3] Silvey *v.* United States, 7 Ct. Cl. 331 (1871); Ford *v.* United States, 18 *id.* 70 (1883).

[4] Jenkins *v.* Frink, 30 Cal. 596 (1866).

[5] Zaleski *v.* Clark, 45 Conn. 401 (1877), Loomis, J.; Steph. Plead. 94-96.

[6] Lockwood *v.* Jones, 7 Conn. 436 (1829), cases.

[7] See R. S. § 726; Indianapolis, &c. R. Co *v.* Horst, 93 U. S. 301 (1876), cases; Railway Co. *v.* Heck, 102 *id.* 120 (1876), cases; 17 F. R. 793; 2 N. M. 462, 475.

[8] Mengis *v.* Lebanon Manuf. Co., 13 Rep. 198 (S. D. N. Y., 1882), Wallace, J.

the losing party, who was duly diligent in preparing for trial, has discovered new evidence which will tend to prove a material fact not directly in issue before, or not then investigated, which will probably produce a different result, and which is not merely cumulative.[1]

In an issue out of chancery, a motion for a new trial is to be made to that court — the verdict being only advisory.[2]

In criminal cases, a new trial will be granted, in most jurisdictions, on the application of the accused, for cause shown.[3]

Public trial. Not necessarily a trial to which the public generally or a large concourse is admitted.

The requirement of a public trial is for the benefit of the accused: that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed, if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend.[4]

Separate trial. A single or different trial of each of two or more persons accused of participation in the same offense.

Error cannot be assigned for refusal to grant such a trial; the granting being discretionary with the court.[5]

Speedy trial. The constitutions of the States provide that persons held on a criminal charge have the right to a "speedy trial," a right which was guaranteed by Magna Charta. The meaning is that the trial shall take place as soon as possible after an indictment is found, without depriving the prosecution of a reasonable time for preparation.[6]

A trial at such a time after the finding of the indictment, regard being had to the terms of court, as will afford the prosecution a reasonable opportunity, by the fair and honest exercise of reasonable diligence, to prepare for a trial.[7]

A trial for an offense under a city ordinance may not be such a public trial as is intended.[8]

State trial. In England, a prosecution conducted by the government; in particular, a public prosecution of more than ordinary importance.

See CALENDAR, 2; DEPOSITION; EVIDENCE; JURY; LIST; PEER; PUNISHED, Twice; RECORD, 2; SLANDER, 1; VENIRE.

TRIBE. Whether a class of Indians have ceased to hold the tribal relation is primarily a question for the political department of the government.[1] See INDIAN.

TRIBUNAL.[2] 1. A magistrate's seat; the place where justice is dispensed.

2. Any court, forum, or judicial body. See COURT; FORUM.

The tribunal before which matters pertaining to railroads are discussed, and by which they are decided, may, with propriety, be called a "court of justice;" not an ordinary court, but a special tribunal authorized to administer justice in a class of cases which experience proves cannot so satisfactorily be tried before the regular courts.[3]

Except as otherwise provided, the decisions of special tribunals are binding and conclusive adjudications upon all parties, like the judgment of a court of record; and this is true independently of any express statutory provision making them final. When a statute creates a special tribunal to determine a class of questions, it is a necessary implication that the determinations are intended to have force and validity, otherwise the proceeding would be useless.[4] See DETERMINE, 2; SEWER.

TRICYCLE. See BICYCLE.

TRIERS, or TRIORS. Persons whose office is to determine whether a juror, challenged for favor, is favorable or unfavorable.[5]

The office is abolished in nearly all of the States, the judge who presides at the trial of the cause being empowered to decide upon the fitness of jurymen.[6]

TRINODA. See NECESSITAS, Trinoda.

TRIPARTITE. See PART, 1.

TROOPS. Conveys the idea of an armed body of soldiers whose sole occupation is war or service, answering to the regular army.[7]

The organization of the active militia of a State bears no likeness to such a body. It is simply a do-

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[1] Chandler *v.* Thompson, 30 F. R. 44 (1886), Dick, J.; Steph. Pl. 93.

[2] Watt *v.* Starke, 101 U. S. 250-56 (1879), cases.

[3] United States *v.* Williams, 1 Cliff. 17 (1858), cases.

[4] Cooley, Const. Lim. *383; 1 Bishop, Cr. Proc. § 959; Grimmett *v.* State, 22 Tex. Ap. 41 (1886).

[5] Spies *et al.* *v.* People, 122 Ill. 265 (1887).

[6] [*Exp.* Stanley, 4 Nev. 116 (1868), Lewis, J.

[7] United States *v.* Fox, 3 Monta. 517 (1880), Wade, C. J. See also *Exp.* Jefferson, 62 Miss. 227 (1884).

[8] State *v.* Topeka, 36 Kan. 87-88 (1886), cases.

[1] United States *v.* Holliday, 3 Wall. 419 (1865).

[2] L. *tribunal*, platform for a magistrate, judgment-seat: *tribunus*, chief of a tribe: *tribus*, one of the three original families: *tri-*, three.

[3] Smith *v.* City of Waterbury, 54 Conn. 178 (1886).

[4] United States *v.* Leng, 18 F. R. 20 (1883), cases, Brown, J.; United States *v.* Arredondo, 6 Pet. *729 (1832); Belcher *v.* Linn, 24 How. 522 (1860); 132 Mass. 43.

[5] [4 Bl. Com. 353.

[6] See Reynolds *v.* United States, 98 U. S. 157 (1878); 5 Cal. 347; 23 Ga. 57; 43 Me. 11; 14 N. J. L. 195; 15 S. & R. 156.

[7] Dunne *v.* State, 94 Ill. 126 (1879), Scott, J.

mestic force, as distinguished from regular troops, to be called into service when the exigencies of the State make it necessary.[1] See MILITIA.

TROUBLE. See DAMAGES.

In a statute giving a land-owner damages for the "trouble and expense" he is put to by proceedings to lay out a street upon his land, the reference is to trouble from which material and pecuniary injury results, involving labor and the expenditure of time, or occasioning inconvenience. Mental trouble, so difficult to estimate by any pecuniary standard, and which may vary in different individuals, according to temperament or health, is not intended.[2]

TROVER.[3] Originally, an action of trespass upon the case for the recovery of damages against such person as had "found" another's goods and refused to deliver them on demand, but "converted" them to his own use.[4] Whence *trover and conversion.*

In form, a fiction; in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use.[5]

One who, being lawfully in possession, wrongfully parts with possession, to the injury of another, is liable in trover for a conversion.[6]

Trover is an action on the case. It may be joined with case, or new counts in case added to it by way of amendment.[7]

Conversion is based upon the idea of an assumption by the defendant of a right of property or a right of dominion over the thing converted, which casts upon him all the risks of an owner; it is therefore not every wrongful intermeddling with or wrongful asportation or wrongful detention of personal property that amounts to a conversion. Acts which themselves imply an assertion of title or a right of dominion, such as selling, letting, or destroying the property, amount to a conversion, although the defendant may honestly have mistaken his rights; but acts which do not in themselves imply such assertion or right of dominion will not sustain an action of trover, unless done with intent to deprive the owner of the property permanently or temporarily, or unless there has been a demand for it and neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant in withholding it claims the right to withhold it, which is a claim of a right of dominion. . . In actions in the nature of trover, the rule of damages is the value of the property at the time of the conversion, diminished, when the property has been returned to and received by the owner, by its value at the time of return.[1]

The rule of damages is the value of the property, with interest from the date of conversion. But this rule may be modified by the relations to the property of the parties to the action. It may be practicable to adjust the rights in one action, indemnifying the plaintiff by a sum less than the full value, and avoiding circuity of action. Thus, where the plaintiff has a special property in the goods, his damages, as against the general owner, is the value of his interest only; but as against a stranger, he will be entitled to the full value of the goods, holding the surplus over his own claim as trustee for the general owner.[2]

See CONVERSION, 2; DEMAND, 2; DETINUE; WAIVER.

TROY WEIGHT. See COIN; WEIGHT, 1.

TRUE. 1. Conforming to the fact; actual; real. 2. Honest; sincere; not knowingly false or misstated. Compare JUST, 2.

In one sense that only is "true" which is conformable to the actual state of things; and in that sense a statement is "untrue" which does not express things exactly as they are. But in another and broader sense "true" is often used as a synonym of honest, sincere, not fraudulent.[3]

What a life insurance company requires of an applicant in making "fair and true answers" to questions put, as a condition precedent to a binding contract, is, that he shall observe the utmost good faith toward it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation or concealment of facts with which the company ought to be made acquainted.[3]

Prima facie "untrue" means inaccurate, not necessarily willfully false.[4]

True bill. See IGNORE.

Truth. Actuality, reality, verity; veracity, veraciousness.

Compare FACT; FAITH; VERIFY; VERUM; VOIR; VOUCH. See EVIDENCE; LIBEL, 5; OATH; SLANDER; REPUTATION; VALUE.

TRUST. 1. Technically, an obligation arising out of a confidence reposed in a person, to whom the legal title to property is conveyed, that he will faithfully apply the

[1] Dunne *v.* State, *ante.*

[2] Whitney *v.* City of Lynn, 122 Mass. 343 (1877).

[3] F. *trover*, to find.

[4] 3 Bl. Com. 152.

[5] Cooper *v.* Chitty, 1 Burr. 31 (1756), Mansfield, J.

[6] Spencer *v.* Blackman, 9 Wend. 168 (1832), Savage, Chief Justice.

[7] M'Connell *v.* Leighton, 74 Me. 416 (1883), Appleton, Chief Justice.

[1] Spooner *v.* Manchester, 133 Mass. 272, 272 (1882), cases, Field, J.

[2] Jellett *v.* St. Paul, &c. R. Co., 30 Minn. 267 (1883), cases, Vanderburgh, J.; Forbes *v.* Fitchburg R. Co., 133 Mass. 158 (1882), cases.

[3] Moulor *v.* American Life Ins. Co., 111 U. S. 345-46 (1884), Harlan, J.; Clapp *v.* Massachusetts Benefit Association, 146 Mass. 580 (1888); First Nat. Bank of Kansas City *v.* Hartford Fire Ins. Co., 95 U. S. 673 (1877)

[4] Fowkes *v.* Manchester, &c. Life Assur. Association, 113 E. C. L. *929 (1863), Blackburn, J.

property according to the wishes of the creator of the trust.[1]

Where there are rights, titles, and interests in property distinct from the legal ownership.[2]

The legal title carries the absolute dominion. Behind it lie beneficial rights belonging to another. These are a charge upon the property, and constitute an equity which the courts will protect.[2]

No technical language is necessary to the creation of a trust. If it appears to be the intention of the parties to an instrument conveying property that it is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title, if it be capable of lawful enforcement. In each case the intention is to be gathered from the general purpose and scope of the instrument.[3]

Trustee. A person holding the legal title to property, under an express or implied agreement to apply it, and the income arising from it, to the use and for the benefit of another person, who is called the *cestui que trust*.[4] Whence co-trustee. He who creates the trust is sometimes called the *trustor*.

The person who establishes the trust is called the "donor," "creator," or "founder."

The word "trustee" of itself means trustee for some one whose name is not disclosed.[5]

In one sense a mere bailee or agent is a trustee, because he has property delivered to him in the confidence that he will do with it according as he is directed by the bailor. It may even be required, by statute, that the title to the property be conveyed to the trustee. . . Conveying property to another in confidence that he will sell it and apply the avails in a particular way, not for his own use, undoubtedly creates a trust.[6]

A trustee is not an agent. An agent represents and acts for his principal. "A trustee is a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another." When an agent contracts in the name of his principal, the principal contracts and is bound. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. When he acts in good faith for the benefit of the trust he is entitled to indemnify himself for his engagements out of the estate in his hands. If he wants to protect himself from individual liability on a contract he must stipulate that he is not to be personally responsible.[1]

Trustee ex maleficio. One who by wrongful or illegal conduct becomes or is held to be a trustee.

Such is a transferee under a fraudulent conveyance, and a bailee who misapplies moneys intrusted to him.[2] See *Constructive Trust;* TORT, 1.

Trustee process. In New England, a proceeding in attachment similar to garnishment, *q. v.*

Cestui que trust. He for whom a trust is created or exists: the owner of the equitable estate where a legal estate is vested in a trustee.

One who has a right to a beneficial interest in and out of an estate, the legal title to which is vested in another as trustee.[3]

"A barbarous Norman-law French phrase, ungainly and ill-adapted to the English idiom. 'Beneficiary' is a more appropriate term."[4]

He is an equitable owner, and, if his right of possession is not postponed, he is entitled to the usufruct or rents and profits of the trust estate.[3]

He may charge the interest vested in him in any manner not inconsistent with the purposes of the trust.[5]

The word "trust" is frequently italicized, as if part of the Norman French expression. Another spelling of *cestui* is *cestuy;* and *cestuique* is met with. The plurals are *cestuis que trust, cestuis que trustent* and *trustents, cestuis que trusts* and *trustents.*[6] The first form has the weight of usage and authority. See CESTUI; also ADDENDA, p. 1129.

Active trust. When the trustee is not merely a passive depositary of the estate, but is required to take active measures to carry into effect the general intention of the creator of the trust; as, a trust by which an executor is to sell property and apply the proceeds as directed. Also called a *special trust.* **Passive trust.** Requires nothing

[1] [Beers *v.* Lyon, 21 Conn. *613-14 (1852), Hinman, J.

[2] 2 Story, Eq. § 964: Taylor *v.* Taylor, 74 Me. 585 (1883). See generally 4 Kent, 301-13; 2 Washb. R. P. 157-215; 3 Pomeroy, Eq. Index; Stimson, Am. St. Law, 233-50.

[3] Colton *v.* Colton, 127 U. S. 310 (1888); Creswell *v.* Jones, 68 Ala. 423 (1880). As to trusts in personalty, see Thomas *v.* Merry, Sup. Ct. Ind. (1888), cases: 27 Cent. Law J. 501-2 (1888), cases.

[4] 1 Story, Contr. § 373.

[5] Shaw *v.* Spencer, 100 Mass. 389 (1868).

[6] Beers *v.* Lyon, *ante.*

[1] Taylor *v.* Davis, 110 U. S. 334-35 (1884), Woods, J. The definition of trustee is identical with that in Hill on Trustees, p. *41.

[2] See 71 Ala. 161; 80 Pa. 406; 74 *id.* 315; 71 *id.* 260; 70 *id.* 269; 67 *id.* 52; 66 *id.* 241; 64 *id.* 443; 63 *id.* 122; 60 *id.* 308; 55 *id.* 374; 51 *id.* 384.

[3] Gindrat *v.* Montgomery Gas-Light Co., 82 Ala. 601 (1886), Somerville, J. See definition, Smith *v.* Anderson, L. R. 15 C. D. 275 (1880).

[4] 1 Story, Eq., 12 ed. § 321, note.

[5] Weaver *v.* Van Akin, Sup. Ct. Mich. (1888): 27 Cent. Law J. 359, cases.

[6] See 2 Story, Eq. §§ 1207, 1196 *b;* Adam's Eq. 107; 13 R. I. 407, 500.

to be done by the trustee beyond transferring property to the beneficiary; in this respect corresponding to the ancient "use." Also called a *barren*, *dry*, *naked*, or *simple trust*.[1]

Where an active duty is imposed upon the trustee, the trust is not executed under the Statute of Uses until the duty is performed. If, however, the trust be purely passive, it will be executed at once under that statute.[2]

Passive trusts have been abolished in some of the States.

Constructive trust. (1) Such trust as is imposed by construction of law, from reasons of equity and justice, and independently of the intentions of the parties: as, a vendor's or vendee's lien (*q. v.*) for purchase-money unpaid or prematurely paid; the renewal of a lease by a trustee in his own name; and, perhaps, a permanent improvement unavoidably made to an estate by the legal possessor.

(2) A trust which arises from actual or legal fraud; as, where a person occupying a fiduciary relation gains an advantage to himself personally.[3] Also called a trust *ex maleficio*.

Sometimes interchanged with "implied trust," *q. v.*

Directory trust. When the trust fund is directed to be invested in a particular manner till the period arrives at which it is to be appropriated.[4]

Executory trust. Requires something to be done toward complete creation. . . A trust which is to be perfected at a future time — as, by a conveyance "to B in trust to convey to C." **Executed trust.** Requires nothing to be done toward complete creation. . . It is when the legal estate passes, as, in a conveyance to B in trust, or for the use of C; or when only the equitable estate passes, as, in a conveyance to B to the use of C in trust for D: in which the trust is executed in D, though he has not the legal estate.[5]

All trusts are in a sense executory, because a trust cannot be executed except by conveyance, and, therefore, there is always something to be done. But in equity an "executory" trust occurs where the author of the trust has left it to be made out from general expressions what his intention is; and an "executed" trust is where there is nothing to be done but to take the limitations given and convert them into a legal estate.[1]

A trust is "executed" when the limitations of the equitable interest are complete and final; in an "executory" trust, the limitations of the equitable estate are not intended to be complete and final, but merely to serve as instructions for perfecting the settlement at some future time.[2]

Executory trusts are modifiable in equity.[3]

Express trust. A trust created in express terms in the deed, will, or other writing.[4]

Implied trust. A trust raised or created by presumption or construction of law,— and either rests upon the presumed intention of the parties, or is independent of any express intention, and enforced upon the conscience by operation of law.[5]

"Express" trusts are raised and created by the act of the parties; "implied" trusts by act or construction of the law.[6]

Resulting trust. Arises by operation of law whenever a beneficial interest is not to go along with the legal title, as where a conveyance is taken in the name of one person and the consideration is advanced by another.

Is raised by law from the presumed intention of the parties and from the natural equity that he who furnishes the means for the acquisition of property shall enjoy its benefits. It does not obtain where an obligation, legal or moral, exists to provide for the grantee, as husband for wife, or parent for child; for in such cases arises the contrary presumption of an advancement for the grantee's benefit.[7]

[1] See Kay *v.* Scates, 37 Pa. 31 (1860), Strong, J.; Bacon's Appeal, 57 *id.* 504 (1868); Barnett's Appeal, 46 *id.* 392, 398 (1864); Rife *v.* Geyer, 59 *id.* 393 (1868); Goodrich *v.* City of Milwaukee, 24 Wis. 429 (1869).

[2] Sprague *v.* Sprague, 13 R. I. 703 (1882), cases, Durfee, C. J.; Stanley *v.* Colt, 5 Wall. 168 (1866); 1 Pomeroy, Eq. § 153; 2 *id.* §§ 988, 992.

[3] Burks *v.* Burks, 7 Baxt. 356 (1874): Perry, Trusts, 827; 39 Ark. 313; 1 Lead. Cas. Eq. (Hare), 62; Bisph. Eq. § 91; 1 Pom. Eq. § 155; 2 *id.* § 1044.

[4] Deaderick *v.* Cantrell, 10 Yerg. 272 (1837).

[5] [4 Kent, 304-5; 33 Miss. 739.]

[1] Egerton *v.* Brownlow, 4 H. L. 210 (1853), Ld. St. Leonards.

[2] Lewin, Trusts, 4: Dennison *v.* Goehring, 7 Pa. 177 (1847), Gibson, C. J.

[3] 1 Story, Eq. § 64. See 2 Pom. Eq. § 1000.

[4] [1 Story, Eq. § 64.

[5] [2 Story, Eq. § 1195; Walden *v.* Skinner, 101 U. S. 577 (1879); 41 N. Y. 58; 6 Col. 439.

[6] Cook *v.* Fountain, 3 Swanst. *591 (1676), Worth, C. J.; 1 Pom. Eq. § 155; 2 *id.* § 1030.

[7] Jackson *v.* Jackson, 91 U. S. 125 (1875), cases, Field, J.; Chapman *v.* County of Douglass, 107 *id.* 357 (1882); 71 Ala. 40; 25 Iowa, 45; 46 Md. 569; 19 S. C. 196, 135; 76

There must be an actual payment of the purchase-money or a liability incurred for it, on the part of the *cestui que trust;* made or incurred as part of the original transaction of purchase, and not pursuant to a subsequent arrangement. Parol evidence, which may be offered to overcome the presumption in favor of the legal owner, must be clear, full, and satisfactory.[1]

If an agent purchases land with his principal's money and takes a deed in his own name, a resulting trust exists in favor of the principal.[2]

No such trust is raised by a subsequent payment of purchase money.[3]

To establish this trust in favor of a wife as against her husband's creditors, the proof that she advanced the purchase-money must be clear.[4]

Parol evidence adduced to raise a resulting trust may be rebutted by parol.[5]

Secret trust. The retention of possession of personalty as if still his own by the vendor affords an example of a secret trust.

May render the sale fraudulent and void as to creditors, whether the trust be express or implied.[6]

Voluntary trust. A trust in favor of a volunteer: one as to whom the trust is a pure gift. **Trust for value.** A trust in favor of a vendee or other claimant who has parted with an equivalent in value.

The founder of a trust may secure the benefit of it to the object of his bounty by providing that the income shall not be alienable by anticipation nor subject to be taken for his debts; but otherwise, in England.[7]

A "voluntary" trust is an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another; an "involuntary" trust is created by operation of law.[8]

Va. 527; Perry, Trusts, § 143; 2 Story, Eq. § 1201; 1 Pom. Eq. § 155; 2 *id.* § 1031.

[1] Harvey *v.* Pennypacker, 4 Del. Ch. 459–60 (1872), cases, Bates, Ch.

[2] Bratton *v.* Mitchell, 3 Pa. 44 (1846); Eshleman *v.* Lewis, 49 *id.* 410 (1865).

[3] Barnet *v.* Dougherty, 32 Pa. 371 (1859); Nixon's Appeal, 63 *id.* 279 (1869). See generally 1 Harv. Law Rev. 185–90 (1887), cases.

[4] Klin's Appeal, 39 Pa. 463 (1861); O'Hara *v.* Dilworth, 72 *id.* 379 (1872); 82 *id.* 57.

[5] Hays *v.* Quay, 68 Pa. 272 (1871); Donaghe *v.* Tams, 61 Va. 141–43 (1885), cases.

[6] Plaisted *v.* Holmes, 58 N. H. 294 (1878).

[7] Nichols *v.* Eaton, 91 U. S. 716, 721–29 (1875), cases; Hyde *v.* Woods, 94 *id.* 526 (1876); Spindle *v.* Shreve, 111 *id.* 547 (1884), cases; Pope *v.* Elliott, 8 B. Mon. 56 (1847); Sparhawk *v.* Cloon, 125 Mass. 266–67 (1878), cases; Broadway Nat. Bank *v.* Adams, 133 *id.* 170–74 (1882), cases; *ib.* 177; Holdship *v.* Patterson, 7 Watts, 547 (1838); Bell *v.* Watkins, 82 Ala. 517 (1886), cases; 47 Pa. 118; 59 *id.* 398; 100 *id.* 151, 254; White *v.* White, 30 Vt. 338 (1857). *Contra*, 18 Ves. 429; 9 Hare, 475; 2 Beav. 63; 37 Ala. 327; 42 Mo. 45; 4 Ired. Eq. 131; 5 R. I. 205; Perry, Trusts, § 386 *a*, cases.

[8] California Code, 7215–17; Dakota Civ. Code, 1288–90.

Trust deed. An instrument creating an active trust. In a few States, the equivalent of a mortgage.

Deed of trust. An assignment of property to a trustee for the purpose therein declared.

Usually made by a debtor in failing circumstances to secure all his creditors equally or to give some a preference over others, when it is not prudent to make immediate sale of his property. The debtor nearly always remains in possession until the trustee is bound to make sale for the purposes of administering the trusts. Registration of the deed is equivalent to the delivery of possession to the trustee. The deed is in the nature of a mortgage,[1] *q. v.*

Prior to the Statute of Uses, uses existed as confidences which a court of chancery would enforce, and were thus the earliest form of trusts. That statute transferred the use into possession, and made the *cestui que use* owner of the legal and equitable estate. Thereupon, equitable jurisdiction over these early uses (now legal estates) ceased, or became unnecessary. But the decision rendered in *Tyrrell's Case*, in 1557, by which a use upon a use was refused recognition, revived and even increased the former jurisdiction over trusts.[2] See further USE, 3, Statute of.

The Statute of Frauds require declarations or creation of trusts in lands to be proven by some writing signed by the creator; and so as to grants or assignments. It is sufficient if the terms can be ascertained from the writing; a letter in acknowledgment is ample. See FRAUDS, Statute of.

The trusts intended by courts of equity as not being affected by the Statute of Limitations are those technical trusts which are not cognizable at law, but fall within the exclusive jurisdiction of equity courts.[3]

A voluntary or express trust cannot be imposed on any one unless he agrees to accept, or by clear implication assumes the duties and liabilities; but acceptance in the case of an implied, resulting, or constructive trust is not necessary.[4]

The nature and duration of a trust estate are governed by the requirements of the trust itself. If that requires a fee-simple in the trustee, it will be created, though the language be not apt. If the language conveys to the trustee and his heirs forever, while the trust requires a more limited estate, in quantity or duration, the latter only will vest.[5]

A trust will not be allowed to fail for want of a trustee; a court of equity will supply a trustee.[6]

Where a conveyance is made to a trustee, and the object of the conveyance fails, the trust cannot be

[1] Means *v.* Montgomery, 23 F. R. 421, 424 (1885), Dick, Dist. J.

[2] 2 Bl. Com. 336.

[3] Kane *v.* Bloodgood, 7 Johns. Ch. *111 (1823), Kent, Ch.; 4 Kent, 305; 2 Story, Eq. § 972; Speidell *v.* Henrici, 15 F. R. 753 (1883), cases; *ib.* 758–63, cases.

[4] Taylor *v.* Holmes, 14 F. R. 509 (1882).

[5] Young *v.* Bradley, 101 U. S. 787–88 (1879), cases.

[6] Kain *v.* Gibboney, 101 U. S. 365 (1879); Irvine *v.* Dunham, 111 *id.* 334 (1884), cases; Tucker *v.* Grundy, 88 Ky. 543 (1886).

executed, and the trustee must re-convey. Where a conveyance would not involve a breach of duty or a wrong, a presumption arises that the trustee conveyed, this being his duty.[1]

Co-trustees are responsible only for their individual acts, unless they have agreed to be bound for each other, or, by co-operation or connivance, have enabled one or more to do an act in violation of the trust. This, too, although they have equal power, and cannot act separately, as executors may, but must join, both in conveyance and receipt. But the rule has been varied where one trustee has assisted another to do a thing, as, to receive money. The rule seems to regard the ability of one to interpose and hinder the other from pursuing the course which resulted in loss. But trustees of a public trust may act by the majority.[2] See JOINT.

Where trustees are in existence and capable of acting, the court will not interfere to control them in the exercise of a discretion vested in them by the instituting instrument.[3]

A trustee may be invested with such powers that his beneficiaries are bound by what is done against or by him. Then, he is in court in their behalf, and they are not necessary parties. But fraud between him and the adverse party may impeach the decree; as, in the case of the trustee of a railway mortgage holding for the benefit of bondholders.[4]

In a suit brought against a trustee by a stranger, for the purpose of defeating the trust altogether, the beneficiaries are not necessary parties, if the trustee has such powers, or is under such obligations, with respect to the execution of the trust, that "those for whom he holds will be bound by what is done against him, as well as by what is done by him." In such cases the beneficiaries will be bound by the judgment, "unless it is impeached for fraud or collusion between him and the adverse party."[5]

The property of a corporation is held in trust for the payment of the debts of the corporation, until it has passed into the hands of a *bona fide* purchaser. Distributed among the stockholders, they hold subject to the trust in favor of creditors. Hence, application to an illegal purpose will be restrained, and restitution compelled.[6]

It is for the beneficiary alone to complain of the non-execution of a trust.[7]

Ordinary prudence is required of one dealing with trust property.[1]

A trustee must prevent the property under his care from being wasted or injured. His first duty is to place the property in a state of security.[2]

Since the characters of vendor and purchaser impose different obligations, they cannot be held by the same person. Their union in the same person would raise a conflict between interest and duty, and, constituted as humanity is, in the majority of cases, duty would be overborne.[3] While there may be cases where an unratified sale, or other contract by a person occupying a fiduciary relation, would be void *ab initio*, the general doctrine is, not that such contracts are absolutely void, but that they are voidable at the election of the party whose interest has been so represented, he exercising his option to avoid within a reasonable time. What is such time is to be decided upon the circumstances of each case.[4]

The acts of trustees when personally interested should be open and fair. Slight circumstances will sometimes be considered sufficient proof of wrong to justify setting aside what has been done; but when everything is honestly done, and the courts are satisfied that the rights of others have not been prejudiced to the advantage of the trustee, the simple fact of interest is not sufficient to justify withholding confirmation of his acts.[5]

The rule is everywhere recognized that a trustee, when investing property in his hands, is bound to act honestly and faithfully, and to exercise sound discretion, such as men of ordinary prudence and intelligence use in their own affairs. In some jurisdictions, no attempt has been made to establish a more definite rule; in others, the discretion has been confined, by the legislature or the courts, within strict limits.[6]

Property once charged with a valid trust will be followed in equity into whosesoever hands it comes, and the holder charged with the execution of the trust, unless he is a purchaser for value without notice.[7] The law exacts the utmost good faith from all parties dealing with a trustee respecting the trust property.

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[1] French *v.* Edwards, 21 Wall. 149–51 (1874), cases.

[2] 2 Story, Eq. §§ 1280–84 *c*; 14 Am. Law Rev. 36–56 (1880), cases; 15 *id.* 159–85 (1881), cases; 2 Lead. Cas. Eq. 858, 865; Bisph. Eq. § 146.

[3] Nichols *v.* Eaton, 91 U. S. 724–25 (1875), cases.

[4] Kerrison *v.* Stewart, 93 U. S. 160 (1876), cases; Shaw *v.* Little Rock, &c. R. Co., 100 *id.* 611 (1879); Richter *v.* Jerome, 123 *id.* 233 (1887), cases.

[5] Vetterlein *v.* Barnes, 124 U. S. 172 (1888), cases, quoting Kerrison *v.* Stewart, 93 *id.* 160 (1876).

[6] Chicago, &c. Co. *v.* Howard, 7 Wall. 409–10 (1868), cases; 2 Story, Eq. § 1252, cases; Broughton *v.* Pensacola, 93 U. S. 269 (1876).

[7] Cowell *v.* Colorado Springs Co., 100 U. S. 58 (1879); Perry, § 834.

[1] Lawrence *v.* Dana, 4 Cliff. 68–69 (1869), cases; *ib.* 548; Eyster's Appeal, 16 Pa. 372 (1851).

[2] Tyler *v.* Campbell, 106 U. S. 325–26 (1882), cases.

[3] Marsh *v.* Whitmore, 21 Wall. 183 (1874); Wardell *v.* Union Pacific R. Co., 103 U. S. 658 (1880), cases.

[4] Twin Lick Oil Co. *v.* Marbury, 91 U. S. 588–89, 592 (1875), cases.

[5] Shaw *v.* Little Rock, &c. R. Co., 100 U. S. 613 (1879), Waite, C. J. Shaw was trustee of a railroad mortgage. See also Allen *v.* Gillette, 127 *id.* 596 (1888), cases.

[6] Lamar (guardian) *v.* Micou, 112 U. S. 465–70 (1884), cases, Gray, J. See also as to attorneys, Stockton *v.* Ford, 11 How. 247 (1850); as to bank directors, First Nat. Bank of Ft. Scott *v.* Drake, 29 Kan. 319–21 (1883), cases; as to executors, Bowen *v.* Richardson, 133 Mass. 296 (1882), cases; Carson *v.* Marshall, 37 N. J. E. 213 (1883), cases; Baugh *v.* Walker, 77 Va. 104–5 (1883), cases; as to guardians, Downs *v.* Rickards, 4 Del. Ch. 430 (1872), cases; Dodge *v.* Stevens, 94 N. Y. 215 (1883).

[7] Stone *v.* Bishop, 4 Cliff. 596 (1878).

Property acquired from him with knowledge of his trust and of his disregard of its obligations, can be followed and recovered.[1] As long as trust property can be traced, the property into which it has been converted remains subject to the trust; and if a man mixes trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his.[2] See IDENTITY, 2.

The estate of a trustee is commensurate with the purposes of the trust, and ceases when there are no further duties to be performed.[3]

Where the acts or omissions of a trustee show a want of reasonable fidelity, a court will remove him. Thus, where he neglects to invest money, he may be removed as for a breach of trust.[4]

See BREACH; CHARITY, 2; CREDIT; DECLARATION, 1; DELEGATUS, Potestas; DESCRIPTIO, Persona; DEVISE, Executory; DIRECTOR; DISCRETION, 2; EQUITY; FIDES; FIDUCIARY; GOVERNMENT; LIEN, Equitable; MINISTERIAL; POWER, 2; RESCISSION; SETTLE, 3; SHELLEY'S CASE; STOCK, 3; TITLE, 1, Equitable.

2. In its modern, non-technical sense: a combination of interests in property, usually of a personal nature, with the power of directing the use, or of controlling the disposal, intrusted to a few men for the benefit of all persons concerned.

Or, more at length, the word describes an arrangement between the holders of the majority of the stock of associations incorporated for similar business purposes, by which those holders transfer the power to vote their stock to a selected committee whose policy will be not only to elect but to so animate each board of directors that the action of all the boards will be identical without a contract therefor. The boards may even be chosen from the members of the committee, each member for this purpose being made the owner of one or more shares of stock in all of the corporations.

Among the objects sought are: lessening competition; regulating supply or production; lowering the cost of material; reducing expenses; advancing prices or rendering them steady; increasing dividends; and enhancing the value of the shares of stock. The effects may be: monopolization, by centralizing power in a few persons; evasion of laws regulating corporations; and, perhaps, even criminal interference with the law of supply and demand.

While, in their organization, "trusts" may vary with the nature of the property involved, the objects in view, and the readiness to confide the use or control of capital, products, or good-will, or their representatives, to agents, the general kinds, as already intimated, are: (1) That in which the use of the stock of similar corporations is given to a few men or to one dominant corporation. (2) That in which the possession of tangible property of any species is committed to others for management or disposal.

The first species has been called a "corporate trust;" the second, which is the simplest in form, as well as the most common, may be called a "commercial trust;" and either may be termed a "proxy trust."

In order to participate in these schemes, private concerns have been re-organized as associations whose capital was represented by issues of stock; some establishments (manufacturing) have been closed, and others consolidated; or all have been leased or conveyed to the committee for the purposes of a common control; or, perhaps, one establishment, centrally located, has been delegated to receive and to sell the products of the confederated establishments. In other cases the plan has been for the owners of the establishments to convey them to the committee, and each receive, for protection, a mortgage upon his property, and certificates for the value of the good-will.

The right to use (by voting or otherwise) another's shares of stock represents the "legal" interest in them. This right may be parted with by an absolute transfer, a "declaration of trust" being executed at the same time, or by means of a simple power of attorney or proxy. The "beneficial" or "equitable" interest in the shares is retained by their original owner, who receives, in place thereof, one or more "trust certificates" for his share in the combined interests,—the trustees having received from the respective corporations new stock-certificates in their own names, and appearing upon the corporate books as the absolute owners of the stock. The committee are not supposed to represent any one corporate body; in effect, all they need do is to determine the *personnel* of the boards of directors and to infuse into the minds of the members a common purpose. By securing control of the voting power of one share more than one-half of all of the shares of stock in each corporation, these ends may be accomplished, it is claimed, without any corporation, as such, knowing anything about the object in view, much less without its participating in any scheme on foot to shape or to control its action. The stockholders of a corporation do not constitute the legal entity known as the corporation.

The principle upon which modern "trusts" are

[1] Smith *v.* Ayer, 101 U. S. 327-28 (1879), cases.

[2] Central Nat. Bank of Baltimore *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 67-70 (1881), cases; Moore *v.* Stinson, 144 Mass. 506 (1887); Fletcher *v.* Sharpe, 108 Ind. 279 (1886), cases: 26 Am. Law Reg. 74-82 (1887), cases.

[3] Koenig's Appeal, 57 Pa. 352 (1868); Williams's Appeal, 83 *id.* 377 (1877); 75 *id.* 354; 80 *id.* 337.

[4] Cavender *v.* Cavender, 114 U. S. 472, 473 (1885), cases.

organized would seem to have been applied in England nearly half a century ago in "cost-book companies," formed for carrying on mining operations.[1] More recently, a plan, very similar, has been employed in that country for receiving and investing subscribed funds in the securities of different incorporated companies, upon the principle of "average gain and loss" — a loss of funds upon one investment being made up by profits derived from other investments.[2]

What is called a "car trust," which is of American extension, if not of American origin, consists in an agreement between the owners of freight cars, chiefly, but perhaps of other rolling stock for railroads, by which such property is placed in the hands of a trustee, possibly a corporation, for the purpose of effecting leases or sales upon the installment plan, the trustee, in cases, issuing certificates for interests in the deferred payments or rentals.[3]

The word "trust," in the sense under consideration, is said to be applicable to the plan upon which the Standard Oil Company was originally organized, and is at present conducted; that, in point of fact, all modern "trust" combinations find in it their prototype.

The following general propositions are deducible, it is believed, from the decisions hereto cited:

1. Mutuality of agreement to become a party to a "trust" arrangement may not of itself serve as a sufficient consideration to make the agreement binding.

2. One who has executed a power of attorney for voting his stock may revoke it at any time, and he may have an injunction to prevent voting it.

3. The combination to transfer the voting power, that is to execute proxies, is not necessarily illegal.

4. A dissenting party can have relief against the combination when its object is illegal.

5. Where the engagement has been to do an illegal act, a withdrawing party cannot be made to pay damages as for breach of a contract.

6. Any agreement in general restraint of alienation is not enforcible.[4]

In the absence of decisions determining more directly the nature and powers of these organizations, the following more general observations are submitted:

A "trust" seems to be like an ordinary partnership — persons endeavoring, through managers, to accomplish a common purpose.

Any species of property which can be assigned at law may be transferred to another person to be held in trust.[1]

A share of stock, which is a chose in action, is personalty. The New York law defining *express* trusts is limited to realty; this is also probably true of the statutes of California, Connecticut, Dakota, Georgia, Kentucky, Michigan, Minnesota, North Carolina, Pennsylvania, Vermont, Wisconsin, and other States, specifying the objects for which legal trusts may be created.

The creation of monopolies is not only not encouraged in any State, but expressly forbidden in Arkansas, Maryland, New Mexico, North Carolina, Tennessee, and Texas.

Perpetuities also are forbidden in all the States; and restraints upon the alienation of property are held to be against public policy, as are also agreements tending toward restraint upon trade, especially in the necessaries of life.[2]

The minority stockholders in a corporation are bound by the action of the majority as to all matters of legitimate business.[3]

If its charter, or general law, does not permit a corporation to enter into a "trust" combination, becoming a party to one would doubtless result in the forfeiture of its franchises, and perhaps incur other penalties.

The power to manage a corporation by its stockholders cannot be transferred to a body other than its own board of directors; nor can it be bound by an executory contract providing for an exercise of any of its powers against the intereste of its stockholders. Any secret arrangement by which it is practically merged into other corporations would be illegal.[4]

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[1] See Kittow *v.* Liskwood Union, L. R., 10 Q. B. 9 (1874).

[2] See Sykes *v.* Beadon, L. R., 11 C. D. 170 (1879) — a "Government Securities Trust," investing in Colonial and other obligations; Smith *v.* Anderson, 15 *id.* 247 (1880) — a "Submarine Cables' Trust;" Wigfield *v.* Potter, 45 L. T. 612 (1882) — a real estate trust or pool; Crowther *v.* Thorley, 32 W. R. 330 (1884); *Re* Siddall, L. R., 29 C. D. 1 (1885). The question in each of these cases did not involve the legality of the "trust," as such, but whether the company was included within the meaning of the Companies Act of 1862, providing that an association consisting of more than twenty persons, carrying on business for gain, should be registered.

[3] See Ricker *v.* American Loan & Trust Co., 140 Mass. 347 (1885).

[4] Hafer *v.* New York, Lake Erie & Western R. Co., Cincinnati Sup. Ct., 14 Cin. Law Bul. 68 (1886); Griffith *v.* Jewett (Cin., Ham. & Dayt. R. Co.), 15 *id.* 419 (1886); Woodruff *v.* Dubuque & Sioux City R. Co., 30 F. R. 91 (Feb. 1887); Louisiana *v.* American Cotton Oil Trust, 1 Ry. & Corp. Law J. 509 (May, 1887); Vanderbilt *v.* Bennett, C. P. 1, Allegheny Co., Pa., 2 *id.* 409 (Oct. 1888): affirmed, Sup. Ct. Pa.; Moses *v.* Scott *et al.*, 84 Ala. 608, 611 (Dec. 1887); Moses *v.* Tompkins, *ib.* 613 (1887); Pennsylvania R. Co. *v.* Commonwealth, 7 Atl. R. 868 (Oct. 1886) — upon an agreement to control parallel and competing lines of railroad, indirectly, through the agency of a third road; Fisher *v.* Bush, 35 Hun, 641 (1885) — upon an agreement neither to sell nor to vote stock without the consent of all parties; Noel *v.* Drake, 28 Kan. 265 (1882) — upon an agreement (against public policy) to make one cashier of a bank.

[1] See Perry, Trusts, 3 ed. § 67; Lewin, Trusts, &c. *45; Hill, Trustees, *44.

[2] See India Bagging Association *v.* Kock, 14 La. An. 168 (1859); Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. 173 (1871); Croft *v.* McConoughy, 79 Ill. 346 (1875) — concerning a grain pool; Arnot *v.* Pittston & Elmira Coal Co., 68 N. Y. 558 (1877); Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666 (1880).

[3] See Ervin *v.* Oregon Railway & Navigation Co., 27 F. R. 625, 630 (1886), cases.

[4] See generally 19 Abb New Cases, 450 (1888), note by Austin Abbott; Monograph on "Trusts," by W. W.

An eminent authority, in discussing the "legality of trusts," writes substantially as follows: The word "trust" is not descriptive of the subject, but it is difficult to find a substitute. Strictly, the trust itself is a mere instrument — the means to an end. The determinative inquiry is whether the end sought is lawful at common law, whether the agreement be by individuals acting, or not acting, as stockholders. The object of each stockholder in making the committee the apparent stockholders and in conferring upon them the power of control, is his own ultimate benefit — which is not unlawful. No law prevents each stockholder from selecting the same trustee or trustees. The "trust deed" declares the trust — a legal contrivance in daily use between individuals. It is the purpose, if anything, that gives the combination the stamp of illegality. The stockholders of a corporation do not own its property; they have but an "equitable" title to it; on the other hand, the rights of the corporation are "legal" rights. Owning stock confers a right to vote for managers or directors, to receive dividends, and to hold the directors, that is the corporation, to an account for their management.

The unincorporated association through the instrumentality of which the objects of a "trust" are sought to be attained constitutes a partnership — something is undertaken by several persons for gain; the consideration is the mutual promises. Its validity depends wholly upon the lawfulness of the ends in view.[1]

Parties may agree to prevent competition between themselves, unless the agreement is unlawful in its own nature. At common law it is not wrong to raise prices so as to pay the costs of production and a reasonable profit, nor to regulate them in order to keep them steady; nor is such an agreement a conspiracy "to commit an act injurious to trade or commerce" (N. Y. Penal Code, sec. 168), since it is not "injurious" to keep production on an even line with consumption.[2]

The same writer's conclusions are: (1) At common law forestalling, regrating, and engrossing were not criminal unless they concerned the necessaries of life. The sounder opinion seems to be that they were made crimes by statute 5 and 6 Edw. VI (1552), c. 14, which was repealed by 12 Geo. III (1772), c. 71, and by 7 and 8 Vict. (1844), c. 24. (2) If forestalling was criminal it was only where there was proven a criminal intent to injure trade. Where the purpose was laudable, as, when to keep prices steady, no such intent could be inferred. (3) It is not a nuisance by that law for persons to form an association, issue transferable certificates, and appoint a committee to make rules for governing the association. (4) The old rule that a contract in general restraint of trade is void as between the parties was originally based upon erroneous views of political economy. It has practically disappeared in England and New York, and is likely to be modified elsewhere.[1] (5) If a "trust" is lawful as a reasonable element in production it cannot be made unlawful by legislation of a stigmatizing character. To produce freely as individuals, to act in concert with others, to stimulate production when there is a scarcity of commodities, to regulate and restrain it when there is a "glut" — are all prime elements in liberty[3] of trade; and they are also constitutional rights.[3]

See ALIENATIO; COMBINATION, 2; HAPPINESS; LEGAL, Illegal; LIBERTY, 1; MONOPOLY; PERPETUITY; STOCK, p. 977, c. 2; TRADE, p. 1043.

TRUTH. See TRUE.

TRY. See ATTEMPT; TRIAL.

TUG-BOAT. In the towing of vessels without motive power, is regarded as the dominant mind or will of the adventure.

The details of immediate navigation, with reference to approaching vessels, must be left to a great extent to those on board of her. And they must use at least reasonable and ordinary care toward the tows in their charge.[4]

Cook (N. Y. City, 1888); 1 Harv. Law Rev. 132-43 (Oct. 25, 1887), by F. J. Stimson; 27 Cent. Law J. 205 (Aug. 31, 1888); New York Times, Feb. 20, 1888; New York World, Feb. 21, 1888.

[1] See Bostwick *v.* Champion, 11 Wend. 571 (1834): s. c. on appeal, 18 *id.* 175 (1837); Merrick *v.* Gordon, 20 N. Y. 93 (1859); Burnett *v.* Snyder, 81 *id.* 555 (1880); Stroher *v.* Elting, 97 *id.* 102 (1884). Analogous to, and not at variance with, Merrick *v.* Gordon are, Wright *v.* Davidson, 13 Minn. 449 (1868); Snell *v.* De Land, 43 Ill. 323 (1867); Irvin *v.* Nashville, &c. R. Co., 92 *id.* 108 (1879).

[2] Compare Marsh *v.* Russell, 66 N. Y. 288, 291-92 (1876) — a contract between four partners to furnish recruits for certain towns at five hundred dollars per man, under an anticipated call for troops.

[1] See Rousillon *v.* Rousillon, L. R., 14 C. D. 351 (1880); Printing, &c. Co. *v.* Sampson, L. R., 19 Eq. C. 462 (1875); Diamond Match Co. *v.* Roeber, 106 N. Y. 473 (1887). In Wickens *v.* Evans, 3 Y. & J. 318 (Exch. R., 1829), an agreement between manufacturers of trunks for a division of territory, and for non-interference, was upheld. In Collins *v.* Locke, L. R., 4 Ap. C. 674 (1879), an agreement to parcel out the stevedoring business of a port, and to prevent competition, at least among the contracting parties, was also held to be valid. In Mogul Steamship Co. *v.* McGregor, L. R., 21 Q. B. D. 544 (1888), it was held that a number of associated owners of vessels could lawfully offer rebates to dealers in China who would ship teas to Europe by vessels controlled by the association, the object being, not to ruin the trade of rival ship-owners, but to confine the transportation of teas to vessels belonging to the association. In Central Shade-Roller Co. *v.* Cushman, 143 Mass. 364 (1877), the court sustained, as not in restraint of trade nor against public policy, a combination between the manufacturers of a patented article to maintain uniform prices. See generally, as to combinations designed to destroy competition, 20 Am. Law Rev. 195-216 (1886), cases.

[3] Compare People *v.* Gillson, 109 N. Y. 398-99 (1888), cases; Matter of Jacobs, 98 *id.* 106 (1885).

[3] 3 Political Science Quarterly, 592-632 (Dec. 1888), by Theodore W. Dwight. *Ib.* 611, is a copy of the "trust deed" of the Sugar Refineries Company, from the report of the Commission relative to Trusts in New York, made March 6, 1888. On the Economic and Social Aspects of Trusts, see 3 *id.* 3 (Sept. 1888).

[4] The Fannie Tuthill, 12 F. R. 448 (1882); The Civilta

Although a tug may not be a common carrier, liable as an insurer, nor required to use the highest degree of care and skill, she is bound to use reasonable care and skill, and to know the condition of the bottom and the depth of the water of the river she may be navigating.[1]

The rule that the tug is alone responsible for damages upon a collision between her tow and other vessels is applicable only when the tow is wholly under the control of the tug.[2]

The English authorities hold that a ship in tow of a tug is liable for injury to third persons though the direct fault may be that of the tug; the ship and her owners being treated as principals. In this country, under the law of principal and agent, the tug is held to be the sole principal, and the ship exempted, when her navigation is, by contract, exclusively in charge of the tug.[3] See TOW-BOAT; COLLISION, 2; VOYAGE.

TUITION. Is ordinarily restricted to the fee or fees paid for instruction, and not to charges made to meet incidental expenses.[4]

TUMULT. See BRAWL; PEACE, 1; RIOT; WAR.

TURNKEY. A jailer's assistant whose special duty is to open and close (lock) the door or doors of the prison. See ESCAPE, 1 (2).

TURNOUT. See RAILROAD.

TURNPIKE. Originally, a road having toll-gates or bars, called "turns" or "pikes," with which to obstruct passage until toll was paid.[5]

A "turnpike road" means a road having on it toll-gates or bars, originally called "turns." Such roads were first constructed about the middle of the last century. Individuals, with a view to the repair of particular roads, subscribed money and erected gates, taking tolls from those who passed through them. The distinctive mark still is the right of turning back any one who refuses to pay toll.[6]

A turnpike company is one which has the power to collect tolls from persons passing over the road, and to enforce the collection by erecting turnpikes or gates, or both, to obstruct the passage till tolls are paid.[6]

This definition is general, embracing various species of roads, whether the materials of which they are formed be stones, gravel, or plank, or the structure be flat or rounded.[6]

A turnpike road is a public highway, differing from a common highway only in being authorized by public authority and made at the expense of individuals, which expense is reimbursed by a toll.[1] See TOLL, 2; WAY.

TURPIS. See CAUSA, Ex turpi; TURPITUDE.

TURPITUDE. Doing a thing against good morals, honesty, or justice; unlawful conduct; infamy. Latin, *turpitudo.*

Allegans suam turpitudinem non est audiendus. One alleging his own infamy is not to be listened to. *Nemo allegans suam turpitudinem est audiendus.* No one who avers his own infamy is to be heard. A person cannot escape fulfilling an obligation by alleging bad conduct on his part. The maxim states the rule applied to a party who seeks to enforce a right founded upon an illegal or criminal consideration.

Where there is turpitude, the law will help neither party.[2]

The meaning is that no one shall be heard in a court of justice to allege his own turpitude as a foundation of a right or claim; not, that a man shall not be heard who testifies to his own turpitude or criminality, however much his testimony may be discredited by his character. In *Walton* v. *Shelley* (1 T. R. 300), where an indorser was held not to be competent to prove that a note was void for usury in its inception, the maxim was plainly misapplied by Lord Mansfield. That was in 1786. In 1798, Lord Kenyon being chief justice, that case was overruled by *Jordaine* v. *Lashbrooke* (7 T. R. 601, 609), as to all instruments. The States are divided between the two cases. But the tendency is to disregard all objections to the competency of witnesses, and to allow their position and character to affect only their credibility. Where *Walton* v. *Shelley* is adopted, the rule is limited to negotiable instruments. A holder cannot invoke protection against an infirmity he has aided to create. But the rule is not applicable to a case between the original parties, where the paper had not been put into circulation and each party was cognizant of all the facts.[3]

There are many cases in which witnesses are admitted, though not compelled, to prove facts which show their turpitude; as, in the case of a *particeps criminis*, when credibility is for the jury. The maxim is more applicable to parties. See LEGAL, Illegal.[4]

and The Restless, 103 U. S. 701-2 (1880); The Atlas, 93 U. S. 302 (1876); The Charles Allen, 11 F. R. 317 (1882).

[1] The Robert H. Burnett, 30 F. R. 215 (1887), cases.

[2] The City of Alexandria, 31 F. R. 427 (1887); Sturgis v. Boyer, 24 How. 121-23 (1860).

[3] The Doris Eckhoff, 32 F. R. 559 (1887), cases.

[4] State *ex rel.* Priest v. Regents of University of Wisconsin, 54 Wis. 159, 163 (1882).

[5] [Northam Bridge Co. v. London Ry. Co., 6 M. & W. 428 (1840), Abinger, C. B.

[6] Haight v. State, 32 N. J. L. 451 (1865), Haines, J.; State v. Haight, 30 *id.* 448 (1864).

[1] Commonwealth v. Wilkinson, 16 Pick. 177 (1834), Shaw, C. J. See also Heyward v. New York, 8 Barb. 492 (1850).

[2] Trist v. Child, 21 Wall. 452 (1874).

[3] Davis v. Brown, 94 U. S. 425-27 (1875), Field, J.; 2 Best, Ev. §§ 545-46.

[4] Winton v. Saidler, 3 Johns. Cas. *189, 192 (1802), Kent, J.; Powell v. Waters, 17 Johns. *180 (1819); Fox v. Whitney, 16 Mass. *121 (1819); Gould v. Gould, 3 Story, 541 (1844); 35 Pa. 527; 40 *id.* 156, 51 *id.* 376; 1 Greenl. Ev. § 383.

TUTOR; TUTRIX. In civil law, a person to whom is committed the care and custody of the person and estate of a minor.

Tutrix is the feminine form of the word. Lest the interests of ward and tutor become opposed, the court in Louisiana appoints an "under-tutor" to act for the ward.[1] See COMMITTEE; GUARDIAN.

TWELVE TABLES. The Roman plebs, in their struggle with the patricians for equality of rights, demanded that the laws of the state be reduced to written form, the patricians, it was claimed, administering the law to suit themselves. A commission of ten persons (*decemviri*) was appointed, 451 B. C., to draw up a code. In 450 the commission reported ten tables or chapters of laws, and added two more in 449. The object was to obtain an open and exact statement of the system already existing.

This code continued for many centuries as the fundamental law. The legislation of Justinian supplanted it in form. The original Tables were inscribed on plates of brass. Quotations are preserved in the extant works of ancient writers. Form and ceremony in actions were rigorously insisted upon.[2]

TWICE. See JEOPARDY.

TWYNE'S CASE. See POSSESSION, Fraudulent.

TYPE. See PLAIN.

Typewriter. See STENOGRAPHER; WRITING.

TYRRELL'S CASE. See TRUST, p. 1059.

U.

U. The initial letter of a few words sometimes abbreviated:

U. B. Upper bench.

U. C. Upper Canada — courts, reports.

U. S. Under sheriff; United States — courts, statutes, reports, etc.

UBERRIMA. See FIDES, Uberrima.

UBI. L. Where; when.

Ubi eadem ratio. See RATIO.

Ubi jus, ibi remedium. See REMEDIUM.

UBIQUITY.[3] 1. Presence throughout a dominion or jurisdiction.

The king, politically, is the fountain of justice, the steward who dispenses justice to whom it is due. A consequence of this prerogative is his "legal ubiquity:" he is always present in his court by his judges, whose power is an emanation of his prerogative. On account of this ubiquity in his royal office he can never be nonsuit, and he is not said to appear by attorney.[1]

The United States, in their sovereign capacity, possess, in contemplation of law, an ubiquity throughout the Union.[2]

2. Universal validity or efficacy.

A valid judgment *in rem* is ubiquitous — binds all the world. . . Decrees as to personal *status* are not necessarily ubiquitous.[3] See RES.

ULLAGE. See LEAKAGE.

ULTIMA. L. The last, extremest; literally, the furthest off, remotest.

Ultima ratio. The final argument; the last resort.

Ultimus hæres. The remote heir: in feudal law, the lord.

Ultimatum. The last proposition a party will make — toward negotiating a contract or a treaty; also, the result of the negotiation as expressed in the final determination.

ULTIMATE. See ULTIMA.

In the expression "ultimate facts," is opposed to probative, evidential. And as the probative or evidential facts are such as serve to establish or disprove the issues, the issues are, therefore, the ultimate facts.[4]

ULTRA. L. Beyond, over, outside of.

Ultra reprises. Beyond drawbacks. See REPRISES.

Ultra vires. Beyond the power or powers. Sometimes termed *extra vires*. **Intra vires.** Within the power or powers. These phrases donate that an act, of contract or of tort, done on behalf of a corporation is, or is not, within the scope of the powers conferred upon it.

The phrase *ultra vires*, as used in the discussion of legal subjects, seems to be first found in Kames's Principles of Equity, published in 1776, where he inquires whether a court of equity can afford relief in a case where a deed is "void at common law, as *ultra vires*."[5]

The expression, which is a concise and convenient form by which to describe the unauthorized act of artificial persons with limited powers, is applicable to individual action.[6]

[1] See Vance *v.* Vance, 108 U. S. 514 (1883); Sensenman's Appeal, 21 Pa. 336 (1853).

[2] Hadley, Rom. Law, 74-79; Maine, Anc. Law, 1, 14, 89; Gibbon, Rome, ch. 44.

[3] L. *ubi-que*, wherever, everywhere.

[1] 1 Bl. Com. 266, 270; 3 *id.* 24.

[2] Vaughn *v.* Northup, 15 Pet. 6 (1841), Story, J.; 16 How. 105; 109 U. S. 657.

[3] 1 Whart. Ev. §§ 814-18; 2 Sm. L. C. 662.

[4] Kahn *v.* Central Smelting Co., 2 Utah, 379, 381 (1878); *id.* 375-76; Pio Pico *v.* Cuyas, 47 Cal. 174 (1873).

[5] See 16 Am. Law Reg. 514 (1877); Green's Brice's Ultra Vires, Pref. v-vi.

[6] Nat. Pemberton Bank *v.* Porter, 125 Mass. 336 (1878).

An act is *ultra vires* when (1) it is not in the power of the corporation to perform it under any circumstances; when (2) the corporation cannot perform the act without the consent of certain persons; and when (3) the corporation cannot perform the act for some specific purpose.[1]

The act, in the first sense, is void *in toto*, and the corporation may avail itself of that plea. But whether the plea may be set up in other cases depends upon circumstances.[1]

When a contract is not on its face necessarily beyond the scope of the power of the corporation, in the absence of proof to the contrary, it will be presumed to be valid. A corporation is presumed to contract within its powers. The doctrine of *ultra vires* should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong.[2]

The House of Lords has decided that a contract not within the scope of the powers conferred on a corporation cannot be made valid by the assent of the shareholders, nor by a partial performance. This decision, which is based upon sound principle, represents the preponderance of authority in this country.[3]

Whatever, under the charter of a corporation and the general laws applicable to it, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited.[4]

The doctrine, as applying to the powers of railroad corporations, has not been construed, of late years, with the strictness that obtained in former times. . . Where a corporation has received the benefits of a contract, it may not now deny its validity.[5]

A corporation possesses only such lawful powers as are expressly conferred by its charter, and such as are clearly incidental or impliedly requisite for carrying out the declared objects of its creation. While some authorities hold that an act in excess of the powers so limited are illegal (any contract in excess thereof being non-enforceable), and that neither party is estopped from pleading the *ultra vires* of the transaction, in some States the corporation is estopped from alleging or taking advantage of its want of power. The latter doctrine seems to be gaining ground.[6]

A corporation is liable for every wrong it commits, and in such cases the doctrine of *ultra vires* has no application. It is also liable for the acts of a servant while engaged in the business of his principal.[1] See TORT, 2.

UMPIRE.[2] When arbitrators do not agree, it is usual to add that another person be called in as umpire (*imperator* or *impar*) to whose sole judgment the controversy is then referred.[3]

A person whom two arbitrators, appointed and duly authorized by the parties to a suit, select to decide the matter in controversy, concerning which the arbitrators are unable to agree.

His province is to determine the issue submitted to the arbitrators, and to make an award thereon. This award is his alone. He is in the situation of a sole arbitrator, and, unless it is otherwise agreed, is bound to hear and determine the case as if it had been originally submitted to his determination.[4] See ARBITRATION.

A testator may designate his executor as umpire to settle questions of doubt as to his intentions. And if such umpire exercises the power in good faith, his decisions will not be revised by a court, although they might be thought erroneous. But if he refuses to act, transcends his authority, makes an incomplete award, or commits any gross mistake or error of judgment evincing partiality, corruption, or prejudice, or violates a statute on which a dissatisfied party has a right to rely, a court of equity may interfere, correct the error, and restrain further abuse of the powers committed to the umpire.[5]

UN. A prefix, of Anglo-Saxon origin, equivalent to the Latin *in* and *non*, not. Compare DIS; IN, 3 (1); NON.

Negatives the meaning of the simple word.

UNA. See UNUS.

UNADEEMED. See ADEMPTION.

UNADJUSTED. See ADJUST.

UNADMINISTERED. See ADMINISTER, 4.

UNADMITTED. See ADMISSION, 2.

UNALIENABLE. See ALIEN, 2.

UNALTERED. See ALTERATION.

UNASSESSED. See ASSESS, 1.

[1] Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 578 (1869), Sawyer, C. J. Approved, McPherson *v.* Foster, 43 Iowa, 65 (1876).

[2] Ohio & Mississippi R. Co., *v.* McCarthy, 96 U. S. 267 (1877), cases, Swayne, J.; Bissell *v.* Michigan Southern, &c. R. Cos., 22 N. Y. 263–80 (1860), cases; Bradley *v.* Ballard, 55 Ill. 419 (1870), cases; Holmes *v.* City of Shreveport, 31 F. R. 119–21 (1887), cases.

[3] Thomas *v.* West Jersey R. Co., 101 U. S. 83 (1879), cases.

[4] Green Bay, &c. R. Co. *v.* Union Steamboat Co., 107 U. S. 100 (1882), cases, Gray, J.

[5] Dimpfel *v.* Ohio & Mississippi R. Co., 9 Biss. 130 (1879).

[6] Denver Fire Ins. Co. *v.* McClelland, 9 Col. 18–31 (1885), cases.

[1] First Nat. Bank of Carlisle *v.* Graham, 100 U. S. 702 (1879), cases. See also Cooley, Torts, 119–23, cases. See generally 16 Am. Law Reg. 513–26 (1877), cases; 13 Am. Law Rev. 632–62 (1879), cases.

[2] For *numpire:* F. *nom-pair*, a non-peer: L. *impar*, un-equal.

[3] [3 Bl. Com. 16.

[4] Haven *v.* Winnisimmet Company, 11 Allen, 384 (1865), cases, Bigelow, C. J. Approved, Ingraham *v.* Whitmore, 75 Ill. 30 (1874).

[5] Board of Foreign Missions *v.* Ferry, 15 F. R. 709 (1883), cases.

UNAVOIDABLE. See ACCIDENT; CASUALTY.

UNBORN. See CHILD.

UNCERTAIN. See CERTAIN.

UNCERTIFIED. See CERTIFICATE.

UNCLAIMED. See CLAIM.

UNCLE. See CONSANGUINITY.

UNCOLLECTIBLE. See COLLECT.

UNCONDITIONAL, or UNCONDITIONED. See CONDITION.

UNCONSCIONABLE. See CONSCIENCE.

UNCONSTITUTIONAL. See CONSTITUTION.

UNCONTESTED. See CONTEST.

UNDE. See DOWER, Writ of.

UNDECIDED. See DECISION.

UNDENIED. See ADMISSION, 2; DEFENSE, 2.

UNDER. Lower than, beneath, below; subject to; subordinate: as, under a law or jurisdiction; under the law; under a judgment, mortgage, or other incumbrance; under sentence; under the hammer. Compare OVER, 1.

No right can be acquired "under a law" which is not in pursuance of, that is, subject to, the law.[1]

Under and subject. Used in relation to the mutual and dependent rights and duties of mortgagees, mortgagors, the grantees of mortgagors and the alienees of such grantees; also, of rights affected by ground-rents, and other incumbrances.

An agreement merely to take land subject to a specified incumbrance is not an agreement to assume and pay the incumbrance. The grantee of an equity of redemption, without words in the grant importing in some form that he assumes the payment of a mortgage, does not bind himself personally to pay the debt. To make him personally liable, there must be words importing that he will pay the debt.[2]

In Pennsylvania, a conveyance of land "under and subject" to a mortgage executed by the grantor creates a covenant of indemnity to the grantor on the part of the grantee. If the grantee aliens by a deed containing the same "under and subject" clause, without more, the alienee does not assume a liability to the mortgagee, or undertake to discharge the grantee's covenant of indemnity. The mortgagee may show, however, that the alienee has taken upon himself not only the grantor's duty to indemnify the mortgagor, but a personal obligation to pay the mortgage debt. The evidence may consist of stipulations in the deed, of written articles outside of its terms, or of a verbal contemporaneous agreement; and the undertaking may be implied from circumstances. . . It may be provided by statute that a grantee shall not be personally liable for an incumbrance unless, in some writing, he shall expressly have assumed personal liability; that the words "under and subject" alone shall not be construed to create it; and that such liability shall not be enforced by any person other than he with whom it was incurred, nor continue after the grantee has *bona fide* parted with the property, unless there is an express agreement for continuing the liability.[1]

UNDER AGE. See AGE.

UNDER-AGENT. See AGENT; DELEGATE.

UNDERBILLING. See COMMERCE, p. 201.

UNDER IMPROVEMENT. See IMPROVEMENT.

UNDERLET. See LEASE.

UNDER PROTEST. See PROTEST, 1.

UNDER-SHERIFF. See SHERIFF.

UNDERSTANDING. An ambiguous word, unless accompanied by an expression showing that it constitutes a meeting of minds as to something respecting which the parties intend to be bound. It may be used to express the expectation of confidence upon which parties frequently are willing to rely without their exacting a binding stipulation.[2]

"Understanding" and "agreement" are synonymous. An understanding is "anything mutually understood or agreed upon."[3]

"It is understood," in ordinary use, when adopted in a written contract, has the same force as "it is agreed."[4]

It falls short of alleging a distinct, express contract.[5]

Expresses a valid contract engagement of a somewhat informal character.[6] See ASSENT; PROMISE.

UNDERTAKE. To assume, engage; to agree, promise, obligate one's self. The technical word used in declaring upon an engagement or promise of any nature. See ASSUMPSIT; CARE; COVENANT.

UNDERTAKER. One who has charge of a funeral.

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[1] Mills *v.* Stoddard, 8 How. 366 (1850).

[2] Elliott *v.* Sackett, 108 U. S. 140 (1883), Blatchford, J. See also Shepherd *v.* May, 115 *id.* 510 (1885); Fiske *v.* Tolman, 124 Mass. 256 (1878); Belmont *v.* Coman, 22 N. Y. 438 (1860); Hoy *v.* Bramhall, 19 N. J. E. 74 (1868); Fowler *v.* Fay, 62 Ill. 375 (1872).

[1] Merriman *v.* Moore, 90 Pa. 80 (1879), cases, Paxson, J.; Act 12 June, 1878, P. L. 235; 121 Pa. 139.

[2] [Camp *v.* Weed, 25 Conn. 529 (1857), Storrs, C. J.]

[3] Barkow *v.* Sanger, 47 Wis. 507-8 (1879), Taylor, J.

[4] Higginson *v.* Weld, 14 Gray, 170 (1859).

[5] Black *v.* City of Columbia, 19 S. C. 419 (1883).

[6] Winslow *v.* Dakota Lumber Co., 32 Minn. 286 (1884).

An undertaker's establishment, in which he keeps coffins, ice-boxes and cases for preserving bodies, and at the rear of which he cleanses and dries such boxes, is not necessarily a nuisance.[1]

UNDER-TENANT. See LEASE, Lessee, page 607.

UNDER-TUTOR. See TUTOR.

UNDERWRITER. When marine insurance was the only insurance known, a person soliciting a contract exhibited in writing, in a resort for merchants or insurers, the particulars of his application, or sent the application to an insurance-broker. A person who was willing to take the risk wrote underneath the application the sum, his name, residence, etc. Hence "underwrite" (and "underwriting") came to mean to accept proposed contracts for insurance, to carry on the business of insuring against loss by storm, shipwreck, fire, etc. See INSURANCE.

UNDISCLOSED. See ADMISSION, 2; AGENT; DISCOVERY.

UNDIVIDED. See DIVISION, 1.

UNDUE. See CONCEAL, 5; INFLUENCE.

UNEXECUTED. See EXECUTE.

UNEXEMPTED. See EXEMPTION.

UNFAIR. See CONSCIENCE; FRAUD; INFLUENCE.

UNIFORM. Conforming to one rule, mode, or unvarying standard; affecting persons and property alike; agreeing with each other; substantially one and the same. See PRESUMPTION.

The National and State constitutions provide that legislation on designated subjects shall be "uniform" in its operation.

Thus, "The Congress shall have Power . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies."[2]

Bankrupt laws are uniform when they allow bankrupts in each of the States the exemption which the laws of any particular State allow to debtors upon the levy of an execution, although this may leave bankrupts in some States more property than they can retain in others.[3]

That "all laws of a general nature shall be uniform in their operation" means that such laws shall bear equally, in their burdens and benefits, upon persons standing in the same category.[4]

Every law of a general nature must operate equally upon all persons brought within the relations and circumstances provided for.[1]

A law is uniform when all persons brought within the relation and circumstances provided for are affected alike, when it has a uniform operation upon all within the class upon which it purports to operate.[2]

Uniformity consists in the fact that no person or thing, of the description affected, is exempt from the operation of the law.[3]

All legislation, to a greater or less extent, consists in the creation of categories to which the provisions of a statute apply.[4]

Uniformity in taxing implies equality in the burden of taxation — uniformity in the mode of assessment, as well as in the rate of taxation. This uniformity must be co-extensive with the territory to which the law applies, and be extended to all property subject to taxation, so that all may be taxed alike and equally.[5]

Absolute uniformity may not be attainable in practice, but an approximation to it is possible, and any plain departure from the rule will defeat the tax. . . Taxes must be levied according to some fixed rate or rule of apportionment, so that all persons shall pay the like amount upon similar kinds of property of the same value.[6]

"All Duties, Imposts and Excises shall be uniform throughout the United States." A tax is uniform when it operates with the same force and effect in every place where the subject of it is found.[7] See TAX, 2.

UNILATERAL. See BILATERAL.

UNIMPAIRED. See IMPAIR.

UNIMPEACHED. See IMPEACH.

UNINCORPORATED. See ASSOCIATION, 8.

UNINCUMBERED. See INCUMBRANCE.

UNION. See MERGER, 1; TRADES-UNION; UNITED STATES; UNITY.

UNITED STATES. In America, the political entity or entirety formed by the adoption of the Federal or National Constitution; also, the whole territory or country subject thereto. Used adjectively, that which emanates from, pertains or belongs to, the General or National government.

See further CONSTITUTION; COURTS; GOVERNMENT; REVISED STATUTES; STATE, 3 (2); TERRITORY, 2; — CITIZEN; COMITY; COMMERCE; CORPORATION, Public; FEDERAL; NATION; TORT, 2; WAR.

[1] Westcott *v.* Middleton, 43 N. J. E. 478 (1887).

[2] Constitution, Art. I, sec. 8, cl. 4.

[3] *Re* Smith, 2 Woods, 460 (1876); *Re* Deckert, 10 Bankr. Reg. 4 (1873); *Re* Shipman, 14 *id.* 570 (1876); Appold's Estate, 16 Am. Law Reg. 627 (1868).

[4] People *v.* Judge, 17 Cal. *554 (1861).

[1] McAunich *v.* Mississippi, &c. R. Co., 20 Iowa, 343 (1866); Kelley *v.* State, 6 Ohio St. 271 (1856).

[2] [Senior *v.* Ratterman, 44 Ohio St. 673 (1887).

[3] [Heck *v.* State, 44 Ohio St. 539 (1886).

[4] Adler *v.* Whitbeck, 44 Ohio St. 573 (1886).

[5] Exchange Bank *v.* Hines, 3 Ohio St. 15 (1853), Bartley, C. J.

[6] Railroad Tax Case, 8 Saw. 252 (1882), Field, J.

[7] Constitution, Art. I, sec. 8, cl. 1; Head Money Cases, 112 U. S. 594 (1884), Miller, J.

UNITY. 1. The peculiar characteristic of an estate in joint tenancy is a four-fold unity — of interest, title, time, and possession. See TENANT.

2. At common law, a husband and wife were one person, and he that person.

Upon this principle of "unity of person" depended all the legal rights, duties, and disabilities that either party acquired by the marriage. Hence, the wife could neither sue nor be sued without joining the husband; and neither could convey directly to the other — a principle which does not now operate, at least in the case of a voluntary transfer as a settlement upon the wife.[1] See HUSBAND.

3. Assent to the same thing in the same sense. See AGREEMENT; ASSENT.

UNIVERSAL. See AGENT; ALL; GENERAL; PARTNERSHIP.

UNIVERSITY. See ABODE; COLLEGE, 3; LECTURES; SCHOOL; TAX, 2.

UNJUSTIFIABLE. See DEFENSE, 2; HOMICIDE.

UNKNOWN. See KNOWLEDGE, 1; CONTENTS, 1; INDICTMENT; OWNER.

UNLAWFUL. See LAWFUL.

UNLESS. See CONDITION; NISI.

UNLIQUIDATED. See LIQUIDATE; DAMAGES.—

UNMARKETABLE. See MARKET.

UNMARRIED. See MAN, 2; MARRIAGE.

UNMORTGAGED. See MORTGAGE.

UNO. See UNUS.

UNOCCUPIED. See OCCUPY.

UNOFFICIAL. See OFFICIAL; REPORT, 1 (2).

UNPAID. See ASSUMPSIT; PAYMENT.

UNREASONABLE. See CAUSE, Probable; REASON; SEARCH-WARRANT.

UNRECORDED. See RECORD, 1.

UNREDEEMED. See REDEEM.

UNREGISTERED. See REGISTER.

UNREPORTED. See REPORT, 1 (2).

UNSATISFIED. See SATISFY.

UNSEATED. See SEATED.

UNSOUND. See SOUND, 2.

UNSUITABLE. See SUITABLE.

UNTAXED. See TAX.

UNTENANTABLE. See LANDLORD.

UNTIL. Generally excludes the day to which it relates, but this construction will yield to the manifest contrary intention of the parties.[2]

A charter continuing "until the first day of January" expires the thirty-first day of December.[1]

"Until" or "till" the next term of court does not include any part of that term. And when time is given for filing exceptions until a particular day in a term, a filing on that day is too late.[2]

Otherwise held where a party had until a certain day for filing a motion for a new trial.[3]

"Until summer" ordinarily means to the first of June; "until fall," to the first of September.[4]

UNTRUE. See TRUE.

UNUS. L. One; the same.

Una voce. With one voice; with one assent.

Uno acto. In one act; by the same act.

Uno flatu. In one breath; in the same breath; in one utterance.

UNUSUAL. See PUNISHMENT; USUAL.

Two is not an "unusual" number, when applied to persons who violently enter premises in dispute.[5]

UNVERIFIED. See VERIFY.

UNWAIVED. See WAIVE.

UNWRITTEN. See LAW, Common, PAROL; WRITING.

UPLIFTED HAND. See OATH.

UPON. 1. Resting on, united with; contained in, *q. v.*

Breaking and turning over the soil of land does not constitute an improvement "upon" land, within the meaning of a mechanic's lien law.[6]

2. When; in case of.

Where a deed is to be delivered "upon" or "on" the payment of the purchase-money, a tender of delivery is precedent to the payment, the covenants being dependent. "Upon" in such case means "when."[7]

"Upon the death" of a devisee was held equivalent to "in case of" his death.[8]

See CASE, 1; THEN. Compare AFTER; ON.

UPPER. See BENCH.

UPSET. See BID.

USAGE; USANCE. See USE, 2, page 1070, c. 2.

USE.[9] 1, *v.* To employ, hold, occupy, enjoy, take the benefit of.[10]

[1] 1 Bl. Com. 442; 101 U. S. 228, 243.

[2] Kendall *v.* Kingsley, 120 Mass. 95 (1876), cases, Gray, C. J.; Webster *v.* French, 12 Ill. 304 (1850).

[1] People *v.* Walker, 17 N. Y. 503 (1858). See also People *v.* Crissey, 91 *id.* 631 (1883).

[2] Corbin *v.* Ketcham, 87 Ind. 139 (1882), cases.

[3] Rogers *v.* Cherokee Iron & Ry. Co., 70 Ga. 717 (1883); 67 *id.* 765.

[4] Abel *v.* Alexander, 45 Ind. 528 (1874).

[5] Pike *v.* Witt, 104 Mass. 597 (1870).

[6] Brown *v.* Wyman, 56 Iowa, 454 (1881); 55 Vt. 149.

[7] Adams *v.* Williams, 2 W. & S. 228 (1841); Courtright *v.* Deeds, 37 Iowa, 508 (1873); 10 Ala. 414.

[8] Conrow *v.* Conrow, 14 W. N. C. 483 (1884); Roberts's Appeal, 59 Pa. 72 (1868).

[9] L. *usus*, q. *v.*

[10] Snow *v.* Columbian Ins. Co., 48 N. Y. 667 (1872).

In insurance law, "to use a port" means to go *into* a harbor or haven for shelter, commerce, or pleasure, and to derive advantage from its protection.[1]

2, *n.* Appropriation, application, employment; enjoyment, benefit, profit. See ABUSE.

"For the use of," in conveyancing, expresses the right of appropriation or enjoyment, rather than the purpose or mode of use.[2]

A grant of "the use of the timber" on a tract of land was held to convey an incorporeal right, not the timber itself nor the soil.[3]

Riding a stray horse about, trying to find the owner, is not such using as is intended by the rule that one who "uses an estray" becomes liable in trover.[4]

A "change in use" in insurance includes a change from occupancy to "disuse."[5]

Actual use. Wearing apparel may be "in actual use" without having been actually worn. "In use" means in employment; and "actual" means real as opposed to nominal and present.[6]

For use. Describes a suit or proceeding, a decree or judgment, had for the benefit of another person than the nominal plaintiff; as, "A, for use, etc. *v.* B."

Misuse; Misuser. Wrongful use; abuse.

Non-use; non-user. Failure to use; neglect.

An office may be forfeited by misuser or abuse, as when a judge takes a bribe; or by non-user or neglect.[7]

Public use. A use which is for the benefit of the public,[8] or which concerns the whole community in which it exists, as distinguished from a particular individual or number of individuals.[9]

The power of taxation cannot be used in aid of enterprises for the benefit of individuals, though in a remote or collateral way the local public may be benefited thereby.[10]

A public use of an invention, permitted by the inventor, for more than two years prior to the date of a patent avoids the patent. To constitute such use it is not necessary that more than one of the patented articles be publicly used.[11]

See DEDICATION, 1; DOMAIN, Eminent; TAKE, 8.

[1] Snow *v.* Columbian Ins. Co., *ante.*

[2] Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 394 (1871).

[3] Clark *v.* Way, 11 Rich. 694 (S. C., 1858).

[4] Henry *v.* Richardson, 7 Watts, 559 (1838).

[5] Cannell *v.* Phœnix Ins. Co., 59 Me. 590 (1871).

[6] Astor *v.* Merritt, 111 U. S. 213 (1884).

[7] 2 Bl. Com. 153; 26 Pa. 318.

[8] *Re* Townsend, 39 N. Y. 182 (1868); *ib.* 179.

[9] Kellar *v.* Corpus Christi, 50 Tex. 629 (1879): Gilmer *v.* Lime Point, 18 Cal. 251 (1861); Concord R. Co. *v.* Greeley, 17 N. H. 61 (1845); Varner *v.* Martin, 21 W. Va. 552-66 (1883), cases.

[10] Loan Association *v.* Topeka, 20 Wall. 665 (1874).

[11] Egbert *v.* Lippman, 104 U. S. 336 (1881), cases; Manning *v.* Cape Ann Isinglass, &c. Co., 106 *id.* 465 (1883).

Usage. General and uniform practice. See *Usual*, p. 1071.

In English law, "usage" is local practice, and must be proved; "custom" is general practice, judicially noticed without proof.

Usage is the fact; custom the law. There may be usage without custom; there can be no custom without usage to accompany or precede it. Usage consists in a repetition of acts; custom arises out of this repetition. The usage leading to a custom may be proved by public writings, by the testimony of aged persons, or by two concurring judgments upon the matter.[1]

Usage of trade. A course of dealing; a mode of conducting transactions of a particular kind.[2]

The custom or usage of a trade is the law of that trade, and obligatory if ancient (sufficiently old to be generally known), certain, uniform, and reasonable.[3]

Usage of trade and custom are part of the common law. They help interpret the otherwise indeterminate intention of parties, where their acts and expressions are doubtful; but they are never admissible to contradict what is plain.[4]

A general usage may be proved in proper cases to remove ambiguities and uncertainties in a contract or to annex incidents, but it cannot destroy, contradict, or modify what is otherwise manifest. Where the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelevant. Usage cannot make a contract where there is none, nor prevent the effect of the settled rules of the law.[5]

See CUSTOM; USUS, Malus, etc.

Usance. The period which, in early times, it was usual to appoint between different countries for the payment of bills.[6]

When usance is a month, *half* usance is always fifteen days, notwithstanding the unequal length of the months.[6]

Use and occupation. A species of *assumpsit*, when one has used another's realty under a contract, express or implied, to pay therefor, and for the value of which an action of rent cannot be maintained, as for

[1] Cutter *v.* Waddingham, 22 Mo. 284 (1855): Escriche, Dict.

[2] Haskins *v.* Warren, 115 Mass. 535 (1874), Wells, J.

[3] Collings *v.* Hope, 3 Wash. 150 (1812); Carter *v.* Philadelphia Coal Co., 77 Pa. 290 (1875), cases.

[4] The Reeside, 2 Sumn. 569 (1837), Story, J.; Barnard *v.* Kellogg, 10 Wall. 390-91 (1870), cases; Merchants' Bank *v.* State Bank, *ib.* 667 (1870), cases; Hearne *v.* Marine Ins. Co., 20 *id.* 492-93 (1874), cases; Savings Bank *v.* Ward, 100 U. S. 206 (1879); 1 Wall. 95; 2 Greenl. Ev. §§ 251, 292.

[5] First Nat. Bank of Cincinnati *v.* Burkhardt, 100 U. S. 692 (1879), cases, Swayne, J.; Grace *v.* American Central Ins. Co., 109 *id.* 283 (1883), cases; Janney *v.* Boyd, 30 Minn. 320 (1883), cases.

[6] Byles, Bills, 206.

want of a lease, or of an agreement to pay a specified sum.[1]

The law implies a promise to pay what the benefits accruing from the possession are worth. This is the foundation of the cause of action. In certain cases the value of lasting and valuable improvements may be deducted.[2]

Not maintainable where the occupation has been tortious, as that forbids the implication of a promise;[3] nor where the relation of landlord and tenant does not exist.[3]

Useful. Is employed in patent statutes incidentally, distinguishing that which is beneficial from that which is mischievous or immoral; does not intend that which is superior to other modes in use for the same purpose.[4]

A "useful invention" is such as may be applied to some beneficial use in society, in contradistinction to an invention which is injurious to the morals, the health, or the good order of society. The law does not regard the degree of utility.[5]

Useful is here opposed to "frivolous" or "noxious."[6]

Unless the invention is shown to be absolutely frivolous and worthless, the patent is valid. The fact that a patent has been issued raises a presumption of utility. The burden of proving inutility is upon the contestant.[7]

See NOVELTY; PATENT, 2; PROCESS, 2; UTILITY. Compare USUS, Utile, etc.

User. The exercise or enjoyment of a right, especially of a franchise right. Opposed, *non-user*, *disuser*.

An uninterrupted possession and use of an incorporeal hereditament or easement, such as a way or a water-privilege, for twenty years, is *prima facie*, and, if unexplained, conclusive evidence of a right; under some circumstances the courts will entertain the presumption of a grant, even for a shorter period. A right thus acquired by "user" may, in like manner, be lost by "disuser;" in other words, discontinuance of the use for a long period affords a presumption of the extinguishment of the right.[8]

Adverse user. A user without license or permission.

An adverse right of easement cannot grow out of a mere permissive enjoyment. The distinction is between a permissive or tolerated user, and a user claimed as a matter of right. Where, however, one has used a right of way for twenty years unexplained it is but fair to presume that the user is under a claim of right, unless it appears to have been by permission. In other words, the use of a way over the lands of another whenever one sees fit, and without asking leave, is an "adverse" use, and the burden is upon the owner of the land to show that the use was by license or contract inconsistent with a claim of right.[1]

An adverse use is such a use of property as the owner himself would make, asking no permission, and disregarding all other claims so far as they conflict with this use. Continued for twenty years, such use is equivalent to a grant.[2]

When an easement has once been acquired, mere non-user will not defeat the right: there must be an adverse use by the servient estate for a period sufficient to create a prescriptive right.[3]

See DEDICATION, 1; EASEMENT.

Usual. According to general practice; conforming to common usage.

"Usual and customary," referring to a usage, import something more than casual or exceptional,—a fixed and established usage which has become general in the particular trade.[4]

"Usual stopping place," in a statute respecting the expulsion of a passenger from a railway train, means a regular station. A water-tank is not such place, although passengers get off there while trains are stopping.[5]

See BUSINESS; DISPATCH; NEGOTIATION.

3. "Where a man has anything to the use of another upon confidence that the other shall take the profits: he who has the profits has an use."[6]

Cestui, or cestuy, que use. He for whose benefit a use is created. Under the Statute of Uses, the legal owner of the estate, as opposed to the nominal grantee or holder.

The forms of the plural, found in standard law works, are: *cestuis que use*, *cestuis que uses*, and *cestui que uses*. The first, like *cestuis que trust*, seems to be the preferred spelling. See further CESTUI.

Usee. Chancery gave the beneficial enjoyment to the person intended to be benefited, calling the first "usee" the legal-estate man, or trustee merely; the proper beneficiary being the second or last "usee," the *cestui que trust*, and true owner in equity.[7]

[1] Hurley *v.* Lamoreaux, 29 Minn. 133 (1882), cases.

[2] Seibert *v.* Baxter, 36 Kan. 190 (1887), cases.

[3] Clark *v.* Clark, 58 Vt. 529 (1886), cases; 25 Am. Law Reg. 772-76 (1886), cases. As to action against trespasser, see 23 Cent. Law J. 387 (1886), cases.

[4] [Lowell *v.* Lewis, 1 Mas. 186 (1817), Story, J.; Seymour *v.* Osborne, 11 Wall. 549 (1870), cases.

[5] Bedford *v.* Hunt, 1 Mas. 303 (1817), Story, J.

[6] Winans *v.* Schenectady, &c. R. Co., 2 Blatch. 290 (1851); Kneass *v.* Schuylkill Bank, 4 Wash. 12 (1820); Roberts *v.* Ward, 4 McLean, 566 (1849).

[7] Parker *v.* Stiles, 5 McLean, 62 (1849).

Hazard *v.* Robinson, 3 Mas. 275 (1823), Story, J.

[1] Cox *v.* Forrest, 60 Pa. 79-80 (1882).

[2] Blanchard *v.* Moulton, 63 Me. 436 (1873), Appleton, Chief Justice.

[3] Curran *v.* Louisville, 83 Ky. 632 (1886), cases.

[4] [Carter *v.* Philadelphia Coal Co., 77 Pa. 290 (1875).

[5] Chicago, &c. R. Co. *v.* Flagg, 43 Ill. 367 (1867).

[6] Burgess *v.* Wheate, 1 W. Bl. 180 (1759), Henley, L. K., quoting Finch.

[7] [Brown's Law Dict., tit. Uses.

A use is where the legal estate of lands is in A, in trust that B shall take the profits and that A will make and execute estates according to the direction of B. . . Before the Statute of Uses, a use was a mere confidence in a friend, to whom the estate was conveyed by the owner without consideration, to dispose of it upon trusts designated at the time, or to be afterward appointed by the real owner. The feoffee or trustee, to all intents and purposes, was the real owner of the estate at law, and the *cestui que use* had only a confidence or trust, for which he had no remedy at common law.[1]

A "use" regards principally the beneficial interest; a "trust," the nominal ownership. A use is an estate vested since the Statute of Uses, and by virtue thereof. A trust is the relation between the holder of the legal estate, and the owner of the equitable estate — the beneficiary. Trusts are now what uses were before the Statute.[2]

Uses and trusts, in their original, are of a nature very similar, or exactly the same. They answer to the *fidei-commissa* of the Roman law, which were trusts introduced by testators to evade the law which disabled certain persons, as, exiles and strangers, from being legatees or heirs. The property was given to a person in confidence that he would convey it or dispose of the profits according to the pleasure of another, the real object of the bounty. But every such gift was also a *jus precarium*, a right with a remedy in entreaty or request, not enforcible in law, but depending solely upon the honor of the trustee. Augustus, having been frequently solicited in favor of persons toward whom trustees had broken faith, directed the prætor to afford a remedy in such cases. These fiduciary interests then increased so fast that special equity jurisdiction was created for them through the prætor *fidei commissarius*, the "chancellor for uses."[3]

In English law, a use may be classed as a *jus fiduciarum* of the Roman law, that is, as a right in trust, with a remedy in conscience; a confidence reposed in another, tenant of land, that he would dispose of the land according to the intentions of him to whose use it was granted, and suffer him to take the profits.[4]

About 1375 these uses were transplanted into England by foreign ecclesiastics, to evade the statutes of mortmain (*q. v.*) by obtaining grants of lands to third persons to the use of religious houses. The clerical chancellors of that day held that these grants were *fidei commissa*, and binding in conscience. The evasion was prevented by 15 Rich. II (1392), c. 5.[1]

The idea continued to be applied to a number of civil purposes: it removed restraints upon alienations by will, and permitted the owner of lands in his lifetime to make such designations of their profits as prudence, justice, or family convenience might require. . . At length, through the desire to provide for children by will, and to secure estates from forfeiture in times of civil commotion when parties alternately attainted each other, uses grew almost universal, and the courts of equity reduced them to a system.[2]

About 1535 the greater part of the land of England was conveyed to uses: the property or the possession of the soil being vested in each case in one man, and the use, or the profits, in another, whose directions regarding the disposition thereof the former was in conscience bound to follow, and he could be compelled so to do by a court of equity.[3]

In 1536 the **Statute of Uses** (27 Hen. VIII, c. 10), the statute for transferring uses into possession, was passed, enacting that "when any person shall be *seized* of lands, tenements, or other hereditaments to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, for years, or otherwise, shall thenceforth stand and be seized or possessed of the lands, etc., of and in the like estates as they have in the use, trust, or confidence; and the estate of the person so seized to uses shall be deemed to be in him or them that have the use, in such quality, manner, form and condition as they had before in the use." The statute "executes the use," that is, it conveys the possession to the use, and transfers the use into possession; thereby making the *cestui que use* complete owner of the lands and tenements, as well at law as in equity.

The statute did not abolish conveyance to uses: it only annihilated the intervening estate of the feoffee, and turned the interest of the *cestui que use* into a legal, instead of an equitable, ownership. Thereupon the courts of common law began to take cognizance of uses. As the use and the land were now convertible terms, they became liable to dower, curtesy, and escheat; but they were no longer devisable.

It was adjudged that if the use cannot take effect the instant the conveyance is made, the operation of the statute may wait till the use shall arise upon a contingency, to happen within a reasonable period. Which doctrine, when devises were again introduced, as

[1] 4 Kent, 289: Gilbert, Uses, 1.
[2] Williams, R. P. 155; 4 Kent, 303; Sand. Uses, 266.
[3] 2 Bl. Com. 327-28; 4 Kent, 290-91; 2 Story, Eq. §§ 965-66; 1 Pomeroy, Eq. § 151; 2 *id.* § 977; Hadley, Rom. Law, 323.
[4] 2 Bl. Com. 328.

[1] 2 Bl. Com. 328; 4 Kent, 290; 2 Story, Eq. § 969.
[2] 2 Bl. Com. 329; 2 Story, Eq. § 969.
[3] 2 Bl. Com. 137.

equivalent to declarations to uses, was also adopted in favor of "executory devises," which are contingent or springing uses, except that for such uses there must be a person seized to the uses when the contingency happens, else they can never be executed by the statute; and, therefore, if the estate of the feoffee be destroyed, before the contingency arises, the use is destroyed: whereas by an executory devise the freehold itself is transferred to the future devisee.[1]

"Springing uses" are limited to arise on a future event, where no preceding estate is limited, and they do not take effect in derogation of any preceding interest. By means of powers, a use, with its estate, may *spring up* at the will of any given person. But future or contingent uses are limited to take effect as remainders,[2] *q. v.* See SCINTILLA, Juris.

Shifting or secondary use. A use which, though executed, may change from one person to another by circumstances *ex post facto;* as, if a man makes a grant to his intended wife and her eldest son for their lives, at marriage the wife takes the whole use in severalty, and upon the birth of a son the use is executed in them jointly.[3]

"Shifting" or "secondary" uses take effect in derogation of some other estate, and are limited by the deed creating them or are authorized to be created by a person named in it. They are common in all settlements. In marriage settlements the first use is always to the owner in fee till the marriage, and then to other uses. The fee thus remains with the owner until the marriage, when it "shifts" as uses arise. But it will be so confined as not to lead to a perpetuity,[4] *q. v.*

Resulting use. Whenever the use limited by the deed expires, or cannot vest, but returns back to him who raised it, after such expiration, or during such impossibility. Thus, if a man makes a grant to the use of his intended wife for life, with remainder to the use of her first-born son: till he marries, the use "results back" to the grantor himself; after marriage, it is executed in the wife for life; and if she dies without issue, the whole goes back to him in fee.[5]

If the use limited by deed expired, or could not vest, or was not to vest except upon a contingency, the use "resulted back" to the grantor. The rule is the same where no uses are declared by the conveyance. So much of the use as the owner does not dispose of remains in him. If he conveys without any declaration of uses, or to such uses as he shall thereafter appoint, or to the use of a third person on the occurrence of a specified event, in all such cases there is a use resulting back.[1]

By the equitable decisions in the courts of law, the power of the court of chancery over landed property was greatly curtailed; but one or two technical scruples restored it with tenfold increase. It was held (1) that "no use could be limited on a use;" that when a man bargains and sells his land for money, which raises a use, by implication, in the bargainee, the limitation of a further use to another person is repugnant, and therefore void; as, a grant to A and his heirs, to the use of B and his heirs, in trust for C and his heirs.[2]

A use limited upon a use is not affected by the statute, which executes the first use only. The second use may be valid as a trust. In the case of a deed of bargain and sale the whole force of the statute is exhausted in transferring the legal title in fee-simple to the bargainee.[3]

It was held (2) that "seized to the use," in the statute, did not extend to a term of years or other chattel interest, whereof the termor is possessed.

As to the distinctions above noted it may be observed that, in the first case, it was evident that the parties did not intend that B should have a beneficial interest; and, in the second case, that the *cestui que use* of the term was expressly driven into chancery for a remedy. That court determined that though these interests were not "uses" which the statute could execute, they still were "trusts" in equity, which in conscience ought to be performed. Thus the doctrine of uses was revived under the name of "trusts;" and thus, by the strict construction of the courts of law, the Statute of Uses has had little other effect than to make a slight alteration in the formal words of a conveyance.[4]

The statute imported into the rules of law some of the then existing doctrines of the courts of equity, and added "to the use" to every conveyance. The intent of the statute was to abolish chancery jurisdiction over landed estates, by giving actual possession at law to every person beneficially entitled in equity. The court of chancery, by the foregoing rulings, defeated this intent.[5]

The Statute of Frauds (*q. v.*) having required that every declaration, assignment, or grant of any trust in lands or hereditaments, except such as arise from implication, shall be in writing signed by the party, or by his written will, the courts now consider a trust estate, expressed or implied, as equivalent to the legal ownership, governed by the same rules of property, and liable in equity as the other is in law. In fine, the courts, assisted by statutes, now make trusts to an-

[1] [2 Bl. Com. 332-34; 4 *id.* 430; 4 Kent, 294-95; 2 Pomeroy, Eq. §§ 963-86.
[2] 4 Kent, 297-98.
[3] [2 Bl. Com. 334-35.
[4] [4 Kent, 297.
[5] [2 Bl. Com. 335.

[1] 4 Kent, 299; 2 Pomeroy, Eq. § 961.
[2] 2 Bl. Com. 335-36.
[3] Croxall *v.* Shererd, 5 Wall. 282 (1866), cases.
[4] 2 Bl. Com. 335-36.
[5] Hopkins *v.* Hopkins, 1 Atk. 591 (1738); 1 Sand. Uses, 265; Beckwith *v.* Rector of St. Phillip's Parish, 69 Ga. 574, 579 (1882).

swer in general all the beneficial ends of uses, without their inconvenience or frauds. The trust will descend, may be aliened, is liable to debts, executions, forfeitures, leases, incumbrances, curtesy, but not to dower, nor to escheat.[1]

Covenant to stand seized to uses. A species of conveyance by which a man, seized of lands, in consideration of blood or marriage, covenants that he will stand seized of the land to the use of his wife, child, or kinsman, for life, in tail, or in fee.

Here the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession.[2]

The statute also introduced the species of conveyance known as *bargain and sale:* a kind of real contract, whereby the bargainor, for a pecuniary consideration, contracts to convey land to the bargainee; and becomes, by such bargain, a trustee for, or seized to the use of, the bargainee: and then the statute completes the purchase. The bargain vests the use, and the statute the possession.[3]

The English doctrines of uses and trusts, under 27 Hen. VIII, and the conveyances founded thereon, have been generally introduced into the jurisprudence of this country.[4]

Charitable use. Such gift, conducive to the welfare of the public, as a court of equity will take cognizance of; a charity, *q. v.*

Executed use. The first use upon which the Statute of Uses operates, by joining the possession and the use, as seen above. **Executory use.** A springing use which confers a legal title analogous to an executory devise.

Future use. A general name for any shifting or secondary, springing, contingent, or resulting use.[4]

Pious use. A gift to a religious house; a devise, bequest, or other donation to a religious organization.

Superstitious use. Refers to old English legislation which restricted gifts in aid of religious doctrines deemed erroneous and pernicious, as, the tenets of dissenters, Roman Catholics, and Jews.

See generally CHARITY, 2; RAISE; TRUST, 1.

USEFUL; USER; USUAL. See USE, 2, p. 1071.

USUFRUCT. See USUS, Fructus.

USURIOUS. See USURY.

[1] 2 Bl. Com. 327.

[2] 2 Bl. Com. 328.

[3] 4 Kent, 229. See generally 2 Washb. R. P. 91–156.

[4] [4 Kent, 296.

USURPER.[1] One who intrudes himself into an office which is vacant, and ousts the incumbent without any title of color whatever.[2]

His acts are void in every respect.[3]

Non usurpavit. L. He has not usurped: he is not exercising a franchise without authority.

A plea to a *quo warranto*, that the defendant has a right to exercise the franchise, accompanied by a negation of the allegations of the writ, is not a plea of *non usurpavit* nor a disclaimer, but is a valid plea in such case.[3]

See OFFICER, De facto.

USURY.[4] Originally, a premium or reward for the use of money, a commodity or other thing.[5]

Taking more than the lawful rate of interest for the loan or forbearance of money.[6]

The taking of more than legal interest for the forbearance of a debt or sum of money due.[7]

Lending money on a contract to receive again the principal sum and an increase by way of compensation for the use is called lending on "interest" by those who think it lawful, and "usury" by those who do not think so. . . The Mosaical precept was political, not moral: while it prohibited the Jews from taking usury from their brethren, it expressly permitted them to take it from strangers. This proves that taking a moderate reward for the use is not *malum in se*. To demand an exorbitant price for the loan of a horse, or a loan of a sum of money, is equally contrary to conscience; but a reasonable equivalent for the inconvenience the owner may feel by the want of the thing, and for the hazard of losing it entirely, is not more immoral in one case than in the other. . . To a moderate profit we give the name of "interest," and to an exorbitant profit the odious name of "usury."[8]

Usurious. Pertaining to, or of the nature of, usury: as, usurious interest, a usurious contract. Whence *usuriousness*.

There must be an intention knowingly to contract for or to take usurious interest. . . Where a contract imports usury upon its face, as, by an express reservation of more than legal interest, inquiry is at

[1] L. *usu-rapere*, to seize to one's own use.

[2] McCraw *v.* Williams, 33 Gratt. 513–14 (1880), cases, Christian, J. See also Hooper *v.* Goodwin, 48 Me. 80 (1861); 14 La. An. 507; 21 Wend. 370.

[3] Commonwealth *v.* Cross Cut R. Co., 53 Pa. 62, 70 (1866).

[4] F. *usure:* L. *usura*, use, interest.

[5] [Henry *v.* Bank of Salina, 5 Hill, 528 (1843).

[6] Turner *v.* Turner, 80 Va. 381 (1885).

[7] Hogg *v.* Ruffner, 1 Black, 118 (1861), Grier, J. See also 11 Conn. 497; 11 Bush, 180; 3 Johns. Cas. 206; 41 Barb. 359; 32 *id.* 557; 6 Ohio St. 535; 17 Wis. 394.

[8] 2 Bl. Com. 455–56.

an end. But where the contract on its face is for legal interest only, proof is necessary that there was some corrupt agreement to cover up usury.[1]

Where the promise to pay a sum above legal interest depends upon a contingency, the loan is not usurious.[2]

Sale at a discount greater than legal interest, of a note made and indorsed in blank for the purpose of raising money by a broker, to a purchaser ignorant of the purpose, is not usury.[3]

Where the promisor in a usurious contract makes it the consideration of a new contract with a person not a party to the original contract, or to the usury paid or received upon it, and the new contract is not a contrivance to evade the statutes against usury, the latter contract is not usurious.[4]

But payment of illegal interest, after the maturity of a note, for forbearance, is usury.[5]

In a usurious transaction, the borrower acts somewhat under duress; he is not wholly a free agent. The maxim *in pari delicto* does not apply.[6]

When an agent who is authorized to lend money for lawful interest exacts for his own benefit more than the lawful rate, without the knowledge of his principal, the loan is not thereby rendered usurious.[6]

But authority to make a usurious loan may be inferred from a general agency, pertaining to an extensive business.[7]

A national bank may take interest at the rate allowed by the laws of the State, territory, or district where the bank is located; and if no rate is fixed, then seven per centum, and it may take it in advance.[8]

Taking a greater rate of interest than that allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the evidence of debt carries with it, or which has been agreed to be paid thereon. The person by whom the greater rate has been paid, or his legal representative, may recover back, in an action of debt, twice the amount of interest paid, provided action is commenced within two years from the time the usurious transaction occurred.[9]

The suit may be had in any circuit, district, or Territorial court of the United States held within the district in which such association is located, having jurisdiction in similar cases,[1] or in a State court.[2]

A national bank may take the rate of interest allowed to natural persons generally, and a higher rate, if State banks of issue are authorized to take it.[3]

Usurious interest *paid* a national bank on renewing a series of notes cannot, in an action by the bank on the last of the renewals, be applied in satisfaction of the principal of the debt.[4]

In most of the States it is provided that, as a penalty, the person who receives more than the legal rate of interest shall forfeit a sum equal to all interest so taken, and that this sum may be withheld from the principal at the time of payment, when that is due as a loan, or be recoverable by an action within a specified period after payment.[5]

In England, all restrictions upon rates of interest were abolished by 17 and 18 Vict. (1854), c. 90.

See BONUS; INTEREST, 2 (3); USUS, UTILE, etc.; VOID.

USUS. L. A using; use, application, employment; service, benefit, utility; practice, usage, custom. From *utere*, *uti*, to use, apply.

Ancipitis usus. Of a double use; having two or more uses.

As it is impossible to determine the final use of an article *ancipitis usus*, in considering what articles in course of transportation to an enemy's country are contraband of war, it is not an injurious rule to deduce the final use from the immediate destination.[6]

In copyright law, refers to the final end or object, as of a design or illustration addressed to the taste, of which the form is the essence, and the production of pleasure the object. But the teachings of science and the rules and methods of useful arts have their final end in application and use — what the public derive from the publication of a book which teaches them. As taught in any literary composition, their essence consists only in their statement, which alone is secured by a copyright.[7]

Malus usus abolendus est. A bad practice is to be abandoned. A usage which is unreasonable, vicious or pernicious, must be abolished. An unsafe way of doing a thing should be discontinued.

If a custom is not a good custom, it ought no longer to be used. *Malus usus*, etc., is an established maxim of the law.[8]

[1] United States Bank *v.* Waggener, 9 Pet. 399 (1835), cases, Story, J.; Call *v.* Palmer, 116 U. S. 101 (1885), cases.

[2] Spain *v.* Hamilton, 1 Wall. 625-26 (1863).

[3] Mosley *v.* Brown, 76 Va. 419 (1882); Siewert *v.* Hamel, 91 N. Y. 201 (1883).

[4] Call *v.* Palmer, 116 U. S. 103 (1885), cases; Palmer *v.* Call, 2 McCrary, 528 (1881), cases.

[5] Philanthropic Building Association *v.* McKnight, 35 Pa. 472 (1860), cases; Mosley *v.* Brown, 76 Va. 425-26 (1882).

[6] Call *v.* Palmer, 116 U. S. 102 (1885), cases; Palmer *v.* Call, 2 McCrary, 525 (1881), cases; Philips *v.* Mackellar, 92 N. Y. 34 (1883), cases; Anonymous, 40 N. J. E. 507-10 (1885), cases.

[7] Sherwood *v.* Roundtree, 32 F. R. 113 (1887).

[8] R. S. § 5197: Act 3 June, 1864, c. 106, s. 30.

[9] R. S. § 5198: Act 3 June, 1864, c. 106, s. 30. See Farmers', &c. Nat. Bank *v.* Dearing, 91 U. S. 29, 32 (1875); Stephens *v.* Monongahela Bank, 111 *id.* 197 (1884), cases.

[1] R. S. § 5198: Act 18 Feb. 1875, c. 80.

[2] Lebanon Nat. Bank *v.* Karmany, 98 Pa. 65 (1881).

[3] R. S. § 5197: Act 3 June, 1864, c. 106, s. 30. See Tiffany *v.* Nat. Bank of Missouri, 18 Wall. 409 (1873)

[4] Driesback *v.* Second Nat. Bank of Wilkes Barre, 104 U. S. 52 (1881); Barnet *v.* Second Nat. Bank of Cincinnati, 98 *id.* 555 (1878); Lebanon Nat. Bank *v.* Karmany, 98 Pa. 65 (1881); Peterborough Nat. Bank *v.* Childs, 133 Mass. 250-51 (1882), cases.

[5] See Harris *v.* Bressler, 119 Ill. 467 (1887).

[6] 1 Kent, 140.

[7] Baker *v.* Selden, 101 U. S. 103-4 (1879).

[8] 1 Bl. Com. 76.

The commercial usage, that the name of the transferee need not be inserted in a power of attorney to transfer stock, is vicious.[1]

A custom among stockbrokers to appropriate money belonging to the principal to the payment of the broker's indebtedness is too iniquitous ever to obtain the sanction of law.[2]

The practice of delivering a note or bond upon which judgment is entered back to the plaintiff is bad, and *malus usus*, etc. It should be left on file.[3]

The maxim applies to the unauthorized act of a government officer in accepting bills of exchange.[4]

Optimus interpres rerum usus. The best interpreter of things is usage. The practice which follows upon the making of a statute or a compact shows the meaning attached among those by whom or for whom the thing was done.

See CONSTITUTION, p. 240; CUSTOM; EXPOSITIO, Contemporanea; STATUTE, pp. 970-71.

Sic utere tuo ut alienum non lædas. So use your own that another you may not injure. You may use what belongs to yourself as you see fit, except to harm another person. Enjoy your own private rights as you please, but take care not to molest others, in the lawful exercise of their rights, by your affirmative action.

The maxim is not applicable to a mere omission to act, but rather to an affirmative act or course of conduct in invasion of another's rights.

Hence, in the absence of a covenant to repair the upper stories of a building, a lessor will not be liable for damage from rain, let in by a roof which has gradually become defective, to merchandise owned by the lessee of a lower story.[5]

Grants of privileges to corporate bodies confer no license to use them in disregard of the private rights of other persons. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids other application or use of the rights and powers conferred.[6]

The maxim expresses the only restriction which the law places upon ownership in property, or the exercise of any other private or public right. Because of the principle it was formerly a question whether property could be taken from an inebriate or spendthrift and given in trust to a committee.[7]

The principle prohibits the creation or continuance of a nuisance. A lawful trade may be so offensive that it should be carried on only in an out-of-the-way place.[8]

A State may require each of its citizens to so conduct himself, and to so use his own property, as not unnecessarily to injure another. This is the very essence of government, and the source of police powers. The maxim, *sic utere*, etc., furnishes the rule by which every member of society possesses and enjoys his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of State authority.[9] See POLICE, 2.

One riparian owner may not injure the concomitant right of another owner.[9]

A surface-owner has a right of action against the mineral-owner for removing supports necessary for holding up the surface.[4]

Every lessee impliedly agrees to so use the property as not unnecessarily to injure it; to so use it as to avoid the necessity for repairs, as far as possible. The tenant, though the United States government, must exercise reasonable care to prevent damage to the inheritance.[5]

See DAMNUM, Absque injuria.

Usucaptio. A taking by using. Acquisition from having the possession and use of an object for a legal period; ownership from adverse possession; prescription.[6]

Usus fructus. Use of the fruit: enjoyment of the income or profit of property; usufruct.

The *usus fructus* of the civil law was the temporary right of using a thing, without having the ultimate property, or full dominion of the substance.[7]

Whence "usufruct:" the right to receive and use the profits of property belonging to another; and "usufructuary:" he who has a usufruct right, or right of enjoying a thing in which he has no property.[8]

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[1] Denny *v.* Lyon, 38 Pa. 101 (1860).

[2] Evans *v.* Waln, 71 Pa. 75 (1872).

[3] Fraley's Appeal, 76 Pa. 43 (1874); 77 *id.* 378.

[4] The Floyd Acceptances, 7 Wall. 677 (1868).

[5] Krueger *v.* Ferrant, 29 Minn. 388 (1882), cases.

[6] Baltimore & Potomac R. Co. *v.* Fifth Baptist Church, 108 U. S. 331 (1883), Field, J.

[7] 1 Bl. Com. 306.

[1] 3 Bl. Com. 217.

[2] Munn *v.* Illinois, 94 U. S. 124-25, 145 (1876), cases, Waite, C. J. See also Richland County *v.* Richland Center, 59 Wis. 596 (1884).

[3] Holyoke Water-Power Co. *v.* Lyman, 15 Wall. 506 (1872).

[4] Jones *v.* Wagner, 66 Pa. 435 (1870).

[5] United States *v.* Bostwick, 94 U. S. 65-66 (1876), cases.

See generally McCutchen *v.* Blanton, 59 Miss. 119-22 (1881), cases; Falloon *v.* Schilling, 29 Kan. 295 (1883); Fletcher *v.* Rylands, L. R., 1 Exch. *265, 279-80 (1866); 21 Cent. Law J. 205-10 (1885), cases; 30 F. R. 792; 8 Gray, 66, 424; 14 Allen, 294; 101 Mass. 252; 106 *id.* 199; 107 *id.* 576; 112 *id.* 58; 97 N. C. 479; 44 Ohio St. 282; 118 Pa. 143.

[6] See Maine, Anc. Law, 275; Hadley, Rom. Law, 172.

[7] 2 Bl. Com. 327.

[8] Cartwright *v.* Cartwright, 18 Tex. 628 (1857); 40 *id.* 700.

Only a usufructuary property may be had in light, air, and water. These belong to the first occupant while he retains possession of them.[1]

In the Roman law, besides praedial servitudes, there were also personal servitudes, in another's property. Of the latter the most important was the *usufructus*, the right to use and enjoy some property belonging to another, without suffering deterioration. Using another's money on a loan was *quasi*-usufruct. The right might be for a term of years in land; was transferable for the life of the original usufructuary; might cease by non-user, and always ceased upon transfer back to the owner of the property. This servitude was commonly established by will.[2]

Usus norma loquendi. Usage is the rule for speaking. Usage regulates speech. Usage interprets language, spoken or written.

Words are generally to be understood in their usual, most known signification; not so much regarding the propriety of grammar as general and popular use.[3]

Usus . . est jus et norma loquendi.[4]

Utile per inutile non vitiatur. The useful by the useless is not destroyed. What is valid is not impaired by what is invalid; the good is not marred by the bad; the lawful is not vitiated by the unlawful — provided they are capable of separation.

If parts of a work, unlawfully copied from another, are inseparable, the entire work will be suppressed.[5]

Where lawful services are blended with such as are forbidden, the whole being a unit and indivisible, the bad destroys the good.[6]

When an indictment contains both good and bad counts, a verdict of guilty upon the whole indictment will be sustained.[7]

A jury may separate articles proper as personal baggage from those which are improper.[8]

The invalid parts of a contract may be discarded, and the valid parts enforced, when the parts are severable and there is no imputation of *malum in se*.[9]

When a bond contains separable legal and illegal conditions, the legal conditions may be enforced.[10]

A contract is good for lawful interest, and voidable as to an excess, unless otherwise provided by law.[11]

A will may be void as to a part of its dispositions and valid as to the rest.[1]

So as to provisions in a trust.[2]

A deed void as a lease may be good as an agreement to execute a lease.[3]

The valid in a statute, if so separable from the invalid that each can stand alone, may be enforced.[4]

But if unconstitutional (*q. v.*) provisions are so connected with the general scope of the statute that, being stricken out, effect cannot be given to the legislative intent, the other provisions fall with them.[5]

UT. L. That; in order that; as.

Ut res magis. See RES, Ut res, etc.

Ut supra. As above; as see foregoing.

UTAH. See BIGAMY; POLYGAMY; RELIGION; TERRITORY, 2.

UTILE. See this page, *ante*.

UTILITY. Usefulness; applicability to a beneficial use.

A valid patent is characterized by both utility and invention. While less evidence, where the utility is great, may establish invention, yet great utility may result from changes in devices which embrace no invention.[6]

In an action for infringement the defense of lack of utility will not be sustained unless there is the clearest evidence that the invention is utterly frivolous and worthless. The fact that the defendant used the invention is an argument against such defense.[7]

See further INVENTION; NOVELTY; PATENT, 2; USE, 1, USEFUL.

UTLAGATUM. See OUTLAWRY.

UTTER.[8] 1, *adj.* Outer: as, utter bar, and barrister, *q. v.*

Outside; extreme, complete: as, utter loss, *q. v.*

2, *v.* To put out, put forth; to tender to another; to offer to put into circulation; to publish: as, to utter a libel, forged paper, counterfeit money.

To "utter" a libel is to publish it.[9]

To "utter" a thing is to offer it, whether the thing is taken or not.[10]

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[1] 1 Bl. Com. 14, 18, 4; 2 *id.* 18, 105.

[2] Hadley, Rom. Law, 191-92, 195.

[3] 1 Bl. Com. 59; 93 U. S. 455; 110 *id.* 534; 6 Conn. 91, 308; 6 Allen, 386; 23 Pa. 84.

[4] Horace, Ars Poetica, 71-72.

[5] Lawrence *v.* Dana, 4 Cliff. 85-86 (1869), cases; Callaghan *v.* Myers, 128 U. S. 617 (1888).

[6] Trist *v.* Child, 21 Wall. 452 (1874).

[7] United States *v.* Reese, 92 U. S. 256 (1875).

[8] N. Y. Central, &c. R. Co. *v.* Fraloff, 100 U. S. 31 (1879).

[9] Gelpcke *v.* City of Dubuque, 1 Wall. 222 (1863); 10 Pet. 360.

[10] United States *v.* Hodson, 10 Wall. 408 (1870); 10 Ohio, 51.

[11] Farmers', &c. Bank *v.* Dearing, 91 U. S. 35 (1875), cases; Ewell *v.* Daggs, 108 *id.* 148-51 (1883), cases.

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[1] Rudy *v.* Ulrich, 69 Pa. 183 (1871); Cuthbertson's Appeal, 97 *id.* 173 (1881).

[2] Bristol *v.* Bristol, 53 Conn. 257 (1885).

[3] Williams, Real Prop. 374.

[4] United States *v.* Reese, 92 U. S. 221 (1875); Trademark Cases, 100 *id.* 98 (1879); Packet Company *v.* Keokuk, 95 *id.* 89 (1877); Penniman's Case, 103 *id.* 716 (1880).

[5] Allen *v.* Louisiana, 103 U. S. 83-84 (1880); Warren *v.* Mayor of Charleston, 2 Gray, 99 (1854.) See also Jaehne *v.* New York, 128 U. S. 189 (1888).

[6] Sax *v.* Taylor Iron-Works, 30 F. R. 838 (1887); Holister *v.* Benedict Manuf. Co., 113 U. S. 59 (1885).

[7] Kearney *v.* Lehigh Valley R. Co., 32 F. R. 828 (1887).

[8] A. S. *uttor*, *ut*, out, without.

[9] Benedict *v.* Westover, 44 Wis. 404 (1878).

[10] People *v.* Caton, 25 Mich. 392 (1872), cases; 27 *id.* 386.

"Uttering" a paper is declaring that it is good, with an intention or an offer to pass it. "Passing" a paper is putting it off in payment or exchange.[1]

To "utter and publish" forged paper means to declare or assert directly or indirectly, by words or actions, that a note is good, as, in offering it in payment. But such paper is not "passed" until received by the person to whom it is offered.[2]

"Uttering and publishing" import a disposal or negotiation of a forged instrument to another person.[3]

The party accused of uttering or passing counterfeit paper must be present when the act is done, privy to it, or aiding, consenting, or procuring it to be done.[4]

An intent to defraud is a material element in the crime of uttering forged paper.[4]

UXOR. L. A wife. Plural, *uxores*.

Et uxor, usually abbreviated **et ux.**, and wife; as, in the case of a conveyance from A *et ux.* to B, or to B *et ux.*

Jure uxoris. In right of the wife: said of a claim made or of an act done by a husband in behalf of his wife. Opposed, *jure mariti*, in right of the husband. See HUSBAND.

Uxoricide. See HOMICIDE.

V.

V. An abbreviation of vacation, verb, Victoria, volume; also, of the Latin words, *versus*, *vice*, *vide* and *voce*, qq. v.

V. A. Vice-admiral.

V. C. Vice-chancellor.

V. C. C. Vice-chancellor's court. See CHANCELLOR.

V. E. *Venditioni exponas.* See VENDITIO.

VACANCY; VACANT; VACATE.[5] "To vacate" has acquired an active sense, through a long period of transition, by popular usage and in consequence of its early adoption as a technical, legal term. "To leave empty; to cease from occupying; to annul; to make void," express its meaning. But it does not follow that its derivatives have acquired exclusively equivalent meanings in popular, legislative, or legal usage. In Latin, the word defined the state and condition of some existing thing at a particular point of time: it had no intransitive power; it meant "to be empty, void or vacant; to be void of, free from or without, to lack or want a thing." Vacant lands were lands that were "uninhabited or uncultivated." Vacant possessions were such as were "free, unoccupied, ownerless." Many derivatives from the English verb retain the exact meaning of the original Latin word. "To be vacant," in its primary sense, is "to be deprived of contents; to be empty, or not filled." . . Usage has warranted the employment of these words in an enlarged and broader sense; but the primary and strictly grammatical meaning which they still retain is identical with their exclusive original signification. The result is that "vacancy" aptly describes the condition of an office when it is first created and has been filed by no incumbent.[1]

Vacancy is the state of being empty or unfilled. Vacant lands are unoccupied lands. A vacant house is an untenanted house. An old office is vacated by death, resignation, or removal. An office newly created is *ipso facto* vacant at creation.[2]

Vacancy is properly applicable to the office, rather than to the term of office or service;[3] but the word may apply to the term to which the event causing the vacancy relates.[4]

A vacancy *de facto* exists where there is an absence from sickness or other cause. A vacancy *de jure* imports an entire legal emptiness.[5]

An existing office without an incumbent is vacant, whether the office is new or old.[6]

An office may not be regarded as vacant when an incumbent lawfully holds over until a successor is duly qualified.[7]

The reference may be to a case where there has been a failure to elect.[8]

[1] United States *v.* Mitchell, Baldw. 367-68 (1831), cases, Baldwin, J.

[2] Commonwealth *v.* Searle, 2 Binn. *339 (1810), Tilgham, C. J.; People *v.* Brigham, 2 Mich. 553 (1853); State *v.* Horner, 48 Mo. 522 (1871).

[3] People *v.* Rathbum, 21 Wend. 527 (1839); Lindsey *v.* State, 38 Ohio St. 511 (1882).

[4] United States *v.* Nelson, 1 Abb. U. S. 135-38 (1867); United States *v.* Carter, 2 Cranch, C. C. 244 (1821); Rex *v.* Jones, 38 E. C. L. 325 (1841); State *v.* Redstrake, 39 N. J. L. 367-71 (1877), cases; 2 Bish. Cr. L. § 605.

[5] L. *vacare*, to be empty: to be void of, free from; to lack, want.

[1] Walsh *v.* Commonwealth, 89 Pa. 435 (1879), Woodward, J.

[2] State *v.* Askew, 48 Ark. 89 (1886), cases.

[3] People *v.* Green, 2 Wend. 273 (1829).

[4] County of Scott *v.* Ring, 29 Minn. 404 (1883).

[5] Woodworth *v.* Hall, 1 Woodb. & M. 391-94 (1846).

[6] Stocking *v.* State, 7 Ind. 329 (1855); Clarke *v.* Irwin, 5 Nev. 129-30 (1869), cases; State *v.* Jones, 3 Oreg. 537 (1869); State *v.* Boecker, 56 Mo. 21 (1874); 113 Ind. 439.

[7] State *ex rel* Attorney-General *v.* Brewster, 44 Ohio St. 593 (1886); State *v.* Howe, 25 *id.* 596 (1874).

[8] People *v.* Crissey, 91 N. Y. 634 (1883).

In Virginia, the failure of any county, corporation, or district officer to qualify before the commencement of his term of office creates a vacancy in the office.[1]

As to a person suspended from office, the office becomes as if it did not exist, and he may not be entitled to salary during the period of suspension; although the cause of suspension be afterward declared insufficient.[2]

"The President shall have Power to fill up all Vacancies which may happen during the Recess of the Senate, by granting Commissions which shall expire at the end of their next Session." This authorizes him to fill a vacancy happening during a session and which continues after adjournment.[3]

A vacant administration or trusteeship is any such office unfilled or without an occupant or incumbent from any cause whatever.[4]

A dwelling-house does not become vacant or unoccupied when the tenant leaves it for a few hours; only when there is a cessation to use it as a dwelling.[5]

Vacant lands are such as have not been appropriated by individuals.[6]

Vacate. (1) To leave empty or unoccupied.[7]

(2) To declare void, deprive of force, annul: as, to vacate a judgment or proceeding for irregularity, surprise, or fraud.

A writ of error does not vacate the judgment below; that continues in force until reversed.[8] See SET ASIDE.

VACATION. The interval between two successive terms of a court.

During this period orders signed by a judge are said to be issued "at chambers," *q. v.*

In this country all courts have terms and vacations. The time of the commencement of every term is fixed by statute, and the end of it by the final adjournment of the court for that term.[9]

The English year was divided into four terms of different lengths, separated by the vacations — the seasons of the great festivals or feasts, or deemed necessary on account of the avocations of rural business. The legal definition of "vacation" is, the period of time between the end of one term and the beginning of another; and this meaning will be given to the word in a statute, unless it appears that a more popular sense was intended. The intervals between the actual sessions of court when conducting the business of a term cannot be called vacations.[10]

Under the earlier organization of courts in England, the terms, which began and ended on fixed days, aggregated ninety-one days. The vacations embraced all days not included in the terms. . . The word may embrace the period, after adjournment, in which a court does not sit and transact business, as, in a statute authorizing judgments by confession in vacation; and not embrace all the time the court is not actually in session, or the time of adjournment from day to day.[1]

VACATUR. L. Let it be set aside.

VADIUM. Law Lat. A pledge.

Vadium mortuum. A dead pledge; mortgage. A security with the condition that if the money be not promptly repaid the debtor's estate will be forfeited.[2]

Vadium vivum. A living pledge. A security to be held by the creditor till he has received the amount of his debt out of the income of the property pledged.[2] See PLEDGE.

VAGRANT.[3] One who wanders about, and has no certain calling; an idle fellow;[4] a vagabond; a tramp, *q. v.*

A person who roams about from place to place, begging, or living without labor or visible means of support.[5]

Any person going about from place to place begging, asking or subsisting upon charity, and for the purpose of acquiring money or a living, and who shall have no fixed place of residence or lawful occupation in the county or city in which he shall be arrested, shall be taken and deemed to be a tramp and guilty of a misdemeanor.[5]

Any act of begging or vagrancy is *prima facie* evidence.[6]

Vagrancy is distinct from disorderly conduct and breach of the peace, and includes only such cases of vagabondage as are known to the common law.[7]

Such statutes, designed to suppress vagrancy, as are in derogation of the right of trial by jury, are to be strictly construed.[8] See CONVICTION, Summary.

A statute authorizing two overseers of the poor, by writing, under their hands, to commit vagrants and paupers to the work-house, is in violation of the Fourteenth Amendment.[9] See PROCESS, 1, Of law.

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[1] Vaughan *v.* Johnson, 77 Va. 300 (1883); Johnson *v.* Mann, *ib.* 271 (1883).

[2] Steubenville *v.* Culp, 38 Ohio St. 18, 26 (1882).

[3] *Re* Farrow and Bigby, 4 Woods, 492-94 (1880), cases, Woods, Cir. J. Constitution, Art. II, sec. 2, cl. 3.

[4] [Cline *v.* Greenwood, 10 Oreg. 238-39 (1882), cases.

[5] Laselle *v.* Hoboken Ins. Co., 43 N. J. L. 470 (1881); Sleeper *v.* N. H. Ins. Co., 56 N. H. 404 (1876).

Marshall *v.* Bompart, 18 Mo. 87 (1853).

[6] See Walsh *v.* Commonwealth, *ante.*

[7] Kansas Pacific R. Co. *v.* Twombly, 100 U. S. 81 (1879).

[8] Bronson *v.* Schulten, 104 U. S. 415 (1881).

[9] Brayman *v.* Whitcomb, 134 Mass. 526 (1883), C. Allen, J.

[1] Conkling *v.* Ridgely, 112 Ill. 36, 40, 43 (1884), Sheldon, J.

[2] 2 Bl. Com. 157; 21 N. Y. 344.

[3] L. *vagari*, to wander.

[4] [Jacob's Law Dict.

[5] Penn. Act, 1879, No. 31.

[6] See Del. Laws, 1879, No. 223; North Car. Laws, 1879, No. 355; Ohio Act, 1879, No. 191; Mary. Laws, 1880, No. 43; Mass. Laws, 1880, No. 231, c. 257, §§ 2-3; 1 N. Y. Laws, 1880, No. 296.

[7] *Re* Way, 41 Mich. 301 (1879). Campbell, C. J.

[8] Bullock *v.* Geomble, 45 Ill. 222 (1867); People *v.* Turner, 55 *id.* 287 (1870); Wynehamer *v.* People, 13 N. Y. 426 (1856); 41 Mich. 308, *supra.*

[9] Portland *v.* Bangor, 65 Me. 120 (1876). See also Prescott *v.* State, 19 Ohio St. 184 (1869); Johnson *v.* Waukesha County, 64 Wis. 268 (1885).

Idleness in any person whatsoever is a high offense against public economy. . . Idle persons or vagabonds, whom ancient statutes describe to be "such as wake on the night and sleep on the day, haunt customable taverns and ale-houses, and routs about, and no man wot whence they come nor whither they go," or such as are more particularly described by 17 Geo. II (1744), c. 5, as idle and disorderly persons, rogues and vagabonds, and incorrigible rogues, are all offenders against good order.[1]

Statute 5 Geo. IV (1825), c. 83, revised and codified previous laws, and has been known as the English Vagrant's Act. Amendments were made by 1 and 2 Vict. (1837), c. 38. These acts form the basis of similar legislation in some of our States.

By force of various statutes, rogues and vagabonds are: persons convicted a second time as idle and disorderly; fortune-tellers, and such as use subtle arts to deceive; persons wandering abroad, lodging in barns or out-houses, in the open air, or in any tent, cart, or wagon, not having any visible means of subsistence, and not giving good account of themselves; persons guilty of indecent exposures — by pictures, or of the person; persons exposing wounds, or making fraudulent pretenses, to obtain alms; persons deserting their families or children, leaving them chargeable to the parish; persons playing or betting in a place to which the public have access, with any instrument of gaming; persons armed or prepared to commit a felony; persons found on premises for an unlawful purpose; reputed thieves, in a public place, intending to commit felony.[2]

VAIN THING. See LEX, Neminem.

VALID.[3] Having force, of binding force; legally sufficient or efficacious; authorized by law. Opposed, **invalid**: as, a valid or invalid — condition, consideration, defense, instrument, marriage, sale. Whence validity, invalidity, invalidate.

A sale of land may be regular in form and in the mode of its conduct, but it cannot be "valid," unless authorized by law.[4]

"Validity" is legal sufficiency, in contradistinction to mere regularity. . . A valid judgment, decree, or sale is not void for any reason. A valid sale means one having the quality of legal sufficiency and complete obligation.[5]

That what is invalid in an instrument will not destroy what is valid, see UTILE, etc., p. 1077. See also LAWFUL; VOID.

VALUE.[6] 1. Applied without qualification to property of any description, means the price it will command in the market.[7]

Consists in the estimate, or the opinion of those influencing the market, attachable to certain intrinsic qualities belonging to an article.[1]

In custom laws, "the true market value of merchandise in the principal markets of the country from whence exported at the date of exportation."[2] See *Market Value; Valuation.*

Actual value; cash value. Within the meaning of a policy of insurance upon a stock of clothing, "actual cash value" is the sum of money the goods would have brought for cash, at the market price, at the time when and the place where they were destroyed.[3]

"Actual value," "cash value," "salable value," and like expressions, in enactments containing directions to tax-assessing officers, mean the same thing, are designed to effect the same purpose — to assess all species of taxable property at the actual value.[4]

Current value. The common marketable price of a thing without reference to the price the owner gave for it.[5]

True value. In duty laws the actual cost. This is the basis of appraisement.[6]

Equitable value. Referring to a life insurance policy, the difference between the cost of a new policy and the present value of the premiums yet to be paid on a forfeited policy when the forfeiture occurred.

Where failure to pay premiums is caused by a public war, the assured may recover the equitable value of his policy, with interest from the close of the war.[6] See *Net Value.*

For value. For a valuable consideration *q. v.*: as, a holder of paper for value, a trust for value. See NEGOTIABLE.

Intrinsic value. The true, inherent, and essential value of a thing, not depending upon accident, place, or person, but the same everywhere and to every one.

A bank note has no such value.[7]

Market or marketable value. The price established by public sales, or sales in the way of ordinary business.[8]

[1] 4 Bl. Com. 169.

[2] Wharton's Law Dict.

[3] L. *validus*, strong.

[4] De Treville *v.* Smalls, 98 U. S. 523 (1878), Strong, J.

[5] Sharpleigh *v.* Surdam, 1 Flip. 487-89 (1876), Emmons, Cir. J.

[6] L. *valere*, to be worth.

[7] Fox *v.* Phelps, 17 Wend. 399 (1837), Bronson, J.

[1] Washington Ice Co. *v.* Webster, 68 Me. 463 (1878), Appleton, C. J.

[2] R. S. § 2962: Act 2 March, 1861; United States *v.* Nash, 4 Cliff. 112 (1869).

[3] Mack *v.* Lancashire Ins. Co., 2 McCrary, 211 (1880), McCrary, Cir. J.

[4] Cummings *v.* Merchants' Nat. Bank of Toledo, 101 U. S. 162 (1879), Miller, J.; Burr. Tax. p. 227, s. 99, cases.

[5] [Tappan *v.* United States, 2 Mas. 399-401 (1822), Story, J.

[6] N. Y. Life Ins. Co. *v.* Statham, 93 U. S. 24, 33-35 (1876).

[7] State Bank *v.* Ford, 5 Ired. L. 698 (1845), Ruffin, C. J.

[8] [Murray *v.* Stanton, 99 Mass. 348 (1868), Wells, J.

The market price of an article furnishes the measure of damages, at the time at which the article was deliverable under a contract. Then the "price" is the "value," the rate at which the thing is sold. To make a market there must be buying and selling, purchase and sale. The asking price is not necessarily the market price. If the price was not fixed by agreement, and ranged between different rates, the jury may take the highest, lowest, or medium rate, according to the conduct of the defendant.[1]

As to what is the market price is sometimes a matter of opinion which may require, for its formation, the consideration of a great variety of facts, as, prices-current, sales, shipments, letters from dealers and manufacturers.[2]

Appraisers of imports are to appraise according to the market value in the principal markets of the country from which the same was imported.[3] See MARKET, Price.

Net value. The net value of a policy of life insurance represents, approximately, the amount of the payments which have been made by the holder in excess of the yearly cost of insurance.[4] Compare *Equitable Value.*

Par value. See PAR, 2.

Value received. An equivalent or a sufficient consideration has passed or exists.

The rule is that in an action upon a non-negotiable instrument a consideration must be proved. But when the instrument on its face states the consideration, or purports to be given for "value received," a *prima facie* case of consideration is made out, as between the original parties, and as against third persons. Indeed, those words, though usual, are not necessary in a negotiable instrument: the instrument of itself is evidence of a legal consideration for the obligation it creates. If no such consideration existed it is incumbent on the defendant to establish that fact. Hence, the plaintiff need not aver, nor prove — until the presumption has been overcome by testimony — that the obligation was originally based upon a sufficient consideration of some kind.[5] See NEGOTIABLE; CONSIDERATION, 2.

In Missouri a statute provides that a promissory note shall not be a negotiable instrument unless it contains the words "value received," but the recital is not essential to impart negotiability to a bill of exchange.[1]

Valuable. (1) Of some value; worthy of preservation: as, valuable papers.[2]

(2) Bearing a value; of equivalent worth: as, a valuable consideration, *q. v.*

(3) That on which money is payable irrespective of contingency: as, a valuable security.[3]

Valuation. The act of estimating the worth, or of appraising the value, as, of an article of property; also, the value placed upon the article.

Over-valuation. An estimate higher than the real value; excessive valuation.

Of insured property, unless so excessive as to amount to proof of fraud, does not vitiate the contract, because an estimate is a matter of mere opinion.[4]

The ordinary test of the value of property is the price it will command in the market if offered for sale. Individual men may honestly differ about the value of property, or as to what it will bring in the market, and such differences are often marked among those whose special business it is to buy and sell property of all kinds. The duty of a person seeking insurance, who is to give the "estimated value" of the property, is to deal fairly in estimating the market value.[5]

G., wishing to borrow money of B., offered as security a mortgage upon land containing sandstone quarries, which had not been worked sufficiently to show their extent. He furnished, however, the certificate of two other persons, each setting forth that he had for many years resided near the quarries and was acquainted with them, and giving, in his best judgment, their value, which was one hundred and fifty per cent. more than the amount of the loan. B. took the mortgage and lent the money, which was not paid. Upon a foreclosure sale, the land brought less than one-sixth of the loan. B. thereupon sued G. and the other parties to recover damages for the loss sustained, and he charged that they had conspired to defraud him by a false and fraudulent certificate. *Held*, that the action would not lie, defendants not being liable for an expression of opinion, however fallacious, in regard to property the value of which depended upon contingencies that might never occur, or developments that might never be made. The court, *arguendo*, said: To justify any imputation of fraud in giving the certificate, it was necessary to show that the parties signing

[1] Blydenburgh *v.* Welsh, Baldw. 341-43 (1831), Hopkinson, J.

[2] Chaffee *v.* United States, 18 Wall. 542 (1873), cases.

[3] United States *v.* Nash, 4 Cliff. 112 (1869), cases; R. S. § 2932: Act 2 March, 1861.

[4] Connecticut Ins. Co. *v.* Commonwealth, 133 Mass. 165 (1882), Morton, C. J.

[5] See Mandeville *v.* Welch, 5 Wheat. 282 (1820), Story, J.; Benjamin *v.* Tillman, 2 McLean, 213 (1840), cases; Gamwell *v.* Mosley, 11 Gray, 173 (1858); Coursin *v.* Ledlie, 31 Pa. 508 (1858), cases; Averett *v.* Booker, 15 Gratt. 164 (1859), cases; Miller *v.* Cook, 23 N. Y. 496 (1861), cases; Osgood *v.* Bringolf, 32 Iowa, 270 (1871); Frank *v.* Irgens, 27 Minn. 43 (1880); Kearney *v.* Whitehead, 34 La. An. 530 (1882); 1 Daniel, Neg. Inst. § 161, cases.

[1] Taylor *v.* Newman, 77 Mo. 263 (1883), cases.

[2] [Hooper *v.* McQuary, 5 Coldw. 135 (1867).

[3] The Queen *v.* Tatlock, 2 Q. B. D. 163 (1876), Cockburn, C. J.

[4] Lynchburg Fire Ins. Co. *v.* West, 76 Va. 582 (1882); Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 83 (1875), cases; May, Ins. § 373; Wood, Ins. 427.

[5] First Nat. Bank of Kansas City *v.* Hartford Fire Ins. Co., 95 U. S. 677-78 (1877), Harlan, J.; Franklin Fire Ins. Co. *v.* Vaughan, 92 *id.* 518-19 (1875).

it had knowledge, at the time, that the value of the property was materially less than their estimate. And from the nature of the property, and its imperfectly developed condition, such knowledge was impossible. No one could know its actual value until further development was made. Until then, any estimate must have been entirely speculative and conjectural. It would depend as much, perhaps, upon the temperament and expectations of the party making it as upon any knowledge of facts. The law does not hold one responsible for the extravagant notions he may entertain of the value of property, dependent upon its future successful exploitation, or the result of future enterprises; nor for expressing them to one acquainted with its general character and condition. How could an over-estimate in such a case be shown? Other estimates would be equally conjectural. The law does not fasten responsibility upon one for expressions of opinion as to matters in their nature contingent and uncertain. Such opinions would probably be as variant as the individuals who give them utterance. A statement of an opinion assigning a certain value to property like a mine or a quarry not yet opened is not to be pronounced fraudulent because the property upon subsequent development may prove to be worthless; nor is it to be pronounced honest because the property may turn out of much higher value. . . Whenever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its value must necessarily be more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance upon it may produce. The determination of its truth or falsity, until the contingency occurs or becomes impossible, would lead the courts into investigations for which they have no fixed rules to guide their own judgments or to instruct juries. For opinions upon matters capable of accurate estimation by application of mathematical rules or scientific principles, such, for example, as the capacity of boilers, or the strength of materials, the case may be different. So, also, for opinions of parties possessing special learning or knowledge upon the subjects in respect to which their opinions are given, as of a mechanic upon the working of a machine he has seen in use, or of a lawyer upon the title of property which he has examined. Opinions upon such matters are capable of approximating to the truth, and for a false statement of them, where deception is designed, and injury has followed from reliance on them, an action may lie.[1]

Valued. With value agreed upon: as, a valued policy of insurance, *q. v.*

See APPRAISE; DESCRIPTION, 4; IMPAIR; JUST, 2; PRICE.

2. Effect, import; as, in a law respecting setting forth, in an indictment, the value of an instrument alleged to have been forged, uttered, etc.[1]

VARIANCE.[2] Failure of proof to correspond with the allegation.[3]

A disagreement between the allegations and the proof in some matter which, in point of law, is essential to the charge or claim.[4]

To be objected to at the trial; cannot avail the defendant, as an error, in the higher court, nor on a motion for a new trial. It is material only when it misleads.[5]

Sometimes confounded with "departure" in pleading, as in Bouvier's Law Dictionary, all editions, and even in Gould's Pleading, 4 ed., at pp. 251-52, secs. 97-100. See DEPARTURE, 3.

See also ALLEGATION; DESCRIPTION, 4; VIDERE, Videlicet.

VARIETUR. See NE, Varietur.

VASTUS. See DEVASTAVIT; WASTE.

VAULT. See BURIAL, par. 4.

VEGETABLES. See PERISHABLE; SOUND, 1 (1).

VEHICLE.[6] In the Revised Statutes, acts and resolutions of Congress, includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land.[7]

A ferry-boat is not a vehicle, within a statute providing for a specific tax on "carriages and other vehicles used for passengers for hire."[8]

But a street-sprinkler is a "public vehicle," within an ordinance imposing a license upon public vehicles using streets for trade or traffic.[9]

The phrase "or other wheeled vehicle of whatever description," used in a statute, following such specified vehicles as "carriages, wagons, buggies, sleighs and sleds," was held to refer to vehicles of the same

[1] Gordon *v.* Butler, 105 U. S. 553, 556-58 (1881), Field, J., citing Holbrook *v.* Connor, 60 Me. 578 (1872),— in which, to induce a sale, representations were made that untested land contained oil, a fact unknown except as inferred from the production of wells on neighboring lands and from a well upon the land itself; and in which it was held, also, that an action would not lie for a false statement as to the price the vendor had paid for the land, *ib.* 582, cases,— two judges, out of the seven, dissenting, *ib.* 585-91, cases. In Southern Development Co. *v.* Silva, 125 U. S. 247, 252 (1888), the principle stated in the text was applied in a suit to rescind a contract for the purchase of a silver mine on the ground of fraud in representations as to the probable amount of mineral it would yield, and to recover the consideration paid..

[1] Chidester *v.* State, 25 Ohio St. 433 (1874).

[2] L. *varius*, diverse, changing. Whence variant.

[3] See Nash *v.* Towne, 5 Wall. 638 (1866).

[4] House *v.* Metcalf, 27 Conn. 638 (1858), Sanford, J.; 30 *id.* 57; 72 Ill. 229.

[5] Roberts *v.* Graham, 6 Wall. 581 (1867), cases; 18 Bradw. 43, 491. See Gould, Pl., pp. 28, 62, 491.

[6] L. *vehere*, to carry, convey.

[7] R. S. § 4: Act 18 July, 1866, § 1.

[8] Duckwall *v.* New Albany, 25 Ind. 286 (1865).

[9] St. Louis *v.* Woodruff, 71 Mo. 92 (1879).

general class as those particularly specified, and not to include street-cars.[1]

See BICYCLE; CONVEYANCE, 1; ROAD, Law of; TEAM; VESSEL; WAGON.

VEIN. The terms "vein" and "lode," as used by miners, and in the Mining Acts of Congress of 1866 and 1872, apply to any zone or belt of mineralized rock lying within the boundaries, clearly separating it from the neighboring rock. Included are all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes.[2]

A vein or lode is a body of mineral or mineral-producing rock within defined boundaries in the general mass of the mountain.[3]

Those acts of Congress, not being framed in the interests of science, may not present scientific accuracy in the use of terms. They were intended to protect miners in the claims they locate and develop, and are to be so construed as to carry out this purpose.[3]

The law assumes that all veins are more or less vertical, and requires that the location of a claim shall be upon the top or apex of the particular vein. Having discovered a vein, and located the claim so that the top or apex is within his surface lines extended down vertically, the locator may follow the vein to any depth, as far as he can show that it is the same lode or vein. The "top" or "apex" is the end or edge or terminal point of the lode nearest the surface of the earth. If found at any depth, and the locator can define on the surface the area which will inclose it, the lode may be held by his location. No location can be made on the middle part of a lode, or otherwise than at the top or apex, which will entitle the locator to go beyond his lines.[4]

When a mining claim crosses the course of the lode or vein instead of being "along the vein or lode," the end lines are those which measure the width of the claim as it crosses the lode; and the side lines those which measure the extent of the claim on each side of the middle of the vein at the surface. . . When there are surface outcroppings from the same vein within the boundaries of two claims, the one first located carries the right to work the claim.[1]

See further MINE.

VELLE. See VOLO.

VEND.[2] To transfer for an equivalent in money; to dispose of by sale; to sell.

Applicable to merchandise or chattels.

Vendible. Capable of being sold, salable; merchantable, marketable, *qq. v.*

Vendor. The party by whom a sale is made.

Vendee. He to whom a sale is made.

Often confined to sales of realty. "Seller" and "buyer" are more comprehensive, applying also to personalty.

He is the vendor, rather than the grantor, who negotiates a sale of realty, and becomes the recipient of the consideration, though the title comes to the vendee from another source.[3]

A sale of personalty procured by fraud does not bind the vendor unless he afterward ratify the sale; and he may recover possession of the property or have damages for the conversion.[4]

What acts upon the part of the vendee of a chattel amount to a fraud upon the vendor has not been uniformly settled.[5]

See LIEN, Vendor's.[6]

Vendue. A public sale by outcry; an auction, *q. v.*

See CONVEYANCE, 2; DECLARATION, 1; DEED, 2; PURCHASE, 2, 3; REVENDICATION; SALE; VENDITIO.

VENDITIO. L. A sale.

Venditioni exponas. That you expose for sale. A writ by which the sheriff sells property already taken in execution under a *fieri facias*. Abbreviated *vend. ex.*, and *v. e.*

In old practice, issued after a return that the goods so taken remained unsold from want of buyers. See EXECUTION, 3, Writs of.

VENIRE. L. To come; to appear in court.

Tarde venit. It came late. A return that a writ came into the officer's hands too late to be executed before the return day named in the writ. The single word *tarde* is sometimes used.

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[1] Monongahela Bridge Co. *v.* Birmingham Ry. Co., 114 Pa. 484 (1886); Act 18 May, 1871.

[2] The Eureka Case (Eureka Mining Co. *v.* Richmond Mining Co.), 4 Saw. 312, 311 (1877), Field, J. Approved, Iron Silver Mining Co. *v.* Cheesman, 116 U. S. 534 (1886), Miller, J.; Stevens *v.* Williams, 1 McCrary, 487 (1879). See also Juniper Mining Co. *v.* Bodie Mining Co., 7 Saw. 107 (1881): s. c. 11 F. R. 666; 123 U. S. 679.

[3] Iron Silver Mining Co. *v.* Cheesman, 2 McCrary, 195 (1881), Hallett, D. J.

[4] Iron Mine *v.* Loella Mine, 2 McCrary, 121 (1880), Hallett, D. J.: s. c. 16 F. R. 829. See also Flagstaff Silver Mining Co. *v.* Tarbet, 98 U. S. 463 (1878); Iron Silver Mining Co. *v.* Cheesman, 116 *id.* 529, 534 (1886), Miller, J.; Same *v.* Elgin Mining Co., 118 *id.* 196 (1886); Patterson *v.* Hitchcock, 3 Col. 545 (1877); R. S. §§ 2322, 2318, *et seq.*

[1] Argentine Mining Co. *v.* Terrible Mining Co., 122 U. S. 478, 485 (1887); Acts of 1866, 1872.

[2] L. *vendere*, to sell.

[3] Rutland *v.* Brister, 53 Miss. 685 (1876), Simrall, C. J.

[4] Amer *v.* Hightower, 70 Cal. 442-43 (1886), cases.

[5] See 25 Am. Law Reg. 247-50 (1886), cases, note to Farwell *v.* Meyers, 59 Mich. 179 (1886). Damages for non-fulfillment of contract, 22 Cent. Law J. 152 (1886), cases.

[6] Also 10 Va. Law J. 515 (1886).

Venire facias. That you cause to come. A writ commanding that jurors be summoned. The emphatic words in the old Latin writ, the full expression being *venire facias juratores.* Often termed simply the *venire.*[1]

Venireman. A person who appears, as a juror, in obedience to the command of a *venire facias.*

This word would seem, in Virginia, to be contrasted with "talesman," a by-stander who is taken as a juror.[2]

The common-law *venire* commanded the sheriff to "cause to come" a certain number of jurors; and the command included: the selection of the names of qualified men, summoning the persons drawn, a return of the writ, with the sheriff's action under it, whereby he "returned and delivered in" the jury to the court — showing the identity of the persons appearing with the persons drawn.[3]

Venire facias de novo. That you cause to come anew. An order, by a court of review, that a new trial be had; also, the writ which summons jurors for such a trial. Shortened to *venire de novo.*

The award of a *venire de novo* is in no instance more than an order for a new trial in a cause in which the verdict or judgment is erroneous in matters of law. It is never equivalent to a new suit.[4]

A trial *de novo* does not mean a trial on appeal with nothing but the record to correct errors, but a trial of the entire case anew, including hearing evidence, whether additional or not.[5]

When the court of review reverses a judgment entered upon a verdict for the plaintiff, but awards no *venire de novo*, the reversal constitutes no bar to another suit for the same cause of action.[6]

VENTER. L. 1. The womb. Fr. *ventre.* See PARTUS.

Ad ventrem inspiciendum, and de ventre inspiciendo. For examining the womb.

At common law, a reprieve was had where a woman, capitally convicted, pleaded pregnancy. The judge directed that a jury of twelve matrons or discreet women inquire into the fact; if they brought in a verdict of quick with child, execution was stayed.[7]

In or en ventre sa mere. Fr. In its mother's womb.

An infant *en ventre* is regarded as born for some purposes. It may have a legacy, and a guardian, assigned to it, and an estate may be limited to its use.[1]

2. A wife, or mother; maternal parentage: as, a child by the first venter; children by the same venter: uterine brothers and sisters.[2]

VENUE.[3] Locality, neighborhood; place of trial; county.

The county where a cause is to be tried.[4]

The clause in a declaration or indictment which states the place where the transaction was had, the injury inflicted, or the crime committed.

Some certain place must be alleged as the place of occurrence for each traversable fact. In local actions the true venue must be laid, and it cannot be changed; in transitory actions, may be laid in any county where the plaintiff can find the defendant.[5]

Originally, a venue was employed to indicate the county from which the jury was to come. The necessity of stating a venue is reluctantly confessed by the authorities. It is enough, in a civil action, to name a place in the county without naming the county.[6]

In a criminal proceeding the venue must be laid in the county where the act was committed. See PLACE, Of indictment.

Change of venue is allowed by statute in cases in which there is reasonable ground to believe that such local prejudice exists toward a party, or that such feeling exists on the subject-matter in litigation, as to preclude the probability of an impartial trial.

The affidavit required must state the facts from which the conclusion is deduced that an impartial trial cannot be had.[7] See KNOWLEDGE, 1; PREJUDICE.

VERACITY. See REPUTATION.

VERBA. See VERBUM.

VERBAL. See FACT; MERGER, 2; PAROL.

VERBUM. L. What is spoken; a word. *Verba.* Words, language, discourse.

Ex visceribus verborum. From the bowels of the words: from the vital part of the language.[8]

In hæc verba, and in his verbis. In these words. **In totidem verbis, or totidem verbis.** In the very same words.

[1] 3 Bl. Com. 352; 4 *id.* 351.

[2] See Cluverius *v.* Commonwealth, 81 Va. 787, 791, 794 (1886).

[3] United States *v.* Antz, 4 Woods, 182 (1882), Billings, D. J.: s. c. 16 F. R. 125; 18 Johns. *216; 13 How. St. Tr. 327.

[4] United States *v.* Hawkins, 10 Pet. *131 (1836), Wayne, J.

[5] Schultz *v.* Lempert, 55 Tex. 277 (1881); 10 Tex. 471.

[6] Fries *v.* Pennsylvania R. Co., 98 Pa. 144 (1881); Aurora City *v.* West, 7 Wall. 82 (1868). See R. S. § 803; 2 Arch. Prac. 1549; Steph. Plead. 120.

[7] 4 Bl. Com. 394; 1 *id.* 456.

[1] 1 Bl. Com. 130; 33 Me. 48; 9 Metc. 263; 22 N. J. L. 57; 91 U. S. 638.

[2] See Doe *v.* Keen, 7 T. R. 386 (1797).

[3] F. *venuë*, a coming, place of arrival.

[4] 3 Bl. Com. 383.

[5] McKenna *v.* Fisk, 1 How. 248 (1843), cases.

[6] Bean *v.* Ayers, 67 Me. 486-87 (1878), cases.

[7] Territory *v.* Egan, 3 Dak. 125 (1882); People *v.* Yoakum, 53 Cal. 567 (1879); 16 Minn. 282.

[8] 10 Johns. 494; 47 Pa. 396.

Ipsissimis verbis. In the very words themselves. **Nudis verbis.** In the naked words.

In the identical language; word for word; *verbatim.*

Where an offense consists of words spoken or written, "the very words" used must be set forth in charging the offense, the substance of the language not then being sufficient. An exception to this rule obtains when the matter is too indecent to be spread upon the records.[1]

Verba de futuro, and de præsenti. See MARRIAGE, 1.

Verba debent intelligi cum effectu. Words are to be understood effectively.[2] See RES, Ut res, etc.

Verba fortius accipiuntur contra proferentem. Words the more strongly are taken against him offering them. Frequently, *verba chartarum fortius accipiuntur contra proferentem:* the language of instruments is to be construed against the person who proposes it, rather than against the person who is invited to accept it.

Does not apply to wills, nor to legislative documents, nor as against the state, nor where a third person would be made to suffer, but is applied to pleadings.[3]

Applies to a contract limiting the liability of a common carrier:[4] and perhaps, also, to questions, with their answers, propounded by a life insurance company.[5]

Self-preservation makes men careful not to prejudice their own interests by a too extensive meaning of words. The maxim tends to prevent deception: some would affect ambiguous and intricate expressions, if at liberty afterward to put their own construction upon them. But the rule, being one of strictness and rigor, is the last to be resorted to.[6]

Verba illata (or relata) inesse videntur. Words referred to are viewed as incorporated. A writing to which reference is made becomes thereby a part of the later instrument — contract, deed, will, statute, pleading.

Reference in a policy of insurance to the application incorporates the application as part of the policy.[7]

An answer to a letter cannot be put in evidence without also admitting the first letter, unless the answer contains statements which cannot be misunderstood when read alone.[1]

A mortgage and the note it secures, by identifying words, become virtually one instrument.[2]

If an agreement, required by the Statute of Frauds, is not signed, but a letter, acknowledging the agreement, is signed, this will satisfy the statute.[3]

Matter stated in one count may, by reference, without re-statement at length, be made part of another count.

A deed or plan directly referred to in another deed becomes thereby part of the latter.

Where a map or plan of a tract of land is referred to in a deed containing a description of one of the lots, such map or plan is regarded as giving the true description, as if it were recited in the deed.[4]

Verba intentione debent inservire. Words ought to subserve the intention.

Expresses the better rule of construction for a statute, when it can be acted upon without doing violence to language or wresting it from a fair application to the subject-matter.[5]

VERDICT.[6] The saying of the truth. The finding of a jury.

The answer of the jury to the questions of fact contained in the issue formed by the pleadings.[7]

General verdict. This directly finds or negatives all facts in issue, in a general form. **Special verdict.** When the jury finds the facts particularly, and submits to the court the questions of law arising upon them.[7]

A "general verdict" is that by which the jury pronounces generally upon all the issues for the plaintiff or for the defendant. A "separate-general verdict" is the finding, upon any of the issues. A "special verdict" is the finding of facts by a jury, as shown in their answers to questions submitted to them in writing.[8]

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[1] United States *v.* Noelke, 17 Blatch. 560–61 (1880), cases; United States *v.* Bennett, 16 *id.* 343–50 (1879), cases.

[2] 2 Bl. Com. 380; 2 Johns. Cas. 97, 101.

[3] Broom, Max. 594; Whart. Max.

[4] 2 Pars. Contr. 241.

[5] 2 Pars. Contr. 357, 465; 30 F. R. 911.

[6] 2 Bl. Com. 380, 121, 347; 2 Pars. Contr. 506, cases.

[7] First Nat. Bank of Kansas City *v.* Hartford Fire Ins. Co., 95 U. S. 675 (1877).

[1] Brayley *v.* Ross, 33 Iowa, 508 (1871), Beck, C. J.; Stone *v.* Sanborn, 104 Mass. 324 (1870), cases; Newton *v.* Price, 41 Ga. 195 (1870); Lester *v.* Sutton, 7 Mich. 331 (1859); Bryant *v.* Lord, 19 Minn. 404 (1872); 1 Greenl. Ev. § 201, note; 2 Whart. Ev. § 1127.

[2] Winchell *v.* Coney, 54 Conn. 31 (1886). See also Wilson *v.* Roots, 119 Ill. 386 (1887).

[3] 2 Whart. Ev. § 872, cases; 3 Pars. Contr. 4, cases.

[4] Chapman *v.* Polack, 70 Cal. 495 (1886), cases: Cragin *v.* Powell, 128 U. S. 696 (1888).

See generally Smith, Contr. 506; 2 Pars. Contr. 421; 2 Black, 504; 62 Cal. 638; 74 Me. 306; 121 Mass. 50; 133 *id.* 514; 144 *id.* 359; 64 Pa. 400.

[5] Milton *v.* Babson, 6 Allen, 324 (1863), Bigelow, C. J.; 2 Bl. Com. 379.

[6] L. *vere dictum*, said by the truth.

[7] Day *v.* Webb, 28 Conn. 144 (1859), Waldo, J.; 45 Me 536; 3 Tex. Ap. 513.

[8] Kentucky Civil Code, § 336, subs. 1, 2, 3.

By a separate-general verdict the jury pass upon an *issue* that may be constituted of many facts: by a special verdict, upon the existence of *facts* without reference to any issue. A separate-general verdict is *separate* as to the particular issue, as distinguished from any other issue, and *general* as to the particular issue; that is, it applies in cases where there is more than one issue.[1]

A special verdict is based upon 13 Edw. I (1286), c. 30. The jury state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding, conditionally, that if upon the whole matter the court should be of opinion that the plaintiff had cause of action, they find for the plaintiff; if otherwise, for the defendant. This is entered at length on the record, afterward argued, and determined by the court.[2]

If error exists in a general verdict, it can be corrected only by a new trial. The usual course is to sustain a special verdict if it contains the facts necessary to a proper judgment upon the matter in controversy; the court of original jurisdiction may render such judgment as the case requires. Error apparent in the record is re-examinable on a writ of error.[3]

It is of the very essence of a special verdict that the jury find the facts on which the court is to pronounce the judgment according to law, and the court is confined to the facts so found. Stating the evidence of the facts is insufficient. . . The verdict is formally prepared by counsel, subject to correction by the court; after being found, it is entered on the record, and the questions of law are then decided by the court, as in a case of demurrer. In a court of error nothing is open for revision except the questions of law inferentially arising upon the facts stated. The proceeding, like a bill of exceptions, enlarges the record by incorporating the facts of the case. Error apparent in any part of the record is within the revisory power.[4]

By leave of court, the verdict may be prepared by the parties, subject to correction by the court, and may include agreed facts in addition to those found by the jury. The purpose is, that the court may have time to hear the parties and give the questions of law deliberate consideration.[5] Rulings on evidence are not properly included, any more than in an agreed statement of facts; because the verdict is entered on the record, and the judgment is based on the findings of the jury.[6] See CASE, 2, Stated; FINDING, 4, Special.

Privy verdict. Where the judge has left or adjourned court, and the jury, being agreed, in order to be delivered from confinement, obtain leave to give their verdict privily to the judge out of court: which verdict they afterward affirm by a public verdict given openly in court; wherein, if they please, they may vary from the first verdict.[1]

A privy verdict is not known in criminal practice; but that practice allows the judge to adjourn while the jury withdraw to confer, and to return in order to receive the verdict in open court.[2] Finding such verdicts is seldom indulged; the practice would allow time for tampering with a jury.[3]

Sealed verdict. A verdict which a jury seal up, return to court, and at the next sitting make known as their finding.

Sealed verdicts are common. In each case, when the court is again session, the jurors assemble and announce their finding in all respects as if it had not been sealed.[4] See POLL, 1.

Public verdict. In this the jury openly declare that they have found the issue for the plaintiff or the defendant.[5]

When the evidence is insufficient to support a verdict for the plaintiff, the court may direct a verdict for the defendant.[6] See further NONSUIT.

But the court cannot direct a verdict of guilty as to a criminal offense, even where the facts are admitted, and the question of guilt depends upon a matter of law left for the court to determine.[7]

On the trial of a felony, at common law, a verdict cannot be rendered in the absence of the accused; and the record should show that he was present.[8]

After a verdict for a plaintiff it is presumed he proved every fact indispensable to a recovery, though no evidence appears in the record to show it.[9]

Where it is so palpable that the jury have erred as to suggest the probability that their verdict was the result of misapprehension or partiality, the court will set aside the verdict.[10]

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[1] [Witty *v.* Chesapeake, Ohio, &c. R. Co., 83 Ky. 29 (1884), Hines, C. J.

[2] 3 Bl. Com. 377; Collins *v.* Riley, 104 U. S. 324 (1881).

[3] New Orleans Ins. Co. *v.* Piaggio, 16 Wall. 387–88 (1872), cases.

[4] Suydam *v.* Williamson, 20 How. 432–33 (1857), cases, Clifford, J.; Sun Mutual Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 500–1 (1882), cases, Matthews, J.

[5] Mumford *v.* Wardwell, 6 Wall. 432–33 (1867). See also Wallington *v.* Dunlap, 14 Pa. 32–33 (1850), cases.

[6] Pomeroy *v.* Bank of Indiana, 1 Wall 603 (1863). Upon special interrogatories to juries, see 20 Am. Law Rev 866–88 (1886), cases.

[1] [3 Bl. Com. 377; 5 Phila. 124; 6 *id.* 520.

[2] 4 Bl. Com. 360.

[3] 3 Bl. Com. 377.

[4] United States *v.* Bennett, 16 Blatch. 373–75 (1879), cases; Doyle *v.* United States, 11 Biss. 100 (1881).

[5] [3 Bl. Com. 377.

[6] Schofield *v.* Chicago, &c. R. Co., 114 U. S. 619 (1885).

[7] United States *v.* Taylor, 11 F. R. 470 (1882); *th.* 475.

[8] United States *v.* Whittier, 13 F. R. 536 (1882); State *v.* Cartwright, 10 Oreg. 195 (1881), cases.

[9] Grignon *v.* Astor, 2 How. 340 (1844); Garland *v.* Davis, 4 *id.* 144 (1846); 3 Bl. Com. 394; 4 *id.* 375.

[10] Mengis *v.* Lebanon Manuf. Co., 10 F. R. 665 (1882); Poole *v.* Chicago, &c. R. Co., 2 McCrary, 351 (1881); New York Central, &c. R. Co. *v.* Fraloff, 100 U. S. 31 (1879).

The courts will not set aside a verdict for excessive damages unless so excessive as to evince prejudice, partiality, or corruption in the jury.[1]

See also BEHAVIOR; CONTRARY; INSTRUCT, 2; JEOPARDY; JURY; LOT, 1; TRIAL.

VERIFY.[2] To show to be true; to confirm by oath: as, to verify an account, a petition, a plea, by making oath to the truth of the statement of the facts set forth. Whence verification.

Sometimes, to confirm or substantiate by oath, sometimes by argument; in legal proceedings generally the former.[3]

A notary may "verify" a mortgagee's written statement of the amount of his claim, but need not "authenticate" the act by his seal. "Verify" here means to swear to.[4] Compare AVER.

VERILY. See BELIEF.

VERITY. See RECORD, Judicial.

VERSUS. L. Turned toward: against.

Separates the name of a plaintiff from the name of the defendant. Abbreviated *vs.* and *v.*[5]

In New York, prior to 1848, when an action was brought by A against B, the declaration was entitled A, plaintiff, *v.* B, defendant. But the plea was entitled B, defendant, *ads.* (ad sectam) A. Generally, when a party was an actor in a proceeding, he placed his own name first. This explains why, in the earlier reports of that State, *v.* or *ads.* appears between the names of parties, and why, in the progress of a case from one court to another, the names themselves appeared reversed.[6] See under A, 3; SUIT, 1.

VERTU. "Objects of vertu and taste" do not necessarily include valuable paintings.[7]

VERUS. L. True; real, actual; genuine. *Verum.* The truth. See AVER; VERDICT; VERIFY.

VESSEL.[8] In the Revised Statutes and acts and resolutions of Congress, includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.[9]

Vessel has been used in contradistinction to an "open boat," which is an open vessel without decks, and it rarely designates any water-craft without a deck; but "boat" is constantly used for such small vehicles of this nature as are used without a deck.[1]

Includes a steam canal-boat,[2] and a steam-dredge.[3]

May include any structure made to float upon the water, for purposes of commerce or war, whether impelled by wind, steam, or oars.[4]

Yet a raft is not a vessel.[5]

Foreign vessel. May sometimes be applied to any vessel not registered or licensed, in reference to the privileges derived from the revenue system, but, in a variety of instances, designates a vessel navigating under the flag and with the papers of a foreign sovereign.[6]

A vessel is to be registered at the home-port, which is the port nearest the owner's residence.[7]

Merchant vessel. Rev. St. § 4270, which provides that the penalties imposed by foregoing provisions regulating the carriage of passengers in merchant vessels shall be liens upon the vessels, applies to those sections which declare a "fine" for the violation of its provisions, as well as to those which declare a penalty *eo nomine;* and a fine incurred by a violation of § 4253, which prohibits carrying more passengers than are allowed by § 4252, is therefore a lien upon the vessel. Under § 4270, the lien for carrying passengers in excess of the limit prescribed, cannot exceed the amount of the fine imposed upon the master, under criminal prosecution.[8]

Public vessel. A vessel belonging to a nation or government, as such, and a part of her sovereignty.

The liability of such a vessel for damages from a collision is merged into the liability of the sovereign. Redress is to come from the sovereign public faith, not through a court of admiralty.[9]

See generally SHIP, 2.

VEST.[10] 1. To clothe, robe; to cover, surround; to put something upon a person, confer upon, endow, put into the possession of, intrust to: as, to vest a person or a court with discretion, authority, power, jurisdiction.

2. To give an immediate, fixed right, of present or future enjoyment.[11]

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[1] Missouri Pacific R. Co. *v.* Peregoy, 36 Kan. 431 (1887); Potter *v.* Chicago, &c. R. Co., 22 Wis. 589 (1868). On amending verdicts, see 20 Cent. Law J. 145–50 (1885), cases; as to form and substance, 22 *id.* 101 (1886), cases.

[2] L. *verus*, true; *facere*, to make.

[3] De Witt *v.* Hosmer, 3 How. Pr. 284 (1848).

[4] Ashley *v.* Wright, 19 Ohio St. 295–96 (1869).

[5] Smith *v.* Butler, 25 N. H. 523 (1852).

[6] See Bowen *v.* Sewing Machine Co., 86 Ill. 12 (1887).

[7] Bridgman *v.* Fitzgerald, 43 L. T. 409 (1880).

[8] F. *vaissel*, a ship: L. *vascellum*, a small receptacle.

[9] R. S. § 3: Act 18 July, 1866. See The Devonshire, 8 Saw. 211 (1882).

[1] United States *v.* Open Boat, 5 Mas. 137, 134 (1828), Story, J.

[2] King *v.* Greenway, 71 N. Y. 416 (1877), cases.

[3] The Pioneer, 30 F. R. 206 (1886).

[4] Chaffe *v.* Ludeling, 27 La. An. 611 (1875).

[5] Moores *v.* Louisville Underwriters, 14 F. R. 236 (1882); Raft of Cypress Logs, 1 Flip. 543 (1876).

[6] [The Sally, 1 Gall. 59 (1812), Story, J.

[7] Hays *v.* Pacific Mail Steamship Co., 17 How. 598 (1854), Nelson, J.

[8] The Strathairly, 124 U. S. 558 (1888).

[9] The Fidelity, 16 Blatch. 573 (1879), cases.

[10] L. *vestire*, to clothe: *vestis*, a garment, dress.

[11] Stewart *v.* Harriman, 56 N. H. 29 (1875), Cushing, C. J.

A statute, deed, or will is said to vest an estate or property in a person, or to vest him with the estate, meaning to confer upon him ownership in the subject thereof; and an estate is said to vest, and to become vested, in a person when it becomes his property.

A contract for the sale of ascertained goods "vests" the property immediately in the buyer, and the right to the price in the seller, unless that is not the intention.[1]

Devest. To remove, take away, withdraw: as, to devest a person of authority, power, right, title to property. Opposed, *invest*.

Divest is common, but not approved.

Adjudication in bankruptcy *ipso facto* devests the debtor of all rights of property.

The repeal of a statute does not devest vested rights. See REPEAL; RETROSPECTIVE.

Invest. To clothe.

(1) To put a thing upon one; to confer, put into one's possession, convey the exercise of: as, to invest with discretion or authority.

(2) To surround with, place in; to lay out money, or its equivalent, so as to produce an income; to put out money at interest. See further INVEST.

Vested. Not subject to a condition precedent or unperformed: as, a vested estate, interest, right; which may be either present or immediate, or even future but uncontingent, and, therefore, transmissible, and may be qualified by a condition which does not delay the actual vesting.

Other examples are "vested" legacies and remainders, *qq. v.* Opposed, *contingent*.

An estate is vested when there is a person in being who will have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate;[2] — when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment.[3]

In the widest sense, vested rights are rights which are complete and consummated, so that nothing remains to be done to fix the right of the citizen to enjoy them.[4] See further RIGHT, 2 906. VESTED.

The law favors the vesting of estates, rather than their resting upon contingencies.[1]

VETO. L. I oppose, protest, forbid. Originally, the word in which the Roman tribunes and the praetor expressed dissent from a measure proposed by the senate or the magistrates.

The power in the President of the United States, and in the governors of the States, to refuse (executive) assent to a bill proposed for enactment into a law.

Whence veto power, message, clause.

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Mannner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."[2] Failure to sign a bill constitutes what is sometimes called a "pocket" or "silent" veto.

This makes the President in effect a third branch of the legislature. Whether the proposed law is necessary or expedient, whether it is constitutional, or whether it is so framed as to accomplish its intent, are questions transferred from the two Houses to the President. . . Said Webster: This is an extraordinary power, to be exercised only in peculiar and marked cases . . . vested in the President as a guard against hasty and inconsiderate legislation, and against any act, inadvertently passed, which might seem to encroach upon the just authority of other branches of government, or on the rights of States or of individuals.[3]

VEX. To harass, trouble, annoy. Said of a second suit or prosecution after another has been fairly tried on the merits and a verdict of acquittal or conviction rendered. "Vexatious litigation" is a common expression. See VEXARI.

VEXARI. L. To shake: to molest, annoy, trouble, prosecute, vex, *q. v.*

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[1] Hatch *v.* Standard Oil Co., 100 U. S. 124 (1879), cases.

[2] Taylor *v.* Gould, 10 Barb. 396 (1851), Parker, J.; 28 *id.* 367.

[3] 4 Kent, 202; 2 Sm. & M. 347.

[4] Moore *v.* State, 43 N. J. L. 243 (1881), Van Syckel, J.; 7 Leigh, 496; 6 Yerg. 154; 4 Q. B. D. 116-26.

[1] Fairfax *v.* Brown, 60 Md. 60 (1882), cases; 50 Mich. 299; 38 Ohio St. 255.

[2] Constitution, Art. I, sec. 7, cl. 2.

[3] Cooley, Princ. Const. Law, 50, 160-63; 1 Webster's Works, 267; Federalist, No. 73; 4 Madison's Works, 369; 1 Story, Const. § 878; 1 Kent, 289.

Nemo debet bis vexari pro uno et eadem causa. No person should twice be prosecuted for one and the same cause. No second suit can be maintained over a matter once fairly adjudicated.[1] No person shall be twice put in jeopardy. See ADJUDICATION, Former; ESTOPPEL, By record; JEOPARDY.

Vexata. See QUÆSTIO, Vexata.

VI. See VIS.

VIA. L. Way, road, path. See FILUM.

Via trita via tuta. The beaten path is the safe path; the worn way is the safest way.

Follow the rule: deviations are dangerous; adhere to precedent: innovations are perilous. *Via antiqua via tuta*, the old way is the safe way, and *via tuta est tutissima*, the beaten way is the safest, are other forms.[2]

VICARIOUS. See LIABILITY, Vicarious.

VICE. L. 1. In the place of; instead of. "*Vice* the officer dismissed."[3] See PRO, Hac vice.

Vice-comes. A deputy earl or sheriff, *q. v.*

Vice versa. The place, position, or order being reversed or exchanged; on the contrary.

2. Prefixed to a title, signifies that the person may serve for another in case of absence, incapacity, or death: as, vice-chancellor, vice-consul, vice-president, vice-principal, *qq. v.*; vice-officer.

VICINITY; VICINAGE.[4] Neighborhood; county.

Etymologically and by common understanding, "in the vicinity" means in the neighborhood, and "neighborhood," as applied to place, signifies nearness as opposed to remoteness. Whether a place is in the vicinity of another depends upon no arbitrary rule of distance or topography. "Vicinity" admits of a more indefinite and wider latitude in place than proximity or contiguity, and, as applied to territory, may embrace a more extended space than that lying contiguous to the place in question; as applied to towns and other territorial divisions, may embrace those not adjacent.[5] See COUNTY, 2; VENUE.

[1] 5 Mass. 176; 7 *id.* 423; 9 *id.* 423; 99 *id.* 208; 76 Pa. 239; 13 R. I. 477; 76 Va. 925.

[2] 5 Pet. 223; 1 Johns. Ch. 527, 530; 4 M. & S. 168.

[3] 16 Op. Att.-Gen. 296, 616.

[4] *F. voisinage;* L. *vicinus*, near.

[5] [Langley *v.* Barnstead, 63 N. H. 247 (1884), Allen, J.

VICIOUS.[1] A vicious propensity in an animal is a propensity to do any act which might endanger the safety of the persons or property of others in a given situation; not merely such propensity as impairs the utility of the animal for the purpose for which it is kept.[2] See ANIMAL.

VIDERE. L. To see; to perceive, understand, know.

Vide. See. *Quod vide:* which see. Words of reference. The last expression is abbreviated *q. v.*, in referring to one word or subject only, as, that immediately preceding it; and *qq. v.*, when the reference is to each of the several terms or topics just mentioned.

Videlicet. From *videre licet*, it is permitted to see: as you may see; to wit; namely. Abbreviated *viz.*

Scilicet, that is, *scire licet*, as you may know; to wit. See WIT.

The office of a *videlicet*, or a *scilicet*, is to particularize what is general in the words preceding, or in some other manner to explain what goes before.

While a *viz.* may restrain the generality of preceding words, it cannot enlarge or diminish the preceding subject-matter. If the averment immediately preceding is direct and positive, that which immediately follows is so. Any fact, in its nature traversable, may be traversed though placed under a *viz.* A material fact cannot be made immaterial by being placed there. Therefore, if an averment under a *viz.* contains matter in itself material, but which is repugnant to what goes before, the pleading is ill. If that which comes under a *viz.* is immaterial, or of mere form, its repugnancy to what goes before does not affect the pleading, but it will be rejected as surplusage.[3]

The terms generally used are "to wit," or "that is to say."

A *viz.* serves to give additional particulars of time or place, or circumstances explanatory of previous statements made in general terms; it cannot render nugatory previous specific averments.[4]

Will not avoid a variance, nor dispense with exact proof in an allegation of material matter.[5]

If repugnant to what has gone before, it will be rejected, but not if it can be reconciled and made restrictive.[6]

[1] L. *vitium*, fault, vice.

[2] Dickson *v.* McCoy, 39 N. Y. 408 (1868).

[3] Gould, Plead. 58, secs. 35-41; United States *v.* Burnham, 1 Mas. 67 (1816), cases; Steph. Pl. 309; 1 Greenl. Ev. § 60.

[4] Lewis *v.* Hitchcock, 10 F. R. 7 (1882), Brown, J.

[5] Bruguier *v.* United States, 1 Dak. 9 (1867); State *v.* Murphy, 55 Vt. 549 (1883); 26 Conn. 431; 47 Ill. 175; 132 Mass. 3, 491; 9 Minn. 317; 7 Cow. 45; 4 Johns. 450; 2 Flip. 445.

[6] Wilson *v.* Mount, 3 Ves. Jr. *194 (1796).

VIE. F. Life.

Cestui que vie. He who lives; he whose life measures the duration of an estate. See further CESTUI.

Per autre vie. For the life of another. The last term is applied to a tenant or to a tenancy limited on the life of another person than the grantee; the first term, to such other person.[1]

VIEW.[2] Seeing, sight, examination by the eye; ocular inspection or survey: as, that a sheriff may arrest upon view, without process. See ARREST, 2 (2, 3).

Whence view of, and to view, a body. See CORONER.

Whence also view, re-view, viewer, board of viewers, etc., as applied to an ocular examination, with report, upon the proposed route of a highway. See REVIEW, 1; ROAD, 1.

Whence, again, the views had by juries, of the spot where a crime is alleged to have been committed, of the location of a railroad upon property alleged to be damaged thereby, and the like. See COMPENSATION, 3.

In many States statutes provide for a view in civil and criminal cases. The first English statute was 4 Anne (1706), c. 16. The general practice is to have the view after the jury has been impaneled. The ruling of Lord Mansfield has been followed, that a view will be allowed only when, in the sound discretion of the court, it appears to be necessary or proper. From the enactments of the greater number of States it would appear that the court has power of its own motion to order the view. In a few States, however, the rule is otherwise. In Massachusetts, New Hampshire, South Carolina, Virginia, West Virginia, and Wisconsin, the authority to order the view seems to be confined to cases where it is asked by either party, and in Indiana, in criminal cases, it can only be allowed "with consent of all parties."

"The purpose is to enable the jury, by view of the premises, the better to understand the testimony and thereby the more intelligently to apply it to the issues; not to make them silent witnesses, burdened with testimony unknown to the parties, and in respect to which no opportunity for cross-examination or correction of error, if any, could be afforded."

In some States, the statutes provide for a special jury in cases involving the condemnation of land.

At common law a view could not be allowed except by consent of parties. Under the constitutional right of the accused to be confronted with the witnesses against him, a view can only be had in his presence.

The particular stage of the proceedings at which the view may be ordered seems to be left to the discretion of the court.[1]

"With a view to a rehearing" means for the purpose of a rehearing.[2]

VIGILANS. L. Awake: watchful, circumspect; attentive to one's own interests; vigilant; active.

Vigilantibus, non dormientibus, leges subveniunt — or *jura subveniunt* or *succurrunt.* Those awake, not those asleep, the laws assist. Relief is not given to such as sleep on their rights. Legal remedies are for the active and vigilant. Another form is *lex vigilantibus favet:* the law favors the vigilant.

Applies to a surety who fails to know what ought to be known before he enters into a contract.

Along with the maxim *interest reipublicæ*, etc., expresses the principle of statutes for the limitation of actions.[3] See LACHES; STALE.

VIGOR. L. Strength, efficacy, force.

Ex proprio vigore. By its own inherent force.

Ex vigore termini. By the strength of the word. *Ex vigore terminorum.* From the very meaning of the language.

VILLAGE. Any small assemblage of houses, for dwelling or business, or both, in the country, whether situated upon regularly laid out streets and alleys or not.[4] See TOWN.

VILLEIN or **VILLAIN.**[5] Under the Saxon government, villeins were a class of people employed at the most servile work, and belonging, with their children and effects, to the lord of the soil, like the cattle upon it.

They held the folk-land, from which they were removable at the lord's pleasure. It is probable that the Romans admitted them to the oath of fealty, which raised them to an estate superior to downright slavery but inferior to every other condition. This they called villeinage, and the tenants villeins. Villeins "regardant" were annexed to the manor or land; villeins "in gross," to the person of the lord, and transferable by deed. They could be enfranchised by manumission; which was express when by deed,

[1] See 2 Bl. Com. 123.

[2] F. *veué:* L. *vid-*, to see, look at.

[1] 26 Cent. Law J. 437, 439, 436-40 (1888), cases; Close v. Samm, 27 Iowa, 507 (1869); 92 Am. Dec. 342-45, cases.

[2] Richards v. Burden, 59 Iowa, 756 (1882).

[3] See 3 Bl. Com. 188; 92 U. S. 98; 3 Cranch, C. C. 453; 17 F. R. 185; 19 *id.* 63; 30 *id.* 911; 66 Ga. 517; 34 La. An. 58; 8 Allen, 182; 12 *id.* 98; 77 Mo. 336; 55 Pa. 69; 58 *id.* 177; 60 *id.* 133.

[4] [Illinois Central R. Co. v. Williams, 27 Ill. 49 (1861), Caton, C. J.; Toledo, &c. R. Co. v. Spangler, 71 *id.* 568 (1874); 25 Minn. 404, 413.

[5] F. *villein*, servile; a boondman: L. *villanus*, a farm-servant.

and implied when the lord dealt with a villein as a freeman. See FEUD.[1]

VINDICATORY. See LAW.

VINDICTIVE. See DAMAGES, Exemplary.

VINOUS. See LIQUOR.

VIOLATION. See DEBAUCH; SEPULCHER.

VIOLENCE.[2] Force, physical force; force unlawfully exercised.

"Violence" and "physical force" are used interchangeably, in relation to assaults, by elementary writers on criminal law.[3]

In the commission of robbery, implies overcoming or attempting to overcome actual resistance, or preventing such resistance through fear. May include restraint of the person. Generally implies that the acts tend to produce terror and alarm.[4]

Domestic violence. "The United States . . shall protect each of them [the States] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."[5]

When, by act of February 28, 1795, Congress delegated to the President the power of protecting a State against violence, the power of judging what authority represented the State was also necessarily delegated, and its exercise cannot be reviewed by the courts.[6]

Violent. (1) Produced by force; unnatural: as, a violent death, *q. v.*

(2) By the exertion of force; forcible: as, violent means.

(3) Strong; almost conclusive: as, a violent presumption, *q. v.*

Violently. With force, forcibly; against consent: as, in charges of rape[7] and robbery, *qq. v.*

See FORCE; VIS; BATTERY; OBSTRUCT; 3 RIOT.

VIRES. L. Powers; corporate powers. See ULTRA, Vires.

VIRTUE. 1. Any rightful act done in office is "by virtue" of that office; a wrongful act may be "under color" of the office.[8] See OFFICE.

2. Moral quality; chastity; purity. See CHARACTER; CHASTE.

[1] 2 Bl. Com. 92-95.

[2] L. *violare*, to use force to: *vis*, force.

[3] State *v.* Wells, 31 Conn. 212 (1862), Butler, J.

[4] People *v.* McGinty, 24 Hun, 64 (1881), cases.

[5] Constitution, Art. IV, sec. 4.

[6] Luther *v.* Borden, 17 How. 43-44 (1849), Taney, C. J.; R. S. § 687.

[7] State *v.* Williams, 32 La. An. 336 (1880); State *v.* Blake, 39 Me. 322, 324 (1855); Commonwealth *v.* Fogerty, 8 Gray, 490 (1857).

[8] Broughton *v.* Haywood, 1 Phill. L. 383 (1867); State *v.* Costin, 89 N. C. 513 (1883).

VIRTUTE. See OFFICIUM, Virtute, etc.

VIS. L. Force.

Vi et armis. With force and arms, *qq. v.*

Vis divina. An act of God.

Vis impressa. Force imparted: the original force applied to a body to put it in motion. See CAUSE, 1, Proximate.

Vis major. Superior force; irresistible force. See ACCIDENT; ACT, Of God.

VISE.[1] To examine and indorse officially; as, to *visé* a passport, that the bearer may proceed on his journey.

Under the treaties and legislation respecting the immigration of Chinese to this country, it has been provided that such persons as are entitled to admission shall produce certificates as to occupation, etc., from their government, *viséd* by our diplomatic or consular representative at the port of departure.

VISIBLE. See POSSESSION, Adverse.

VISIT.[2] 1. In international law, the right of visit or visitation is the right to ascertain by inspection of a ship's papers that she has the nationality which she claims; the right of approach.[3]

The inter-visitation of ships at sea is a branch of the law of self-defense, and is, in point of fact, practiced by the public vessels of all nations when piratical character is suspected.[4]

2. The right officially to inspect a charitable institution, or a place receiving pecuniary assistance from an individual or the public. Whence also *visitor*, and *board of visitors*, for the person or persons authorized to perform such service.

Corporations, like the individuals who compose them, are liable to deviate from the end of their institution. For this reason the law provides proper persons to visit, inquire into, and correct all irregularities that arise in them. With respect to a lay corporation, the founder, his heirs or assigns are the visitors. In the original and strictest sense, the founder of all corporations is the king alone. The law has appointed the court of king's bench as the place where he exercises this jurisdiction; there all misbehaviors of civil corporations are inquired into and redressed.[5]

3. A visitor to a place is one who goes there for pleasure or health, engages in no busi-

[1] *Vē-zā'*. F. *viser*, to put a *visa* to: to indorse, after examination: L. *visus*, seen.

[2] L. *visitare*, to go to see: *videre*, to see.

[3] [The Marianna Flora, 11 Wheat. 42 (1826), Story, J.

[4] 1 Kent, 153, note; Woolsey, Int. Law, § 213.

[5] 1 Bl. Com. 480-82; 2 Kent, 300-5; Dartmouth College *v.* Woodward, 4 Wheat. 674-75 (1819), Story, J.; Allen *v.* McKean (Bowdoin College Case), 1 Sumn. 300-1 (1833), Story, J.

ness, and remains only for a reasonable time.[1] See RESIDENT.

4. The expressions "visit" an act of negligence with damages, and "visit" liability, or the consequences of an act, upon one, are not uncommon.

VITIATE. See FRAUD; USUS, Utile, etc.

VIVA VOCE. L. With living voice; by word of mouth; by spoken word; verbally; orally: as, testimony given *viva voce* in court; to vote *viva voce*.

VIZ. See VIDERE, Videlicet.

VOCATION. See BUSINESS; HAPPINESS; TAX, 2; TRADE.

VOID; VOIDABLE.[2] As employed in contracts, laws, decisions, and text-books these words are often ambiguous. They have been more or less interchanged in speaking of agreements, assignments, conveyances, sales, leases, orders, judgments, and other acts, transactions, and proceedings where incapacity, irregularity, or actual or imputed fraud is present.

Void. Properly, of no legal force, null, incapable of confirmation or ratification; often, voidable or capable of being avoided.[3]

Said of an act of no effect at all — a nullity *ab initio*.[4]

Whenever entire technical accuracy is required, only applied to contracts that are of no effect whatever — mere nullities, incapable of confirmation or ratification.[5] But also used in the sense of

Voidable. Whatever may be avoided; not absolutely null and invalid:[6] as, in saying that fraud renders a contract voidable at the option of a party defrauded;[7] that an unauthorized contract by a trustee is voidable, and not necessarily void.[8]

A transaction void for unlawfulness cannot be bettered by ratification.[9]

A judgment may be erroneous and not void, and it may be erroneous because void. The distinctions between void and merely voidable judgments are nice, and they may fall under the one class or the other as they are differently regarded.[10]

A thing is "void" which is done against law, at the time of doing it, and where no person is bound by the act. A thing is "voidable" which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it himself, after it is done. Whenever the act takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, it is not a nullity, and, therefore, is not utterly void, but merely voidable. Another test of a void act or deed is, every stranger may take advantage of it; not so as to a voidable one.[1]

In some cases it is said that fraud in procuring a contract makes it "void," in others, only "voidable." While a conveyance which is made in fraud of creditors is usually called "void," in many cases "voidable" is designedly substituted. Provisions in leases are common that for non-performance of a covenant the lease shall be "void," yet the word is perhaps generally held to mean "voidable." And "voidable" is now the usual predicate of contracts by infants. These instances reveal the general principle that the persons intended to be wronged by the particular transaction are not bound by it, also that they are not bound to reject it: they may adopt it, after they learn of it. Contracts absolutely void are contracts to do an illegal act, or to omit a legal public duty. They have no legal sanction; they establish no legitimate bond or relation between the parties.[2]

That is *absolutely void* which the law or the nature of things forbids to be enforced at all; that is *relatively void* which the law condemns as wrong to individuals, and refuses to enforce as against them. It is void because absolutely or relatively invalid or not binding.[2]

In all contracts, when stipulations are inserted for the sole benefit of one of the parties, the word "void" will be construed "voidable." Thus, an insurer may waive a breach of the contract and continue the policy in force.[3]

The fact that one promise is illegal will not render a disconnected promise void. But the doctrine does not embrace cases where the objectionable stipulation is for the performance of an immoral or criminal act for such an ingredient taints the entire contract; nor in general, will it apply where a part of the considere tion is illegal. Many decisions hold that where there are several considerations, and one is illegal, the

[1] [Exp. Archy, 9 Cal. 168 (1858).

[2] F. *voide:* L. *viduus*, bereft, empty.

[3] [Van Schaack *v.* Robbins, 36 Iowa, 203-5 (1873), cases.

[4] [Inskeep *v.* Lecony, 1 N. J. L. 112 (1791).

[5] Allis *v.* Billings, 6 Metc. 417 (1843).

[6] Brown *v.* Brown, 50 N. H. 552 (1871); Kearney *v.* Vaughan, 50 Mo. 287 (1872).

[7] Foreman *v.* Bigelow, 4 Cliff. 541 (1878), cases.

[8] United States *v.* Schurz, 102 U. S. 400 (1880).

[9] United States *v.* Grossmayer, 9 Wall. 75 (1869).

[10] *Exp.* Lange, 18 Wall. 175 (1873), Miller, J.

[1] Anderson *v.* Roberts, 18 Johns. *528 (1820), Spencer C. J. See also Somes *v.* Brewer, 2 Pick. 191 (1824) Crocker *v.* Bellangree, 6 Wis. *668 (1858).

[2] Pearsoll *v.* Chapin, 44 Pa. 13-16 (1862), cases, Lowrie, C. J. See also Ewell *v.* Daggs, 108 U. S. 148-49 (1883), Matthews, J.

[3] Turner *v* Meridan Fire Ins. Co., 16 F. R. 454 (1883), cases; Hinckley *v.* Germania Ins. Co., 140 Mass. 47 (1885).

whole agreement is void; because it is impossible to say how much or how little weight the void portion had in inducing the contract.[1]

See AVOID, 1; CONFIRMATION, 1; LEGAL, Illegal; RATIFICATION; TRUST; USUS, Utile, etc.; VALID.

VOIR. F. The truth.

Voir dire. To speak the truth. Refers to an oath administered to a proposed witness or juror, and also to the examination itself, to ascertain whether he possesses the required qualifications, he being sworn to make true answers to the questions about to be asked him concerning the matter.

Thus, at common law, the interest of a witness in the result of a suit may be made to appear on the *voir dire*. And a supposed wife may be examined on the *voir dire* to facts showing the invalidity of the marriage.[2]

If the court has doubts as to the age (infancy) of a party, it may examine him upon an oath of *voir dire*, that is, to make true answers to such questions as the court shall demand of him.[3]

The use of this test is now questioned, for if a witness be sworn on the *voir dire*, he can be sworn on the examination in chief. The English practice is to put questions as to competency on the examination in chief. With us, the old practice continues in many courts, though this is rather as to the discretion of the judge, who may remand the question to the examination in chief. The appeal to the *voir dire* does not preclude recourse to other means of proving incompetency.[4]

In homicide cases, the practice of examining on the *voir dire* persons drawn as jurors, as to whether they have conscientious scruples against capital punishment, and as to relationship, prejudice, belief as to guilt, etc., is continued.

VOLO. L. I will, or am willing; I consent.

Volenti non fit injuria. To him consenting no injury is done. One who wills a thing to be or to be done cannot complain of that thing as an injury. That to which a man consents, or which he causes by his own action, cannot be considered an injury for which he can recover damages.[5]

Thus, a man cannot complain of an injury which he has received through his own want of foresight; nor as to a right of action or defense which he has knowingly relinquished.[6]

Applies where both plaintiff and defendant are in equal fault; where one pays a debt he might have avoided paying;[1] where one gives answers to improper questions;[2] where a tenant plants away-going crops;[3] where one voluntarily throws up a contract.[3]

When one prevents a thing being done he cannot avail himself of the fact of the non-performance.[4]

One who waives the effect of an alteration in an instrument and consents to be bound, when he might have objected, cannot complain.[5]

Equity will not relieve from the consequences of one's own inattention and carelessness,—the means of knowledge being at hand and equally available to both parties.[6]

One who becomes a member of a church or other society consents to be governed by the laws of the organization.[7]

Money paid or value parted with, under the alternative of submitting to an illegal exaction or discontinuing one's business, is not regarded as a voluntary act within the meaning of the maxim.[8]

See LACHES; WAIVER.

Voluit, sed non dixit. He willed but did not say it. He may have intended the result, but he did not provide for it.

Quoted in answer to an argument based upon the supposed intention of a testator[9] or law-maker.

Compare VOLUNTAS; NOLLE.

VOLUME. See COPYRIGHT.

VOLUNTARY. 1. In accordance with one's own free will; without constraint or compulsion; spontaneous; free; chosen, intended; allowed, suffered. Opposed, **involuntary**: as, a voluntary, and, in some senses, involuntary — answer, assignment, association, confession, conveyance, curtesy, escape, ignorance, manslaughter, negligence, nonsuit, oath, payment, sale, servitude, waste, *qq. v.*

"Voluntary" means spontaneously, of one's own will, without being moved, influenced, or impelled by others.[10]

Voluntarily. Used alone in a certificate of acknowledgment, is not the equivalent of "her own free will and accord, and without fear," etc.[11]

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[1] Erie R. Co. *v.* Union Locomotive & Express Co., 35 N. J. L. 246 (1871) cases; Burlington, &c. R. Co. *v.* Northwestern Fuel Co., 31 F. R. 657, 659 (1887), Brewer, Judge.

[2] 1 Greenl. Ev. §§ 423-25; 2 *id.* § 339.

[3] 3 Bl. Com. 382, 384, 370.

[4] 1 Whart. Ev. § 492, cases.

[5] Richards *v.* City of Waupun, 59 Wis. 47 (1883).

[6] Wharton, Maxims.

[1] 1 Greenl. Ev. § 193.

[2] 2 Bl. Com. 145.

[3] United States *v.* Wormer, 13 Wall. 29 (1871).

[4] United States *v.* Peck, 102 U. S. 65 (1880), cases.

[5] Smith *v.* United States, 2 Wall. 220 (1864).

[6] Slaughter *v.* Gerson, 13 Wall. 383 (1871); Fitzpatrick *v.* Flannagan, 106 U. S. 660 (1882).

[7] Stack *v.* O'Hara, 98 Pa. 224 (1881).

[8] Swift Co. *v.* United States, 111 U. S. 29 (1884); Chicago, &c. R. Co. *v.* United States, 104 *id.* 687 (1881); 106 *id.* 487. See also 69 Ga. 517; 34 La. An. 182; 11 Cush. 386, 550.

[9] See 4 Kent, 538.

[10] Kearney *v.* Fitzgerald, 43 Iowa, 586 (1876), Day, J.

[11] Scott *v.* Simons, 70 Ala. 356 (1881).

2. Without consideration — a valuable or adequate consideration; gratuitous: as, a voluntary — conveyance, deposit, settlement, trust, *qq. v.*

Volunteer. One who receives a voluntary conveyance,[1] that is, a conveyance made without a good or valuable consideration.

In contests between different volunteers equity will generally not interfere, but leaves the parties where it finds them as to title — their equities being equal. Equity favors a transferree for value, as against a mere voluntary contract of any nature, except, perhaps, a settlement upon wife and children. Exceptions are made in the cases of *bona fide* grantees for value, without notice, from volunteers — such innocent persons always being favorites in equity.[2] See especially CONVEYANCE, 2; SETTLE, 3.

VOLUNTAS. L. Will; intention; volition.

Stat pro ratione voluntas. The will stands for the reason.

The fact that a testamentary disposition is made, is sufficient reason for its being made.[3]

Voluntas reputatur pro facto. The will is to be taken for the deed.

In cases of treason, the rule at common law was, that the intention to commit treason was sufficient to constitute the crime without an overt act.[4]

Voluntas testatoris ambulatoria est usque ad mortem. The will of a testator is ambulatory up to death.[5] See further AMBULATORY.

VOTE.[6] The will of a member of a body, formally manifested toward the decision of a question by the body as whole; also, the aggregate of the expressions of the will of the members.[7]

The word, with its inflections, is most commonly used in speaking of the election of officers of corporations and of government.

A "vote" is but the expression of the will of the voter — whether the formula of expression be by ballot or *viva voce*.[8]

A "voter" is an elector who votes — an elector in the exercise of his franchise or privilege of voting.[9]

"Voting" and "giving in a vote" are synonymous.[10]

The qualifications of voters are similar in all the States, but not uniform. Among those generally required are: citizenship, by birth or naturalization; residence for a given period; age — twenty-one years; payment of taxes, and registration; freedom from infamy, *q. v.*; sanity.[1] See INSANITY, 2 (3).

Casting vote. At common law, signifies, sometimes, the single vote of a person who ordinarily does not vote; and, in case of an equality of votes, sometimes, the double vote of a person who first votes with the others and, upon an equality, creates a majority by giving a second vote — as, in the New York statute relating to religious corporations.[2]

The President of the Senate "shall have no Vote, unless they be equally divided."[3]

See ABODE; BALLOT; BRIBERY; CITIZEN; ELECTION, 1; FRANCHISE, 2, Elective; MAJORITY, 2; PRECINCT; QUALIFIED, 1; REGISTRY; RESIDENCE; SUFFRAGE.

Cumulative voting. "In all elections for directors or managers of a corporation, each member or shareholder may cast the whole number of his votes for one candidate or distribute them upon two or more candidates as he may prefer."[4]

By "whole number" is meant, as many votes for each share as there are directors to be elected.[5]

The section confers upon the individual stockholder the right to cast all the votes which his stock represents, multiplied by the number of directors or managers to be elected, for a single candidate. The intent was to work a radical change in the method of conducting corporate elections. The innovation, being made part of the supreme law, is thus placed beyond the power of legislative interference.[6]

The provision is unambiguous. If there are six directors to be elected, the single shareholder has six votes, and, contrary to the old rule, he may cast them for one candidate or distribute them to two or more candidates. The ordinary manner of conducting corporate elections is in nowise interfered with. Legislation directing the manner of exercising the right is not required: the provision is self-operative; and it applies to all private corporations, including railway and canal companies.[7]

The purpose of the provision is to enable the stockholders who are in the minority, on any question of administration or policy, to secure representation in the directory or management; but the right to cumulate does not exist unless expressly conferred: each shareholder being entitled, at common law, to but one

[1] [Mitchell *v.* Mitchell, 40 Ga. 16 (1869), Brown, C. J.
[2] 1 Story, Eq. §§ 433-34, 176.
[3] See Dietz's Case, 41 N. J. E. 296 (1886).
[4] See 4 Bl. Com. 80; 4 Mass. 439.
[5] 2 Bl. Com. 502.
[6] L. *votum*, a wish; originally, a vow.
[7] [Abbott's Law Dict.
[8] People *v.* Pease, 27 N. Y. 57 (1863).
[9] Sanford *v.* Prentice, 28 Wis. 362 (1871), Dixon, C. J.
[10] State *v.* Moore 27 N. J. L. 107 (1858).

[1] See McCrary, Elections, § 4.
[2] [People *ex rel.* Remington *v.* Rector of Church of Atonement, 48 Barb. 606 (1866).
[3] Constitution, Art. I, sec. 3, cl. 4.
[4] Penn. Const. Art. XVI, sec. 4.
[5] Commonwealth *ex rel.* Donnelly *v.* Tintsman, 23 Pitts. Leg. J. 122 (1876).
[6] Hays *v.* Commonwealth *ex rel.* McCutcheon 82 Pa. 521 (1876).
[7] Pierce *v.* Commonwealth *ex rel.* Pierce, 104 Pa. 154 (1883).

vote on each share for each member of the proposed new board.[1]

See CORPORATION; ELECTION, 1; MAJORITY, 1; PROXY.

VOUCH.[2] To call upon — in attestation; to attest; to affirm, confirm, support, prove; to aver that a thing is true.

"Vouched by witnesses" imports the same as testified by witnesses, called into court. A note subscribed by two persons cannot be said to be vouched by witnesses, until the persons are called and testify before a court respecting the note.[3]

Vouchee. A person called to attest or warrant.

Voucher. 1. Calling in a person, to answer in a real action, who warranted the title to the defendant; also, such warrantor himself.

Thus, in a common recovery, the tenant vouched another to warrant his title. If the vouchee appeared, he was made defendant in place of the voucher.[4]

2. An instrument which attests, warrants, maintains, bears witness.[5]

A document which serves to vouch the truth of an account, or to confirm and establish facts of any kind.[6]

Evidence, written or otherwise, of the truth of a fact — as, that services have been performed, or expenses paid or incurred.[7]

An account-book in which charges and acquittances are entered; also, any acquittance or receipt, discharging a person or being evidence of payment.[8]

In connection with the disbursement of monies, implies some written or printed instrument in the nature of a receipt, note, account, bill of particulars, or something of that character which shows on what account or by what authority a particular payment has been made, and which may be kept or filed away by the party receiving it, for his own convenience or protection, or that of the public.[9]

While it is true that receipts are not indispensable, it is still "the imperative duty" of registers of wills, of auditors of the accounts of executors, administrators, etc., and of the judges of orphans' courts, "to require some distinct and definite form of proof to establish the validity of demands against dead men's estates."[1]

That municipal vouchers are non-negotiable, see NEGOTIABLE.

VOYAGE.[2] A passage by water from one place to another.

As applied to vessels engaged in foreign and inter-State commerce, is not used of a tug making short trips from one body of water to another.[3]

In a policy of marine insurance, the enterprise begun; not, the route taken.[4]

Not limited to the passage of a vessel from one port to another, but may include several ports.[5]

Foreign voyage. A voyage to some port or place within the territory of a foreign nation.

Not, then, a whaling voyage into the northern seas.[6]

But may include, as within the meaning of the Coasting Act of 1793, a voyage to a place within the waters of the United States, for trade.[7]

See COURSE, 1; DEVIATION; INSURANCE, Marine.

VS. See VERSUS.

VULGAR. See INDECENT; OBSCENE.

W.

W. 1. As an abbreviation may denote west, western, Westminster, William (king), wills, Washington, Wyoming.

W. D. Western District. See D, 3.

2. In law-French, interchanged with *g:* as in wages and gage, ward and guardian, warn and garnish, warranty and guaranty.

WAFER. See SEAL.

WAGE.[3] To pledge, give assurance of security; also, a pledge. Whence wager, and wages, *qq. v.*

WAGER. 1. A pledge or gage.

Wager of battel or battle. Trial by combat. When the tenant in a writ of right pleaded the general issue and offered to prove it by his champion, and the tender was accepted, the tenant produced his champion, who, by throwing down his glove as a gage or pledge, waged or stipulated battel with the champion of the demandant. The latter, by taking up the gage, stipulated to accept the challenge.

[1] 1 Morawetz, Priv. Corp. § 476 *a*. As to the meaning of "majority of votes cast," in popular elections, see Walker *v.* Oswald, 68 Md. 146 (1887) — High License Act of 1886: 27 Am. Law Reg. 516-19 (1888), cases, *contra*.

[2] F. *voucher*, to cite, pray in aid of a suit: L. *vocare*, to call to or upon.

[3] Baker *v.* Coit, 1 Root, 225 (1790).

[4] [3 Bl. Com. 300; Coke, Litt. 101 *b*.

[5] State *v.* Hickman, 8 N. J. L. 301 (1826).

[6] [People *v.* Green, 5 Daly, 199 (1874), Daly, C. J.; 56 N. Y. 476.

[7] Brown *v.* Green, 46 How. Pr. 304 (1873): People *v.* Haws, 12 Abb. Pr. 202 (1861).

[8] Whitwell *v.* Willard, 1 Metc. 218 (Mass., 1840), Shaw, Chief Justice.

[9] People *v.* Swigert, 107 Ill. 504 (1883), Mulkey, J.

[1] Romig's Appeal, 84 Pa. 237 (1877), Woodward, J.

[2] F. *veiage, voyage:* L. *viaticum*, provision for a journey: *via*, a way.

[3] The John Martin, 2 Abb. U. S. 181 (1870).

[4] [Friend *v.* Gloucester Ins. Co., 113 Mass. 332 (1873).

[5] *Re* George Moncan, 8 Saw. 353 (1882).

[6] Taber *v.* United States, 1 Story, 7 (1839), Story, J.

[7] The Lark, 1 Gall. 57 (1813); The Three Brothers, *ib.* 143 (1812).

[8] F. *wage, gage*, pledge. L. *vas, vad-;* L. L. *vadium, wadium*; old Scotch, *wad-*. See GAGE; VADIUM.

This mode of trial, which originated in the military spirit of early days, was introduced into England by the Conqueror. It was also resorted to in appeals of felony and upon approvements.[1] See APPROVE, 5; BATTEL.

Wager of law. As in wager of battel the defendant gave a pledge, gage, or *vadium*, to try the cause by battel, so in wager of law he was to put in sureties or *vadios* that at such a day he would make his law, that is, take the benefit which the law allowed him. In the view that in cases an innocent man of credit might be over-borne by false witnesses, this species of trial, by the oath of the defendant himself, was established: for if he swore himself not chargeable, and appeared to be a person of repute, he went free and acquitted of the cause of action. He had, however, to produce eleven neighbors as "compurgators," his *secta* or suit, who upon oath avowed their belief that he spoke the truth. Abolished by 3 and 4 Will. IV (1833), c. 42.[2]

If wager of law ever existed in the United States, it is now abolished.[3]

2. Placing something valuable, belonging in part to each of two individuals, in such a position, that it is to become the sole property of one, upon the result of an unsettled question.[4]

A contract by which two or more parties agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening of an uncertain event.[5]

The contract by which a "bet" is made; also, the thing or amount bet, but not the subject on which the bet is laid.[6]

A wager is the bet or stake laid upon the result of a game. "Bet" and "wager" are synonymous, and applied to the contract of betting and wagering, and to the thing or sum bet or wagered. They may be laid upon acts to be done, events to happen, or facts existing or to exist,—upon things legal and illegal.[7]

Offering a premium is not a bet or wager. A "premium" is an award or recompense for some act to be done. A "wager" is a stake upon an uncertain event.[8]

At common law, all wagers were not illegal. Thus, it was not illegal to make a bet or wager on a horse-race; and an action to recover a wager could be maintained. . . To trot a horse in another State for a wager or stakes is not *prima facie* illegal in that State.[9]

Wagering contract. A wager, as defined above; that is, a contract in which the parties stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest except that arising from the possibility of such gain or loss.[1]

Whether a particular contract is wagering is for a jury to decide. All such contracts are void.

The generally accepted doctrine in this country is that a contract for the sale of goods [merchandise, commodities, stocks, etc.] to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than by going into the market and buying them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price is to be paid by the buyer; and if, under guise of such a contract, the real intent be merely to speculate upon the rise or fall of prices, and the goods are not to be delivered, but one party is to pay the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes a mere wager, and is null and void. This is now the law in England also, by force of the statute of 8 and 9 Vict. (1845), c. 109, s. 18, altering the common law.[2]

Dealing in futures without intent to pay for or to receive or deliver the property is declared to be a wagering contract by recent enactments in Illinois, Missouri, Ohio, Texas, and other States; and "bucket shops" and other places maintained for enabling persons to make such contracts are declared to be nuisances.

See further FUTURES; OPTION, Contract; SPECULATION.

Wager policy. That in which the party assured has no interest in the thing assured, and could sustain no possible loss by the event insured against, if he had not made such wager.[3]

Wager or gambling policies are those in which the persons for whose use they issue have no pecuniary interest in the life insured.[4]

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[1] 3 Bl. 337-41; 4 *id.* 346-48, 414.

[2] 3 Bl. Com. 341; Coke, Litt. 295.

[3] Childress v. Emory, 8 Wheat. 674 (1823).

[4] Edson v. Pawlet, 22 Vt. 223 (1850), Hall, J.

[5] *Exp.* Young, 6 Biss. 67 (1874), Blodgett, J.; Merchants' Savings, &c. Co. v. Goodrich, 75 Ill. 560 (1874).

[6] [Smoot v. State, 18 Ind. 19 (1862), Perkins, J.

[7] Woodcock v. McQueen, 11 Ind. 16 (1858), Perkins, J.

[8] Alvord v. Smith, 63 Ind. 63 (1878), Biddle, J.; Delier v. Agricultural Society, 57 Iowa, 481 (1881).

[9] Harris v. White, 81 N. Y. 532, 544 (1880), cases; Cosmy v. Hillegas, 94 Pa. 122, 126 (1880), cases; Irwin v. Williar, 110 U. S. 510 (1884), cases.

[1] Fareira v. Gabell, 89 Pa. 99 (1879), cases, Hare, P. J

[2] Irwin v. Williar, 110 U. S. 508 (1884), cases, Matthews, J.; Benj., Sales, §§ 541-42. See further Roundtree v. Smith, 108 U. S. 269 (1883); Higgins v. McCrea, 116 *id.* 686 (1886), cases; White v. Barber, 123 *id.* 419 (1887); Ward v. Vosburgh, 31 F. R. 12 (1887); 6 Biss. 53-67; 7 *id.* 552-58; 8 *id.* 217-19; 11 *id.* 60, 223; 10 F. R. 249; 11 *id.* 193, 201; 18 *id.* 263; 15 *id.* 438, 774; 68 Ga. 124, 296; 78 Ill. 43; 81 *id.* 415; 88 *id.* 33, 324; 58 Iowa, 711; 39 Mich. 337; 6 Mo. Ap. 269; 70 N. Y. 202; 71 *id.* 430; 83 *id.* 93; 55 Pa. 297-99; 70 *id.* 325; 89 *id.* 250; 10 W. N. C. 112; 11 C. B. 538.

[3] Amory v. Gilman, 2 Mass. 27 (1806), Parker, J.

[4] Gamba v. Covenant Mut. Life Ins. Co., 50 Mo. 47 (1872), Bliss, J.

A pretended insurance founded on an ideal risk, where the assured has no interest in the thing assured.[1]

Originally, applied to the practice of insuring large sums without having any property on board a vessel: insurance, interest or no interest; and also, of insuring the same goods several times over,—species of gaming without any advantage to commerce.[2] Now extended to all species of insurance.[3] See further INSURANCE, Policy of.

See also BETTING; GAME, 2; STAKE-HOLDER.

WAGES.[4] Compensation paid or to be paid for services by the day, week, or month; as, for the services of laborers.[5]

Compensation paid a hired person for his services: a specified sum for a given time of service or for particular work.[6]

The term suggests inconsiderable pay, without necessarily excluding "salary," which is suggestive of larger compensation for personal services. As applied to compensation made or to be made a laborer or employee, conveys the idea of a subordinate occupation which is not very remunerative; one of not much independent responsibility, but rather subject to immediate supervision.[7]

See EARNINGS; LABOR, 1; SALARY; ADMIRALTY; APPRENTICE; BUSINESS; EXEMPTION; HUSBAND; PARENT; SERVICE, 1.

WAGON. In a statute exempting property from execution, a common vehicle for the transportation of goods, wares, and merchandise of all descriptions.[8]

What is usually called a "buggy" is within the meaning of the term "wagon" in the Minnesota statute.[9]

The term is general. Vehicles known as wagons differ in style, form, and dimensions, depending upon the character of the use, the nature of the business, and the pleasure or notions of the manufacturer or owner. A "hearse" is a wagon.[10]

See CARRIER; TOOL; VEHICLE.

WAIF. Waifs, *bona waviata*, were goods stolen and thrown away by the thief in his flight, from fear of being apprehended.

If the party robbed did not recover the goods first, they were forfeited to the king, to punish the owner for not pursuing the felon.[1]

WAIVE.[2] To abandon, relinquish, surrender: said of property, claims, privileges, rights.

Waiver. A voluntary relinquishment of some right.[3]

The intentional relinquishment of a known right.[4]

A voluntary surrender and relinquishment of a right.[5]

Implies an election of the party to dispense with something of value, or to forego some advantage which he might at his option have demanded or insisted upon.[6]

A renunciation of some rule which invalidates a contract, but which, having been introduced for the benefit of the contracting party, may be dispensed with at his pleasure.[7]

There must be both knowledge of the existence of the right and an intention to relinquish it.[8] The waiver must be supported by an agreement founded upon a valuable consideration, or the act must be such as to estop the party from insisting on the performance of the contract or forfeiture of the condition.[9]

Waiver is a voluntary relinquishment of some right which, but for such relinquishment, the party would continue to have enjoyed. Voluntary choice, and not mere negligence, is of the essence, though from negligence, unexplained, such election may be inferred. Waiver is a question of fact, to be determined from declarations and acts, or from forbearance to act.[9] See KNOWLEDGE, 1.

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[1] [Sawyer v. Dodge County Mut. Ins. Co., 27 Wis. 539 (1870), Ryan, C. J.: Arnould, Ins. 17.

[2] [2 Bl. Com. 460.

[3] 3 Kent, 275–78, 369, n, cases.

[4] *Wage:* stipulated pay.

[5] [Cowdin v. Huff, 10 Ind. 85 (1857), Perkins, J.

[6] [Ford v. St. Louis, &c. R. Co., 54 Iowa, 728 (1880), Beck, J.; Lang v. Simmons, 54 Wis. 529 (1885).

[7] South & North Ala. R. Co. v. Falkner, 49 Ga. 118 (1873), upon an act providing that the "wages of laborers and employees" should not be subject to garnishment or attachment. See also McLellan v. Young, 54 Ga. 400 (1875); People v. Remington, 45 Hun, 388 (1887); 1 Bl. Com. 428.

[8] Quigley v. Gorham, 5 Cal. 418 (1855); Snyder v. North Lawrence, 8 Kan. 84 (1871).

[9] Allen v. Coates, 29 Minn. 49 (1882); Gen. St. 1878, c. 66, § 310. *Contra*, 27 *id.* 507.

[10] Spikes v. Burgess, 65 Wis. 481 (1886), Cassoday, J. See also 64 Ga. 625; 7 Kan. 320; 71 Me. 164; 18 Johns. 128; 19 *id.* 442; 32 Tex. 533; 39 *id.* 363; 46 N. H. 521; 47 N. Y. 194.

[1] 1 Bl. Com. 296; 2 Kent, 358.

[2] O. E. *waiven*, to set aside, remove, refuse, give over: F. *waiver*.

[3] Stewart v. Crosby, 50 Me. 134 (1863), Davis, J.

[4] Hoxie v. Home Ins. Co., 32 Conn. 40 (1864), Butler, J.; Shaw v. Spencer, 100 Mass. 395 (1868), Foster, J.; 143 *id.* 374; State v. Churchill, 48 Ark. 445 (1886), cases.

[5] Dawson v. Shillock, 29 Minn. 191 (1882), Dickinson, J.; 33 *id.* 117.

[6] Warren v. Crane, 50 Mich. 301 (1883), Cooley, J.; State Ins. Co. v. Todd, 83 Pa. 275 (1877); 12 Tex. 102.

[7] Hare, Contracts, 272.

[8] Ripley v. Ætna Ins. Co., 30 N. Y. 164 (1864); Montague v. Massey, 76 Va. 314 (1882).

[9] [Fishback v. Van Dusen & Co., 33 Minn. 117 (1885), Mitchell, J. The question was whether a vendor had waived a condition for payment in cash on delivery of 5,000 bushels of wheat, or had made a conditional de-

Waiver of a tort. Said of the act of a person who, by treating a matter as a contract, waives his right to pursue it as a tort with the peculiar remedies, penalties and consequences belonging to it in that character.[1]

Thus, the owner of personalty may waive a tortious conversion of it.[2]

If property be tortiously taken or converted, the tort-feasor may be sued in trespass or trover, or the injured party may waive the tort and sue in *assumpsit* — as if there had been an implied contract. The defendant cannot set up his own wrong-doing to defeat the action, and a judgment will bar an action *ex delicto*.[3]

A party may waive any provision of a contract, statute, or constitution intended for his benefit.[4]

The doctrine of waiver is especially important in connection with covenants in lessees; as to these a waiver may be actual or express, and implied, as, in the last case, from taking rent after notice to quit for covenant broken.

Where no principle of public policy is concerned, a party is at liberty to waive a statutable provision intended for his benefit.[5]

A man may not barter away his life, freedom, or substantial rights. Thus, in a criminal case, it has been held, he cannot consent to be tried without a jury, or by a jury of eleven men.[6]

The public has an interest in his life and liberty. Neither can be lawfully taken except as prescribed by law. That which the law makes essential in proceedings involving the deprivation of either life or liberty cannot be dispensed with or affected by the consent of the accused.[7]

In a civil case he may consent to an arbitration, or decision by a single judge. He may waive removal into a Federal court, in each recurring case, but, not by an agreement in advance thus to forfeit a right on every occasion. And a party cannot waive jurisdiction.[8]

See ABANDON; ACQUIESCENCE; PRIVILEGE, 1, Personal; PROTEST, 2; VOID.

WALKING. See STREET; TRAVEL; NIGHT-WALKERS.

WALL. Occurs in the expressions ancient wall; common wall, division-wall, party-wall; and private wall. See FLEE.

Ancient wall. A wall built to be used, and in fact used, as a party-wall, for more than twenty years, by the express permission or continuous acquiescence of the owners of the land on which it stands.[1]

Common or division-wall. See *Party-wall.*

Party-wall. A wall built partly on the land of one person and partly on the land of another, for the common benefit of both, in supporting timbers used in the construction of contiguous buildings.[2]

A wall of which the two adjoining owners are tenants in common — the most common and primary meaning; also, a wall divided longitudinally into two strips, one belonging to each of the neighboring owners; also, a wall which belongs entirely to one of the adjoining owners, but subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements; and, also, a wall divided longitudinally into two moieties, each moiety being subject to a cross-easement in favor of the owner of the other moiety.[3]

The principle upon which the law as to party-walls is based is the same as that applied to partition fences. This principle has been recognized in the law of France for ages. The absolute right of property is not invaded, for that absolute involves a relative, in that it implies the right of each adjoiner, as against the other, to insist upon a separation by a substantial boundary line.[4]

A right to a party-wall is a right which an owner of land has to build a division-wall partly over his line on the land of another. It is therefore a right appurtenant to land, and may properly be called an easement or servitude. In the city of Philadelphia, for example, this relation between adjoiners is regulated by statute. He that first builds on his line must erect the wall at his own expense, and it is then, as one whole wall, an essential part of his house, and real estate. Yet half of it rests on his neighbor's land, which is charged with a servitude for this purpose. The neighbor cannot use the wall without paying for so much of it as he intends to use; and, on paying, he may use it, and then the wall becomes a common wall, and each lot appurtenant to the other, as far as needed for its support. The price to be paid by the adjoining

livery with right to reclaim reserved. See also Okey *v.* State Ins. Co., 29 Mo. Ap. 111 (1888).

[1] Harway *v.* New York City, 1 Hun, 630 (1874), Davis, Presiding Judge.

[2] Tome *v.* Dubois, 6 Wall. 554 (1867), cases.

[3] May *v.* Le Claire, 11 Wall. 235–36 (1870), cases.

[4] Shutte *v.* Thompson, 15 Wall. 159 (1872); *Re* Cooper, 93 N. Y. 512 (1883), cases.

[5] White *v.* Connecticut Mut. Life Ins. Co., 4 Dill. 183 (1877).

[6] Cancemi *v.* People, 18 N. Y. 135–38 (1858); State *v.* Stewart, 89 N. C. 563 (1883); Swart *v.* Kimball, 43 Mich. 448–49 (1880).

[7] Hopt *v.* Utah, 110 U. S. 579 (1884), Harlan, J.

[8] Home Ins. Co. *v.* Morse, 20 Wall. 451 (1874); 1 Story, Eq. § 670; 25 Am. Law Reg. 402–4 (1886), cases.

[1] Eno *v.* Del Vecchio, 4 Duer, 63 (1854), Bosworth, J.

[2] Brown *v.* Werner, 40 Md. 19 (1873), Robinson, J.

[3] Watson *v.* Gray, L. R., 14 Ch. D. 194–95 (1880), Fry, J.; s. c. 37 Eng. R. 22.

[4] Evans *v.* Jayne, 23 Pa. 36 (1854).

lot-owner, before he can use the wall, is a fixed lien upon the lot, enforced by restraining the full use of the wall until the amount is paid. The mason who builds the wall may agree to look to the adjoiner for half the value, and retain a lien for that half, which will remain incident to the wall, that is, to the house and wall, and pass on a sale of the house. In such case the owner of the house is a trustee of the lien for the builder of the wall, and a purchaser from such original owner, with notice of the agreement, becomes himself a trustee; but a purchaser without notice will take title to the wall discharged of the builder's claim. If the trustee sells the house without reserving the lien, he must account to the builder for the amount of it.[1]

The rights and liabilities of the co-owners differ somewhat in different jurisdictions. But the weight of authority is that an agreement, under seal between the adjoining owners, for the construction of a party-wall, creates cross-easements which run with the land and bind all persons, even an assignee, succeeding to the estates to which the easements are appurtenant.[2]

If the necessity for the repair of an old wall be established, the cost will be divided. But some cases hold that the easement is terminated by decay or destruction of the wall, as, by fire.[3]

See EASEMENT; SUPPORT, 2; RIP-RAP.

WANT. Being commonly used to mean "wish" or "desire," and as frequently "need" or "require," is in itself ambiguous.

Where a testator created a life-estate with power, if the tenant "should want for his support," to sell part or all of the land, it was held that the provision implied a limitation or restriction of the power to a case of necessity.[4]

Wanted. In a statute for condemning land "wanted for the construction or repair" of a railroad, means necessary, and is not synonymous with "desired."[5]

WANTON. Unrestrained; reckless; regardless of another's right.

Adds no force to a charge that an act was done in a "reckless" manner.[6]

To make the killing of animals (sheep) a wanton act, under a charge of malicious mischief, the killing must have been committed regardless of the rights of the owner, in reckless sport or under such circumstances as evinced a wicked or mischievous intent, and without excuse.[1]

The act of killing an animal belonging to another is wanton when it is needless for any rightful purpose, is without adequate legal provocation, and manifests a reckless indifference to the interests and rights of others.[2]

Wantonly. In an indictment, implies turpitude — that the act is of willful, wicked purpose.[3]

Wantonness. Reckless sport; willfully unrestrained action, running immoderately into excess.[4]

Action without regard to the rights of others.[4]

Eminent judges have used the term with reference to cases of mere "omission," but such use is of doubtful propriety.

Smart money may be allowed as damages in actions of tort founded on wanton misconduct; as, where a ball, fired at a mark, glanced and hurt a person living near the place where the mark was set up.[5]

Doing that which will annoy another and which the first party knows will produce no results to himself, as, by violently ringing a door bell late at night, the person having reasonable cause to believe that he will not be admitted, is wanton conduct.[6]

See CRUELTY.

WAR. An interruption of a state of peace for the purpose of attempting to procure good or prevent evil by force. A *just* war is an attempt to obtain justice or prevent injustice by force, in other words to bring back an injuring party to a right state of mind and conduct by the infliction of deserved evil. A justifiable war, again, is only one that is waged in the last resort, when peaceful means have failed to procure redress, or when self-defense calls for it.[7]

An armed contest between different states upon a question of public right.[8]

Every contention by force, between two nations, in external matters, under the authority of their respective governments, is a public war. If it be declared in form, it is

[1] Roberts v. Bye, 30 Pa. 377 (1858), Lowrie, C. J. See also Appeal of Western Nat. Bank, 102 *id.* 171, 182 (1883), cases.

[2] Roche v. Ullman, 104 Ill. 19 (1882), cases; Spencer's Case, 1 Sm. L. C. 211, cases; 98 Ill. 359; 111 Mass. 111; 57 N. Y. 209.

[3] Campbell v. Mesier, 4 Johns. Ch. *334 (1820); Dowing v. Hennings, 20 Md. 179 (1863); Partridge v. Gilbert, 15 N. Y. 601 (1857); Orman v. Day, 5 Fla. 385 (1853); Vollmer's Appeal, 61 Pa. 118 (1868). See generally 18 Cent. Law J. 122-26 (1884), cases; 92 Am. Dec. 289-306 (1887), cases.

[4] Hull v. Culver, 34 Conn. 405 (1867).

[5] Tracy v. Elizabethtown, &c. R. Co., 80 Ky. 267 (1882).

[6] Lafayette, &c. R. Co. v. Huffman, 28 Ind. 290 (1867).

[1] Thomas v. State, 14 Tex. Ap. 205 (1883), Willson, J.

[2] State v. Brigman, 94 N. C. 890 (1886), Smith, C. J.

[3] State v. Massey, 97 N. C. 468 (1887).

[4] Cobb v. Bennett, 75 Pa. 330 (1874), Agnew, C. J.

[5] Welch v. Durand, 36 Conn. 184-85 (1869), Butler, J.

[6] Clarke v. Hoggins, 103 E. C. L. *552 (1862), Willes, J.

[7] Woolsey, Int. Law, § 115.

[8] Brown v. Hiatt, 1 Dill. 380 (1870); Bluntschli, Code Int. Law, 270.

called *solemn*, and is of the "perfect" kind: because one whole nation is at war with another whole nation.[1]

That state in which a nation prosecutes its right by force.[2] One belligerent may claim sovereign rights as against the other — but both need not be independent sovereignties.

Insurrection may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents — the number, power, and organization of the persons who originate and carry it on. When the parties in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence, cast off allegiance, organized armies, committed hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a "war." When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, then "civil war" exists.[3]

"The Congress shall have Power . . to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies; . . To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[4]

"No State shall, without the Consent of Congress, . .. keep Troops, or Ships of War in time of Peace, . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."[5]

"The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[6]

Previous to any declaration of war by Congress, the President, by acts of February 28, 1795, and March 3, 1807, is authorized to meet invasion or insurrection by military force.[1]

The late war in the United States was accompanied by the general incidents of an international war.[2] Whatever auxiliary causes may have contributed to bring it about, the overshadowing, efficient cause was African slavery.[3]

In that war the United States acted both as belligerent and as sovereign. As belligerent she enforced her authority by capture; as sovereign she recalled her revolted subjects to allegiance by pardon and restoration of rights.[4]

The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. The usual incidents of a war between independent nations ensued.[5]

At no time were the rebellious States out of the pale of the Union. Their rights under the Constitution were suspended, not destroyed. Their constitutional duties and obligations were unaffected: as a citizen is still a citizen though guilty of a crime and visited with punishment.[6]

A political society which attempted to separate itself from the Union did not destroy its identity as a State, nor free itself from the binding force of the Constitution. Hence, all its acts, during the period of the rebellion, are obligatory on the State now, except those in aid of that rebellion, or in conflict with the Constitution and laws of the United States, or intended to impeach its authority.[7]

When the war closed there was no government in an insurgent State. Such as had been organized for waging war against the United States had disappeared. The chief functionaries, and many subordinate officials, left the State. Legal responsibilities were annulled or greatly impaired. . . The new freemen became part of the people, and the people still constituted the State. Having suppressed the rebellion, the next duty imposed upon the United States government was to re-establish the broken relations of the States with the Union. . . Restoration of the old government, without a new election of officers, was impossible; and before an election could be held, it was necessary that the old constitutions should receive such amendments as would conform their provisions to the new conditions created by emancipation, and afford security to the people. . . Authority to suppress rebellion is found in the power to suppress insurrection and carry on war. Authority to provide for the restoration of State governments, when subverted, is derived from the obligation "to guarantee to every State a republican form of government." While war continues, the President, as commander-in-chief, may institute temporary governments within the insurgent districts, the means being

[1] The Eliza (Bas v. Tingy), 4 Dall. *40 (1800), Washington, J.

[2] [Vattel, Law of Nations, *291: 2 Black, 666.

[3] Prize Cases, 2 Black, 666–67 (1862), Grier, J.

[4] Constitution, Art. I, sec. 8, cl. 11–15.

Vesting the sole power to declare war in Congress is "a regulation where the spirit of republicanism exerted its humanest influence. The world has been retarded in civilization, impoverished and laid waste by wars of the personal ambition of its kings." 2 Bancroft, Const. 146.

[5] Constitution, Art. I, sec. 10, cl. 3.

[6] Constitution, Art. II, sec. 2.

[1] Prize Cases, 2 Black, 668 (1862).

[2] Dow v. Johnson, 100 U. S. 164 (1879), Field, J.

[3] Slaughter-House Cases, 16 Wall. 68 (1872), Miller, J.

[4] Lamar v. Browne, 92 U. S. 195, 198–200 (1875), Waite, Chief Justice.

[5] United States v. Pacific Railroad, 120 U. S. 238 (1887).

[6] White v. Hart, 13 Wall. 651 (1871), Swayne, J.

[7] Keith v. Clark, 97 U. S. 459–61 (1878), Miller, J.

necessary and proper, although the power to carry into effect the clause of the guaranty is primarily a legislative power and resides in Congress.[1]

Acts of hostility occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and at the close of the war, that it would be difficult, if not impossible, to say on what precise day it began or terminated. To fix the dates it is necessary, therefore, to refer to some public act of the political or executive department of the government. The proclamations of the President may be assumed as the dates. The proclamations of intended blockade were: that of April 19, 1861, embracing South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas; and that of April 27, 1861, embracing Virginia, and North Carolina. The proclamations declaring the war closed were: that of April 2, 1866, applying to Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas; and that of August 20, 1866, applying to Texas.[2]

One of the immediate consequences of a declaration of war and the effect of a state of war, even when not declared, is that all commercial intercourse between the adherents of the contending powers is unlawful and interdicted. All the members of each belligerent are respectively enemies of all the members of the other belligerent. Were commercial intercourse allowed, it would tend to strengthen the enemy, and afford facilities for conveying intelligence, and even for traitorous correspondence. Trading may be authorized by the sovereign, and, to a limited extent, by a military commander.[3]

As war is necessarily a trial of strength between the belligerents, the ultimate object of each is to lessen the strength of his adversary, or add to his own. Whatever is necessary to accomplish this end is lawful; and each belligerent determines for himself what is necessary. If, in so doing, he offends against the accepted laws of nations he must answer in his political capacity to other nations for the wrong he does. If he oversteps the bounds which limit the power of belligerents in legitimate warfare, as understood by civilized nations, other nations may join his enemy, and enter the conflict against him. If, in the course of his operations, he improperly interferes with the person or property of a non-combatant subject of a neutral power, that power may redress the wrong.[4]

When a foreign war first breaks out it is the duty of the citizen to return home without delay; when the war is civil, it is his duty to leave the rebellious section, and adhere to the regular, established government.[1]

The President alone has power to license commercial intercourse.[2]

War dissolves a partnership subsisting between citizens of the nations at war.[3]

The doctrine of the revival of contracts suspended during war is based upon considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust and inequitable to revive; as, a contract of life insurance.[4]

A statute of limitations did not run against the right of action upon a contract made previous to, and maturing after, the commencement of the war; because the courts were closed to public enemies.[5]

See ARMS, 1; BLOCKADE; CAPTURE; CONFISCATE; CONTRABAND; DEBT, Public; ENEMY; FEUD; FIELD, 2; INFAMY; INSURANCE; LEX, Silent leges: LEVY, 1; MARQUE; MARTIAL; MILITARY; MILITIA; NECESSARY; OATH, Of office; PEACE, 2; PRIZE, 3; RANSOM; TENDER, 2 (2), Legal; TREASON; TROOPS.

WARD.[6] Care, charge; protection, defense.

1. One of the principal duties of constables is to keep "watch and ward." "Ward" or guard was chiefly applied to the day time, for apprehending rioters, and robbers on the highways. "Watch" properly referred to the night only.[7]

In walled towns the gates were closed from sunrise to sunset, and watch was to be kept in every borough and town to apprehend rogues, vagabonds, and nightwalkers, and make them give an account of themselves.[7]

2. A territorial division of a city.

"A division in the city of London committed to the special ward, that is, guardianship, of an alderman." Also, a prison, or a division thereof.

Warden. A keeper or guardian: as, the warden of a prison or penitentiary; a fish-warden; a port-warden.

3. One who is guarded.

Ward of chancery or of court. A minor or lunatic under the protection of a court of equity. More particularly, a minor under the personal care of a guardian.

"While the infant is in ward."[8]

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[1] Texas *v.* White, 7 Wall. 727–30 (1868), Chase, C. J. On "Theories of Reconstruction," see 1 Am. Law Rev. 233–64 (1867).

[2] The Proctor, 12 Wall. 701–2 (1871), Chase, C. J.; Walker *v.* United States, 106 U. S. 419 (1882); Carver *v.* United States, 16 Ct. Cl. 383 (1883).

[3] Matthews *v.* McStea, 91 U. S. 9–10 (1875), Strong, J.

[4] Young *v.* United States, 97 U. S. 60 (1877), Waite, Chief Justice.

[1] The William Bagaley, 5 Wall. 408 (1866); Gates *v.* Goodloe, 101 U. S. 617–18 (1879).

[2] Coppell *v.* Hall, 7 Wall. 554–55 (1868).

[3] The William Bagaley, 5 Wall. 405–12 (1866), cases; Matthews *v.* McStea, 91 U. S. 9–11 (1875).

[4] N. Y. Life Ins. Co. *v.* Statham, 93 U. S. 29 (1876), Bradley, J.

[5] Brown *v.* Hiatts, 15 Wall. 183–86 (1872), cases, Field Justice.

[6] A. S. *weard-*, to guard, keep.

[7] 1 Bl. Com. 356–57.

[8] 2 Bl. Com. 70.

A person under the age of twenty-one years, and subject to the guardianship of another.[1]

An inseparable incident to tenure in chivalry was "wardship." When a tenant died seized of a knight's fee, leaving an heir of full age, the king received of the heir a year's profits of the land, if in immediate possession, and, if in reversion expectant on a life estate, a half year's profits. This right was called "primer seisin."

If the heir was a male under twenty-one, or a female under fourteen, the lord was entitled to the wardship of the heir, as "guardian in chivalry" — with custody of body and lands, without accounting, till the male was twenty-one and the female sixteen. "Wardship of the land," or custody of the feud, was retained by the lord that he might, out of the profits, provide a person to supply the infant's services. A consequence was, "wardship of the body:" the lord was the most proper person to educate and maintain the infant, and qualify him for the services he was to render in maturity. At maturity he could sue delivery of the lands out of the guardian's hands; the action being called *ouster le main*. Before maturity the guardian had power to dispose of his ward in matrimony — to tender a suitable match; because of the ward's tender years, and the danger of a female inter-marrying with the lord's enemy. Magna Charta provided that notice of the proposed contract should be given to the next of kin.[2]

"Wardship in socage" differed from wardship in chivalry. The inheritance, descending to an infant under fourteen, did not belong to the lord of the fee, because no personal services were required, and no part of the profits of the land were spent in procuring a substitute. The ward's nearest relation had custody of his land and body. At fourteen, the heir could oust the guardian, require him to account for the profits, and choose another guardian. But as heirs so young made improvident choices, 12 Car. II (1651), c. 24, enacted that the father might by will appoint a guardian to serve till the ward attained twenty-one. The father failing in that, the court of chancery would name such guardian.[3] That statute is the original of similar legislation in this country.[4]

See further GUARDIAN, 2; NECESSARIES, 1.

Wards of admiralty. Seamen are sometimes so called, from the fact that, by reason of their improvidence and their inability to make or enforce advantageous contracts, the courts extend them more consideration than is accorded to persons generally who are employed in serving others.

Courts of admiralty watch with scrupulous jealousy every deviation in shipping articles from the principles of the maritime law as to seamen's wages, as injurious to the rights of seamen, and as founded in an unconscionable inequality of benefits. Seamen as a class are rash, thoughtless, and improvident. They are generally necessitous, ignorant of the nature and extent of their rights and privileges, and incapable of appreciating their value. Their credulity is easily excited, and their confidence readily surprised. Hence it is that bargains between them and ship-owners, the latter persons of intelligence and shrewdness, are open to scrutiny; for they involve great inequality of knowledge, of forecast, of power, and of condition. On this account courts of admiralty are accustomed to consider seamen as peculiarly entitled to their protection; by a somewhat bold figure they are said to be "favorites" with such courts. Those courts, acting upon the enlarged and liberal jurisprudence of courts of equity, may hold void any stipulation in the shipping articles which derogates from the privileges of seamen, as founded upon imposition, unless the nature of the clause was fully and fairly explained, and an additional compensation is allowed, adequate to any new risk or restriction imposed upon the seamen.[1]

WAREHOUSE. A building for the safe-keeping of merchandise.

Warehouseman. One who receives and stores goods as a business for a compensation or profit.[2]

A person whose business is the receiving and storing of merchandise for a compensation.

Under duties-laws, an importer who does not choose to pay duties may have the goods stored in a "public warehouse" designated by law, there to remain, subject to the duties and storage fees, till withdrawn for consumption, exportation, etc.[3]

This "warehousing system," begun under the act of August 6, 1846 (St. L. 53), was extended by the establishment of private *bonded* warehouses, under act of March 28, 1854 (St. L. 270).[4]

The object of the Warehousing Act of 1846 was to facilitate and encourage commerce by exempting the importer from the payment of duties until ready to bring his goods into market.[5]

All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be "public warehouses."[6]

The act of April 25, 1871, intended to give effect to that article, is not repugnant to the Constitution of the United States. Where warehouses are situated and their business is carried on exclusively within a State, she may, as a matter of domestic concern, prescribe regulations for them, notwithstanding they are used as

[1] Darland *v.* The Justices, 4 Bibb, 524 (1817), Boyle, Chief Justice.

[2] 2 Bl. Com. 67-71.

[3] 2 Bl. Com. 87-89.

[4] 2 Kent, 222-26; 5 Johns. 278.

[1] Brown *v.* Lull, 2 Sumn. 449 (1836), Story, J.; Harden *v.* Gordon, 2 Mas. 556-57 (1823); The Georgeanna, 31 F. R. 406 (1887); 3 Kent, 193.

[2] Bucher *v.* Commonwealth, 103 Pa. 534 (1883), Gordon, J.; Pa. Act 24 Sept. 1866.

[3] See R. S. §§ 2954-3008, cases.

[4] See R. S. §§ 2964-65.

[5] Tremlett *v.* Adams, 13 How. 303 (1851). See Hartranft *v.* Oliver, 125 U. S. 527-29 (1888): Act 3 March 1883, § 10.

[6] Const. of Ill., Art. XIII, sec. 1.

instruments by those engaged in inter-State as well as in State commerce; and, until Congress acts with reference to their inter-State relations, such regulations can be enforced, even though they directly operate upon commerce beyond her immediate jurisdiction.[1]

The undertaking of a warehouseman is a contract for mutual benefit. Ordinary care toward preserving the merchandise is required of him. When a common carrier has transported goods, ready to be forwarded by another, he continues liable as a warehouseman only. Nor is it necessary that the goods be housed, in order to affect a bailee with the liabilities of a warehouseman; it is enough if they are actually in his custody for housing. A warehouseman has a lien for all reasonable charges.[2]

A public warehouseman assumes an obligation to serve the entire public. He cannot escape this obligation by calling himself a "commission merchant."[3]

In the ordinary railway transportation by common carriers of goods there is no obligation after the goods reach their destination but to place them safely in a warehouse.[4]

State statutes largely regulate the rights and duties of warehousemen. Although their *receipts* for the property are made negotiable, they as bailees are not guarantors of the title to the property.[5]

A receipt in Pennsylvania, under the act of September 24, 1866, must be issued by the person in possession of the goods in his own right, and not by his agent.[6]

If a receipt is that of a warehouseman it is negotiable without regard to its form, and to destroy that negotiability notice to that effect must appear upon its face. But unless it is in fact a warehouse receipt no form will make it such.[7]

In the absence of statutory regulations, the delivery of a receipt payable to bearer, as collateral security, without indorsement, passes the legal title to the pledgee as if there had been an actual manual delivery. Although, to enable the transferee to sue on the receipt in his own name at law, a statute may require an indorsement to pass the legal title, and the holder of an indorsed receipt is protected against latent equities, yet a transfer by delivery passes a special property and constructive possession sufficient to create a valid pledge as between the parties and as against a third person who has not acquired a prior or intervening right.[8]

See BAILMENT; CARRIER, Common; LADING, Bill of; POLICE, 2; WHARFINGER.

[1] Munn *v.* Illinois, 94 U. S. 114, 123 (1876), Waite, C. J.

[2] 2 Pars. Contr. 139-43; 2 Kent, 565; Story, Bailm. § 444; Seals *v.* Edmondson, 71 Ala. 511 (1882); Bank of Oswego *v.* Doyle, 91 N. Y. 32 (1883); 2 Kan. Law J. 99 (1885).

[3] Nash *v.* Page, 80 Ky. 539 (1882); 103 Pa. 535.

[4] American Union Express Co. *v.* Robinson, 72 Pa. 278 (1872); Redf. Car., 33, cases; White *v.* Colorado Central R. Co., 3 McCrary, 559, 564 (1878), cases.

[5] Mechanics', &c. Ins. Co. *v.* Kiger, 103 U. S. 355 (1880); Adams *v.* Merchants' Nat. Bank, 9 Biss. 396, 400-2 (1880), cases.

[6] People's Bank *v.* Gayley, 92 Pa. 527, 529 (1880). See also 6 Col. 356; 40 Ill. 320; 62 Miss. 86.

[7] Bucher *v.* Commonwealth, 103 Pa. 535 (1883).

[8] Alabama State Bank *v.* Barnes, 82 Ala. 615 (1886), cases. See generally 10 Cent. Law J. 421-23 (1880), cases; "Grain Elevators," 6 Am. Law Rev. 450-71 (1872), cases.

WARES.[1] Up to the middle of the last century, had the same meaning as "merchandise."[2]

In the Revised Statutes of 1873, merchandise was substituted as an equivalent for "goods, wares, and merchandise," which expression had formerly been in use as including all movable chattels, in particular chattels capable of being imported.[3] See further GOODS; MERCHANDISE.

WARN. See GARNISH.

WARRANT.[4] 1, *v.* To give assurance of the existence of a fact; as, of the quality of goods sold, the validity of a title, the description and uses of insured property. Whence *warrantor*. Compare WARRANTY.

2, *n.* (1) A writing from a competent authority, in pursuance of law, directing the doing of an act, and offering him protection from damage if he does it.[5]

"Warrant" and "commission," outside of naval technicality, are synonymous words. There is no difference, in form, between them as used in the Navy, except that one recites that the appointment is made "by and with the advice and consent of the Senate," and the other does not. Both are signed by the President.[6]

Bench-warrant. See BENCH.

Death-warrant. See DEATH, Penalty.

Landlord's warrant. See LANDLORD.

Search-warrant. See SEARCH.

Warrant in bankruptcy. See BANKRUPTCY.

Warrant of arrest. See ARREST, 2.

Warrant of attorney. See ATTORNEY.

Warrant of commitment. See COMMIT, 3.

(2) Several evidences of debt and of title are known as warrants. Thus a *city, county,* or *town warrant* calls for the payment of money out of the public treasury; a *dividend* or *interest warrant* is a check drawn by a joint-stock company upon its banker, directing payment to a shareholder or to his order; and a *land warrant* authorizes the holder (the warrantee) to take up public lands. See LAND, 1, Warrant.

[1] A. S. *ware*, to be guarded.

[2] Passaic Manuf. Co. *v.* Hoffman, 3 Daly, 512 (1871), Daly, C J.

[3] See R. S. § 2766.

[4] F. *warant, garant*, protection, heed, care

[5] People *v.* Wood, 71 N. Y. 376 (1877), Folger, J.

[6] Brown *v.* United States, 18 Ct. Cl. 543 (1883).

3. A stipulation, on the part of an assured person, that a fact is as stated by him.

Answers in applications for life insurance are made warranties by express condition. The effect is that if any answer is not true, however immaterial to the risk, there can be no recovery. In some policies, all statements are put on this footing. But statutes have been passed to restrict the nullifying effect of warranties on immaterial matters.[1]

Affirmative warranty. The representation of the existence of some fact or state of things, at the time of, or previous to, the making of the policy. **Promissory warranty.** Relates to the happening of some future event, or the performance of some future act.

An affirmative warranty is a condition precedent; if not true in fact, the policy does not attach. A promissory warranty may be a condition precedent or subsequent — is an executory stipulation, has the effect of a representation rather than a warranty. The precise nature is to be ascertained from the language employed, the subject-matter, and surrounding circumstances. The words of a warranty receive a liberal or a strict construction, to meet the justice of the case. A condition precedent includes what is necessarily implied in its terms. But some courts say that there is no difference between warranties, that both species are conditions precedent.[2]

In order to constitute a statement a warranty, it must be made a part of the policy, either by appearing in the body of the instrument, or by reference therein to some other paper in which it is found. Being a condition precedent, the statement must form part of the contract.[3]

The distinction has been made that a "representation" is a part of the preliminary proceedings which propose the contract, while a "warranty" is a part of the completed contract; and the former, unless coupled with fraudulent intent, need be only substantially true, whereas the latter must be literally fulfilled.

Where a policy becomes void by a failure of the warranty, the insured is entitled to a return of the premium, if there be no actual fraud.[4]

See further REPRESENTATION, 1 (2).

WARREN.[1] A "free warren" is a franchise erected for the preservation or custody of beasts and fowls of warren, which, being *ferœ naturæ*, every one had a right to kill as he could.

A franchise invented by the Normans to protect royal game, by giving the grantee sole power of killing, on condition of his preventing other persons from so doing. The name in time designated ground set apart for the breeding of hares and rabbits.[2] See GAME, 1.

WASHINGTON CITY. See DISTRICT, 2, Of Columbia.

WASHINGTON TERRITORY. See TERRITORY, 2.

WASHINGTON'S BIRTHDAY. See HOLIDAY.

WASTE.[3] Deterioration; destruction.

1. Any squandering or misapplication of property or of a fund by trustees or others charged with a duty, or any abuse of trust or of duty by which property is lost or an estate or trust fund is diminished in value.[4]

If an executor or administrator be extravagant, it is a species of "devastation or waste" of the substance of the deceased.[5]

2. A spoil or destruction in houses, gardens, trees, or other corporeal hereditament, to the disherison of him that has the remainder or reversion in fee-simple or fee-tail. Whatever does a lasting damage to the freehold or inheritance.[6]

A spoil and destruction of the estate, in houses, woods, or lands, by demolishing not the temporary profits only but the very substance of the thing, thereby rendering it wild and desolate, which the common law expresses by the word *vastum*.[7]

Spoliation or destruction to lands or other corporeal hereditaments by a tenant to the prejudice of the reversioner or remainderman.[8]

Any unlawful act or omission of duty on

warranties in sales by agents, see 18 Cent. Law J. 223–25 (1884), cases.

[1] White *v.* Connecticut Mut. Life Ins. Co., 4 Dill. 181 (1877), Dillon, Cir. J. See also Jeffries *v.* Economical Life Ins. Co., 22 Wall. 52–53 (1874); Anderson *v.* Fitzgerald, 4 H. L. C. 484, 495 (1853); Connecticut Mut. Life Ins. Co. *v.* Pyle, 44 Ohio St. 29–32 (1886), cases.

[2] Cady *v.* Imperial Life Ins. Co., 4 Cliff. 209–10 (1873), cases, Clifford, J.; James *v.* Lycoming Life Ins. Co., *Id.* 280–82 (1874), cases; Phœnix Ins. Co. *v.* Benton, 87 Ind. 136–37 (1882), cases; Lynchburg Fire Ins. Co. *v.* West, 76 Va. 582 (1882).

[3] Goddard *v.* East Texas Fire Ins. Co., 67 Tex. 71–75 (1886), cases.

[4] Tyrie *v.* Fletcher, Cowp. 668 (1777); Delavigne *v.* United Ins. Co., 1 Johns. Cas. 310 (1800); Connecticut Mut. Life Ins. Co. *v.* Pyle, 44 Ohio St. 31–32 (1886), cases; 3 Kent, *341; May, Ins. § 4.

[1] F. *war-enne*, a preserve for animals.

[2] 2 Bl. Com. 38–39; 4 Law J. 648.

[3] L. *vastus*, empty, desolate, devastated.

[4] Ayers *v.* Lawrence, 59 N. Y. 197 (1874), Allen, J.

[5] 2 Bl. Com. 508; 3 *id.* 222.

[6] 2 Bl. Com. 281: Coke, Litt. 53.

[7] 3 Bl. Com. 223.

[8] Ayers *v.* Lawrence, *supra*. See also 1 Saw. 437; 59 Miss. 304; 29 Mo. 327; 3 N. H. 107; 13 Pa. 440; 53 Wis. 60; 107 U. S. 323.

the part of the tenant which results in permanent injury to the inheritance.[1]

An improper destruction or material alteration or deterioration of the freehold, or of things forming an essential part of it, done or suffered by a person rightfully in possession as tenant, or having but a partial estate, like that of a mortgagor.[2]

Double waste. Committing a new act of waste in providing against another act; as, felling timber for repairing a house suffered to be out of repair.[3]

Legal waste. Such waste as a court of law may restrain. **Equitable waste.** Such as a court of equity alone can restrain; as, injury to a reversion or remainder.

Nul waste. No waste: a plea forming the general issue in an action of waste.

Permissive waste. A matter of omission only; as, by suffering a house to fall for want of necessary repairs.[4] Also called *passive waste.*

"Arises from mere negligence, and want of sufficient care in reparations, fences, and the like."[5]

Voluntary waste. An actual and designed demolition of lands, woods, and houses.[5] Also called *active waste.*

Writ of waste. An action, brought by the immediate reversioner or remainderman, to recover the land and damages for its illuse.[6]

Removing a thing once fixed to the freehold is waste; and, up to 1708, negligence in a lessee by which the house was burned; cutting down timber or causing it to decay, but not so as to underwood; converting land from one species to another; opening the ground in search of mines. The general heads of waste are then: houses, timber, land; though, whatever else tends to destroy or depreciate the value of the inheritance is waste. At one time waste was punishable only in a guardian in chivalry, in a tenant in dower, and in a tenant by curtesy; because, the law, which created those relations, afforded a remedy for abuses. In other cases, as in tenancy for life or years, up to 1268, if there was no remedy, the owner of the fee was at fault. The punishment consisted in being required to pay damages, possibly treble damages, and forfeiture of the thing or place.[7]

It is not waste for a mortgagor to remove or change fixtures, to sell timber, to remove coal, stone, or other minerals from opened mines, nor growing nursery stock,—if done in good faith in the regular course of business, before foreclosure proceedings are begun and not in apprehension thereof.[1]

Modern remedies are by injunction to stay waste where the injury would be irreparable; and by special action on the case in the nature of waste, to recover damages.[2]

It is now a common practice, in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, as, by extracting ores from a mine, cutting timber, or removing coal, to issue an injunction, though the title to the premises is in litigation.[3]

In the absence of an express covenant, there results, from the relation of landlord and tenant, an implied obligation on the part of the tenant not to commit waste, nor to permit it.[4]

The English doctrine is not fully applicable to a new and unsettled country. Here, regard is had to the condition of the land, and, where the inheritance will not suffer, what good husbandry would direct.[5]

A tenant for life cannot open new mines, because that would be a lasting injury to the inheritance; but his right to operate previously opened mines, and work them to exhaustion, cannot be questioned.[6]

See DEVASTAVIT; ESTREPEMENT; FIXTURE; IMPEACH, 1; MANURE; MORTGAGE; TENANT.

WATCH. 1. See BAGGAGE; JEWELRY.

2. See DEATH-WATCH; WARD, 1.

Watchman. A condition in a policy requiring that a watchman be kept on certain premises as long as an insured mill, standing thereon, remained idle, was held to be complied with by the watchman continuing in close proximity to the property, in a location from which he could speedily discover the inception of a fire.[7]

WATER. Being a movable, wandering thing, of necessity continues common by the law of nature; so that one can only have a temporary, transient, usufructuary property in it.[8]

The grantee of land has a usufruct in the water. The limitation is, the use must not interfere with public navigation, nor, in a substantial degree, diminish and impair private rights of use in other proprietors.[9]

[1] Whitney v. Huntington, 34 Minn. 462 (1886), Berry, J.

[2] Hamilton v. Austin, 36 Hun, 143 (1885), Follett, J.

[3] Coke, Litt. 53.

[4] 2 Bl. Com. 281.

[5] 3 Bl. Com. 223. See also Peirce v. Burroughs, 58 N. H. 304 (1878), cases.

[6] 3 Bl. Com. 227-28.

[7] 2 Bl. Com. 281-84.

[1] Hamilton v. Austin, 36 Hun, 143 (1885).

[2] 4 Kent, 77-85.

[3] Ehrardt v. Boaro, 113 U. S. 539 (1885), cases.

[4] United States v. Bostwick, 94 U. S. 65-66 (1876), cases; California Dry-Dock Co. v. Armstrong, 17 F. R. 216 (1883), cases.

[5] Drown v. Smith, 55 Me. 143-44 (1862), cases; Keeler v. Eastman, 11 Vt. 294 (1839); Lynn's Appeal, 31 Pa. 46 (1857); 56 *id.* 119.

[6] Eley's Appeal, 103 Pa. 307 (1883), cases.

[7] Sierra Company v. Hartford Fire Ins. Co., Sup. Ct. Col. (1888): 27 Cent. Law J. 452-54 (1888), cases.

[8] 2 Bl. Com. 14, 18; 5 Conn. *518-19.

[9] Washington Ice Co. v. Shortall, 101 Ill. 54 (1881), cases; Red River Roller Mills v. Wright, 30 Minn. 252-54 (1883), cases.

A grant of land carries title to the center of an unnavigable boundary stream, and includes bed, islands, water, and ice.[1]

Water companies. See MONOPOLY.

Water-course. A stream of water, usually flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water.[2]

A living stream with defined banks and channel, not necessarily running all the time, but fed from other and more permanent sources than mere surface water.[3]

Consists of bed, banks, and water. The water need not flow continually; many water-courses are sometimes dry.[4]

The term does not include occasional bodies of surface water at certain seasons descending from the hills down ravines without any definite channel.[5]

The size of the stream is not material. There must be a stream in fact, as distinguished from surface drainage occasioned by freshets. Where water has a definite source, as, a spring, and takes a definite channel, it is a water-course, and no person through whose land it flows has a right to divert it from its natural channel so as to injure another land-owner.[6] See SPRING.

A natural water-course may be created by the flow of surface water.[7]

Mere surface drainage over one tract of land to another, through a ditch, does not constitute a water-course.[8]

Water-mark. High and low water-marks, referred to as boundaries, mean the place to which the water ordinarily ascends or descends.[9]

Where the tide ebbs and flows, the line of high water is marked by the periodical flow of the tide, excluding the advance of waters above this mark by winds and storms, and by freshets or floods; and the line of low water-mark is the furthest receding point of ebb and flow.[10]

Where streets had been dedicated as terminating at the Hudson River, and, afterward, the bed in front below high water-mark was filled in by legislative authority and the land so made conveyed by the State to the defendants, who had also succeeded to the title of the original owner and dedicator, it was held that the title to the filled-in land was not affected by the dedication, that the streets terminated at the former high water-mark.[1] See BEACH.

Water-power. The fall in a stream when in its natural state, as it passes through one's land, or along the boundary of it; the difference of level between the surface where the stream first touches his land, and the surface where it leaves it.[2]

See further AQUA; BOUNDARY; COMMERCE; DRAIN; MILL; NAVIGABLE; PROPERTY, Qualified; RIPARIAN; RIVER; SURFACE; TAKE, 8; VESSEL; WELL, 1.

WATERING STOCK. See DIVIDEND, 8; STOCK, 3 (2).

WAX. See SEAL, 1, 5.

WAY. The right of going over another man's ground.[3]

By *right of way* is generally meant a private way, which is an incorporeal hereditament of that class of easements in which a particular person, or description of persons, has an interest and a right, though another person is the owner of the fee of the land in which it is claimed.[4]

A right to pass over another's land more or less frequently according to the nature of the use to be made of the easement.[5]

The privilege which one person, or description of persons, may have of passing over the land of another in some particular line.[6]

Referring to a railway, a right of way is a mere easement in the lands of others, obtained by lawful condemnation to the public use or by purchase.[7]

It is a way over which the company has to pass in the operation of its trains. The term includes land acquired for necessary side tracks and turnouts, and the improvements thereon.[8]

[1] 3 Kent, 427–32; Angell, Water-Cour. § 5; 18 R. I. 614.
[2] Luther *v.* Winnisimmet Co., 9 Cush. 174 (1851), Bigelow, J.
[3] Jeffers *v.* Jeffers, 107 N. Y. 651 (1887).
[4] Angell, Water-Cour. § 4; 26 Cent. Law J. 26–31 (1888), cases.
[5] Wels *v.* City of Madison, 75 Ind. 253 (1881), cases; 27 *id.* 556; 37 *id.* 228; 41 *id.* 320; 30 Conn. 180; 75 Ind. 253; 25 Kan. 210; 67 Me. 356; 12 N. J. E. 280; 16 Nev. 317; 10 Oreg. 76; 37 Wis. 226.
[6] Pyle *v.* Richards, 17 Neb. 182 (1885), cases.
[7] Kelly *v.* Dunning, 39 N. J. E. 483 (1885), cases.
[8] Stanchfield *v.* Newton, 142 Mass. 110, 116 (1886).
[9] Gerrish *v.* Proprietors, 26 Me. 395–96 (1847), cases, Shepley, J.; 113 Mass. 238; 60 Pa. 339.
[10] Howard *v.* Ingersoll, 13 How. 423, 417 (1851), Nelson, J.; Houghton *v.* Chicago, &c. R. Co., 47 Iowa, 372 (1877).

[1] City of Hoboken *v.* Pennsylvania R. Co., 124 U. S. 656 (1888).
[2] McCalmont *v.* Whitaker, 3 Rawle, 90 (1831), Gibson, C. J.; 62 Me. 91; 10 Barb. 521.
[3] 2 Bl. Com. 35.
[4] Wild *v.* Deig, 43 Ind. 458 (1873): Angell, Highw. 1–2.
[5] Bodfish *v.* Bodfish, 105 Mass. 319 (1870), Ames, J.
[6] Kripp *v.* Curtis, 71 Cal. 63 (1886), Searls, C.
[7] Williams *v.* Western Union R. Co., 50 Wis. 76 (1880), Orton, J.
[8] Pfaff *v.* Terre Haute, &c. R. Co., 108 Ind. 144 (1886), cases.

It sometimes refers to the mere intangible right of crossing; often, to the strip which the company appropriates for its use, and upon which it builds its road-bed.[1]

This incorporeal hereditament is a right of passage over another man's ground, and arises by grant from the owner of the soil, by prescription, which supposes a grant, or from necessity. To be a freehold right it must be created by deed. It imports a right of passing in a particular line. If it be a right of way in gross, or a mere personal right, it dies with the person. As *appendant* or annexed to an estate, it may pass by assignment of the land. A right of way *from necessity* arises, as an incident, where one sells another land which is surrounded by other land of the vendor: the grant of land, or the use of a house, etc., carries the right of ingress and egress. The temporary right of going upon adjoining land, where the highway is impassable, applies solely to public ways.[2]

A "way appurtenant" is incident to the estate, inheres in it, and goes with it on a transfer as essential to its enjoyment. "A right of way *in gross*" is personal to the grantee, and not assignable or inheritable.[3]

What is a reasonable use of a way, where the purposes are not defined in the grant, is a question of fact, to be determined upon evidence. A grant without restriction is understood to be general for all purposes.[4]

A grant of way across one's land does not imply that it is to be open and free from *gates*, unless the nature of the use indicates that it should be unobstructed. Nothing passes as an incident to the grant of an easement but what is requisite to the fair enjoyment of the privilege.[5]

Private way. A way established by law for the particular benefit or accommodation of individuals, such as lead from a county or town road to the farms or dwelling-houses of private individuals, and which are to be maintained and kept in repair by those for whose accommodation they were established.[6]

Public way; highway; public highway. A lawful public road.[7]

"Highway" applies to all great roads leading from town to town, to markets, and to public places, and denotes a way that is common to all passengers.[1]

A "highway" is a road open to the public for use in their own vehicles. In a special connection may include a railroad. Plank and macadamized roads are highways in a strict sense.[2]

"Highway" is a generic name, embracing every kind of way common to all citizens, whether a foot-way, a horse-way, a cart-way, or way by water, however laid out originally and under whosesoever's charge. Roads are divided into "highways" and "private ways." Highways are subdivided into "public highways" and "neighborhood roads."[3]

A highway is nothing but an easement, comprehending merely the right of all individuals in the community to pass and repass, with the incidental right in the public to do all acts necessary to keep it in repair.[4]

Every thoroughfare which is used by the public is a highway, whether it be a carriage way, a horse way, a foot way, or a navigable river. It is the genus of all public ways. The presumption is that the owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public.[5]

A railroad is a public highway — a road for public use. And a State may impose a tax in furtherance of that use. The same is true as respects turnpikes, bridges, ferries, canals, etc. The public have in "common roads" a mere right of passage, no right of possession or occupation.[6]

In most cities, the fee of the land belongs to the adjacent owner, and, upon discontinuance of the street, the possession reverts to him.[7]

The State has an easement to adapt the streets of a city to easy and safe passage.[8]

The duty of a municipality being to keep ways free from defects — in good repair, it will be held liable for an injury from an obstruction placed on a street by a third person, where the obstruction remains long enough to charge the authorities with notice.[9]

Every parish is bound of common right to keep the highroads that go through it in good repair, unless the care is consigned to a particular person. From this burden no man was exempt by early law. About

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[1] [Keener v. Union Pacific R. Co., 31 F. R. 128 (1887), Brewer, J.

[2] 3 Kent, 419-21, 494; 2 Bl. Com. 35. As to ways of necessity, see further City of London v. Riggs, 37 Eng. R. 1 (1880); Linkenhoker v. Graybill, 80 Va. 838-39 (1885), cases; Kripp v. Curtis, 71 Cal. 65 (1886); as to ways of convenience, 17 Cent. Law J. 127 (1887) — Can. Law J.

[3] Hall v. Armstrong, 53 Conn. 556 (1885), cases, Loomis, J.

[4] Rowell v. Doggett, 143 Mass. 487 (1887); Washb. Ease. 254, 282.

[5] Whaley v. Jarrett, 69 Wis. 615 (1887), cases; Washb. Ease., 3 ed., 230-31, 264.

[6] Jones v. Andover, 6 Pick. 60 (1827), Parker, C. J.; 96 Ga. 458; 16 Gray, 179; 24 N. H. 118.

[7] Vantilburgh v. Shann, 24 N. J. L. 744 (1855).

[1] Harding v. Medway, 10 Met. 469 (1845), Hubbard, J.

[2] Flint, &c. R. Co. v. Gordon, 41 Mich. 428-29 (1879), Cooley, J.

[3] State v. Harden, 11 S. C. 368 (1878), Haskell, A. J.

[4] Peck v. Smith, 1 Conn. 128 (1814), Swift, J. See also State v. Davis, 80 N. C. 352 (1879).

[5] 3 Kent, 432. Boston & Albany R. Co. v. Boston, 149 Mass. 87-88 (1886), cases — as to a "public foot-way."

[6] Olcott v. Supervisors, 16 Wall. 694-97 (1872), cases.

[7] Banks v. Ogden, 2 Wall. 69 (1864); Barnes v. District of Columbia, 91 U. S. 556 (1875).

[8] Transportation Co. v. Chicago, 99 U. S. 641 (1878).

[9] Merrill v. City of Portland, 4 Cliff. 145-46 (1878), cases.

1530, the care of roads was first left to the parishes, and the care of bridges to the county at large; for neglect a parish could be indicted. About 1555, and later, in 1773, by statute 13 Geo. III, surveyors of the highways were chosen in every parish, empowered to call the parish together, and set the people at the work of repair, the owners of teams and of lands being each required to send a team, and other persons between eighteen and sixty-five required to work in person or by substitute, or else to compound with the surveyors at certain rates. When the personal labor of a parish was inadequate for the work of repair, the surveyors, with the approval of the court of quarter sessions, were authorized to levy a tax on the parish in aid of the personal duty.[1]

See further ALLEY; ALONG; BOUNDARY; DEDICATION, 1; EASEMENT; FILUM, VIÆ; NECESSITAS, Trinoda; NUISANCE; ROAD, 1; STREET; TRAVEL.

WAYS AND MEANS. The committee of or on ways and means, in a legislative assembly, is charged with the duty of inquiring into and recommending the ways and means for raising funds for the uses of government.

The "committee of supply" considers what specific grants of money shall be voted as supplies demanded by the crown for the service of the current year, as explained by the estimates and accounts prepared by the executive government, and referred by the house to the committee. The "committee of ways and means" determines in what manner the necessary funds shall be raised to meet the grants which are voted by the committee of supply, and which are required for the public service. The former committee controls the public expenditure; the latter provides the public income: the one authorizes the payment of money, the other sanctions the imposition of taxes, and the application of revenues not otherwise applicable to the service of the year.[2]

WEAPON. While the right of the people to bear arms, that is, to own and preserve weapons for warfare, is secured by the constitutions, statutes may prohibit, as a police regulation, the carrying of "concealed," "deadly" or "dangerous" weapons.

Concealed weapon. A weapon willfully and knowingly covered or kept from sight.[3]

The purpose of statutes forbidding the carrying of concealed weapons is to protect individuals against sudden, unexpected, dangerous and perhaps deadly violence inflicted with weapons which the assailant has concealed in some way about or conveniently near his person, and which he may use under sudden impulse, or deliberately and unfairly against one taken unawares; and to conserve the public peace and safety.[4]

Until a pistol has lost so many of its parts as to cease to be a fire-arm, carrying it concealed, without sufficient excuse, is indictable.[5]

The weapon (a pistol) need not be complete in all its parts or capable of direct and immediate use.[6]

The implement must be carried about the person, accessible for use in fight, and so hidden from general view as to put others off their guard. If a pistol is worn concealed, the jury may presume it was loaded and worn as a weapon; but the presumption is rebuttable.[7]

Dangerous weapon. A weapon dangerous to life, as actually used.

A weapon likely to produce death or great bodily injury.[8]

In many cases the court may declare that a particular weapon was, or was not, a dangerous weapon; and, when practicable, it is the court's duty to do so. But where the weapon might be dangerous or not, according to the manner in which it was used or the part of the body struck, the question must be left to the jury.[9]

That a loaded pistol is both a dangerous and a deadly weapon, the courts will notice without proof.[10]

Deadly weapon. Includes any weapon with which a person may be wounded by cutting or stabbing.[6]

A weapon likely to produce death or great bodily harm.[7]

A hoe is *per se* a deadly weapon.[8]

If a deadly weapon be used in a case of homicide in the manner in which it would be likely to produce death, the presumption of an intention to kill arises. Otherwise, if used so as not naturally to produce death.[9]

See ARMS; CARRY, 2; CONTRACT; DEFENSE, 1; JOURNEY; LOADED; SHOOTING; TRAVEL; THRUST.

WEAR AND TEAR. "Natural and reasonable wear and tear" means deterioration by use, and does not include damage by operation of nature, as, by a freshet.[10]

[1] 1 Bl. Com. 357–59.

[2] May, Parliamentary Law, 41.

[3] Owen v. State, 31 Ala. 389 (1858), Rice, C. J.

[4] State v. McManus, 89 N. C. 559 (1883), Merrimon, J.

[5] Atwood v. State, 53 Ala. 509 (1875); Hutchinson v. State, 62 *id.* 3 (1878); Evins v. State, 46 *id.* 88 (1871); Williams v. State, 61 Ga. 417 (1878); Cook v. State, 11 Tex. Ap. 19 (1881).

[6] Redus v. State, 32 Ala. 53–54 (1886).

[7] Carr v. State, 34 Ark. 448 (1879).

[8] United States v. Williams, 2 F. R. 64 (1880), Deady, Dist. J.

[9] United States v. Small, 2 Curtis, 243 (1855), cases, Curtis, J.; State v. Dineen, 10 Minn. 411 (1865); Doering v. State, 49 Ind. 58 (1874).

[10] Commonwealth v. Branham, 8 Bush, 388 (1871), Hardin, J.; 3 *id.* 105.

[7] Kouns v. State, 3 Tex. Ap. 15 (1877), White, J.: 4 *id.* 328; 43 Tex. 93.

[8] Hamilton v. People, 113 Ill. 38 (1885).

[9] Hanvey v. State, 68 Ga. 615 (1882); Moon v. State, 69 608 (1882).

[10] Green v. Kelly, 20 N. J. L. 547 (1845).

A tenant from year to year is not liable for permissive waste, and is to make good mere wear and tear.[1]

He is only bound to keep the leased house "wind and water" tight.[2]

See LEASE.

WEARING APPAREL. See APPAREL; BAGGAGE.

WEBSTER'S CASE. See HOMICIDE; MALICE, Aforethought.

WEEK. A period of time commencing on Sunday morning and ending at midnight Saturday; also, a period of seven days' duration, without reference to the time when it commences.[3]

"Once a week" means once between each Sunday and Saturday night, the particular time of the week not being important.[3]

The first publication of a notice of a sale under a power contained in a mortgage, which requires the notice to be published "once a week for three successive weeks," need not be made three weeks before the time appointed for the sale.[4]

See DAY; MONTH; NEWSPAPER; TIME; YEAR.

WEIGHT. 1. Heaviness, gravity.

"The Congress shall have Power . . To fix the Standard of Weights and Measures."[5]

This power has not as yet been fully exercised. The States, in the exercise of the police power, may compel conformity with a fixed standard. The weights in use are the avoirdupois and troy systems.[6] See INSPECTION, 1; METRIC SYSTEM; NET; TON.

2. In the figurative sense of ponderance or preponderance, is used of evidence, cases, authorities. See PREPONDERANCE.

WELFARE. Well-going, well-being; prosperity in its most comprehensive sense.

"WE THE PEOPLE of the United States, in Order to . . promote the general Welfare . . do ordain and establish this CONSTITUTION. . ."[7]

"The Congress shall have Power To Lay and collect Taxes, Duties," etc., to "provide for the . . general Welfare of the United States. . ."[8]

Promote the general welfare. This phrase was adopted from the Articles of Confederation, and, though seemingly vague, was employed in a rigidly restrictive sense to signify "the concerns of the Union at large, not the particular policy of any State."[1]

Experience had proved to the people that they required a national government for national purposes. The separate governments of the separate States, bound together by the Articles of Confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated States. For this reason they established the government of the United States, and defined its powers by a constitution, which they adopted as its fundamental law, and made its rule of action.[2]

See POLICE, 2; PREAMBLE; PROHIBITION, 2; TAX, 2.

WELL. 1, *n.* An artificial excavation and erection in and upon land, which necessarily includes and comprehends the substantial occupation and beneficial enjoyment of the whole premises on which it is situated.[3]

A person has a right to dig a well on his land for water for his own use, although the effect may be to dry up the spring of a neighbor. But if he acts in bad faith, he may be liable in damages.[4]

Making dry a well by taking lands for a public use constitutes an element of damages for which compensation must be made.[5]

See APPENDAGE; GRANT; LAND; WATER.

2, *adv.* Agreeably, suitably, adequately, fully; properly, legally.

Thus, a demurrer admits such facts as are well pleaded, that is, properly pleaded.[6] A bill may well be brought as an original bill.[7] A power is sometimes said to be well executed.[8] A jury is sworn to well and truly try the issue. Well knowing charges knowledge in a defendant to an action on the case. See BAD, 2; ILL, 2.

WEREGILD.[9] In old English law, a pecuniary satisfaction paid to a party injured, or to his relatives, to expiate an enormous offense, most commonly homicide.[10]

The custom originated with the ancient Germans. For homicide, Athelstan (and other rulers) graded the

[1] Torriano *v.* Young, 6 Car. & P. 8 (1833).

[2] Anworth *v.* Johnson, 5 Car. & P. 239 (1832). See generally Taylor, Land. & T. § 343; 1 Wood, Land. & T. § 365.

[3] [State *v.* Yellow-Jacket, &c. Mining Co., 5 Nev. 420 (1868), Beatty, C. J.; Ronkendorff *v.* Taylor, 4 Pet. 361 (1830); Steinle *v.* Bell, 12 Abb. Pr. 176 (1872).

[4] Dexter *v.* Shepard, 117 Mass. 484 (1875); 1 *id.* *254.

[5] Constitution, Art. I, sec. 8, cl. 5.

[6] See 1 Bl. Com. 274; Social Science Assoc., 1871, 578. On the "weight of authorities," see 10 Va. Law J. 582 (1886).

[7] Constitution, Preamble.

[8] Constitution, Art. I, sec. 8, cl. 1.

[1] 2 Bancroft, Const. 208 (1882), abr. ed. 358 (1884), quoting Washington.

[2] United States *v.* Cruikshank, 92 U. S. 549 (1875), Waite, C. J.; 1 Story, Const. §§ 497-506.

[3] Johnson *v.* Rayner, 6 Gray, 110 (1856), Bigelow, J. See Mixer *v.* Reed, 25 Vt. 257 (1853).

[4] Chesley *v.* King, 74 Me. 170-71 (1882), cases; Buckingham *v.* Elliott, 62 Ga. 296 (1884).

[5] Trowbridge *v.* Brookline, 144 Mass. 141 (1887), cases; Ballard *v.* Tomlinson (Eng.), 24 Am. Law Rev. 634, 636-40 (1885), cases.

[6] 91 U. S. 536; 2 Black, 523.

[7] 14 Wall. 82.

[8] 7 Pa. 530.

[9] Wēre'-gĭld. A. S. *were*, a man; *geld*, money: the value of a life.

[10] [4 Bl. Com. 313.

amount according to the rank of the deceased, from peasant to king. In the time of Henry I, other offenses were made redeemable. A private process seems to have been allowed for recovering the amount.

See APPEAL, 3; CAPUT, Æstimatio.

WESTMINSTER. Up to 1180, the court of common pleas followed the king's household from one end of the kingdom to the other. For the convenience of suitors, Magna Charta provided that the court should "be held in some certain place." This place has ever since been Westminster, or Westminster Hall, where the *aula regis* originally sat, when the king resided there.[1]

WHARF. A structure erected on a shore below high-water mark, and sometimes extending into the channel, for laying vessels alongside to load or unload, and on which stores are often erected for the reception of cargoes.[2]

A sort of quay (*q. v.*) constructed of wood or stone, on the margin of a road-stead or harbor, alongside of which ships or lighters are brought for convenient loading or unloading.[3]

A structure, on the margin of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded.[4]

A paved street extending to the water's edge and used by vessels as a place for receiving and discharging freight and passengers may be designated as a "wharf."[5]

Wharfage. The fee paid for tying vessels to a wharf, or for loading goods on a wharf or shipping them therefrom.[6]

"A toll or duty for the pitching or loading of goods upon a wharf." "Money paid for landing goods at a wharf or quay, or taking goods into a boat and from thence."[6]

A municipal corporation, owning wharves for the benefit of persons engaged in commerce upon the public navigable waters of the United States, may collect from those persons such reasonable fees as will fairly remunerate it for the use of the property.[7]

The power of the State includes the power to discriminate as to the rates between different classes and vessels employed in different occupations.[1]

But care must be taken that the exaction is not a "duty of tonnage."[8]

Wharfage is a charge for the use of a wharf. This must be reasonable. But a "private wharf," that is, a wharf which the owner has constructed and reserves for his private use, is not subject to this rule. That a private wharf may be had, even on a navigable river, is not open to controversy; but whether it may be maintained as such, where it is the only facility of the kind, may be questioned. . . The regulation of wharves belongs *prima facie* and in the first instance to the States, and would only be assumed by Congress when its exercise by them became incompatible with the interests of commerce.[2]

To create a lien for wharfage, the contract must be made by a person who has authority to pledge the vessel. A sheriff who attaches a vessel is not such person.[4]

A city which is in possession of a wharf, exercising exclusive control over it, and receiving tolls for its use, is bound to keep it in condition for use.[5]

See ADMIRALTY; COMMERCE; DOCKAGE; RIPARIAN; TONNAGE, 2.

Wharfinger.[6] One who keeps a wharf for receiving goods for hire.

His responsibility begins when the goods are delivered on the wharf, and he has received them, expressly or by implication.[7]

He is a bailee for hire, held to ordinary care only He must use reasonable care to keep the dock in repair for the vessels he invites to enter.[8] See DOCK, 2.

WHEEL. See JURY; LOTTERY.

WHEN. Standing unqualified, in a will, is a word of condition, perhaps equivalent to "if." The context may show that the possession, not the vesting, of the gift, is meant.[9]

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[1] 1 Bl. Com. 23; 3 *id.* 38. See Jeaffreson, "Lawyers:" 3 Leg. Gaz. 408.

[2] Doane *v.* Broad Street Association, 6 Mass. 334 (1810), Parsons, C. J

[3] Giger *v.* Filor, 8 Fla. 332 (1859), Blatsell, C. J.

[4] Langdon *v.* Mayor of New York, 93 N. Y. 151 (1883), Earl, J.

[5] City of Keokuk *v.* Keokuk Northern Packet Co., 45 Iowa, 206 (1876).

[6] Kusenberg *v.* Browne, 42 Pa. 179 (1862); Town of Pelham *v.* The Woolsey, 16 F. R. 423 (1883).

[7] Packet Co. *v.* St. Louis, 100 U. S. 423 (1879); Vicksburg *v.* Tobin, *ib.* 430 (1879); Ouachita Packet Co. *v* Aiken, 121 *id.* 444 (1887), cases.

[1] The Barge Welch, 9 Bened. 514 (1878).

[2] Cannon *v.* New Orleans, 20 Wall. 577, 580 (1874). *Exp.* Easton, 95 U. S. 68 (1877); Packet Co. *v.* Keokuk. *ib.* 88 (1877): 45 Iowa, 196; Ouachita Packet Co. *v.* Aiken, 4 Woods, 211 (1883); s. c. 16 F. R. 892.

[3] Transportation Co. *v.* Parkersburg, 107 U. S. 696, 699, 703 (1882), cases, Bradley, J. See generally 22 Am. Law Reg. 588-605 (1883), cases; 16 F. R. 894-96 (1883), cases.

[4] The Mary K. Campbell, 31 F. R. 840 (1887), Wallace, Cir. J.

[5] Pittsburgh *v.* Grier, 22 Pa. 54 (1853); City of Allegheny *v.* Campbell, 107 *id.* 535 (1885); Joyce *v.* Martin, 15 R. I. 558 (1887); 1 Thomp. Neg. 316.

[6] Wharf'-in-jer, for wharf*ager*.

[7] Rodgers *v.* Stophel, 32 Pa. 113 (1858).

[8] See Roberts *v.* Turner, 12 Johns. *232 (1815), cases, Blin *v.* Mayo, 10 Vt. 60 (1838), cases; New Orleans, &c. R. Co. *v.* Hanning, 15 Wall. 659 (1872); Nickerson *v.* Tirrell, 127 Mass. 239 (1879), cases.

[9] 2 Jarman, Wills, 417-21, cases; 3 Ired. Eq. 398; 6

Though the word may import a contingency, as, for instance, in the case of a legacy to A "when he attains twenty-one," without more, yet it is settled that it may mark the period at which the estate is to take effect in enjoyment, and not as postponing the period of vesting.[1]

"When," like "if," is ordinarily a word of condition, or of conditional limitation; but this meaning may be controlled by language showing that the estate is to be vested.[2]

Whenever. Though often equivalent to "as soon as," is frequently used where the time intended is, and will be, until arrival, or of some uncertain period at least, indeterminate.[3]

"Whenever" and its synonyms, referring to the time when property is to be enjoyed, are among the most ordinary words used in creating a vested remainder, and cannot be relied upon as creating a contingent remainder.[4] Compare THEN.

WHEREAS. Involving recital, cannot be used where direct, positive averment is required; as, in pleadings, *q. v.* See also RECITAL.

WHEREUPON. Denotes sequence, succession, order of action, relation, a thing done with reference to something previously done; is interchangeable with the words "upon which," "after which."[5]

WHILE. Compare DUM.

WHIP HAND. See ROAD, 1, Law of.

WHIPPING. Punishment by the infliction of stripes.

Whipping-post. A stake to which an offender is tied to receive stripes; punishment by whipping.

At common law, whipping was inflicted on inferior persons for petty larceny and vagrancy, and it accompanied sentences of imprisonment in a few other cases.[6]

Abolished, as to female delinquents, by 1 Geo. IV (1820), c. 57. Later statutes, notably 24 and 25 Vict. (1861), and 26 and 27 Vict. (1863), prescribe the offenses, ages, number of strokes, and the instrument.

The punishment of whipping shall not be inflicted.[7]

The Great Law of the Province of Pennsylvania, by enactment of 1684, provided that twenty-one stripes should be inflicted where no other number was prescribed.[1]

The Maryland act of 1882, c. 120, which provides that any person who shall brutally assault and beat his wife, shall, upon conviction, be sentenced to be whipped, not exceeding forty lashes, or be imprisoned for a term not exceeding one year, or both, in the discretion of the court, is not in contravention of the VIIIth Amendment to the Constitution of the United States, which forbids inflicting "cruel and unusual punishments," since that is a restraint upon Congress only; nor is it in contravention of the like prohibition in the constitution of Maryland. The provision appears in 1 W. and M. (1689), stat. 2, c. 2, and in the declarations of the rights of the State promulgated in 1776, 1850, 1864, and 1867. From 1776 to 1819, the punishment of whipping for certain offenses was imposed upon whites and negroes alike, and upon negroes alone until the adoption of the constitution of 1864. The word "brutal," in the act of 1882, has its ordinary, popular meaning.[2]

WHISKEY. See ALCOHOL; LIQUOR; PROHIBITION, 2.

WHITE. "White person," as used in the naturalization laws, means a person of the Caucasian race, and does not therefore include a Mongolian.[3]

Does not include a person half white and half Indian.[4]

But does include one nearer white than black or red.[5]

In the legislation of the slave period, referred to a person without admixture of colored blood, whatever the actual complexion might be.[6]

See CITIZEN; COLOR, 1; MULATTO.

White acre. See ACRE.

WHOLE. See BLOOD.

Wholesale. See RETAIL.

WHORE. See PROSTITUTE; SLANDER, 1.

WIDOW. A woman who has lost her husband by death.[7]

A wife that outlives her husband.[8]

May refer to the person, not to her state, whether she remain a widow or marry again; as, in a statute giving a widow the right to sue for the homicide of her husband.[9]

Whenever a right by law has been attached by rea-

Jones, Eq. 347; 6 Ves. Jr. 343; 16 C. B. 59; 7 Ves. 422; 11 id. 489.

[1] Minnig v. Batdorff, 5 Pa. 506 (1847), cases; Letchworth's Appeal, 30 id. 175 (1858); 1 Dall. 175; 5 Watts, 496.

[2] Sutton v. West, 77 N. C. 431 (1877); Fisher v. Johnson, 38 N. J. E. 47 (1884).

[3] Robinson v. Greene, 14 R. I. 188 (1883), Durfee, C. J.

[4] Manderson v. Lukens, 23 Pa. 31 (1854).

[5] [Lee v. Cook, 1 Wyom. 419 (1878), Peck, J.

[6] 4 Bl. Com. 169.

[7] R. S. § 5327: Act 26 Feb. 1889.

[1] Linn, 168, 275.

[2] Foote v. State, 59 Md. 264, 267 (1882), Stone, J.; s. c. 4 Cr. L. M. 401. Compare 6 Alb. Law J. 70 (1872); Cooley, Const. Lim. *329-30; 1 Law J. 697; 51 id. 306.

[3] Re Ah Yup, 5 Saw. 155 (1878), Sawyer, Cir. J.

[4] Re Camille, 6 F. R. 256 (1880).

[5] Jeffries v. Ankeny, 11 Ohio, 375 (1842); United States v. Barryman, 21 Alb. Law J. 194 (1879): R. S. §§ 2154-55; 2 Kent, 72.

[6] Du Val v. Johnson, 39 Ark. 192 (1882), Eakin, J. See also Beardsley v. Bridgeport, 53 Conn. 492 (1885).

[7] Whitsell v. Mills, 6 Ind. 231 (1855): Webster's Dict.

[8] Claim of Eliza Burr, 11 Op. Att.-Gen. 2 (1863).

[9] Georgia R., &c. Co. v. Garr, 57 Ga. 280 (1876).

son of widowhood, there must be some law by which it is divested, or it will remain.[1]

Widow's appraisement, law, portion, share or third, and renunciation are frequently spoken of. See those words, also DOWER; HEIR, 1; HUSBAND; QUARANTINE, 1; REPRESENTATIVE, 1, Personal; WIFE.

WIFE. A woman who has a husband living.[2]

As used in a will may refer to the wife of the testator at the time he made his will, and not to any wife who might survive him.[3]

In laws providing for alimony and dower after a divorce has been granted, the term "wife" may be regarded as designating the person, and not the actual existing relation.[4]

See FAMILY; HUSBAND; SETTLE, 4; UXOR; WIDOW.

WIGGLESWORTH'S TABLES. See TABLE, 4.

WIGS. Compare GOWN.

The custom of wearing wigs seems to date back to the remotest antiquity. They were worn in Egypt; references in the classics attest their use in Greece and Rome. The fashion died out; it was revived in France in the time of Henry III, and became prevalent in that of Louis XIII, and almost universal in that of Louis XIV. From France it spread to other countries, attaining its height in England in the reign of Anne. After the Revolution it disappeared in France, and, gradually, elsewhere. From the time of George III, the fashion began to wane in England, except among professional men. It prevailed, to some extent, in this country during the latter half of the last century. "The wig of the seventeenth century now holds its place only on the judicial bench" of Great Britain, "and with the speaker of the House of Commons, barristers, and advocates; but even on the bench its use is being threatened.[5]

WILD. See ANIMAL; LAND.

WILL. 1. The faculty of the mind which makes choice between objects or ends; the power which directs action; inclination toward action; desire, purpose, consent, intention, volition.

As employed in defining the crime of rape, is not construed as implying the faculty by which intelligent choice is made between objects, but as the synonym of "inclination" or "desire;" and in this sense is used with propriety in reference to the actions of persons of unsound mind.[6]

The technical phrase "against the will" charges violence, especially in the commission of such crimes as rape, and robbery from the person. "Against consent" expresses the idea with equal accuracy. In the case of robbery, the greatest degree of terror is not contemplated.[1] See VIOLENCE.

On the subject of ill-will, see MALICE; as to estates at will, see TENANT, At will.

Willful; willfully. In common parlance "willful" means intentional, as distinguished from accidental or involuntary; in penal statutes it means with evil intent, with legal malice, without ground for believing the act to be lawful.[2]

The ordinary meaning of "willful," in statutes, is not merely "voluntary," but with a bad purpose.[3]

Sometimes it means little more than "intentional" or "designed." But that is not its ordinary signification in criminal and penal statutes; in them it most frequently conveys the idea of legal malice in greater or less degree — implies an evil intent without justifiable excuse. "Voluntary" is, therefore, a weaker word: it means simply "willing."[4]

Doing or omitting to do a thing "knowingly and willfully" implies not only a knowledge of the thing, but a determination with a bad purpose to do it or to omit doing it.[5]

"Willful," frequently means more than merely "intentional;" it sometimes implies perverseness, deliberate design, malice.[6]

"Willfully," in an indictment, implies that the act is done knowingly and of stubborn purpose, but not necessarily of malice.[7]

Referring to an act forbidden by law, means that the act must be done knowingly and intentionally — that with knowledge the will consented to, designed and directed the act.[8]

Only want or defect of will will protect the doer of a forbidden act from the punishment annexed thereto. An involuntary act induces no guilt: the concurrence of the will, when it has its choice to do or to avoid an act, being the only thing that renders human action either praiseworthy or culpable. To make a

[1] Commonwealth v. Powell, 51 Pa. 441 (1866).

[2] People v. Hovey, 5 Barb. 118 (1849), Selden, J.

[3] Anshutz v. Miller, 81 Pa. 212 (1876).

[4] Woods v. Waddle, 44 Ohio St. 457 (1886); McGill v. Deming, *ib.* 654 (1887).

[5] See Ency. Brit.; 45 Law Times, 273, 278 (1868); 37 Litt. Liv. Age, 543 (1853): 12 Penn. Monthly, 894 (1881); Jeaffreson, "Lawyers."

[6] Crosswell v. People, 13 Mich. 427 (1865), Cooley, J.

[1] 4 Bl. Com. 212, 224.

[2] State v. Clark, 29 N. J. L. 96 (1860), Whelpley, J.; Thomas v. State, 14 Tex. Ap. 204 (1883); Minkler v. State, 14 Neb. 183 (1883); United States v. Three Railroad Cars, 1 Abb. U. S. 201 (1868).

[3] Commonwealth v. Kneeland, 20 Pick. 220 (1838), Shaw, C. J.

[4] [State v. Preston, 34 Wis. 683-84 (1874), Dixon, C. J.; 10 Ala. 928; 36 *id.* 285; 37 *id.* 154; 9 Metc. 268.

[5] Felton v. United States, 96 U. S. 703 (1877), Field, J.

[6] Wales v. Miner, 89 Ind. 128 (1883), Franklin, C.; State v. Smith, 52 Wis. 136 (1881).

[7] State v. Massey, 97 N. C. 468 (1887).

[8] Woodhouse v. Rio Grande R. Co., 67 Tex. 419 (1887), Stayton, A. J See also Highway Commissioners v. Ely, 54 Mich. 180-81 (1884), cases.

crime complete there must be both a will and an act. As no temporal tribunal can search the heart or fathom the intentions of the mind, otherwise than as demonstrated by outward actions, it cannot punish what it cannot know. Hence, an *overt act*, some open evidence of an intended crime, is necessary to demonstrate depravity of will, before a man can be punished. . . To constitute a crime against human laws, there must be a vicious will and an unlawful act consequent thereon. The will does not join with the act in three cases: (1) When there is a defect of understanding. Where there is no discernment there is no choice, and where no choice there is no *act of the will*, which is merely a determination of one's choice to do or to abstain from doing a particular action. (2) Where there is understanding and will sufficient, but it is not called forth or exerted at the time the action is done; as, in cases of chance and ignorance. (3) When the action is constrained by outward force. Here the will disagrees as to the act which the person is obliged to perform. To the first class of cases are referred *infancy, lunacy*, and *intoxication:* to the second class, *misfortune* and *ignorance;* to the third class, *compulsion* or *necessity*,[1] qq. v.

See CONSENT; CRIME; DURESS; INSANITY; INTENTION; KNOWLEDGE, 1; MALICE; MIND; VOLO; VOLUNTARY, 1. See also GOOD-WILL.

2. The legal declaration of a man's intention which he "wills" to be performed after his death.[2]

A disposition of real and personal property to take effect after the death of the testator.[3]

It expresses "the will" of the maker as to the direction his property shall take.[4]

A declaration of the mind, either by word or writing, in disposing of an estate; to take place after the death of the testator.[5]

An instrument in any form, if the obvious purpose is not to take place till after the death of the maker, operates as a will. The essence of the definition is, it is a disposition to take effect after death. The form is immaterial, if the substance is testamentary.[6]

An instrument by which a person makes a disposition of his property to take effect after his decease.[7]

A will is to be considered as the "testament," and the instrument. The testament is the result and effect in law of what is the will; that consists of all the parts, including a codicil.[1] See further TESTAMENT.

Whatever the form of the instrument, if it vests no present interest but only appoints what is to be done after the death of the maker, it is "testamentary."[2]

If the intention is to convey a present estate, though the possession be postponed until after the death of the maker, the instrument is a "deed;" if an interest accruing after his death, it is a "will."[3]

If the disposition necessarily takes effect after the death of the maker, and that intention is clear, the instrument is a will, though the maker supposed it to be some other kind of a paper.[4]

If the instrument is such that, upon delivery, interests vest, though to be enjoyed in possession in the future, or obligations are created which are enforceable by the parties respectively, it is a contract *inter vivos*.[5]

An instrument in the form of a deed, signed, sealed, and delivered as such, but intended as a posthumous disposition of a maker's property, is testamentary.[6]

Last will. The last will made.

If two or more wills are in contemplation, this expression appropriately designates the one made after the other or others; otherwise, "last" is redundant, the word "will" alone fully expressing the idea.

Nuncupative will.[7] Such will as depends upon merely oral evidence, being declared by the testator *in extremis*, before a sufficient number of witnesses, and afterward reduced to writing.[8]

In early times, a will of chattels was good without writing — that being then little known. By the time of Henry VIII (1509), reading and writing had become so widely diffused that verbal or unwritten wills were confined to extreme cases. A case of perjury in connection with one will, as well as the opportunities for imposition they have ever afforded, caused nuncupative testaments to be placed under restrictions by the Statute of Frauds and Perjuries of 29 Chas. II (1678), c. 3. By 1 Vict. (1837), c. 26, §§ 9, 11,— preceded by 1 Will. IV (1830), c. 20 — the privilege was confined to soldiers "in actual military service" and to mariners and seamen "at sea," and extended to personalty

[1] 4 Bl. Com. 20–22.

[2] 2 Bl. Com. 499; Smith *v.* Bell, 6 Pet. *75 (1872); 127 U. S. 309; 80 Pa. 170; 11 Lea, 323.

[3] 4 Kent, 501.

[4] McRee *v.* Means, 34 Ala. 361 (1859), Walker, C. J.

[5] Hubbard *v.* Hubbard, 12 Barb. 153 (1851), Brown, J., citing 7 Bac. Ab. 299.

[6] Frew *v.* Clarke, 80 Pa. 178 (1875), cases, Mercur, J.

[7] Younger *v.* Duffie, 94 N. Y. 539 (1884), Earl, J. See also Wilks *v.* Burns, 60 Md. 68 (1882); Cover *v.* Stem, 67 Md. 449 (1887), Alvey, C. J.

[1] Fuller *v.* Hooper, 2 Ves. Sr. 342 (1750), Hardwicke, Ld. C.; Alsop's Appeal, 9 Pa. 382 (1848).

[2] Turner *v.* Scott, 51 Pa. 134 (1866), Woodward, C. J.

[3] Williams *v.* Tolbert, 66 Ga. 128 (1880), Crawford, J.; Ga. Code, § 2295; Sperber *v.* Balster, *ib.* 317, 321 (1881), Jackson, C. J.

[4] Kelleher *v.* Kernan, 60 Md. 442–43 (1883), cases, Irving, J.; Cunningham *v.* Davis, 62 Miss. 366 (1884).

[5] Book *v.* Book, 104 Pa. 345 (1883).

[6] Cover *v.* Stem, 67 Md. 449 (1887), Alvey, C. J.; Habergham *v.* Vincent, 2 Ves. Jr. 230 (1793). See generally 19 Cent. Law J. 46–50 (1884), cases; 92 Am. Dec. 383–89, cases. On contracts to dispose of property by will, see 37 Cent. Law J. 503 (1888), cases.

[7] Nun-cu'-pative. L. *nomine capere*, to call by name; *i. e.*, to declare publicly in solemn words the disposition to be made, or who shall be executor. See Prince *v.* Hazleton, 20 Johns. 519 (1823).

[8] 2 Bl. Com. 500.

only. These statutes, which, in substance, have been re-enacted here, receive a strict construction. The deceased must, furthermore, possess testamentary capacity, be in contemplation of death, without time to make a written will, and clearly evince, by words or signs, an intention to dispose of his property.[1]

In England, while property continued in a man only for his life, wills were unknown. In more modern times, a person could dispose of but one-third of his movables from his wife and children. No will of lands was permitted till 1541, and then of a portion only. Indeed, wills and successions are creations of municipal law exclusively.[2]

Statute of wills. Statute of 32 Henry VIII (1541), c. 1, which enabled a person seised in fee-simple, socage tenure, to devise lands according to his own pleasure, except to a body corporate, and enabled a person holding lands in chivalry to devise two-thirds thereof.[3]

Later statutes, notably that of 7 Will. IV and 1 Vict. (1837), c. 26, removed all restrictions.

Our ancestors imported the English law on the subject of wills. Statutory regulations, which are substantially alike in all the States, follow the English statutes, especially the Statute of Wills, so called.[4]

In New York, for example, every person must devise within the limitation of the Statute of Henry VIII, which became part of her law upon the adoption of the constitution of 1777, and, with modifications, remains so to this day.[5]

Power to dispose of property by will rests almost wholly upon statutes, the directions of which must be substantially complied with.

No right is now more solemnly assured than the power to dispose of property by will as the owner pleases. This privilege creates an incentive to practice industry and frugality. The law secures equality of distribution when the owner dies intestate. The object of a will is to produce *inequality* either in the disposition or use, to make preferments; and, in this matter, a sane man, not unlawfully influenced, has a right to be governed by his prejudices.[6]

If a testator does not violate any principle of public policy, religion, or morality, nor infringe upon any statute, he may make such disposition of his property as he sees proper.[7]

A will "speaks from the death" of the maker; that is, takes effect, as respects its dispositions, from the moment of his decease.

The testator must be of years of discretion, now generally twenty-one, and of testamentary capacity. The draughting, signing, attesting, publishing, revoking, probating, etc., are matters also largely regulated by statutes, and explanatory decisions.

An important general principle is that personalty is to be disposed of according to the law of the domicil of the testator, while realty must be disposed of according to the law in vogue at the place where the property is situated.[1]

A court of equity has power to correct mistakes in a will apparent upon the face of the instrument or made out by a due construction of its terms: the intention is the will.[2]

The intent of the testator is the cardinal rule by which to construe a will. If that intent can be clearly perceived, and is not contrary to a positive rule of law, it must prevail, although, in giving effect to it, some words should be rejected, or so restrained, as materially to change the literal meaning of the particular sentence.[3]

Wills being the least artificial of all instruments, often the productions of persons ignorant of the law and of the correct use of the language in which they are written, are the least to be governed by the settled use of technical legal terms. It may well be doubted if any other source of enlightenment is of much assistance than the application of natural reason to the language of the instrument under the light thrown upon the intent of the testator by the extrinsic circumstances surrounding the execution, and connecting the parties and the bequests and devises with the testator and with the instrument itself.[4]

When interpreting a will, the attending circumstances of the testator, such as the condition of his family, the amount and character of his property, are to be considered. The interpreter is to place himself in the position occupied by the testator when he made his will, and from that standpoint discover what was intended.[6]

Little aid is to be derived from a resort to formal rules, or from a consideration of judicial determinations in cases apparently similar. It is a question in each case of the reasonable interpretation of the words of the particular will, with a view to ascertaining the testator's intention.[6]

See further ADMINISTER, 4; AFTER; AMBIGUITY; ATTEST; BEQUEST; CANCEL; CODICIL; CONTEST; CONVERSION, 1; CY PRES; DEMONSTRATIO; DESCENT; DESCRIPTION, 2; DESIRE; DEVISE; DONATIO; EFFECTS;

[1] See 2 Bl. Com. 500-1; 4 Kent, 517; 1 Jarman, Wills, 97-98; 1 Williams, Exec. 59; Redfield, Wills, 185; Sykes *v.* Sykes, 2 Stew. 364 (Ala., 1830): 20 Am. Dec. 44-48, cases; Moffett *v.* Moffett, 67 Tex. 642 (1887).

[2] 2 Bl. Com. 12, 211, 491-92. See 20 Am. Law Rev. 502 (1886); Hadley, Rom. Law, 294-325; Maine, Anc. Law, 171-217.

[3] 2 Bl. Com. 375.

[4] 4 Kent, 504; Williams, R. P., Ch. X, notes to 4 Am. ed.; 3 Jarman, Wills, 731, ed. by R. & T.; 1 Whart. Ev. § 984.

[5] United States *v.* Fox, 94 U. S. 321 (1876).

[6] McMasters *v.* Blair, 29 Pa. 304 (1857); Stevenson *v.* Stevenson, 33 *id.* 471 (1859); Cauffman *v.* Long, 82 *id.* 77-78 (1876).

[7] Bainbridge's Appeal, 97 Pa. 485 (1881).

[1] See 25 Am. Law Reg. 153-62 (1886), cases.

[2] 1 Story, Eq. §§ 179-80; 2 Jarman, Wills, 189; 1 Redfield, Wills, 501; Effinger *v.* Hall, 81 Va. 98 (1885), cases.

[3] Finlay *v.* King, 3 Pet. *377 (1830), Marshall, C. J.

[4] Clarke *v.* Boorman's Executors, 18 Wall. 502 (1873), Miller, J. Approved, Giles *v.* Little, 104 U. S. 293 (1881), Woods, J.

[6] Drake *v.* Hawkins, 98 U. S. 324 (1878), cases, Strong, Justice.

[6] Robison *v.* Female Orphan Asylum, 128 U. S. 707 (1887), cases, Matthews, J.; Colton *v.* Colton, 127 *id.*

ELECTION, 2; EQUALLY; EXECUTOR; FIRST, 2; HEIR, 1; HOLOGRAPH; IGNORANCE; INFLUENCE; INHERIT; INOFFICIOUS; INSANITY, 2 (5); ISSUE, 5; ITEM; LEGACY; LOST, 2; MONEY; MORTMAIN; MUTILATE, 2; PART, 1, Reasonable; PERPETUITY, 2; POWER, 2; PRECATORY; PRESENCE; PROBATE; PROPERTY; PROVIDED; PUBLICATION; PUNCTUATION; READING; REPRESENTATIVE (1); RES, 2; RESIDUE; SAID; SCRIPT; SCRIVENER; SEPARATE, 2; SIGN; SO; SOLE; SUBSCRIBER, 2; THEN; TRUST, 1; UMPIRE; WHEN; WRITING.

WIND. See DANGERS; TEMPEST.

Wind and water. See WEAR AND TEAR.

WINDOW. See BAY-WINDOW; LIGHT.

WIND UP. To liquidate the assets of an association, as, a partnership or corporation, for purposes of distribution. Whence "winding-up" statutes, and proceedings. See LIQUIDATOR.

WINE. See LIQUOR.

WISDOM. See DISCRETION, 2.

WISH. See PRECATORY; VOLO; WANT.

WIT.[1] To know, have knowledge of. To wit explains what precedes, being equivalent to "that is to say," "more particularly," "namely," "*videlicet.*"[2] See VIDERE, Videlicet.

Wittingly. Relating to the wit or understanding; knowingly, designedly.[3]

Knowingly, with knowledge, by design.[4]

WITCHCRAFT. The practices of a witch: a woman (formerly, a man or a woman) supposed to be able to affect the happiness and destiny of other persons by the exercise of supernatural power acquired from intercourse with evil spirits; conjuration; sorcery; enchantment.

"A species of offense," says Blackstone, "against God and religion, of which one knows not well what account to give, is witchcraft, conjuration, enchantment or sorcery. The thing is a truth to which every nation hath borne testimony, by examples seemingly well attested or by prohibitory laws."

The civil law punished with death sorcerers and those who consulted with them, imitating the Mosaic law "Thou shalt not suffer a witch to live" [by her craft?] Our own [English] laws have been equally penal, condemning culprits to the flames. Statute 33 Henry VIII (1542), c. 8, made witchcraft and sorcery felony without benefit of clergy; and 1 James I (1603), c. 12, enacted that persons invoking any evil spirit, or consulting, covenanting with, entertaining, employing, feeding, or rewarding any evil spirit, or hurting any person by such infernal arts, should be guilty of felony without benefit of clergy, and suffer death; and that if any person attempted by sorcery to discover hidden treasure, to restore hidden goods, to provoke unlawful love, or to hurt any man or beast, he or she should suffer imprisonment and pillory for the first offense, and death for the second. Not a few of those executed under these laws confessed guilt at the gallows. Louis XIV of France forbade the courts to receive informations of witchcraft. Statute 9 Geo. III (1769), c. 5, disallowed prosecutions for conjuration, witchcraft, sorcery, or enchantment. But pretending to use witchcraft, tell fortunes, or discover stolen goods, by skill in the occult sciences, is still a punishable misdemeanor in England,[1] and in the States.

WITH. Along with, in place or time.

That an affidavit is to be filed "with a pleading" does not necessarily imply a filing at the same time.[5]

It is a sufficient compliance with the rule that "the plaintiff shall file with his declaration an affidavit of claim," that they be both filed at the same time, and this is not affected by their being detached, or by the place of deposit in the office.[6]

With all faults. See FAULT.

With interest. See INTEREST, 3.

With strong hand. See HAND, 2.

WITHDRAW. To take away, as, to withdraw a record; to mark off, as, to withdraw an appearance once entered of record in a cause; to substitute one for another, as one plea for another plea; to cause to leave, to remove, to retire, as, to withdraw a juror from the box; to quit or sever connection

809-10 (1888); Hatcher *v.* Hatcher, 80 Va. 171 (1885), cases; 50 Mich. 460; 74 Me. 413; 100 Pa. 481; 102 *id.* 247; 16 S. C. 227; 17 *id.* 348.

As to testamentary capacity, in addition to the references to "influence" and "insanity" (*ad fin.*), see 34 Alb. Law J. 4-7 (1886), cases; 4 Law Quar. Rev. 442-48 (1888), Eng. cases; formalities as to execution, 34 Alb. Law J. 485-88 (1886), cases; execution, authentication, and construction, 26 Cent. Law J. 151-56 (1880), cases; implied revocation of, *ib.* 387-91 (1888), cases; costs in contested cases, 18 *id.* 83-86 (1884), cases; lost wills, 39 Alb. Law J. 44-47, 64-67 (1888), cases; distribution of assets in cases of erroneous construction, 28 *id.* 582 (1886) — Irish Law Times.

[1] A. S. *witan*, to know: L. *vid-*, to see. Whence "witness."

[2] See Commonwealth *v.* Grey, 2 Gray, 502 (1854).

[3] Harrington *v.* State, 54 Miss. 493 (1877).

[4] Osborne *v.* Warren, 44 Conn. 359 (1877): Webster.

[1] 4 Bl. Com. 60-62; 3 Coke, Inst. 44; Spectator, 117; 1 Steph. Hist. Cr. Law Eng. 54; 2 *id.* 430-36. See Trial of Suffolk Witches, 6 St. Tr. 687-702 (1665),— Rose Cullender and Amy Duny, who were convicted after half an hour's deliberation by the jury, Sir Matthew Hale presiding, and were executed four days later, neither one confessing the charge, although "much urged to," "the judge and all the court" being "fully satisfied with the verdict;" Trial of Three Devon Witches, 8 *id.* 1018-39 (1682),— with "the substance of their last words and confessions at the time and place of execution." See also 2 West. Law J. 312; 106 North Am. Rev. 176; 45 New Engl. 788.

[5] Hummert *v.* Schwab, 54 Ill. 146 (1870).

[6] Hossler *v.* Hartman, 82 Pa. 55 (1876).

with, to end responsibility in, as, to withdraw from a cause.

"Withdrawing a juror" describes a fiction to which a court may resort when it appears that, owing to some accident or surprise, defect of proof, unexpected and difficult question of law, or like reason, a trial cannot proceed without injustice to a party.[1]

The clerk, under direction from the court, calls a juror out of the box, whereupon the plaintiff objects, or is supposed to object, to proceeding with eleven jurors, and the trial goes over to the next term, the rights of the litigants remaining unimpaired. The court may resort to this practice rather than nonsuit the plaintiff. The costs may be imposed upon one party, be divided between both, or abide the event of the continued suit.[2]

See GUILTY; NONSUIT; RETRAXIT.

WITHIN. May refer to a place or a period of time. Compare CONTAINED.

Referring to place, may mean on the line or outside of. Thus, a horse in the street, breaking down a fence, is doing damage "within the inclosure."[3]

"Within thirty days" from May thirteenth includes June twelfth as the last day; that is, the first day is excluded and the last included.[4] See further DAY.

WITHOUT. 1. Outside, beyond: as, "without the State;"[5] "without the allegiance;"[6] "without the jurisdiction."

2. With the omission of; with the exclusion of, excluding; independently of; without any: as, without appeal, or exception; without children, heirs, or issue; without day, defalcation, notice, recourse, reserve, *qq. v.*

"Without being licensed" is of the same import and effect as "not licensed" or "not being licensed."[7]

Without this, etc. See TRAVERSE.

WITNESS.[8] 1, *n.* One who gives evidence in a cause before a court.[9]

A most general term, including every person from whose lips testimony is extracted to be used in any judicial proceeding.[10]

An "affiant" or "deponent" is always a witness, but a witness is not necessarily an affiant or deponent.[10]

2, *v.* To bear testimony to; to have personal knowledge of the execution of an instrument.

Adverse witness. A witness who is hostile toward, or who testifies strongly against, a party.

Attesting witness. One who signs an instrument, certifying that it was executed in his presence.

At the time of attestation he must be "competent" to testify in court on the subject-matter.[1] See further ATTEST.

Competent witness. A person who is legally qualified to give testimony. Opposed, *incompetent witness.*

In some States wills devising land must be attested by competent witnesses, unless wholly written by the devisor, as, in Kentucky. In Pennsylvania the "competent witnesses" who are to prove a will need not be subscribing witnesses.[2]

In Virginia, by the code of 1873, c. 118, sec. 4, unless the will, about to be attested, be olograph, the witnesses must subscribe *as* witnesses, though that word need not be used.[3] See further COMPETENT.

Credible witness. A witness who is deserving of confidence; a person who, being competent to testify, is worthy of belief.

In some States a will is to be attested by "credible witnesses." It has been held that "credible" in this connection means "competent."[4]

In a statute empowering an examined copy to be made and sworn to by "credible witnesses," in the absence or inability of the clerk of a probate court, held to mean witnesses giving testimony under the sanction of an oath, and who could be cross-examined as to the existence of the record and the accuracy of the copy.[5] See further CREDIBLE, 2.

Interested witness. A witness who is directly interested in the result of the suit, or in the record as evidence.

The common-law rules disqualifying for interest have been generally abrogated, except as to personal communications with a dead party. See *post.*

Subscribing witness. A person who, being present at the execution of an instrument, at that time and at the request of the

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[1] [Abbott's Law Dict.

[2] See People *v.* Judges of New York, 8 Cow. 180 (1828), cases; Winsor *v.* The Queen, L. R., 1 Q. B. *298–99 (1866), cases; 3 Chitty, Pr. 917.

[3] Pettit *v.* May, 34 Wis. 672 (1874).

[4] McDonald *v.* Vinette, 58 Wis. 620 (1883).

[5] 91 U. S. 277; 97 *id.* 637.

[6] 9 Mass. 456.

[7] Commonwealth *v.* Thompson, 2 Allen, 508 (1861), cases.

[8] A. S., *witnes*, knowledge, testimony. See WIT; SUIT, 1.

[9] Barker *v.* Colt, 1 Root, 225 (Conn., 1790).

[10] [Bliss *v.* Shuman, 47 Me. 252 (1859), Appleton, J.

[1] Jenkins *v.* Dawes, 115 Mass. 601 (1874), Gray, C. J.; Haven *v.* Hilliard, 23 Pick. 17–18 (1839), cases.

[2] Frew *v.* Clarke, 80 Pa. 178–79 (1875).

[3] Peake *v.* Jenkins, 80 Va. 296 (1885).

[4] See Amory *v.* Fellowes, 5 Mass. *298 (1809); Sears *v.* Dillingham, 12 *id.* *361 (1815); Hawes *v.* Humphrey, 9 Pick. *356 (1830); Bacon *v.* Bacon, 17 *id.* 135 (1835); Haven *v.* Hilliard, 23 *id.* 17–18 (1839); Hall *v.* Hall, 18 Ga. 44–45 (1855); Jones *v.* Larrabee, 47 Me. 476 (1860); Estep *v.* Morris, 38 Me. 424 (1873). *Contra*, Windham *v.* Chetwynd, 1 Burr. 417 (1758), Ld. Mansfield, considering 29 Charles II, c. 3.

[5] Dibble *v.* Morris, 26 Conn. 495 (1857).

party, attaches his signature to it; or, a person who, though not so present, yet subsequently in the presence of the party, who acknowledges the signature and requests him to sign, affixes his signature.[1]

At common law a subscribing witness was to be called to prove the execution of the instrument, but never as to a collateral matter; a party was not sufficient, except when the subscribing witness was incapacitated. He is not called when an opponent produces a writing on notice and claims an interest under the writing, nor when he refuses to produce the writing, nor where an acknowledgment makes a writing evidence. An attesting witness proves his own signature only.[2]

Swift witness. A witness who is very eager to testify.

Zealous witness. A witness who evinces partiality for the party who calls him.

The tendency is to admit all persons to testify who can furnish relevant, material evidence, leaving the jury to judge of the credibility of each witness.

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried."[3]

That enactment was intended to admit the testimony of witnesses previously incompetent on account of interest or of being parties. It introduced a principle extensively adopted in the States.[4]

"*Provided*, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity, and admiralty."[5]

The purpose in preventing a party from testifying, where the adverse party is an executor or administrator, is to guard the estates of decedents against fraudulent defenses and claims, or unfounded causes of action.[6]

In trials at common law a party to the record could not be a witness for or against himself or his adversary. The purpose of the statutes is to put the parties on a footing of equality with other witnesses, that is, to make all admissible to testify for themselves, and compellable to testify for others. The statutes are remedial, and to be construed accordingly.[7] See INTEREST, 1.

The exception of executors, administrators, and guardians leaves other suitors, including the United States, under the operation of the common law.[8]

A wife is not given capacity to testify for (or against) her husband.[9]

In a criminal case the defendant, at his own request, shall be a competent witness. But failure to make himself a witness shall create no presumption against him.[10]

Like remedial statutes have been enacted in all the States, Delaware and New Mexico excepted. In a few States persons charged with homicide may not testify in their own behalf.[11]

In civil suits a witness may demand prepayment of expenses.[12] Non-attendance, after a subpœna has been duly served, is an offense against public justice, and a contempt of court, for which an attachment may issue and a fine, or a fine and imprisonment, be imposed. A writ of *habeas corpus* will secure the attendance of an imprisoned witness. By common law in criminal cases, and by statutes in civil cases, a witness likely to disappear before trial may be required to give bail for his appearance.[13]

On calling witnesses before either house of Congress or a committee thereof, see R. S. § 859, and CONTEMPT, 2.

See further AGED; ANCIENT, 2; ARREST, 2 (2, 3); CALL, 1; COMMUNICATION, Privileged, 1; CONFRONT; CONTEMPT, 1; CRIME; DECISION, Rules of; DEPOSITION; DUMB; EXAMINATION, 9; EXPERT; EVIDENCE; FALSUS, In uno; GOING; HUSBAND; IMPEACH, 3; INFAMY; INFANT; INSANITY, 2 (1); LETTERS, 4, Rogatory; OATH; OPINION, 1; PARTY, 2; QUESTION, 1; REFRESH; REPUTATION; SLANDER, 1; SUBPŒNA, 3; TESTIFY; TESTIMONY; TESTIS; TURPITUDE; VOUCH.

WITTINGLY. See WIT.

WOLF'S HEAD. See CAPUT, Lupinum.

WOMAN. May mean any human being of the female sex, or an adult female.

In the United States unmarried women have all the *civil* rights of men: they may make contracts, sue and

[1] Huston *v.* Ticknor, 99 Pa. 238 (1881), Paxson, J.; 1 Greenl. Ev. § 569 *a*, cases; Cussons *v.* Skinner, 11 M. & W. 168 (1843); Hollenback *v.* Fleming, 6 Hill, 304 (1844), cases.

[2] 1 Whart. Ev. §§ 705–40, cases; 1 Greenl. Ev. §§ 272–78, cases.

[3] Act 2 July, 1864, § 3: R. S. § 858.

[4] United States *v.* Ten Thousand Cigars, Woolw. 195 (1867); Rison *v.* Cribbs, 1 Dill. 184 (1870).

[5] Act 3 March, 1865: R. S. § 858, cases. See also Rice *v.* Martin, 7 Saw. 338–40 (1881), cases.

[6] Roberts *v.* Briscoe, 44 Ohio St. 601 (1887); Dudley *v.* Steele, 71 Ala. 426 (1882). As to testifying to communications with deceased persons, see 36 Alb. Law J. 84–90 (1886), cases.

[7] Texas *v.* Chiles, 21 Wall. 490–91 (1874), Swayne, J.

[8] Green *v.* United States, 9 Wall. 658 (1869); 1 Whart. Ev. §§ 457–90, cases.

[9] Lucas *v.* Brooks, 8 Wall. 452 (1873).

[10] Act 16 March, 1878: 1 Sup. R. S. 312.

[11] 1 Whart. Ev. §§ 464–72, cases; 27 Cent. Law J. 328–32 (1888), cases; 4 Cr. Law M. 333, 397.

[12] O'Neil *v.* Kansas City, &c. R. Co., 31 F. R. 666 (1887); 1 Whart. Ev. § 464.

[13] 1 Whart. Ev. §§ 381–85, 414, cases. As to privileges of witnesses, see 61 Alb. Law J. 144, 183, 244, 323, 344, 383, 403 (1885), cases; as to "utterances," 27 Am. Law Reg. 714–19 (1888), cases, and 26 Cent. Law J. 2–8 (1888), cases.

be sued, be trustees and guardians, be witnesses, and attest all kinds of papers. But exercise of *political* powers has not been generally conferred upon them: while she is a citizen (*q. v.*), she is not eligible to office, nor entitled to vote, nor has she a constitutional right to practice law.[1]

It is not one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life. The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution is repugnant to the idea of the wife adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of common law that it became a maxim that a *wife* had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most of the States; as, that she, without his consent, is incapable of making a contract binding on either of them. This incapacity renders her incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor at law. That *unmarried women* are not affected by the incapacities which arise out of the married state are exceptions to the general rule. But the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases. It is within the province of legislation to ordain what offices, positions, and callings shall be filled and discharged by men, and what by men or women.[2]

Act of 15 February, 1879, admits to practice before the Supreme Court any woman of good character who shall have been a member of the bar of any State or Territory, or of the supreme court of the District of Columbia, for three years.[3]

The tendency of legislation, and of the decisions of the higher courts, is toward the admission of women to the legal profession, upon equal terms with men.[4]

In a few States a woman may serve as a recorder of deeds, be appointed a notary public, be eligible to a school or a city office and vote for nominees for such offices, and hold the office of overseer of the poor. In Illinois by statute[1] no person is precluded from any occupation, profession, or employment (except military) on account of sex, the statute not affecting the eligibility of women to an elective office, nor enabling them to serve as jurors, nor permitting them to labor on the streets; but, by construction, it allows them to be appointed masters in chancery.[2]

In the discretion of the head of any department of the general government she may be appointed to any clerkship authorized by law, upon the same conditions and with the same compensation as are prescribed for men.[3]

She may be employed as customs inspector to search the baggage and persons of females.[4]

When women are excluded from the right to vote for particular officers, they are excluded from the right to hold the offices.[5]

Compare FEME. See BURN; CITIZEN; FEUDAL, System; HUSBAND; MAN; PERSON; PRIVILEGE, 1; PRONOUNS; SCOLD; WIDOW; WIFE; WITCHCRAFT.

WOOD. See SOUND, 2 (1); TIMBER.

Wood-cut. See COPYRIGHT; PRINT.

Wooden buildings. See POLICE, 2.

Woods. Forest; woodland.

A field grown up in broom-sedge and wire-grass, surrounded by an old fence and used as a pasture, is not "woods" within the meaning of a law against setting fire to a woods.[6]

But an old field, "turned out," without fencing around it, grown up in broom-sedge and pine bushes, some of which are head high, is a "woods," within such statute.[7]

The reference, in such cases, is to forest lands in their natural state, in contradistinction to lands cleared and enclosed for cultivation.[8]

A sale of "standing wood" includes trees suitable for timber as well as those for fuel.[9] See FIRE, Set on.

WOOLSACK. If the lord chancellor "be a peer, he ought regularly to be placed at the top of the dukes' bench, on the left of the throne; and if a commoner, upon the uppermost sack in the Parliament chamber, called the lord chancellor's woolsack."

"For convenience, here he generally sits, though a peer, and here he puts the question, and acts as prolocutor; but this place is not considered within the

[1] United States *v.* Anthony, 11 Blatch. 200 (1873); Minor *v.* Happersett, 21 Wall. 162 (1874); United States *v.* Reese, 92 U. S. 214 (1875); 16 How. 287; 1 MacArthur, 169; 43 Cal. 43; 39 Ga. 282.

[2] Bradwell *v.* Illinois, 16 Wall. 140-42 (1872), Bradley, J.: s. c. 55 Ill. 535 (1869).

[3] 20 St. L. 292: 1 Sup. R. S. 410.

[4] *Re* Hall, 50 Conn. 131 (1882), Park, C. J.: R. S. 1875; *Re* Goodell, 48 Wis. 693 (1879), Cole, J.: R. S. 1878; *Re* Kilgore, 17 W. N. C. 475 (Pa., 1886): Act May, 1885; s. c. 14 *id.* 80, 255, 466; 17 *id.* 563-68, cases. *Contra*, Robinson's Case, 131 Mass. 376-84 (1881), cases, Gray, C. J.: Stat. 1876.

[1] R. S. 1874, p. 478.

[2] Schuchardt *v.* People, 99 Ill. 505 (1881).

[3] R. S. § 165: Act 12 July, 1870.

[4] R. S. § 3064: Act 18 July, 1866.

[5] Atchison (County Judge) *v.* Lucas, 83 Ky. 464 (1885).

[6] Achenbach *v.* Johnston, 84 N. C. 264 (1881).

[7] Hall *v.* Cranford, 5 Jones, L. 4 (N. C., 1857).

[8] Averitt *v.* Murrell, 4 Jones, L. 323 (1857).

[9] Strout *v.* Harper, 73 Me. 273 (1881).

House, and when he is to join in debate as a peer he stands in front of his proper seat, at the top of the dukes' bench."

"There are woolsacks for the judges and other assessors, as well as for the lord chancellor. They are said to have been introduced into the House of Lords as a compliment to the staple manufacture of the realm; but I believe that in the rude simplicity of early times a sack of wool was frequently used as a sofa."[1]

WORDS. Words for the most part do not represent distinct thoughts; only the parts into which a thought or conception has been, or may be, divided by an analytic process.[2]

Words get their point and meaning almost entirely from the time, place, circumstances, and intent with which they are used.[3]

The same word may have different meanings even in the same sentence.[4]

In ordinary writings any words may be used which express the intention of the parties: the words ought to subserve the intention. Words are to be taken effectively, according to the subject-matter, and so that the purpose may not fail; are to be taken the more strongly against the party who proposes the phraseology; such as are of general import are to be construed with reference to the subject-matter, and will be controlled by specific or technical terms: words of an art are to be understood as in the art or trade. In cases of doubt, written control printed words.

It is often necessary to ascertain whether a word has acquired a special meaning, as applied to the subject-matter of a contract, or whether it is used with a restricted signification by authors or jurists or those conversant with the business to which the contract relates. It is not always safe to adopt the mere etymological meaning, or such as lexicographers give.[5]

Words are to be taken in their most usual and known signification; technical terms, according to the interpretation of the learned in each art, trade, or science.[6]

The courts take notice of the meaning and force of common words, and also of technical words where the meaning is well settled by usage, and, when necessary, they define them to the jury.[7]

It has been a source of perplexity to those who attempt to reduce discoveries to scientific classification, that old terms, with well-defined meanings, are applied to things wholly new, as "road" in railroad, *q. v.* To avoid this result, modern science is enriched with compounds of Greek and Latin words.[8]

In addition to particular words or terms, see generally ART, 3; CONSTRUCTION; DEFAMATION; ETYMOLOGY; EXPRESSIO; FOLIO; GENDER; GENERAL, 6; GRAMMAR; INFERIOR; NOSCITUR; NUMBER; PROVOCATION; RES, Ut res; TERM, 1; USUS, Utile; WRITING. Compare VERBUM.

WORK. The "work" and the "duty" of a person, as of a brakeman, mean the same thing.[9] See BUSINESS; LABOR, 1; SERVICE, 1.

Work and labor. See COUNTS, 4, Common.

Work-beast. See HORSE.

Working-days. Days that succeed each other, exclusive of Sundays and holidays.[10]

Lay-days. Time to load and unload a cargo.[11]

Running days. Successive or consecutive days, whether working-days or not.[12]

In a charter-party, days as they run, day by day, from a given time.[13]

WORKS. The structures and grounds which compose a factory or manufacturing establishment.

In a statute exempting from taxation "all machines, vehicles and carriages, belonging to the company, with all their works," the word "works" was held to include real estate.[14]

"Works of all kinds," as used in a provision for licensing in a city charter, does not include the business of insurance agents.[15]

Works of charity, or of necessity. See CHARITY, 2; NECESSITY; SUNDAY; WORSHIP.

Works of fine arts. See ART, 2; COPYRIGHT.

WORLD. "The whole world," in the law of notice, means all persons who are interested or who may become interested in a transaction or proceeding. See NOTICE, 1.

Worldly employments. See SUNDAY.

WORRY. 1. Compare TROUBLE.

2. To pursue, run after, harass; as, for a dog to worry sheep or fowls.

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[1] Campbell, Lives of the Lord Chancellors, vol. I, pp. 15–16, note.

[2] [Lieber, Hermen, 3 ed., 14, n.

[3] Dillard *v.* State, 41 Ga. 280 (1870).

[4] Minot *v.* Harris, 132 Mass. 533 (1882).

[5] Dole *v.* New England Mut. Mar. Ins. Co., 6 Allen, 386–87 (1863), Bigelow, C. J.

[6] Pea Patch Island Case, 1 Wall. Jr., cxlv (1848); People *v.* May, 3 Mich. 605 (1855); 1 Col. 359.

[7] State *v.* Baldwin, 36 Kan. 22 (1886), cases. The lower court explained "anæsthetic," "chloroform," 'poison," and "asphyxia."

[8] Bridge Proprietors *v.* Hoboken Co., 1 Wall. 147 (1863), Miller, J.

[9] Chicago, &c. R. Co. *v.* Bragonier, 119 Ill. 63 (1886).

[10] Pedersen *v.* Eugster, 14 F. R. 492 (1882): 1 Cal. 498.

[11] See 3 Kent, 202; 2 Steph. Com. 141; 10 M. & W. 331.

[12] Crowell *v.* Barreda, 16 Gray, 472 (1860), Hoar, J.

[13] Davis *v.* Pendergast, 16 Blatch. 567 (1879), Waite, Chief Justice.

[14] City of Richmond *v.* Richmond, &c. R. Co., 21 Gratt. 607–8 (1872).

[15] State *v.* Smith, 31 Iowa, 496 (1871). See also 21 How. Pr. 1; 5 Abb. Pr. 232

Worrying sheep does not imply tearing them with the teeth; for a dog to pursue and bark at them is worrying them.[1]

In a statute giving the owner of domestic animals, such as fowls, worried by a dog, the right to kill the dog, "worry" means to run after, chase, bark at.[2]

WORSHIP. No definition of this word, as used in "divine worship," "religious worship," "place of worship," and similar expressions, applicable to all cases, has, seemingly, been framed by any court. The word has no technical, legal signification; each case, in which its meaning has been the subject of contention, has been decided upon its own merits.

A Sunday-school is a worshiping assembly.[3]

But a Sunday-school was held not to be contemplated by the expression "divine worship," in an agreement between two congregations for the erection of a common meeting-house, at a time when Sunday-schools were not in vogue in the neighborhood.[4]

One room used as a chapel does not reserve the whole building "for religious worship."[5]

A Christmas-tree festival for Sunday scholars at a school-house is not an assembly for "religious worship."[6]

Camp-meeting grounds belonging to an association deriving profit therefrom are not to be exempt from taxation as a "place of worship."[7]

"Religious worship" has no technical meaning, in a legal sense. Whether a temperance camp-meeting is "a public assembly convened for the purpose of religious worship" is a question of fact.[8]

Receiving compulsory prices for admission to a camp-meeting on Sunday is worldly employment or business, and not within the exception of "works of necessity and charity."[9]

A prosecution for disturbing an assemblage for religious worship will not be sustained by proof that the meeting was for business purposes, though opened with religious exercises.[10]

A building for "religious purposes" is exempt from taxation although used for educational purposes, so long as the use is merely incidental or occasional, or, if habitual, is purely permissive and voluntary and does not interfere with the use for religious purposes, there being no alienation (as, *e. g.*, by lease) of the building in whole or in part for educational uses. Much Sunday-school teaching, though auxiliary to religion, is not purely religious. Buildings for religious worship, or parts of them, are frequently permitted to be used on week days for literary or scientific lectures, or for industrial instruction. Some of these uses, while not wholly religious, are prompted by religion.[1]

See ASSEMBLY, Civil; CHURCH; PARSONAGE; RELIGION; SUNDAY.

WOUND. Within the meaning of 9 Geo. IV (1829), c. 21, s. 12, an injury to the person by which the skin is broken — the whole skin, not the cuticle merely.[2]

Breaking a limb was not, then, a wounding; nor was biting off a finger, or the nose; nor was throwing acid in the face — because, in such cases, no instrument inflicting at least a skin wound was used.[3]

Statute of 24 and 25 Vict. (1861), c. 97, s. 47, makes it an offense to kill, maim, or wound any cattle. "Wound" is distinguishable from "maim," which implies a permanent injury, whereas a wound is any mutilation or laceration which breaks the continuity of the outer skin. The injury may be as great when produced by manual power as by an instrument, though in the former case it is not evidence of so much malice.[4]

In many cases there is great difficulty in determining what constitutes a wound. . . A scratch on the face, by rupturing the cuticle only, without separating the whole skin, is not a wound.[5]

The words "mortal wound," in an indictment for murder by felonious wounding, are superfluous when the indictment alleges a wounding which produces death.[6]

Wounding. As an injury to the limbs or body, consists in giving another some dangerous hurt; an aggravated species of battery.[7]

If death ensues from a wound given in malice, not in its nature fatal, but which, being neglected or improperly treated, causes death, the assailant may be held guilty of murder, unless it clearly appears that the neglect or treatment was the sole cause of the death.[8] See MAYHEM; STAB.

[1] Campbell *v.* Brown, 1 Grant, 83 (1854).

[2] Marshall *v.* Blackshire, 44 Iowa, 478 (1876), Seevers, Chief Justice.

[3] Martin *v.* State, 6 Baxt. 234 (Tenn., 1873).

[4] Gass' Appeal, 73 Pa. 45 (1873).

[5] St. Joseph's Church *v.* Assessors, 12 R. I. 19 (1878).

[6] Layne *v.* State, 4 Lea, 200 (1879).

[7] Summit Grove Meeting Association *v.* School District of New Freedom, 12 W. N. C. 103 (Pa., 1882).

[8] State *v.* Norris, 59 N. H. 536 (1880).

[9] Commonwealth *v.* Weidner, 4 Pa. Co. Ct. R. 437 (1888): Act 22 April, 1794.

[10] Wood *v.* State, 11 Tex. Ap. 318 (1882). *Contra*, Hollingsworth *v.* State, 5 Sneed, 518 (Tenn., 1858).

[1] Saint Mary's Church *v.* Tripp, 14 R. I. 309 (1883), Durfee, C. J.

[2] Moriarty *v.* Brooks, 25 E. C. L. 598 (1834); Rex *v.* Wood, 19 *id.* 564 (1830); Regina *v.* M'Loughlin, 34 *id.* 561 (1838).

[3] Rex *v.* Stevens, 1 Moody, C. C. 409 (1834); Rex *v.* Murrow, *ib.* 456 (1835); Rex *v.* Harris, 33 E. C. L. 700 (1836). See these cases explained, 11 Cox, Cr. C. 127, *infra*.

[4] Regina *v.* Bullock, 11 Cox, Cr. C. 127 (1868), Cockburn, C. J.: s. c., L. R., 1 C. C. 115.

[5] Commonwealth *v.* Gallagher, 6 Metc. 568 (1843), Shaw, C. J.; State *v.* Leonard, 22 Mo. 450 (1856).

[6] Brown *v.* State, 18 Fla. 476 (1881), cases, Randall, C. J.; People *v.* Steventon, 9 Cal. 275 (1858); Commonwealth *v.* Macloon, 101 Mass. 23 (1869).

[7] 3 Bl. Com. 121; 4 *id.* 216; 2 East, P. C. 1076.

[8] Crum *v.* State, 64 Miss. 4 (1886), cases, Cooper, C. J.: 26 Am. Law Reg. 368 (1887); *ib.* 370-71, cases.

WRECK.[1] By the ancient common law, was where any ship was lost at sea, and the cargo or goods were thrown upon the land.[2]

Such goods as, after a shipwreck, are cast upon land by the sea, and left there, within some county.[3]

A ship becomes a wreck when, in consequence of injury received, she is rendered absolutely unnavigable, or unable to pursue her voyage, without repairs exceeding the half of her value.[4]

That "admiralty has no jurisdiction of the wreck of the sea" does not refer to property deemed wreck or shipwrecked, in the sense of the maritime or commercial law, but to "wreck of the sea" in the purely technical common-law sense.[5]

The act of December 23, 1852 (R. S. § 4136), authorizes the issue of a certificate of register or enrollment for any vessel built in a foreign country, but wrecked in the United States, and purchased or repaired by a citizen thereof. "Wrecked" here applies to a vessel disabled and rendered unfit for navigation, whether this condition has been caused by the winds or the waves, by stranding, fire, explosion of boilers, or other casualty.[6]

At common law, to constitute a legal wreck, the goods must come to land. If they continue at sea they are jetsam, flotsam, or ligan.[7] *qq. v.*

Wreck, by the common law of England, belonged to the king or his grantee; but within a year and a day the true owner could claim it or the proceeds.[8]

Here, sea-shore rights were vested in the Colonies; and wreck belongs to the owner of the shore where it is cast, as against a stranger claimant.[9]

The States may by legislation regulate property in wrecks.[10]

Stealing or destroying money or goods from or belonging to any vessel, boat, or raft, in distress, lost, or stranded, or willfully obstructing the escape of any person endeavoring to save his life from such vessel, etc., or holding out any false light or extinguishing any true light, with intent to bring any vessel, etc., on the sea into danger, distress, or shipwreck, are felonies, punishable by fine up to five thousand dollars and with as much as ten years imprisonment.[11]

See ADMIRALTY; BILGED; LOSS, 2; MARITIME; SALVAGE; STRANDING.

[1] *Wrack*, what is cast ashore, drift: A. S. *wreccan*, to drive, force.

[2] [1 Bl. Com. 290; 3 *id.* 106.

[3] Baker *v.* Hoag, 7 N. Y. 558 (1853), Jewett, J.

[4] Wood *v.* Lincoln, &c. Ins. Co., 6 Mass. 482 (1810), Parsons, C. J.; 3 Kent, 322-24.

[5] United States *v.* Coombs, 12 Pet. *77 (1838), Story, J.

[6] Wrecked Vessel, 15 Op. Att.-Gen. 402 (1877), Devens, A.-G. See also The Mohawk, 8 Wall. 570 (1865).

[7] 1 Bl. Com. 292.

[8] 1 Bl. Com. 290-92; 12 Pet. 72.

[9] Baker *v.* Bates, 13 Pick. 257 (1832); 113 Mass. 337.

[10] The Schooner Tilton, 5 Mas. 479 (1830).

[11] Act 3 March, 1825: R. S. § 5358. See also 12 Pet. 72; 1 Bl. Com. 293; 4 *id.* 236; 2 Kent, 321, 357.

WRIT. That which is written: a writing; a mandate or precept.

The king's precept in writing under seal issuing out of some court and commanding something to be done touching a suit or action, or giving commission to have it done.[1]

As used in the statutes of some States, generally means process in a civil suit, while process in a criminal case is denominated a "warrant."[2]

At common law writs in civil actions were either original or judicial writs:

Original writ. When a person had to apply to the sovereign for redress of an injury he sued out an "original writ," or simply an "original," from the court of chancery (wherein all the king's writs were framed). This was a mandatory letter from the king, in parchment, sealed with his great seal, and directed to the sheriff of the county wherein the injury was committed, or supposed to be, requiring him to command the wrong-doer to do justice to the complainant or else to appear in court and answer the accusation.

Whatever the sheriff did in pursuance of this writ he "returned" or certified to the court of common pleas, together with the writ itself. This was the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause.

An original writ was either *optional* or *peremptory*. It was "optional," or a *præcipe*, when in the alternative, commanding the defendant to do the thing required, or show the reason why he had not done it. It was "peremptory," or a *si fecerit te securum*, when it directed the sheriff to cause the defendant to appear in court, without option, provided the plaintiff gave security to effectually prosecute his claim. The former writ issued when something certain was demanded; the latter, when only a satisfaction in general was wanted.[3]

Judicial writ. A mandate, precept, or process issuing, or issued, from a court (of law or equity), or from a judge acting as a judge.

If a defendant, being summoned, neglected to appear, or if the sheriff returned a *nihil* (i. e., nothing whereby the defendant may be summoned, attached, or distrained), a *capias* issued, to take the body of the defendant and have him in court on the day of the return, to answer the complaint. That writ of *capias*, and all other writs subsequent to the original writ, not issuing out of chancery, but from the court into which

[1] Termes de la Ley; Brown's Law Dict.

[2] Stoddard *v.* Couch, 23 Conn. *240 (1854), Waite, J.

[3] 3 Bl. Com. 273-74.

the original was returnable, and being grounded on what passed in that court in consequence of the sheriff's return, were called *judicial* writs. They issued under the private seal of that court, and were teste'd in the name of the chief or senior justice only.[1]

In England, since 1873, all suits begin with a writ of summons. In this country, the courts derive jurisdiction from constitutions, and not from any writ in the nature of the old common-law original writ.[2] See STRAW BAIL.

In some jurisdictions, "original" refers to the writ by which a suit is instituted, as, a writ of summons, and is contradistinguished from the "final" writ or writ of execution. See FINAL, 3.

The forms of writs, by which actions are commenced, were perfected in the reign of Edward the First (1273–1307).[3]

One inherent power in an appellate court is the right to make use of all writs known to the common law, and, if necessary, to invent new writs or proceedings in order to suitably exercise jurisdiction already conferred.[4]

The various species of writs in use take their names from their office or purpose; as, a writ of — assistance, attachment, *capias*, dower, ejectment, entry, error, execution, extent, inquiry, right, summons; prerogative writs, etc. See those substantives, also ABATEMENT, 4; EXIGENCY; JUDGE, p. 575, c. 2; QUASH; PROCESS, 1; RETURN, 2; SERVICE, 6; especially EXECUTION, 3, Writs of.

WRITING. Words traced with a pen, or stamped, printed, engraved, or made legible by any other device.[5]

The expression of ideas by visible letters — on paper, wood, stone, or other material.

When a statute or usage requires a "writing," it must be on paper or parchment; but it is not essential that it be in *ink;* it may be in *pencil*. This rule applies to promissory notes, book accounts, a will or a signature thereto, applications for insurance, and the like.[6]

The notes of an official stenographer, taken when a witness testifies in court, is a taking "in writing."[7]

A judicial order by telegraph is an order "in writing."[8] Compare SUBSCRIBE.

Under a statute which provides that an officer may assign tax certificates "by writing" his name in blank, with his character added, the officer may "stamp" his name and character, with intent to assign a certificate.[1]

A printed theater ticket is a "writing" which may be made the subject of forgery at common law.[2]

A contract, required to be "in writing," may not need the signatures of both parties.[3]

Words written prevail over words printed: the former are the immediate language of the parties; the latter, a general formula adapted to all cases, as, in the case of a policy of insurance, or a lease.[4]

Ancient writings. Deeds, wills, and other instruments more than thirty years old.

May be read in evidence without other proof of execution than that they have been in the possession of those claiming rights under them.

The evidence of such ancient documents is admitted upon the ground that, although between strangers, they are of such character as usually accompanies transfers of title or acts of possession, and purport to form a part of actual transactions referring to coexisting subjects by which their truth can be tested, and there is deemed to be a presumption that they are not fabricated. But plottings for plans and field-notes are memoranda only, which may never have been acted upon.[5]

The rule is that an ancient deed may be admitted in evidence, without direct proof of its execution, if it appears to be of the age of at least thirty years, when it is found in proper custody, and either possession under it is shown, or some other corroborative evidence of its authenticity, freeing it from all just grounds of suspicion.[6]

After the lapse of thirty years, the witnesses are presumed to be dead. . . The rule applies to all kinds of deeds, where the instrument comes from the custody of the proper party claiming under it, or entitled to its custody.[7]

More or less credit has always been attached to ancient documents without other proof of authenticity than that of their production from proper depositories. Where any document purporting or proved to be thirty years old is produced from its proper custody, every part which purports to be in the handwriting of a particular person is presumed to be authentic. This exception to the general rule of evidence rests upon a conceded necessity, and applies not only to formal instruments, such as wills, bonds, and

[1] 3 Bl. Com. 282.

[2] Walker, American Law, 514.

[3] 4 Bl. Com. 427.

[4] Wheeler *v.* North. Col. Irrigation Co., 9 Col. 251 (1886), cases.

[5] Henshaw *v.* Foster, 9 Pick. 318 (1830), Parker, C. J., quoting La. Penal Code.

[6] Myers *v.* Vanderbelt, 84 Pa. 513–14 (1877), cases; Chitty, Contr. 91; Story, Prom. Notes, § 11; Byles, Bills, 134; 1 Redf. Wills, § 17, pl. 2; City Ins. Co. *v.* Bricker, 91 Pa. 490 (1879); 2 Bl. Com. 297.

[7] Nichols *v.* Harris, 33 La. An. 646 (1880).

[8] State *v.* Holmes, 56 Iowa, 590 (1881); 48 N. H. 480; 36 N. Y. 307.

[1] Dreutzer *v.* Smith, 56 Wis. 297 (1882), cases.

[2] *Re* Benson, 34 F. R. 649 (1858); Benson *v.* McMahon, 127 U. S. 467 (1888).

[3] Hightower *v.* State, 72 Ga. 482 (1884); Wofford *v.* Wyly, *ib.* 863 (1884).

[4] James *v.* Lycoming Ins. Co., 4 Cliff. 289–91 (1874), cases; 3 Kent, 260; 1 Whart. Ev. § 925, cases.

[5] Boston Water Power Co. *v.* Hanlon, 132 Mass. 484 (1882), Devens, J.

[6] Applegate *v.* Lexington, &c. Mining Co., 117 U. S. 263 (1886), cases, Woods, J.; Fulkerson *v.* Holmes, *ib.* 389 (1886); Williams *v.* Conger, 125 *id.* 417, 397 (1888).

[7] Winn *v.* Patterson, 9 Pet. *675 (1835), Story, J. See generally 1 Greenl. Ev. §§ 141–46, cases; 1 Whart. Ev. §§ 708–32, cases.

other deeds, but to receipts, letters, entries,—all ancient writings.[1] Compare POSSESSION, Adverse.

Public writings. The recorded acts of public functionaries, in the executive, legislative, and judicial departments of government; the transactions which official persons are required to enter in books in the discharge of their public duties, and which occur within the circle of their personal knowledge.[2]

Also spoken of as *judicial* or *non-judicial*, and, as to their proof, as those which are *of record* or *not of record*.

See generally ALTERATION, 2; BLANK, 2; CANCEL; CERTAINTY, 2; CONSTRUCTION; DEED, 2; DOCUMENT; FALSE; FRAUDS, Statute of; GRAMMAR; HANDWRITING; ILLITERATE; INSTRUMENT, 2, 3; MAIL, 2; OBLIGATORY; OBSCENE; PAROL; PHOTOGRAPH; READING; RECORD; REFORM; SUBPŒNA, 3, Duces; UNDERWRITER; WILL, 2.

WRONG.[3] A violation of right or of a right; a privation of right; an injury; a tort, or a crime.

In its broad sense, includes every injury to another, independent of the motives of the offender; but, in an instruction as to negligence, may not inappropriately refer to the failure to exercise the required degree of care where another may be injured.[4]

Legal wrong. Such transgression of right as the law takes cognizance of.

Private wrong. An infringement or privation of a private or civil right belonging to an individual considered merely as an individual; frequently termed a *civil injury*.[5]

Public wrong. A breach and violation of a public right and duty, which affects the whole community, considered as a community; a crime or misdemeanor.[6]

Wrong-doer. A person who commits a civil injury; a tort-feasor.

Wrongful; wrongfully. These words, referring to acts or intent, charge legal malice, *q. v.* They may import simply that a thing is contrary to law.[6]

Compare DELICTUM; ENORMIA; MALUM. See BENEFIT; CONTRIBUTION; CRIME; DAMAGES; INJURY; MERGER, 3; REMEDY; RIGHT; TORT; WAIVER; WILL, 1.

WYOMING. See TERRITORY, 2.

[1] Bell *v.* Brewster, 44 Ohio St. 694-95 (1887), cases.

[2] [1 Greenl Ev. § 470.]

[3] A. S. *wrang*, wrung, wrested, perverted. Compare TORT.

[4] Union Pacific R. Co. *v.* Henry, 36 Kan. 570 (1887).

[5] [3 Bl. Com. 2; 4 *id.* 5; 1 *id.* 122.

[6] Tax on Distilled Spirits, 16 Op. Att.-Gen. 668 (1880).

Y.

Y. B. Year-book, *q. v.*

YACHT. A light sea-going vessel used only for purposes of pleasure, racing, and the like.

The secretary of the treasury may cause yachts employed exclusively as pleasure vessels, and designed as models of naval architecture, if entitled to be enrolled as American vessels, and built and owned in compliance with Rev. St. §§ 4133-35, to be licensed on terms which will authorize them to proceed from port to port without entering or clearing at the custom-house; the license to be in such form as the secretary may prescribe; the owner to first give a bond in such form and amount as the secretary shall prescribe, conditioned that the vessel shall not engage in trade, nor violate the revenue laws, and shall comply with the laws in all other respects. Such vessel shall not transport merchandise or carry passengers for pay; and shall have the name and port placed on some conspicuous portion of the hull. For any violation of the laws on the subject of commerce and navigation the vessel may be seized and forfeited. *Provided*, that all charges for license and inspection fees shall not exceed five dollars, and for admeasurement ten cents per ton.[1]

All such licensed yachts shall use a signal of the form, size, and colors prescribed by the secretary of the navy; and naval architects in the employ of the United States may at all times examine and copy the models.[2]

Yachts, belonging to a regularly organized yacht club of any foreign nation which shall extend like privileges to the yachts of the United States, may enter or leave any of our ports without entering or clearing at the custom-house or paying tonnage tax.[3]

For the identification of yachts and their owners a commission to sail for pleasure in any designated yacht belonging to any regularly organized and incorporated yacht club, stating the exemptions and privileges enjoyed under it, may be issued by the secretary of the treasury, and shall be a token of credit to any United States official, and to the authorities of any foreign power, for privileges enjoyed under it.[4]

Every yacht visiting a foreign country under the foregoing provisions shall, on her return, make due entry at the custom-house of the port at which she arrives.[5]

Yachts which are propelled by steam must have their hulls and boilers inspected.[6]

A licensed yacht of four hundred and eighty-one tons burden, propelled by steam, and having two high masts, is an "ocean-going steamer" and a "steamer carrying sail," within Rule 3 of the rules of navigation prescribed by Rev. St. § 4233, and should carry the

[1] Act 3 March, 1883: 22 St. L. 566, repealing R. S. § 4214—parts of Acts of 1848, 1870.

[2] Act 7 Aug., 1848: R. S. § 4215.

[3] Act 29 June, 1870: R. S. § 4216.

[4] Act 29 June, 1870: R. S. § 4217.

[5] Act 29 June, 1870: R. S. § 4218.

[6] Act 28 Feb., 1871: R. S. § 4426.

lights therein provided for, and not the lights specified in Rule 7.[1]

YARD. See CURTILAGE; SQUARE.

YEAR. The civil year consists of three hundred and sixty-five days, with one more day for a "leap" year. Compare ANNUS; DAY; MONTH.

In legislative and judicial proceedings, in the absence of another system of reckoning, the Christian calendar is intended.[2]

The period is determined by the subject-matter and the context,— by the intention of the parties.[3]

In New York, a year consists of three hundred and sixty-five days; a half year, of one hundred and eighty-two days; a quarter year of ninety-two days.[4, 5]

Means "year of our Lord," in Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Missouri, New Hampshire, North Carolina, Vermont, West Virginia, and Wisconsin. In most of the States, also, a "calendar year" is meant.[6]

Bissextile or leap year. Consists of three hundred and sixty-six days.

By 21 Henry III (1237), the increasing day and the preceding day are counted as one day.[8]

"The day of a leap year and the day immediately preceding, shall be reckoned as one day."[7]

In Indiana the twenty-eighth and twenty-ninth of February are counted as two days, when a specified number of days are to be computed. Out of the statute of Henry has grown the notion that for all purposes the two days are as one. The correct rule is that in speaking of a "year," a "quarter's" rent, and the like, the twenty-ninth day is not counted; but in marking off a fixed number of *days*, it is to be counted.[9]

The statute of Henry is in force in some of the States, as common law or by re-enactment.[9]

That statute was passed to produce uniformity in the length of years. It has no relation to the computation of time when a rule or a statute fixes a certain number of days.[10]

Ninety-nine or nine hundred and ninety-nine years. See *Years, Estate for.*

Sixty years. See TEMPUS, Nullum, etc.

Thirty years. See WRITINGS, Ancient.

Twenty and twenty-one years. See LIMITATION, 8.

Year and a day. At common law, a fixed period of time for many purposes. The *day* seems to have been included to secure the full complement of one whole year.[1]

Thus, to make a felonious killing murder, the party assailed must die within a year and a day from the day on which the attempt was made on his life.[2]

Execution on a judgment must, at common law, issue within a year and a day from rendition; otherwise the judgment will be presumed satisfied.[3]

If the owner of an estray did not claim it within this period it became the property of the lord of the manor where found.[4]

And that was the law as to claims by owners of wreck.[5]

In some States, no *scire facias* has been allowed on a common mortgage till the end of a year and a day; and so as to suits on common bonds — which do not stipulate for a shorter period within which the obligee may sue for a default. See DAY; LIMITATION, 8.

Year-books. Reports of decisions, made by the "prothonotaries" at the expense of the sovereign, and published annually from about 1300 to 1550.[6]

Spoken of as mere "lumber garrets of obsolete feudal law."[7] "They are not worth the labor and expense either of a new edition or of a translation." . . "Valuable to the antiquarian and historian" as records of ancient customs and manners."[8]

Year of our Lord. Statutes in some States provide that "year" shall be taken to mean "the year of our Lord," as see *ante.*

In England, the time of an offense may be alleged as that of the sovereign's reign, or as that of the year of our Lord. The former is the usual mode. Hence, there, "year" alone might not certainly indicate the time intended. But we have no other era; therefore, any particular year, as "1857," must mean that year in our era.[9]

Hence, the abbreviation "A. D." may be omitted; and the omission of the word "year" is not fatal.[10] See ABBREVIATIONS.

An indictment charging that the defendant made an unlawful sale of liquor "Aug. 16, 18184," was held bad, on a motion to quash.[11]

Yearly. See ANNUALLY.

Years, estate, lease, or tenant for, and term of. A contract for the possession of

[1] Chase *v.* Belden, 34 Hun, 571 (1885).
[2] Engleman *v.* State, 2 Ind. 93–94 (1850).
[3] Thornton *v.* Boyd, 25 Miss. 505 (1853); United States *v.* Dickson, 15 Pet. 162 (1841).
[4] 2 N. Y. Rev. St. c. 19, t. I, § 3.
[5] See 2 Bl. Com. 141.
[6] 1 Stimson, Am. St. Law, p. 139.
[7] 2 N. Y. St. *ante;* N. Car.
[8] Helphenstine *v.* Vincennes Nat. Bank, 65 Ind. 537–90 (1879), cases, Howk, J.
[9] See 10 Cent. Law J. 158 (1880).
[10] Harker *v.* Addis, 4 Pa. 517 (1846).

[1] 1 Para. Contr., 6 ed., *294, *h.*
[2] 4 Bl. Com. 197, 306; 1 Greenl. Ev. § 18, n.
[3] 3 Bl. Com. 421.
[4] 1 Bl. Com. 298.
[5] 1 Bl. Com. 292; 8 Pet. 4. See also 2 Bl. Com. 284, 354; 3 *id.* 175; 4 *id.* 315, 335.
[6] 1 Bl. Com. 71–72.
[7] 2 Wall. Jr. 309; 69 Pa. 281.
[8] 1 Kent, 480–81; 2 Taunt. 201; 2 Columb. Jur. 133.
[9] Commonwealth *v.* Doran, 14 Gray, 38–39 (1859), cases, Dewey, J.; *ib.* 97; 5 *id.* 91.
[10] State *v.* Bartlett, 47 Me. 393 (1860); State *v.* Munch, 22 Minn. 71 (1875). *Contra*, Commonwealth *v.* McLoon, 5 Gray, 92 (1855). See also 3 Vt. 481.
[11] Murphy *v.* State, 106 Ind. 96 (1885).

lands or tenements for a determinate period,— where a man lets them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon.[1]

If the lease be but for half a year, or a quarter, or less time, the lessee is a tenant for years: a year being the shortest term of which the law in this case takes notice.[1]

Every estate which must expire at a period certain and fixed, by whatever words created, is an estate for years. If no other day is mentioned, it begins from the delivery of the lease. A lease for as many years as A shall live is void for uncertainty; but not so a lease for twenty or more years, if he shall so long live, though the term may end sooner by his death.[2]

An estate for one thousand years is only a chattel, part of one's personalty. An estate for life is a freehold.[3]

But in several States, permanent leaseholds are regarded as freeholds or realty for purposes of judgments, executions, descent, distributions, and the like.[4]

Estates from year to year. Estates at will are turned into estates from one year to another, or estates for years, by the operation of statutes or by force of decisions of the courts.

The privilege of determining a tenancy at will upon the mere caprice of the lessor being found to greatly inconvenience the lessee, the courts held that such relation was a tenancy from year to year. Again, a tenant at will was not entitled to notice to quit, but the rule obtained that he held from year to year, so far at least as to entitle him to notice six calendar months prior to the day when the lessor desired to resume possession, except where the tenant was already apprised of the end of the term. A general tenancy at will is construed as a tenancy from year to year. Beginning a new year, by sufferance on the part of the lessor, is a tacit renovation of the contract for another year, subject to the right of distress and half a year's notice to quit.[5]

See EMBLEMENT; LEASE; MERGER; RENT; TERM, 3.

YEARLING. See HEIFER.

YEAS AND NAYS. Affirmative and negative votes.

The power of calling for the yeas and nays in legislative bodies is given by the various constitutions, and by municipal charters.

"The Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal,"[1] *q. v.*

The restriction of a call to one fifth is founded upon the necessity of preventing too frequent a recurrence to this mode of ascertaining the votes at the mere caprice of an individual.[2]

In eight States the yeas and nays are always to be entered on the journal; in three at the request of any member; in three others at the request of three members, and in ten by request of two members, in either house; in nine at the request of one-fifth of the members present, and in three, one-tenth; in Georgia, when the constitution requires a two-thirds vote; in Michigan, at the request of one-fifth of the members elected, and in Wisconsin, one-sixth of those present.[3]

See ENTRY, II. 6.

YELLOW FEVER. See QUARANTINE, 2.

YEOMAN.[4] He that has free land of forty shillings by the year.[5]

Anciently, such person could serve on juries, vote for knights of the shire,— do any act permitted of one *probus et legalis.*[6]

With us, the word has no exact meaning; it is found as an addition to the names of parties in declarations, indictments, and common-law forms of writs.[6]

YES; YEZ. See OYEZ.

YIELDING AND PAYING. In a lease, constitute a covenant by the lessee to pay the rent.

If the covenant is express, the lessee is bound for the rent notwithstanding an assignment of the term and acceptance of the rent by him from the assignee; while, if the covenant is merely implied, the liability

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[1] 2 Bl. Com. 140.

[2] 2 Bl. Com. 143.

[3] 2 Bl. Com. 143, 386, 270; 4 Kent, 86; 5 Mass. 419; 1 N. H. 350, *infra.*

[4] See Mass. Rev. St. 1836; *Re* Gay, 5 Mass. 419 (1809); 2 Chase, Ohio Sts., 1185; North. Bank of Kentucky *v.* Roosa, 13 Ohio, 361 (1844); Brewster *v.* Hill, 1 N. H. 350 (1818); Flannery *v.* Rohrmayer, 49 Conn. 26 (1881).

[5] 2 Bl. Com. 147; 4 Kent, 112-14; 1 Johns. 329; 2 *id.* 7 6 *id.* 272; 7 *id.* 1, 4; 8 East, 167; 8 T. R. 3.

[1] Constitution, Art. I, sec. 5, cl. 3. See Cooley, Const. Lim. 140.

[2] 1 Story. Const. § 843.

[3] 1 Stimson, Am. St. Law, p. 69; 1 Sup. p. 7, § 275; Cooley, Const. Lim. 140, cases.

[4] Etymologists are not agreed as to the origin of the *yeo-*. It may be — 1. *Ge*, a servant. 2. *Yeo*, young. 3. O. Eng. *yemen*, to take care of: A. S. *gémen*, to keep,— Webster's Dict.

"A yeman [young man] hadde he, and servaunts no moo," — Chaucer, Prol. Cant. T., l. 101 (1390).

In records of London for 1396 "serving man" is said to be "called yoman."

"Youngman" is used for "yeoman" in 33 Hen. VIII (1542).

4. Greek, *gê*, earth, land; Gothic, *gaus*, country: cultivator, husbandman, proprietor.

5. O. Fries., *gaman*, a villager.

6. O. Dutch, *goyman*, arbitrator.

7. *Geman*, common; *i. e.*, a commoner — next to a gentleman.

8. *Yew-bow* man — a respectable freeholder next to an esquire.

See Skeat's Etym. Dict.; Notes & Queries, Ser. I, vol. x, p. 468; III, viii, 286, 419; ix, 438; VI, i, 416; Long Ago, I, 249, 280; Gent. Mag. I, 129.

[5] 1 Bl. Com. 406: 2 Coke, Inst. 6, 68.

[6] See Respublica *v.* Steele, 2 Dall. 98 (1786); Cobeen *v.* Thompson, 1 P. & W. 98 (1829).

for rent is but co-extensive with the occupation, and the lessee is not liable for such as accrues after assignment and acceptance of the rent by his lessor from the assignee.[1]

YOUNG. See ANIMAL; PARTUS.

YOUTH. Includes young persons of both sexes.[2]

[1] See Auriol v. Mills, 4 T. R. 98 (1790); Kimpton v. Walker, 9 Vt. 198-202 (1837), cases; Walker v. Physick, 6 Pa. 202 (1847); Ghegan v. Young, 23 *id.* 20 (1854); Fanning v. Stimson, 13 Iowa, 49 (1862); Rawle, Cov. Tit. 481, n.

[2] Nelson v. Cushing, 2 Cush. 532-34 (1848).

Z.

ZEAL. See WITNESS, Zealous.

ZINC. See COIN; MANUFACTURE; ORE.

ZONE. See LEAGUE; VEIN.

ZOOLOGICAL PARKS. See ANIMAL.

&.

&, &c. See ET, Etc.

ADDENDA.

CESTUI, pages 162, 1057.

Neither the origin nor the pronunciation of this term is given in the law dictionaries or glossaries, and in but two of the popular dictionaries (both of them English) is anything said on either subject; while the original plural form is not stated or conjectured in any book upon words or etymologies that has come to the notice of the writer.

While the pronunciation cĕst'-wē is authorized by the Imperial and Encyclopædic Dictionaries, learned lawyers everywhere say cĕt'-wī, a pronunciation which, it is probable, has always generally obtained.

In Coke upon Littleton, the term is spelled *cesty* (*que use*).

The spellings of the plural of *cestui que trust* (the expression which, from the nature of the subject, is most common), collected on page 1057, are found in standard law works and in the opinions of the courts, both English and American. The statement that *cestuis* receives the preference (the rest of the expression remaining unchanged) is based upon the writer's observations, and his examination of many text-books and reports. At the same time, it needs be said that the other forms, some more, others less, are in general use, even those in which the English word "trust" is pluralized "trust*ent*" and "trust*ents*," and *cestui* is made *cestuis*.

As to what the earliest plural was teachers of Norman French are not in accord; one, a philologist, suggests that it was *cesteaux;* another, a lecturer in a law school, writes that the simple words received no plural endings. More certain information can be of little importance at this date: the courts and law-writers will continue to "follow precedent," varying as that has been seen to be.

A late authority (Encyclopædic Dictionary, 1888) makes *cestui* the objective case of the Norman French *cist, cest*, equivalent to the modern French *ce*.

In modern French, also, as the lexicons show, *ce* means this, that; *qui* (subjective) and *que* (objective), the one which, and *que*, also, of whom; *celui*, he that, the one, that one: plural, *ceux; celui qui*, he who: plural *ceux qui; c'est eux: cesteaux.*

Cestui que trust may be rendered, he for whom, or as to whom, there is a trust, or the trust is — exists, is created, is founded; *cestui que use*, he as to whom, or for whom, there is a use, or the use exists; *cestui qui vie*, he who lives, he as to whose life, or on whose life — an estate depends, or is to continue.

CHINESE, pages 177–78.

The treaty of March 12, 1888, was not finally ratified by China. The articles as agreed upon by secretary Bayard and minister Chang Yen Hoon are those printed on page 178, excepting the words, at the close of the first Article, "and this prohibition shall extend to the return of Chinese laborers who are not now in the United States, whether holding return certificates under existing laws or not," and the sentence, at the close of the second Article, "And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required."

These amendments were engrafted upon the proposed treaty by the Senate, May 7, 1888, the President having submitted the same for its advice and consent. They were designed to obviate difficulties presented by the decision in *Yung Ah Lung's Case* (124 U. S. 621, Feb. 13, 1888, *ante*, p. 179). The first amendment was intended to cancel "permits" granted to laborers not actually residing here March 12, 1888; the "extension" was viewed, by the Senate, as necessary to render the treaty completely effective,— it having been found impossible, in many cases, under the acts of 1882 and 1884 (*ante*, p. 175), to disprove alleged "prior residence," identity, etc., when genuine certificates were presented by persons who claimed to be the original and rightful holders of them.

But for the amendments the Chinese minister was prepared, it would seem, to exchange ratifications. As it was, on May 12th he wrote to Mr. Bayard that he did not disapprove of the changes proposed "as they did not alter the terms of the treaty." Without delay he also telegraphed the language of the amendments to China, whither an original draft of the treaty had been sent by mail. He was, moreover, of the opinion that about three months would elapse before the subject could be acted upon by the Grand Council of his government, and the result be reported to him at Washington. He intended, meanwhile, to go to Peru on official business, and return in September, when the expected exchange of ratifications could take place.

During the ensuing summer, Congress proceeded to embody in one comprehensive act legislation deemed necessary to give effect to the new treaty. The bill for this purpose, which became a law by the President's approval September 13th, 1888, passed the Senate on August 6th, and the House on the 20th. The first of its fifteen sections recites "that from and after the date of the exchange of ratifications of the pending treaty, . . signed the twelfth of March, A. D. 1888, it shall be unlawful for any Chinese person" to enter the United States, "except as hereinafter provided."

About September 1st it was "reported, by way of London," that the treaty in its new shape had been rejected. The representative of China, at Washington, made no such report.

On September 3rd the subjoined "Exclusion Act" was presented, read and passed in the House of Representatives, and by the Senate, four days later, unamended. A motion to reconsider the vote postponed final action by the latter body some ten days; and on October 1st the President signed the bill,— the Chinese government, on September 20th, having declined to negotiate further upon the subject-matter. The act reads as follows:

"*Be it enacted, etc.*, That from and after the passage of this act, it shall be unlawful for any Chinese laborer who shall at any time heretofore have been, or may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall have not returned before the passage of this act, to return to, or remain, in the United States.

"Sec. 2. That no certificates of identity provided for in the fourth or fifth section of the act to which this is a supplement shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer, claiming admission by virtue thereof, shall not be permitted to enter the United States.

"Sec. 3. That all the duties prescribed, liabilities, penalties and forfeitures imposed, and the powers conferred by the second, tenth, eleventh, and twelfth sections of the act to which this is a supplement are hereby extended and made applicable to the provisions of this act.

"Sec. 4. That all such part or parts of the act to which this is a supplement as are inconsistent herewith are hereby repealed." (See 25 St. L. 504.)

An act approved October 19, 1888, appropriated fifty thousand dollars for carrying into effect the provisions of the Exclusion Act. (25 St. L. 615.)

In the case of *Chae Chan Ping* v. *United States*, decided May 13, 1889 (130 U. S. 581, 589), the Supreme Court held that Congress has power to pass the act of October 1st, 1888, notwithstanding that it may affect personal rights acquired under existing treaties. Mr. Justice Field, delivering the opinion, said, in substance: By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, although in the nature of a contract, is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.

While it will not be presumed that Congress will lightly pass laws conflicting with treaties, circumstances may arise which would not only justify the Government in disregarding their stipulations, but demand, in the interests of the country, that it should do so. Unexpected events may call for a change in the policy of the country. Neglect or violation of stipulations on the part of the other contracting party may require corresponding action on our part. In 1798 the conduct toward this country of the government of France was of such a character that Congress declared that we were freed and exonerated from the stipulations of previous treaties with that country.

That the Government, through the legislature, can exclude aliens from this territory is a proposition not open to controversy. Jurisdiction over its own territory to that extent belongs to every independent nation. It is a part of its independence. If it could not exclude aliens, to that extent it would be subject to the control of another power. As said by this Court in the case of *The Exchange*, 7 Cranch, 136 (1812), speaking by Chief Justice Marshall: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction and an investment of that sovereignty to the same extent in that power which could impose such restriction."

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of a nation. To attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from hordes of its people crowding in upon us. The Government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be staid because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in the one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our Government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy.

The power of the Government to exclude foreigners whenever, in its judgment, the public interests require such exclusion, has been asserted in numerous in-

stances, and never denied by the executive or legislative departments. It was asserted, for example, by representatives of the executive department in 1852, 1856, 1869, 1879, and 1882. The exclusion of paupers, criminals and persons afflicted with incurable diseases, for which statutes have been passed, is only an application of the same power to particular classes of persons, whose presence is deemed injurious, or a source of danger to the country.

The power of exclusion of foreigners being an incident of sovereignty, the right to its exercise at any time when, in the judgment of the Government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to an other parties. . . Whatever license Chinese laborers may have obtained, previous to the act of October 1st, 1888, to return to the United States after their departure, is held at the will of the Government, revocable at any time, at its pleasure. Whether a proper consideration by our Government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition, and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just grounds of complaint on the part of China, it must be made to the political department, which alone is competent to act upon the subject.

COMMERCE, page 206.

An act approved October 1, 1888 (25 St. L. 501), authorizes the creation of boards of arbitration or commission for settling controversies and differences between railroad corporations and other common carries engaged in inter-State and Territorial transportation of property and passengers, and their employees.

Pages 201-5. Inter-State act of February 4, 1887, as amended by the act of March 2, 1889. The italics indicate the additions, the brackets the omissions, in the former act —

Sec. 1 is re-enacted without change.

Sec. 2. If any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, *in the transportation of passengers or property, subject to the provisions of this act*, than it charges, demands, collects or, receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Secs. 3, 4 and 5 remain unchanged.

Sec. 6. Every common carrier subject to the provisions of this act shall print and keep *open* to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its [railroad, as defined by the first section of this act] *route*. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force [upon such railroad], and shall also state separately the terminal changes and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type [of at least the size of ordinary pica], and copies for the use of the public shall be [kept in every depot or station upon any such railroad, in such places and] *posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation*, in such form that they *shall be accessible to the public and* can be conveniently inspected.

Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep [for] *open to* public inspection, at every depot *or office* where such freight is received for shipment, schedules showing, etc.,— as in the former act.

No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, etc.,— as in the former act. Reductions in such published rates, fares, or charges [may be made without] *shall only be made after three days'* previous public notice, [; but whenever any such reduction is made, notice of the same shall immediately be publicly posted and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection] *to be given in the same manner that notice of an advance in rates must be given.*

Paragraph 4 remains unchanged.

From the end of paragraph 5 is omitted the words: "but no common carrier party to any such joint tariff shall be liable for the failure of any other common carrier party thereto to observe and adhere to the rates, fares, or charges thus made and published."

Paragraph 6 succeeds the following new matter:

No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, except after ten days' notice to the Commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect. No reduction shall be made in joint rates, fares, and charges, except after three days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates.* The Commission may make public such proposed advances, or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs.*

(*NOTE. "The time is to be computed from the day when the notice reaches the office of the Commis-

sion in Washington." *Official Circulars*, March 7, 23, 1889.

March 8, 1889, the Commission ordered that—

"All advances and reductions in joint rates, fares and charges shown upon joint tariff established by common carriers subject to the provisions of the act shall be made public. Every such advance or reduction shall be so published by plainly printing the same in large type, two copies of which shall be posted for the use of the public in two public and conspicuous places in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation under such schedules, in such form that they shall be accessible to the public and can be conveniently inspected. Such schedules shall be so posted ten days prior to the taking effect of any such advance and three days prior to the taking effect of any such reduction in joint rates, fares and charges."

The rule which required ten days' public notice of any advance in the rates established by individual carriers was enlarged, March 7, 1889, by adding the following provision:

"Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given.")

It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time.

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient.

Secs. 7, 8 and 9 remain unchanged.

To sec. 10 is added the following:

Provided, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Any person or any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

Sec. 11 remains unchanged.

The first paragraph of sec. 12 now reads:

The Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; *and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission it shall be the duty of any district attorney of the United States to whom the Commission*

may apply to institute in the proper court and to prosecute under the direction of the attorney-general of the United States, all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, *by subpœna*, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and [to that end] *in case of disobedience to a subpœna, the Commission, or any party to a proceeding before the Commission*, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

Sec. 13 is unchanged.

To sec. 14 is added as paragraph third:

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained, in all courts of the United States, and of the several States, without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

Sec. 15 remains unchanged.

Sec. 16 presents the following changes:

Whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey *or perform* any lawful order or requirement of the Commission [in this act named] *created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States*, it shall be [the duty of] *lawful for* the Commission [and lawful] *or* for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district, etc., as in the act of 1887, except that "on such hearing the *findings of fact* in the report of the Commission shall be prima facie evidence," etc. A second paragraph provides that

If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty, nor more than forty days from the time said order is made, and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial the findings of fact of said Commission as set forth in its report shall be prima facie evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshal forthwith to summon a jury to try the cause; but if all the parties shall waive a jury in writing, then the court shall try the issues in said cause and render its judgment thereon. If the subject in dispute shall be of the value of two thousand dollars or more either party may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court. If the judgment of the circuit court shall be in favor of the party complaining, he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session.

The last sentence of sec. 17 now reads: "Either of the members of the Commission may administer oaths and affirmations *and sign subpœnas.*"

Sec. 18. The first two sentences read as formerly, and the section continues: The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties, [subject to the approval of the secretary of the interior. The Commission shall be furnished by the secretary of the interior with suitable offices and all necessary office supplies.] *Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies.* Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, *or upon official business* in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission [and the secretary of the interior.]

Secs. 19 and 20 remain unchanged.

The rest of the act reads as follows:

Sec. 21. That the Commission shall, on or before the first day of December in each year, make a report [to the secretary of the interior], which shall be [by him]

transmitted to Congress, and copies of which shall be distributed as are the other reports [issued from the interior department] *transmitted to Congress.* This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary, *and the names and compensation of the persons employed by said Commission.*

Sec. 22. That nothing in this act shall [apply to] *prevent* the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, *or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation,* or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, *or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes;* nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: *Provided,* That no pending litigation shall in any way be affected by this act.

(New section.) *That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: Provided, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement.*

RULES OF PRACTICE IN CASES AND PROCEEDINGS BEFORE THE COMMISSION, ADOPTED JUNE 8, 1889.

I. The general sessions of the Commission for the hearing of contested cases will be held at its office in the Sun building, No. 1315 F street, northwest, Washington, D. C., on such days and at such hour as the Commission may designate.

Sessions for receiving, considering, and acting upon petitions, communications, and applications relating to business before the Commission, and also for considering and acting upon any business of the Commission other than contested cases, will be held at its said office at 11 o'clock a. m. on Monday of every week when the Commission is at Washington.

When special sessions are held at other places such regulations as may be necessary will be made by the Commission.

II. Where a complaint concerns only anything done or omitted to be done by a single carrier no other need be made a party, but if it relates to joint tariffs, or matters in which two or more carriers doing business under a common control, management, or arrangement, for a continuous carriage or shipment, are interested, all the carriers constituting such line must be made parties.

A complainant may embrace several carriers, or lines of carriers, operated separately, in the same proceeding, when the subject-matter of the complaint involves substantially the same alleged violation of the law by the several carriers or lines.

Persons or carriers not parties may apply, in any pending case or proceeding, for leave to intervene and to be heard upon the questions involved.

III. Complaints under section 13 of the act, of anything done or omitted to be done by any common carrier subject to the provisions of the act in contravention of the provisions thereof, must be made by petition, which must briefly state the facts which are claimed to constitute a violation of the act, and must be verified by the petitioner, or by some officer or agent of the corporation, society, or other body or organization making the complaint, to the effect that the allegations of the petition are true to the knowledge or belief of the affiant.

The complainant must furnish as many written or printed copies of the complaint or petition as there may be parties complained against to be served. When a complaint is made the name of the carrier or carriers complained against must be set forth in full, and the address of the petitioner, and the name and address of his attorney or counsel, if any, must be indorsed upon the complaint.

The Commission will cause a copy of the complaint to be served upon every common carrier complained against, by mail or personally, in its discretion, with notice to the carrier or carriers to satisfy the complaint or to answer the same in writing within the time specified.

IV. A carrier complained against must answer the complaint made within twenty days from the date of

the notice, unless the Commission shall in particular cases prescribe a shorter time for the answer to be served, and in such cases the answer must be made within the time prescribed. The original answer must be filed with the Commission, at its office in Washington, and a copy thereof must at the same time be served upon the complainant by the party answering, personally or by mail, who must forthwith notify the secretary of the Commission of the fact. The answer must admit or deny the material allegations of fact contained in the complaint, and may set forth any additional facts claimed to be material to the issue. The answer must be verified in the same manner as the complaint. If a carrier complained against shall make satisfaction before answering, a written acknowledgment of satisfaction must be filed with the Commission, and in that case the fact of satisfaction without other matter may be set forth in the answer filed and served on the complainant. If satisfaction be made after the filing and service of an answer, a supplemental answer setting forth the fact of satisfaction may be filed and served.

V. If a carrier complained against shall deem the complaint insufficient to show a breach of legal duty, it may, instead of filing an answer, serve on the complainant notice for a hearing of the case on the complaint; and in case of the service of such notice, the facts stated in the complaint will be taken as admitted. A copy of the notice must at the same time be filed with the Commission. The filing of an answer will not be deemed an admission of the sufficiency of the complaint, but a motion to dismiss for insufficiency may be made at the hearing.

VI. Copies of notices or other papers must be served upon the opposite parties to the proceeding, personally or by mail, and when any party shall have appeared by attorney the service upon the attorney shall be deemed proper service upon the party.

VII. Affidavits to a petition, complaint, or answer may be taken before any officer of the United States, or of any State or Territory, authorized to administer oaths.

VIII. Upon application by any petitioner or party, amendments may be allowed by the Commission, in its discretion, to any petition, answer, or other pleading in any proceeding before the Commission.

IX. Adjournments and extensions of time may be granted upon the application of parties in the discretion of the Commission.

X. Parties to cases and proceedings before the Commission may, by stipulation, duly signed by them and filed with the secretary, agree upon the facts, or any portion of the facts, they deem to be involved in the controversy, which agreed statement shall be regarded and used as evidence. It is desirable that the facts be thus agreed upon whenever practicable.

XI. Upon issue being joined by the service of answer, the Commission will assign a time and place for hearing the same, which will be at its office in Washington, unless otherwise ordered. Witnesses will be examined orally before the Commission, unless testimony be taken or facts agreed upon as otherwise provided in these rules. The petitioner or complainant must in all cases prove the existence of the facts alleged to constitute a violation of the act, unless the carrier complained of shall admit the same, or shall fail to answer the complaint. Facts alleged in the answer must also be proved by the carrier, unless admitted by the petitioner.

In cases of failure to answer, the Commission will take such proof of the charge as may be deemed reasonable and proper, and make such order thereon as the circumstances of the case appear to require.

XII. Subpœnas requiring the attendance of witnesses will be issued by any member of the Commission in all cases and proceedings before it, and witnesses will be required to obey the subpœnas served upon them requring their attendance or the production of any books, papers, tariffs, contracts, agreements, or documents relating to any matter under investigation or pending before the Commission. When a subpœna is desired for the production of books, papers, or other documentary evidence, special application must be made to the Commission therefor, specifying the documentary evidence desired.

When a cause is at issue on petition and answer, each party may proceed at once to take depositions of witnesses in the manner provided by sections 863 and 864 of the Revised Statutes of the United States, and transmit them to the secretary of the Commission, without making any application to, or obtaining any authority from, the Commission for that purpose.

[Sections 863 and 864, Revised Statutes, provide as follows:

"Sec. 863. The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until the claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as au-

judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court."

"Sec. 864. Every person deposing as provided in the preceding section, shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent."

Fees of witnesses are fixed by law at $1.50 for each day's attendance at the place of hearing or of taking depositions, and 5 cents per mile for going to said place from his place of residence and 5 cents per mile for returning therefrom.]

XIII. Upon the final submission of a case to the Commission, either party may submit proposed findings of fact for the consideration of the Commission, which findings must embrace only the material facts of the case supposed to be established by the testimony.

XIV. Application for a rehearing may be made by either party at any time within sixty days after a decision shall have been filed and made public in any case decided by the Commission. Such application must be by petition, and must state clearly the findings of fact or conclusions of law supposed to be erroneous. If the application be to give further testimony, the nature of the additional testimony must be briefly stated, and it must not be merely cumulative. The petition must be verified in the same manner as a complaint, and a copy thereof, with a notice of the time and place of the application, must be served upon the opposite party at least ten days before the time named for the application.

XV. For convenience in reading and filing, it is recommended that when practicable petitions, answers, and depositions be printed or in type-writing, and that when in type-writing, or ordinary writing, only one page of the paper be used. [It is desirable, if complaints, answers, etc., are in ordinary writing or type-writing, that the size of the pages should conform as near as convenient to 9 by 13 inches, not to exceed the same; if printed, 6 by 9 inches.]

XVI. Copies of any petition, complaint, or answer in any matter or proceeding before the Commission, or of any order, decision, or opinion by the Commission, and also of testimony when practicable and desired for use in the case, will be furnished without charge upon application to the secretary by any person or carrier party to the proceeding.

XVII. All complaints concerning anything done or omitted to be done by any railroad carrier, and all petitions or answers or applications relative to any pending proceeding, and all letters or telegrams relating in any manner to either of these matters, must be addressed to the Interstate Commerce Commission, Washington, D. C.

The following forms may be used, with such alterations as circumstances render necessary:

COMPLAINT AGAINST A SINGLE CARRIER.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
THE —— RAILROAD COMPANY.

The petition of the above-named complainant respectfully shows:

I. That [*Here let complainant state his occupation and place of business.*]

II. That the defendant above named is a common carrier engaged in the transportation of passengers and property by railroad between points in the State of —— and points in the State of ——, and as such common carrier is subject to the Act to regulate commerce.

III. That [*Here state concisely the matters intended to be complained of. Continue numbering each succeeding paragraph as in Nos. I, II, and III.*]

Wherefore the petitioner prays that the defendant may be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the defendant to cease and desist from said violations of the act to regulate commerce, and for such other and further order as the Commission may deem necessary in the premises. [*If reparation for any wrong or injury be desired, the petitioner should state the nature and extent of the reparation he deems proper.*]

Dated at ——, ——, ——, 18—. A. B.
[*Complainant's signature.*]

STATE OF ——,
County of ——, ss:

A. B., being duly sworn, says that he is the complainant in this proceeding, and that the matters set forth in the foregoing petition are true as he verily believes. A. B.

Subscribed and sworn to before me this —— day of ——, 18—. C. D.,
Justice of the Peace,
[*Or other officer authorized to administer oaths.*]

COMPLAINT AGAINST JOINT OR CONNECTING CARRIERS.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
THE —— RAILROAD COMPANY.

[*Here set out in full the titles of the several carriers complained against.*]

The petition of the above-named complainant respectfully shows:

I. That [*Here let complainant state his occupation and place of business.*]

II. That the defendants above-named are common carriers, and under a common control, management, or arrangement, for continuous carriage or shipment, are engaged in the transportation of passengers and property wholly by railroad [*or partly by railroad and partly by water, as the case may be*] between ——, in the State of ——, and ——, in the State of ——, and

as such common carriers are subject to the Act to regulate commerce.

[*Then proceed as in form No. 1.*]

NOTICE TO ANSWER.

INTERSTATE COMMERCE COMMISSION,
WASHINGTON, D. C., —— ——, 18—.

To the —— ·——,
—— ——:

Enclosed please find a copy of a —— petition filed against your company, embracing a statement of charges made by —— —— under section 13 of the act to regulate commerce, approved February 4, 1887, and amended March 2, 1889.

You are hereby called upon to satisfy the complaint or to answer the same, in writing, within twenty days from this date.

For the Commission:

—— ——,
Secretary.

NOTICE TO COMPLAINANT.

INTERSTATE COMMERCE COMMISSION,
WASHINGTON, —— ——, 18—.

—— ——,
·—— ——:

—— :

Your petition against the —— Company, under section 13 of the act to regulate commerce, approved February 4, 1887, and amended March 2, 1889, is received and placed on file.

A statement of the charges made has been forwarded to the carrier for satisfaction or answer within twenty days.

For the Commission:

—— ——,
Secretary.

ANSWER.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
THE —— RAILROAD COMPANY.

The above-named defendant, for answer to the complaint in this proceeding, respectfully states—

1. That [*Here follow the usual admissions, denials, and averments. Continue numbering each succeeding paragraph.*]

Wherefore the defendant prays that the complaint in this proceeding be dismissed.

THE —— RAILROAD COMPANY,
By E. F.,
[*Title of officer.*]

STATE OF ——,
County of ——, ss:

E. F., being duly sworn, says that he is the —— of the —— Railroad Company, defendant in this proceeding, and that the foregoing answer is true as he verily believes.

E. F.

Subscribed and sworn to before me this —— day of ——, 18—.

C. D.,
Justice of the Peace,
[*Or other officer authorized to administer oaths.*]

NOTICE BY CARRIER UNDER RULE V.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
THE —— RAILROAD COMPANY.

Notice is hereby given under Rule V of the Rules of Practice in proceedings before the Commission that a hearing is desired in this proceeding upon the facts as stated in the complaint.

THE —— RAILROAD COMPANY,
By E. F.,
[*Title of officer.*]

ACKNOWLEDGMENT OF ANSWER.

INTERSTATE COMMERCE COMMISSION.
WASHINGTON, —— ——, 18—.

—— ——,
—— ——,
—— ——.
—:

The Commission acknowledges the receipt of an answer made by the —— Rail—— Company to the complaint filed against said company —— by —— ——, and the same has been filed.

Very respectfully,

—— ——,
For the Commission:
Secretary.

NOTICE OF HEARING.

INTERSTATE COMMERCE COMMISSION.
WASHINGTON, —— ——, 18—.

—— ——,
—— ——,
—— ——,
——:

The case of —— against the —— Rail—— Company —— is assigned for hearing —— ——, 18—, —— a. m., at ——.

For the Commission:

—— ——,
Secretary.

SUBPŒNA.

INTERSTATE COMMERCE COMMISSION.

To —— ——,
—— ——:

You are hereby required to appear before —— in the matter of a complaint of —— —— against —— ——, as a witness on the part of —— ——, on the —— day of ——, 18—, at —— o'clock at ——, and bring with you then and there ——.

Dated —— ——.
[SEAL.]

—— ——,
Commissioner.

—— ——,
—— ——,
Attorney for —— ——.

[NOTICE.—Witness fees for attendance under this subpœna are to be paid by the party at whose instance the witness is summoned, and every copy of this summons for the witness must contain a copy of this notice.]

NOTICE OF TAKING DEPOSITIONS UNDER RULE XII.

INTERSTATE COMMERCE COMMISSION.

A. B.
&
against
THE —— RAILROAD COMPANY.

You are hereby notified that G. H. will be examined before C. D., a —— [*title of officer or magistrate*], at ——, on the —— day of ——, 18—, at —— o'clock in the ——noon, as a witness for the above-named complainant [*or defendant, as the case may be*], according to act of Congress in such case made and provided, and the rules of practice of the Interstate Commerce Commission; at which time and place you are notified to be present and take part in the examination of the said witness.

Dated ——, ——, 18—.

L. J.

[*Signature of complainant or defendant, or of counsel.*]

To A. B., the above-named complainant [*or The —— Railroad Company, the above-named defendant; or to K. L., counsel for the above-named complainant or defendant.*]

NOTE.—The Commission recommends that the conditions upon which witnesses may be examined under sections 863 and 864 of the Revised Statutes before one of the officers designated be waived, and that parties consent in all cases to take testimony in that manner when practicable.

COURT, United States Circuit, p. 281.

An act approved August 13, 1888 (25 St. L. 433), corrects the enrollment of the act of March 3, 1887 (24 *id.* 552), as follows:

Page 261, column 2, line 15, "of" is made "or;" line 25, "of" is made "if;" lines 42 and 49, "any other suit" and "and when" begin new sentences.

Page 282, column 1, line 14, "At any other time," and line 27, "Whenever," begin paragraphs; column 2, line 31, "the owner" is made to read "that the owner."

A few changes are also made in the punctuation.

EXECUTION, p. 431. *Levari facias.*

At common law, by means of this writ, the sheriff could levy upon the chattels of the defendant, and also upon the emblements, rents, and present profits of his lands. In American practice, the land itself may be seized and sold. In Delaware, the writ is used to enforce a judgment upon a mechanic's lien, and to sell unimproved or unproductive real estate; in Indiana, it serves the purpose of a writ of *venditioni exponas;* in Pennsylvania, it enforces payment of a mortgage, a mechanic's lien, a municipal claim, or other like charge upon realty. The writ, as a writ of execution, may be employed in any manner designated by statute. See Com. Dig. tit. Execution, C. 3; Freeman, Executions, § 6; Herman, Executions, §§ 10–11.

JUDGMENT, page 578.

An act approved August 1, 1888 (25 St. L. 357), intended "to regulate the liens of judgments and decrees of the courts of the United States," provides as follows:

"That judgments and decrees rendered in a circuit or district court of the United States within any State, shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State: *Provided*, That whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county or parish in the State of Louisiana before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State.

"Sec. 2. That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public.

"Sec. 3. Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any State office within the same county or parish in the State of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county."

OBSCENE, page 724.

An act approved September 26, 1888 (25 St. L. 496), amends former legislation as follows: Section 1. That the last clause of section two of the act of June 18, 1888 (*ib.* 188), shall constitute section three of that act, and read thus:

"Sec. 3. That all matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another may be written or printed, or otherwise impressed or apparent, are hereby declared non-mailable matter, and shall not be conveyed in the mails, nor delivered from any postoffice nor by any letter-carrier, and shall be withdrawn from the mails under such regulations as the postmaster-general shall prescribe; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same or cause the same to be taken from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall, for each and every offense, upon conviction thereof, be fined not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court."

Sec. 2. Revised Statutes, § 3893, as amended by act of July 12, 1876, shall read:

"Sec. 3893. Every obscene, lewd, or lascivious book,

pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, letter, circular, book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made, whether sealed as first-class matter or not, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails or delivered from any post-office nor by any letter-carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall, for each and every offense, be fined upon conviction thereof not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court. And all offenses committed under the section of which this is amendatory, prior to the approval of this act, may be prosecuted and punished under the same in the same manner and with the same effect as if this act had not been passed: *Provided*, That nothing in this act shall authorize any person to open any letter or sealed matter of the first-class not addressed to himself."

PROHIBITION, page 832.

Case of *Kidd* v. *Pearson*, argued before the Supreme Court April 4, and decided October 22, 1888.

The code of Iowa (ch. 6, tit. 11), as amended in 1884 (Laws, ch. 143), provides: That no person shall manufacture or sell intoxicating liquors, except for mechanical, medicinal, culinary, and sacramental purposes; keeping liquors with intent to sell them within the State contrary to law is prohibited, and liquor so kept "is a nuisance," and shall be forfeited (secs. 1538, 1526). "Nothing in this chapter shall be construed to forbid the sale by the importer thereof of foreign intoxicating liquor imported under the authority of the laws of the United States regarding the importation of such liquors and in accordance with such laws: *Provided*, That said liquor at the time of said sale by said importer remains in the original casks or packages in which it was by him imported, and in quantities not less than the quantities in which the laws of the United States require such liquors to be imported, and is sold by him in said original casks or packages and in said quantities only. . . ." (Sec. 1524.) Permission to manufacture or buy and sell for "mechanical, medicinal, culinary, or sacramental purposes" is to be obtained from the board of supervisors of the county in which the business is to be conducted, under conditions prescribed as to moral character, the wants of the locality, etc.

December 24, 1885, I. E. Pearson and S. J. Loughran filed a petition in equity against J. S. Kidd, praying that a certain distillery used by him for the unlawful manufacture and sale of intoxicating liquors be abated as a nuisance, and that he be perpetually enjoined from manufacturing such liquors therein. The concluding averment was that Kidd manufactures and keeps for sale, and sells within the State, intoxicating liquors to be taken out of the State for use as a beverage, and for other than "mechanical, medicinal, culinary, or sacramental purposes," contrary to the statute.

Kidd, in his answer, pleaded that he had at all times complied with the requirements of the law. Upon the trial it was proven that all the liquors he manufactured were for exportation and were sold outside of Iowa. A decree was rendered against him, ordering that his distillery be abated as a nuisance, etc., as prayed for. This decree being affirmed by the supreme court of the State, the case was carried to the Supreme Court of the United States, by which the constitutionality of the law and proceedings was upheld.

Mr. Justice Lamar, delivering the unanimous opinion of the court, said in substance: That the State of Iowa could abate the distillery without depriving the owner of his property "without due process of law," within the meaning of the Fourteenth Amendment to the Constitution, was settled by the opinion in the case of *Mugler* v. *Kansas*. The only question to be decided is then as to whether the legislation of Iowa undertakes to "regulate commerce."

That power, conferred upon Congress, is absolute and complete in itself, with no limitation other than prescribed in the Constitution; is to a certain extent exclusively vested in Congress, so far free from State action; is co-extensive with the subject on which it acts, and cannot stop at the external boundary of a State, but must enter into the interior of every State whenever required by the interests of commerce with foreign nations, or among the States. This power, however, does not comprehend the purely internal domestic commerce of a State which is carried on between man and man within a State or between different parts of the same State. Whenever power reserved to one of the States is so exercised as to conflict with the free course of a power vested in Congress, the law of the State must yield to the supremacy of the Federal authority, though the law may have been enacted in the exercise of a power indisputably reserved to the States.

It is a mistake to say, as in this case, that the act of transporting alcohol from the State in the course of lawful commerce with other States not being a crime, to perform that act was not a criminal intent, whether formed before or after the manufacture. It is not the criminality of the intent to *export* that is in question, but the innocence or criminality, under the statute, of the *manufacture*, in the absence of the specific exceptions to the prohibition, the actual and controlling and *bona fide* presence of at least one of which exceptions was indispensable to the legality of the manufacture.

The construction contended for by Kidd would extend the words of the grant to Congress beyond their obvious import. . . "Manufacture" is transformation — fashioning raw materials into a change of form for use. The functions of "commerce" are different. The buying and selling and the transportation incl

dental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. If it be held that the term "commerce" includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock-raising, domestic fisheries, mining,—every branch of industry; for there is not one of these that does not contemplate, more or less clearly, an inter-State or foreign market. The power being vested in Congress and denied to the States, it would follow that the duty would devolve on Congress to regulate all those delicate, multiform, and vital interests,—interests which are and must be local in all the details of their successful management.

We find in the statute no provision the purpose of which is to exert the jurisdiction of the State over persons or property or transactions within the limits of other States; or to act upon intoxicating liquors *as* exports, or while in process of exportation or importation. Its avowed object is to prevent, not the carrying of liquors *out* of the State, but their manufacture, except for specified purposes, *within* the State. Because the products of a domestic manufacture may ultimately become the subjects of inter-State commerce, it does not follow that State legislation respecting such manufacture is an attempted exercise of the power to regulate commerce exclusively conferred upon Congress.

The right of a State wholly to prohibit the manufacture of intoxicating liquors is not to be overthrown by the fact that a manufacturer *intends* to export the product of his distillery. And a statute, by merely omitting to except from its operation liquors manufactured for export, does not interfere with the power vested in Congress. In *License Tax Cases*, 5 Wall. 471 (1866), it was said: "No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature [Congress]. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject." The manufacture of intoxicating liquors in a State is none the less a business within that State because the manufacturer intends, at his convenience, to export the liquors to other States.

It has already been decided that the fact that an article was manufactured for export to another State does not *of itself* make it an article of inter-State commerce, and that the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce. In the case of *Coe* v. *Errol*, 116 U. S. 517, 524 (1886), logs, which had been cut in New Hampshire and hauled to Errol on the Androscoggin river, in the same State, to be floated down that river to Lewiston, Maine, while being held at Errol for a convenient opportunity for the transportation were assessed for local and State taxes. This court held that the logs were liable for taxes like other property in New Hampshire; that "goods do not cease to be part of the general mass of property in a State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey."

The police power of a State is as broad and plenary as its taxing power; and property within a State is subject to the operations of the former as long as it is within the regulating restrictions of the latter.

(The case is reported in 128 U. S. 1, 15–26. Fuller, C. J., not being a member of the Court when it was argued, took no part in the decision. With *Coe* v. *Errol* compare *Low* v. *Austin*, 13 Wall. 29 (1871), determining when goods lose their character as "imports.")

NON OBSTANTE, page 711.

Lat. Notwithstanding.

Formerly used (1) to preclude any construction other than that stated; (2) to express a privilege exercised by a sovereign to dispense with a law,—a practice "effectually demolished by the bill of rights." 1 Bl. Com. 342; 2 *id.* 271; 4 *id.* 401.

Non obstanto veredicto. Notwithstanding the verdict. Describes a judgment for the party against whom a verdict was found.

Imports that the claim or defense was not good in law. At common law, is entered, on motion of the plaintiff, when the plea or defense confesses the cause of action, and a matter of avoidance relied upon, and found to be true in fact, is not legally sufficient. The corresponding remedy for the defendant is a motion in arrest of judgment. Ward *v.* Phillips, 89 N. Car. 217 (1883); Tillinghast *v.* McLeod, 17 R. I. 212 (1891); Stephen, Pl. *97; 1 Chitty, Pl. *688; Gould, Pl. x, § 46.

The motion includes nothing *dehors* the record. Stearn *v.* Clifford, 62 Vt. 96 (1889). Another judgment must not have been entered. Scheible *v.* Hart, 91 Ky. — (1890). The motion does not preclude a motion for a new trial. Stone *v.* Hawkeye Ins. Co., 68 Iowa, 744 (1886); Indianapolis &c. R. Co. *v.* McCaffrey, 69 Ind. 555 (1879); Chicago &c. R. Co. *v.* Dimick, 96 Ill. 48 (1880).

In a few States, the motion will not be entertained unless a controlling question of law is reserved and a record thereof, and of the supporting facts, made at the time. Inquirer Printing Co. *v.* Rice, 106 Pa. 624 (1884); Buckley *v.* Duff, 111 *id.* 227 (1887). 1 Thompson, Trials, § 1022. See RESERVE, 6.

In other States, there may be a general verdict with a finding upon special issues. Which shall prevail, in case of conflict, is not uniformly settled. Larkin *v.* Upton, 144 U. S. 19, 21 (1892); St. Louis &c. R. Co. *v.* Ritz, 38 Kan. 408 (1885); Fenton *v.* Chicago &c. R. Co., 69 Iowa, 577 (1886); Porter *v.* Waltz, 108 Ind. 40 (1886); Brown *v.* Searle, 104 *id.* 222 (1885); 1 Freeman, Judgm. § 7, cases. Compare DEMURRER TO EVIDENCE; NONSUIT; VERDICT, Special, p. 1086.